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[consolidated with]
No. 33624-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

William Martinez,

Appellant.

Yakima County Superior Court Cause No. 14-1-00421-0

The Honorable Judge Richard Bartheld

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Mr. Martinez's Sixth and Fourteenth Amendment right to present a defense by prohibiting him from introducing critical evidence.
2. The court violated Mr. Martinez's right to present a defense under Wash. Const. art. I, §§ 3 and 22 by prohibiting him from introducing critical evidence.
3. The court violated Mr. Martinez's right to present a defense by precluding him from showing that the shooting was part of a gang-related confrontation that had nothing to do with him.

ISSUE 1: An accused person has a constitutional right to present relevant, admissible evidence necessary to the defense. Did the court violate Mr. Martinez's right to present a defense by precluding him from introducing testimony that the shooting was part of a gang-related fight, and that he was not a gang member and had no interest in the outcome of the brawl?

4. The court violated Mr. Martinez's right to present a defense by refusing to sever his trial from his codefendant's, to permit him to introduce evidence of the gang-related nature of the shooting.

ISSUE 2: No state interest can be compelling enough to preclude the introduction of highly probative defense evidence. Did the court violate Mr. Martinez's right to present a defense by prioritizing judicial economy over his right to introduce evidence establishing the gang-related context of the shooting?

5. The court violated Mr. Martinez's right to present a defense by prohibiting him from introducing expert testimony explaining the unreliability of cross-racial eyewitness identification.

ISSUE 3: An accused person has a constitutional right to present evidence critical to the defense. Where a white eyewitness described Mr. Martinez as one of "a bunch of little Mexicans" and claimed he was the shooter, should the court have allowed Mr. Martinez's to introduce expert testimony regarding cross-racial eyewitness identification?

6. The court erred under ER 702 by excluding expert testimony on cross-racial identification.
7. The court abused its discretion by preventing Mr. Martinez from introducing expert testimony on cross-racial identification.

ISSUE 4: ER 702 permits expert testimony that will assist the trier of fact. Did the court err by excluding expert testimony on cross-racial identification, when the Supreme Court has identified the subject matter as outside the knowledge of the ordinary juror?

8. Prosecutorial misconduct deprived Mr. Martinez of his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.
9. Prosecutorial misconduct deprived Mr. Martinez of his right to a fair trial by an impartial jury under Wash. Const. art. I, §§3, 21, and 22.
10. The prosecutor committed misconduct during his PowerPoint presentation by displaying exhibits that had been altered to add inflammatory captions.

ISSUE 5: A prosecutor may not show the jury exhibits that have been altered to add captions or inflammatory text. Did the prosecutor commit prejudicial misconduct by displaying numerous exhibits with captions conveying the state's theory of the case, some of which were inflammatory?

11. The prosecutor committed misconduct by conveying his personal opinion of Mr. Martinez's guilt and credibility.

ISSUE 6: A prosecutor may not show the jury images conveying a personal opinion of guilt or credibility. Did the prosecutor commit prejudicial misconduct through a visual strategy that repeatedly juxtaposed Mr. Martinez's testimony with the jury instruction on credibility and the prosecutor's opinion of the truth?

12. The trial court erred by giving Instruction No. 3.
13. The trial court erred by refusing to give Mr. Martinez's proposed instruction defining reasonable doubt.
14. The trial court's reasonable doubt instruction violated Mr. Martinez's right to due process under the Fourteenth Amendment and art. I, § 3.

15. The trial court's reasonable doubt instruction violated Mr. Martinez's right to a jury trial under the Sixth and Fourteenth Amendments and art. I, §§ 21 and 22.
16. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
17. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

1. **ISSUE 7:** A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Martinez's constitutional right to a jury trial?

18. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 8: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Martinez is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. Damarius Morgan was killed in a gang-related shooting.

Down Since Birth (DSB) is a rap group in Yakima that is associated with the Fun Boys street gang.¹ RP (3/27/15) 2857. The DSB supporters generally wear red and black. RP (3/12/15) 1235-1236.

DSB had a performance in downtown Yakima. RP (3/12/15) 1231. Members of the West Side Hustlers – another local street gang – were in attendance. RP (3/16/15) 1559; RP (3/27/15) 2857.

During the concert, members of both gangs rushed outside to “rumble.” RP (3/27/15) 2857. The two groups squared off in the street. RP (3/16/15) 1559. The group wearing red was on one side of the street. RP (3/11/15) 1005. Damarius Morgan was with the group on the other side. RP (3/9/15) 758-759.

Morgan punched Klick Klack (a member of DSB) and Klick Klack fell to the ground. RP (3/9/15) 713; RP (3/12/15) 1240.

A few seconds later, a member of the Fun Boys gang shot Morgan in the chest. He died as a result of his wounds. RP (3/20/15) 2244; RP (3/27/15) 2858.

¹ Fun Boys is a subset of the Nortenos gang. RP (3/27/15) 2857.

2. Luis Rodriguez-Perez was a high-ranking member of the Fun Boys. All of the physical evidence of the shooting pointed to him.

Luis Rodriguez-Perez performed with DSB at the concert that night. RP (3/25/15) 2574-2575. He was also a member of the Fun Boys gang. RP (3/27/15) 2858. Rodriguez-Perez has a tattoo indicating that he holds a position of authority in the Fun Boys gang. RP (3/27/15) 2859.

A surveillance video shows Rodriguez-Perez hiding a gun in the bushes immediately after the shooting. Ex. HH. Forensic evidence later showed that the bullet that killed Morgan had been shot from the gun Rodriguez-Perez hid. RP (3/25/15) 2629. Rodriguez-Perez's fingerprints were also on the magazine inside the gun. RP (3/25/15) 2670.

One eyewitness said that the shooter had been wearing a black hoodie and a hat. RP (3/12/15) 1260. At the time of the shooting, Rodriguez-Perez had on a black jacket and a red, black, and white baseball hat. RP (3/23/15) 2301-2303; Ex. 49. He hid his jacket and hat in the bushes before he was apprehended by the police. RP (3/18/15) 1907, 1914; Ex. A.

Another eyewitness looked at Rodriguez-Perez during a police showup. Rodriguez-Perez was not wearing a hat during the showup. The eyewitness said that he could have been the shooter, if he had ditched his hat before the showup. RP (3/12/15) 1343, 1416.

3. At the scene, three eyewitnesses said Williams Martinez was not the shooter; two other witnesses identified him as the shooter because he was wearing a red hat.

William Martinez was also at the concert. RP (3/27/15) 2918. He was eighteen years old and had just returned to Yakima after living out of state. RP (3/27/15) 2911-2912. He was friends with Rodriguez-Perez. RP (3/27/15) 2914.

Mr. Martinez was not a member of any street gang, including the Fun Boys. RP (3/16/15) 1562. But he happened to be wearing a red baseball hat and a red sweatshirt under his camouflage-print jacket. RP (3/27/15) 2916.

Mr. Martinez and four or five men were detained by the police and included in on-scene showups. RP (3/10/15) 932, 940-941.

On the night of the shooting, two eyewitnesses told the police that Mr. Martinez had not been the shooter. RP (3/12/15) 1255; RP (3/20/15) 2267-2270. The police failed to collect any contact information from one of these two eyewitnesses. RP (3/20/15) 2267-2270.²

A third eyewitness – Daniel Cerda – did not identify Mr. Martinez at the showup but later changed his mind and told the police that he had been the shooter. RP (3/10/15) 940-941; RP (3/11/15) 1090-1091.

² Accordingly, that witness could not be contacted by the defense attorneys or called to testify at trial. A police officer testified to his interaction with that witness. RP (3/20/15) 2267-2270.

Cerda's son was a member of DSB and was performing at the concert that night. RP (3/11/15) 1003.

Two more eyewitnesses picked Mr. Martinez out at the showup. RP (3/9/15) 742, 793; RP (3/12/15) 1415. Both of those witnesses said that they chose Mr. Martinez on the basis of his clothing – specifically his red hat – alone. RP (3/9/15) 742; RP (3/12/15) 1349.

One of those eyewitnesses told police that the shooter had had a mustache. RP (3/12/15) 1350. Mr. Martinez did not have a mustache on the night of the shooting. RP (3/27/15) 2950; Ex. 50. The second eyewitness who picked Mr. Martinez out of the lineup told the police that he did not see him well enough to know what race he was. RP (3/9/15) 769.

The police did not find any physical or forensic evidence connecting Mr. Martinez to the gun or the shooting.

Still, both Mr. Martinez and Rodriguez-Perez were charged with Morgan's murder. CP 4. Mr. Martinez was also charged with unlawful possession of a firearm. CP 5.

Over Mr. Martinez's objection, the court granted the state's motion to consolidate the cases. CP 46; RP (9/10/14) 37-44, 86-93. The case proceeded to a joint trial.

4. The trial court prohibited Mr. Martinez from presenting evidence that the shooting was gang-related, and that he was not associated with a street gang and had no interest in the fight.

At trial, Mr. Martinez sought to present evidence of the gang-related nature of the fight. RP (2/27/15) 2857-2862. He also wanted to elicit testimony from a Yakima Police Department gang unit member that Rodriguez-Perez was a known member of the Fun Boys gang. RP (2/27/15) 2858-2859. That same witness would have testified that Mr. Martinez was not a gang member. RP (3/16/15) 1562.

But the court prohibited Mr. Martinez from eliciting that testimony. RP (2/27/15) 2859-2862. The court noted that the evidence would not have been admissible if offered by the state, and relied on case-law applying that rule. RP (2/27/15) 2859-2862.

Mr. Martinez also moved to sever his case from that of Rodriguez-Perez to permit him to elicit the gang testimony. RP (3/27/15) 2839-2840. The court refused to sever the cases. RP (3/27/15) 2849-2853.

As a result, the jury did not learn about the Fun Boys' association with DSB or the fact that the street fight was actually a rumble between two gangs. Nor did jurors learn about Rodriguez-Perez's membership in the Fun Boys. Jurors were also not told that Mr. Martinez was not a

member of either gang, and did not have an interest in the outcome of the brawl.

5. The trial court prohibited Mr. Martinez's expert witness from testifying about the problems inherent in cross-racial eyewitness identification.

Mr. Martinez is Hispanic. RP (3/27/15) 2915. Adams, one of the eyewitnesses who claimed Mr. Martinez had been the shooter, is white.

Ex. BBB, p. 2; RP (3/13/15) 1338, 1415.

At one point, Adams described the group wearing red as "a bunch of little Mexicans." RP (3/13/15) 1400.

As a result, Mr. Martinez sought to have his expert on eyewitness identification discuss the problems inherent in cross-racial identification.

Ex. BBB, p. 7. Although the court allowed the expert to testify about other issues, the court refused to allow expert testimony about cross-racial identification. RP (3/2/15) 67.

6. The prosecutor displayed PowerPoint slides consisting of exhibits with added commentary during closing argument.

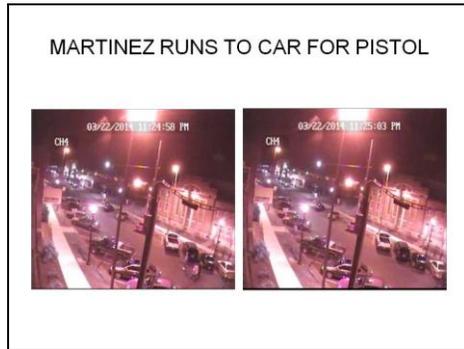
Throughout his closing argument, the prosecutor displayed a PowerPoint slide show to the jury. Ex. SE-A. Several of the prosecutor's slides consisted of admitted exhibits with added commentary providing the state's theory of the case.

First, the prosecutor displayed screen captures from a video on Mr. Martinez's cell phone. Ex. SE-A (slides 42, 43). The photos first showed Rodriguez-Perez pointing a gun at the camera. Ex. SE-A (slide 42). The next slide showed Mr. Martinez slumped on a couch with the words "GOOD TIMES." Ex. SE-A (slide 43). Mr. Martinez had used this phrase during his testimony when explaining that the video had been taken while he and his friends were just messing around at home.



Ex. SE-A (slides 42, 43).

Later, the prosecutor showed the jury a slide with two images from a surveillance video. The slide also stated "MARTINEZ RUNS TO CAR FOR PISTOL." Ex. SE-A (slide 48). In his testimony, Mr. Martinez had denied going to get a gun. RP (3/27/15) 2955, 2985.



Ex. SE-A (slide 48).

Finally, the prosecutor displayed two slides with surveillance images labeled “FLIGHT ON PENDLETON WAY” and “FLIGHT IN THE ALLEY.” Ex. SE-A (slides 65, 67). During this portion of the argument, the prosecutor told the jury that Mr. Martinez had run from the police and that his flight was evidence of his guilt. RP (3/31/15) 3310.



Ex. SE-A (slides 65, 67).

7. The prosecutor displayed a repetitive series of slides juxtaposing a summary of Mr. Martinez’s testimony with the jury instruction on credibility and the state’s theory of the truth.

The prosecutor's slide presentation also employed a repetitive pattern in which the slides summarized Mr. Martinez's testimony, provided the jury instruction on credibility of witnesses, and then provided the state's theory of the truth in italics:

WILLIAM MARTINEZ

- Luis had pistol in waistband at house before concert
- Drank tequila
- Smoked marijuana
- Drove to concert
- Parked car on Naches Avenue
- Wanded for weapons at door
- Luis did not enter; left for 5 minutes
- Did not know why Luis went back (not credible)
- Jury instruction: You are the sole judges of the credibility of each witness. ... In considering a witness's testimony, you may consider these things: ... any *personal interest* that the witness might have in the outcome or the issues; ... the *reasonableness* of the witness's statements in the context of all of the other evidence;
- *William knew why Luis left – to put the pistol back in the car!*

Ex. SE-A (slide 44).

WILLIAM MARTINEZ

- Watched concert
- Went outside
- Saw fight
- Walked to car
- *Ran to car! (video)*
- Did not know where Luis was.
- *Luis was seconds behind William heading for car! (video)*
- Jury instruction: You are the sole judges of the credibility of each witness. ... In considering a witness's testimony, you may consider these things: ... any *personal interest* that the witness might have in the outcome or the issues; ... the *reasonableness* of the witness's statements in the context of all of the other evidence;
- *William and Luis went together to get the pistol from the car.*

Ex. SE-A (slide 47).

WILLIAM MARTINEZ

- Car locked
- Talked with girls
- Heard car alarm
- Saw Luis inside car
- Touched Luis on shoulder
- Luis (*best friend*) ignores William; leaves the car
- William calls out for Luis
- Luis doesn't answer or look back
- William: Does not know that Luis got gun
- Jury instruction: You are the sole judges of the credibility of each witness. ... In considering a witness's testimony, you may consider these things: ... any *personal interest* that the witness might have in the outcome or the issues; ... the *reasonableness* of the witness's statements in the context of all the other evidence;
- *William knew that Luis got the pistol; William helped Luis get pistol.*

Ex. SE-A (slide 50).

WILLIAM MARTINEZ

- Best friends
- Saved money for Luis at bank
- Wore Luis's red shirt and shoes
- Luis carried pistol every time William saw him
- Videoed Luis pointing pistol ("Good times")
- Luis had pistol in waistband earlier that night
- Ran back to car just ahead of Luis
- Saw Luis get something from backseat of car
- Went back to Pendleton Way with Luis
- Stood behind orange PU with Luis. "I was right up front where that fool was."
- *Didn't know that Luis intended to fire?*

Ex. SE-A (slide 56).

8. The court refused to give Mr. Martinez's proposed jury instruction on the state's burden of proof.

Mr. Martinez proposed a "reasonable doubt" jury instruction based on the pattern instruction. CP 327. The proposed instruction omitted an optional bracketed sentence from the pattern instruction. The optional sentence reads "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 327; RP (3/26/15) 2785.

The court refused Mr. Martinez's proposed instruction, and gave the state's proposed instruction instead. The state's instruction included

the bracketed language regarding “the truth of the charge.” CP 327; RP (3/26/15) 2787.

The jury convicted both Mr. Martinez and Rodriguez-Perez of second degree murder. CP 360. The jury also convicted Mr. Martinez of unlawful possession of a firearm. CP 366.

This timely appeal follows. CP 388-389.

ARGUMENT

I. THE COURT VIOLATED MR. MARTINEZ’S RIGHT TO PRESENT A DEFENSE BY PROHIBITING HIM FROM INTRODUCING CRITICAL EVIDENCE.

An accused person has a constitutional right to present a defense. U.S. Const. Amends. VI, XIV; art. I, §§3, 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).³ The right to present a

³ Mr. Martinez repeatedly moved below to sever his case from Rodriguez-Perez’s. RP (9/10/14) 37-44, 86-93; RP (3/27/15) 2839-2840. He also sought permission to present evidence regarding the gang-related nature of the fight and the problems inherent in cross-racial witness identification. RP (2/27/15) 2857-2862. Insofar as he did not raise these exact constitutional arguments in the trial court, they present manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

defense includes the right to introduce relevant⁴ and admissible evidence. *Jones*, 168 Wn.2d at 720.

Once the accused has established that proffered evidence is relevant and admissible, it can only be excluded if the state proves that it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.* No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

A. Mr. Martinez had a constitutional right to inform the jury that the shooting was part of a gang-related “rumble” in which he had no interest.

Morgan was killed in a gang-related brawl. The fight in the street was between the Fun Boys gang and the West Side Hustlers. RP (3/12/15) 1235-1236; RP (2/27/15) 2857-2862. Morgan punched Klick Klack – a Fun Boys member – immediately before he was shot. RP (3/9/15) 713; RP (3/12/15) 1240.

⁴ Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Mr. Martinez was not associated with either the Fun Boys or the West Side Hustlers. RP (3/16/15) 1562. In fact, a Yakima Police Department gang unit officer would have testified that Mr. Martinez was not in a gang at all. RP (3/16/15) 1562.

Rodriguez-Perez, on the other hand, was a member of the Fun Boys. RP (3/27/15) 2858. He performed with the gang-affiliated rap group DSB (alongside Klick Klack) at the concert and had a tattoo indicating that he held a position of authority within the gang. RP (3/25/15) 2574-2575; RP (3/27/15) 2859.

But the trial court did not permit Mr. Martinez to elicit any of that evidence. RP (2/27/15) 2859-2862. As a result, the jury did not know that the fight was gang-related. The jury also never learned that Mr. Martinez had no reason to be involved in the fight, but that Rodriguez-Perez did.

Additionally, Cerda – one of the eyewitnesses who identified Mr. Martinez as the shooter – was at the concert to support his son, who was also a member of DSB. RP (3/11/15) 1003. Although Cerda himself was not alleged to be a gang member, his son's affiliation with DSB and the Fun Boys might have led jurors to conclude that Cerda was biased in favor of the gang members, which included Rodriguez-Perez but did not include Mr. Martinez.

The jury did not know that Rodriguez-Perez did have an interest in the fight. The jury also did not know that Cerda was biased by his interest to protect his son and his son's gang-mates. The court's ruling violated Mr. Martinez's constitutional right to present evidence in his defense. *Jones*, 168 Wn.2d at 721.

1. The court violated Mr. Martinez's right to present a defense by prohibiting him from introducing evidence that he had no interest in the fight that led to the shooting.

The right to present a defense includes the right to present evidence of the circumstances surrounding an alleged crime when those circumstances point to the accused's innocence. *Jones*, 168 Wn.2d at 721. In *Jones*, the Supreme Court held that the accused had a constitutional right to present evidence that an alleged rape had actually occurred during an all-night, drug-induced sex party. *Id.* Indeed, the evidence was so probative that no state interest could have been compelling enough to preclude its introduction. *Id.*

Similarly, here, the evidence of the context in which the shooting took place was critical to Mr. Martinez's defense. Without it, the jury would have reasonably assumed that Mr. Martinez was part of the fight and had as much interest in its outcome as everyone else there.

But the court did not permit Mr. Martinez to elicit evidence of the gang-related nature of the shooting, the gang involvement of the other

participants, and the fact that he was not in a gang. RP (2/27/15) 2859-2862. Accordingly, he was completely unable to argue in his defense that he had no reason to participate in the fight or to want to shoot Morgan.

Mr. Martinez was also not permitted to inform the jury that Rodriguez-Perez *did* have reason to shoot Mr. Morgan (who had just punched his gang-mate, Klick Klack, to the ground). *Cf. Franklin*, 180 Wn.2d at 377 (“The trial court in this case erred when it excluded Franklin’s alternate suspect evidence.”) Similarly, he was unable to demonstrate Cerda’s potential bias in favor of members of the gang.⁵

No state interest could have been compelling enough to preclude the admission of the highly probative evidence, which was necessary for Mr. Martinez’s defense. *Jones*, 168 Wn.2d at 720. Accordingly, the exclusion of the evidence violated Mr. Martinez’s right to present a defense under the Sixth and Fourteenth Amendments and art. I, §§ 3, 22.

The state cannot demonstrate that the violation was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382.

The gang evidence was critical to Mr. Martinez’s defense. It would have shown that he had no reason to participate in the fight or to

⁵ In addition to implicating his right to present a defense, this restriction likely infringed his constitutional right to confront witnesses to show bias. *Davis v. Alaska*, 415 U.S. 308, 319, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (right of confrontation violated by state statute’s exclusion of evidence needed to show bias of important witness).

shoot Morgan. It also would have shown that numerous other people had an interest in the outcome and had reason to avenge Klick Klack. These others included Rodriguez-Perez, who ran to the car prior to the shooting, who was seen disposing of the gun after the shooting, who wore a hat with red on it (which he dumped after the shooting), and whose fingerprints were on the gun and on the gun's magazine. RP (3/25/15) 2670; RP (3/27/15) 2925-2926; Ex. HH. Furthermore, most of the gang members were also wearing red and could have easily been mistaken for Mr. Martinez.

Likewise, the gang evidence would have informed the jury that Cerda might be biased in favor of the Fun Boys gang, and therefore at least potentially had a reason to pin the shooting on Mr. Martinez, who was not a member of the gang.

The state cannot prove that “any reasonable jury would have reached the same result without the error.” *Jones* 168 Wn.2d at 724. Mr. Martinez's convictions must be reversed. *Id.*

2. The court erred by prioritizing judicial economy over Mr. Martinez's constitutional right to present a defense.

The court prevented Mr. Martinez from eliciting the gang-related evidence because it would have prejudiced his codefendant, Rodriguez-Perez. RP (2/27/15) 2859-2862. This was improper, because the state's

interest in a joint trial did not outweigh Mr. Martinez's right to present the evidence in his own defense. *See State v. Cayetano-Jaimes*, 190 Wn. App. 286, 298, 359 P.3d 919 (2015).

Mr. Martinez repeatedly moved to sever his case from that of Rodriguez-Perez. He did so in part so that he could present the evidence of the gang-related context of the shooting. RP (3/27/15) 2839-2840. The court denied his repeated motions to sever. RP (3/27/15) 2849-2853.

As outlined above, no state interest can be compelling enough to preclude the admission of highly probative evidence necessary to the defense. *Jones*, 168 Wn.2d at 720. Even if the gang evidence does not qualify as *highly* probative, the state's interest in judicial economy through a joint trial was insufficient to overcome Mr. Martinez's constitutional right to present necessary evidence in his defense. *Jones*, 168 Wn.2d at 721; *See also United States v. Seifert*, 648 F.2d 557, 564 (9th Cir. 1980).

The state cannot point to any other interest served by the exclusion of the gang-related context of the shooting. But the burden is on the state to show that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Cayetano-Jaimes*, 190 Wn. App. at 298. The state cannot do so in this case.

The court violated Mr. Martinez's constitutional right to present a defense by prohibiting him from presenting evidence of the gang-related

nature of the shooting. *Jones* 168 Wn.2d at 724. Mr. Martinez's convictions must be reversed. *Id.*

B. The trial court erred by prohibiting Mr. Martinez from presenting evidence regarding the unreliability of cross-racial eyewitness identifications.

Mr. Martinez is Hispanic. RP (3/27/15) 2915. Adams, one of only two eyewitnesses who picked Mr. Martinez out at an on-scene showup, is white. Ex. BBB, p. 2; RP (3/13/15) 1338, 1415. He described Mr. Martinez as one of "a bunch of little Mexicans." RP (3/13/15) 1400.

Studies have shown that eyewitness identification is erroneous approximately one third of the time. Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. Rev. 861, 866-868 (2015). Such error plays a role in 75% of exonerations after wrongful conviction. *Id.* at 686.

Cross-racial eyewitness identification is particularly fraught. One meta-analysis has shown that eyewitnesses are 56% more likely to falsely identify someone who is of another race. *Id.* at 871 (citing *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 15 (2001)).

Adams may be particularly likely to have misidentified a Hispanic person. He displayed his prejudice by referring to the people on Mr.

Martinez's side of the street as "a bunch of little Mexicans." RP (3/13/15) 1400.

Accordingly, Mr. Martinez sought to present expert testimony regarding the unreliability of cross-racial eyewitness identification. Ex. BBB, p. 7. The court prohibited him from doing so without providing any explanation. RP (3/2/15) 67.

The trial court violated Mr. Martinez's right to present a defense and abused its discretion by precluding him from explaining the problems inherent in cross-racial identification. *Jones* 168 Wn.2d at 724; *State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003).

1. The court violated Mr. Martinez's right to present a defense by prohibiting him from demonstrating the unreliability of Adams's cross-racial identification.

Expert testimony on the unreliability of cross-racial identification was necessary to place Adams's questionable identification in proper context. Without it, the jury would likely have placed the same weight on Adams's identification as on that of any other witness, despite the fact that it was less likely to be accurate. *See Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 Psychol. Pub. Pol'y & L. at 15.

The prosecutor did not point to any state interest in the exclusion of the evidence. The state certainly did not establish that the expert

testimony would have been “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720.

The court violated Mr. Martinez’s right to present a defense by precluding him from providing evidence regarding the unreliability of Adams’s cross-racial identification.⁶ *Jones* 168 Wn.2d at 724. Mr. Martinez’s convictions must be reversed. *Id.*

2. The court abused its discretion under ER 702 by excluding expert testimony regarding cross-racial identification.

Expert testimony is admissible if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” ER 702. The Supreme Court has recognized that the problems inherent in cross-racial identification are outside the knowledge of the average juror. *Cheatam*, 150 Wn.2d at 646 (*citing* Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. Miami L. Rev. 1059, 1062 (2001)).

Here, expert testimony about the problems with cross-racial identification was necessary to help the jury put Adams’s identification testimony into proper context. *Cheatam*, 150 Wn.2d at 646. The court

⁶ The Washington Court of Appeals have never considered this issue in the context of the constitutional right to present a defense. The Supreme Court has mentioned the right in a case applying ER 702. *Cheatam*, 150 Wn.2d at 663. However, the *Cheatam* court’s reference is *dicta. Id.*

abused its discretion under ER 702 by prohibiting Mr. Martinez's proffered expert testimony on cross-racial identification. ER 702; *Cheatam*, 150 Wn.2d at 646.

In this case, Adams was standing 30-40 yards away from the shooter. RP (3/12/15) 1326. He told the officers that the shooter had a mustache, which Mr. Martinez did not have. RP (3/12/15) 1349; RP (3/27/15) 2950; Ex. 50. He admitted that he identified Mr. Martinez based exclusively on his clothing, particularly his hat. RP (3/12/15) 1349. And he described the group of people wearing red as "a bunch of little Mexicans." RP (3/13/15) 1400.⁷

A court abuses its discretion by basing its decision on untenable grounds. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). The trial court did not give any reason at all for prohibiting Mr. Martinez's expert from testifying regarding cross-racial identification. RP (3/2/15) 67. The court abused its discretion by prohibiting Mr. Martinez from eliciting expert testimony on the unreliability of cross-racial eyewitness identification. ER 702; *Cheatam*, 150 Wn.2d at 646.

⁷ In *Cheatam*, by contrast, the court upheld a trial court decision excluding expert testimony on cross-racial identification because the eyewitness had made a point of memorizing her attacker's face, and had met with a police sketch artist to produce a rendering of the attacker that was a "nearly photo perfect" depiction of the accused. *Id.* at 649.

An erroneous evidentiary ruling that violates the defendant's constitutional rights “is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt.” *Franklin*, 180 Wn.2d at 377 n. 2. As outlined above, the error here infringed Mr. Martinez’s constitutional right to present a defense. *Jones* 168 Wn.2d at 724. The state cannot show that the error was “harmless beyond a reasonable doubt.” *Franklin*, 180 Wn.2d at 377 n. 2.

Had the court allowed expert testimony on cross-racial identification, jurors may well have discredited Adams’s identification of Mr. Martinez as one of the “little Mexicans” who shot Morgan. RP (3/13/15) 1400.

Mr. Martinez’s convictions must be reversed, and the case remanded with instructions to allow him to introduce expert testimony on cross-racial identification. *Jones* 168 Wn.2d at 724.

II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. MARTINEZ OF A FAIR TRIAL.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. A conviction must be reversed where the misconduct prejudices the accused. *Id.* Even absent objection, reversal is required when misconduct is “so flagrant and ill intentioned that an

instruction would not have cured the prejudice.” *Glasmann*, 175 Wn.2d at 704.

To determine whether a prosecutor’s misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor’s office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Images displayed during closing argument can be particularly prejudicial. *Glasmann*, 175 Wn.2d at 707-709. Such images “may sway a jury in ways that words cannot,” and the effect is difficult to overcome with an instruction. *Id.* at 707 (quoting *State v. Gregory*, 158 Wn.2d 759, 866-867, 147 P.3d 1201 (2006)).

This is because:

[W]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.

Id. at 709 (quoting Lucille A. Jewel, *Through A Glass Darkly : Using Brain Science and Visual Rhetoric to Gain A Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 293 (2010)).

A. The prosecutor committed misconduct in his closing PowerPoint presentation by adding inflammatory text to exhibits.

At Mr. Martinez’s trial, the prosecutor relied on a PowerPoint presentation throughout closing argument. Ex. SE-A. The jury saw numerous slides consisting of exhibits with the prosecutor’s commentary in the form of captions. Ex. SE-A (slides 10, 18, 21, 22, 24, 30, 34, 36, 39, 42, 43, 48, 49, 52-54, 59-61, 62, 63, 65-68).

One of the slides shows Mr. Martinez slumped down on a sofa with the words “GOOD TIMES,” referring to his testimony about the day he took a video of Rodriguez-Perez holding a gun. Ex. SE-A (slide 43). The slide follows one displaying a photo of Mr. Rodriguez-Perez pointing the pistol at the viewer. Ex. SE-A (slides 42, 43).

Several other slides display surveillance photos of unidentifiable people on the street, with captions claiming that they showed Mr. Martinez “run[ning] to car for pistol” and then in “flight” from the police. Ex. SE-A (slides 48, 65, 67). Both of those contentions were contested at trial.

The prosecutor committed misconduct in closing by displaying exhibits that had been altered to add captions, at least one of which was inflammatory and displayed Mr. Martinez in a negative light. *Glasmann*, 175 Wn.2d at 706.

A prosecutor may not display exhibits that have been altered by the addition of captions during closing argument. *Glasmann*, 175 Wn.2d at 706. Such visuals are akin to exposing the jury to unadmitted evidence. *Id.*

The prosecutor's closing PowerPoint presentation at Mr. Martinez's trial included numerous admitted photographs, all of which were altered to add captions emphasizing the state's theory of the case. Ex. SE-A (slides 10, 18, 21, 22, 24, 30, 34, 36, 39, 42, 43, 48, 49, 52-54, 59-61, 62, 63, 65-68).

At least four of those slides showed Mr. Martinez engaged in seemingly innocuous activity like sitting on a couch and walking in the street but proclaimed that he was actually going to get a gun, fleeing from the police, or having "GOOD TIMES" while his friend held a gun. Ex. SE-A 43, 48, 65, 67.

The prosecutor committed misconduct by displaying slides containing exhibits altered to include inflammatory captions. *Glasmann*, 175 Wn.2d at 706.

It is also misconduct for a prosecutor to make arguments designed to inflame the jury's passion and prejudice. *Id.* at 704. Furthermore, a prosecutor commits misconduct by displaying derogatory images of the accused during closing argument. *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 *cert. denied*, 135 S.Ct. 2844, 192 L.Ed.2d 876 (2015).

The prosecutor's slide showing Mr. Martinez slumped on the couch and proclaiming that he was enjoying "GOOD TIMES" while his friend brandished a pistol was designed to inflame the jury's passion and prejudice and to depict Mr. Martinez in a negative light. *Id.*; *Glasmann*, 175 Wn.2d at 704. The image encouraged the jury to conclude that Mr. Martinez thought violence was fun and implied that he was an unproductive member of society who lazed on the couch all day. The slide had no purpose but to evoke a negative emotional reaction.

The prosecutor committed misconduct by showing the jury the altered exhibits. *Id.* The prosecutor also committed misconduct by appealing to passion and prejudice and presenting Mr. Martinez in a derogatory negative light for no purpose other than to evoke negative emotion. *Id.*

- B. The prosecutor committed misconduct by displaying slides conveying his personal opinion regarding Mr. Martinez's credibility and guilt.

The prosecutor's closing argument PowerPoint also employed a repetitive strategy of slides enumerating the points Mr. Martinez made in his testimony, followed by the jury instruction on credibility, and then the prosecutor's opinion of Mr. Martinez's credibility (in the form of his italicized version of the truth). Ex. SE-A (slides 44, 47, 50, 56).

The prosecutor committed misconduct by repeatedly conveying his personal opinion of Mr. Martinez's guilt and credibility.

A prosecutor may not express his/her personal opinion of guilt or credibility to the jury. *Id.* at 706-707; *Walker*, 182 Wn.2d at 478; RPC 3.4(e). This includes personal opinions expressed on PowerPoint slides. *Id.*

The prosecutor's visual approach of again and again juxtaposing Mr. Martinez's testimony, the jury instruction on credibility, and the prosecutor's version of the truth clearly conveyed the prosecutor's personal opinion that the Mr. Martinez was not credible. Ex. SE-A (slides 44, 47, 50, 56). The prosecutor committed misconduct. *Id.*

C. The prosecutor's misconduct was flagrant, ill-intentioned, and prejudicial

Mr. Martinez was prejudiced by the prosecutor's improper PowerPoint slides. *Glasmann*, 175 Wn.2d at 711. As outlined, above, improper visual imagery carries a high risk of prejudice because of the way it is processed in jurors' brains. *Id.* at 707-709.

The evidence against Mr. Martinez was not overwhelming. All of the physical evidence pointed to Rodriguez-Perez. One eyewitness described the shooter's clothing in a way that matched what Rodriguez-Perez was wearing. RP (3/12/15) 1260; RP (3/23/15) 2301-2303; Ex. 49. Another thought Rodriguez-Perez looked like the shooter, even without his hat. RP (3/12/15) 1343, 1416.

The eyewitness testimony tying Mr. Martinez to the shooting were shaky and based primarily on the fact that Mr. Martinez was wearing a red hat (as were multiple other people at the concert). There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Mr. Martinez's trial. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the argument. *Glasmann*, 175 Wn.2d at 707. At the time of Mr. Martinez's trial, the prosecutor had access to two Supreme

Court cases disallowing the exact strategy he used in closing. *See Id.*; *Walker*, 182 Wn.2d 463.

As in *Glasmann*, the prosecutor here also “produced a media event” with the goal of influencing the jury into voting guilty. *Glasmann*, 175 Wn.2d at 708. The effect of such misconduct cannot be undone by a curative instruction. *Id.*

Finally, arguments with an “inflammatory effect on the jury” are generally not curable by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). The prosecutor’s misconduct was flagrant and ill-intentioned. *Id.*; *Glasmann*, 175 Wn.2d at 708.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by displaying images during closing argument that altered admitted exhibits, inflamed the jury’s emotions, and conveyed a personal opinion of guilt and credibility. *Id.* Mr. Martinez’s convictions must be reversed. *Id.*

III. THE COURT’S “REASONABLE DOUBT” INSTRUCTION INFRINGED MR. MARTINEZ’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH.”

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury’s task “is to

determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760.

Here, over objection, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 327. The court rejected the instruction proposed by Mr. Martinez, which omitted the optional language found in the pattern instruction. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed).

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 327.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 327. Jurors were obligated to follow the instruction.

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 review

denied, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014). This court should not follow Division I.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I's position.

In *Bennett*, the appellant argued *in favor of* WPIC 4.01⁸— including the language to which Mr. Martinez objected— and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.⁹ *Id.*

The *Fedorov* court also relied on *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant favored the “truth of the charge” language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.*, at 656.¹⁰ The *Pirtle*

⁸ The pattern instruction at issue here.

⁹ The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

¹⁰ The challenged language in *Pirtle* read as follows: “If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction “invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit.” *Id.*, at 656.

court was not asked to rule on the constitutionality of the “truth of the charge” provision.

Neither *Bennett* nor *Pirtle* should control this case. Division III should not follow Division I’s decisions in *Kinzle* and *Fedorov*.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

Improper instruction on the reasonable doubt standard is structural error.¹¹ *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Martinez his constitutional right to a jury trial.

Mr. Martinez’s convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

¹¹ RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is “a special category of manifest error affecting a constitutional right.” *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) (“If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a ‘manifest error affecting a constitutional right.’”)

IV. IF THE STATE PREVAILS ON APPEAL, THIS COURT SHOULD NOT REQUIRE MR. MARTINEZ, WHO IS INDIGENT, TO PAY APPELLATE COSTS.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016).¹²

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 72102-0-I, 2016 WL 393719 at * 4. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Martinez indigent at the beginning and end of the proceedings in superior court. CP 518-520; Order Appointing Attorney filed 3/24/14, Supp. CP. That status is unlikely to change, especially with the addition of several felony convictions and the imposition of a lengthy prison term. CP 380-382. The *Blazina* court indicated that courts should “seriously question” the ability of a person

¹² Division II’s commissioner has indicated that Division II will follow *Sinclair*.

who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The court violated Mr. Martinez's constitutional right to present a defense and abused its discretion by prohibiting him from eliciting testimony about the gang-related nature of the shooting and the unreliability of cross-racial eyewitness identification. The prosecutor committed misconduct by relying on altered exhibits and conveying personal opinions in a closing PowerPoint presentation. The court's reasonable doubt instruction violated Mr. Martinez's right to due process. Mr. Martinez's convictions must be reversed.

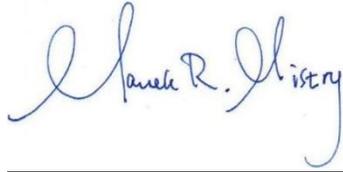
In the alternative, if Mr. Martinez does not prevail on appeal, this court should not assess appellate costs because he is indigent.

Respectfully submitted on March 25, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 25, 2016.



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