FILED

JUN 23, 2016

Court of Appeals
Division III
State of Washington

NO. 33571-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LUIS GUADALUPE RODRIGUEZ-PEREZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Richard Bartheld, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

Page

ASSIGNMENTS OF ERROR 1

1. The prosecutor's clear and unmistakable expression of personal opinion during closing argument denied Rodriguez-Perez a fair trial. 1

2. The prosecutor committed misconduct in closing argument by vouching for the credibility of Martinez. 1

3. The prosecutor committed misconduct during his PowerPoint presentation by displaying exhibits altered to add inflammatory captions. 1

4. Prosecutorial misconduct deprived Rodriguez-Perez of his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. 1

5. Prosecutorial misconduct deprived Rodriguez-Perez of his right to a fair trial by an impartial jury under Wash. Const. Art. I. §§ 3, 21, and 22. 1

6. The trial court's reasonable doubt instruction undercut the burden of proof and confused the jury's roll in the judicial process. 1

7. The trial court erred when, because of a scrivener's error, it failed to strike incarceration fees from the Judgment and Sentence. 1

8. This court should not impose costs on appeal. 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

1. In his opening statement, the prosecutor assured the jury he would prove Martinez shot and killed Damarius Morgan. After Martinez took the stand and testified Rodriguez-Perez was the shooter, the prosecutor used closing argument to assure the jury Rodriguez-Perez was the shooter. Did the prosecutor's explicit

vouching for Martinez's credibility on this point deny Rodriguez-Perez a fair trial? 1

2. A prosecutor may not show the jury exhibits 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? 2

3. The jury's roll is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. The jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal? 2

4. The remedy for a scrivener's error in a judgment and sentence is remand for the sentencing court to correct the error. The court found Rodriguez-Perez did not have the ability to pay costs of incarceration but failed to strike from the Judgment and Sentence the obligation to pay incarceration costs. Is this court required to remand this matter to the trial court to correct its error? 2

5. If an appellant does not prevail on appeal, this court has authority to not impose appellate costs. Rodriguez-Perez is indigent, burdened with a victim assessment, restitution, and DOC supervision costs, and is serving a 22-year prison sentence. Should this court use its discretion to not impose appellate costs? 2

STATEMENT OF THE CASE 3

1. William Martinez and Luis Rodriguez-Perez are arrested for the shooting death of Damarius Morgan 3

2. The police develop a lukewarm case against Rodriguez-Perez. ... 4

3. The court refused to give Rodriguez-Perez and Martinez's proposed jury instruction on the State's burden of proof 6

4. The prosecutor vouched for Martinez's credibility in closing argument. 7

5. The prosecutor displayed PowerPoint slides consisting of exhibits with added commentary during closing argument. 7

6. The jury lacked confidence in the evidence and had to deliberate for five days before reaching a verdict. 10

7. A scrivener's error at sentencing leaves Rodriguez-Perez with hundreds of thousands of dollars of unintended debt. 10

ARGUMENT 11

1. The prosecutor's clear and unmistakable expression of personal opinion and vouching for witness credibility during closing argument denied Rodriguez-Perez a fair trial. 11

a. A prosecutor commits misconduct when vouching for a witness's credibility. 11

b. The prosecutor vouched for Martinez's credibility by adopting Martinez's testimony as fact in closing argument. 12

c. There is a substantial likelihood the prosecutor's improper vouching affected the verdict. 13

d. Rodriguez-Perez's conviction should be reversed. 15

2. The prosecutor's use of a prejudicial PowerPoint in closing argument deprived Rodriguez-Perez a fair trial 17

a. The prosecutor committed misconduct in his closing PowerPoint presentation by adding inflammatory text to exhibits. 18

b. The prosecutor's misconduct was flagrant, ill-intentioned, and prejudicial. 20

c. Rodriguez-Perez's conviction must be reversed. 22

3. The abiding belief instruction undercuts the State's burden of proof by erroneously equating the jury's job with a search for the truth rather than a test of the State's case. 22

4. The court should remand for correction of the incarceration fee scrivener's error in the Judgment and Sentence. 27

***a. Scrivener's errors may be challenged.*..... 27**

***b. If not stricken, the challenged error will cost Rodriguez-Perez hundreds of thousands of dollars*. 27**

5. This court should not impose appellate costs. 29

***a. Appellate costs are discretionary*. 29**

***b. This Court should exercise its discretion and disallow appellate costs against Rodriguez-Perez should the State substantially prevail.* 31**

CONCLUSION 32

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

Page

Cases

In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012)... 11, 14, 17, 19, 20, ……..21

In re Personal Restraint of Mayer, 128 Wn. App. 694, 117 P.3d 353 (2005)..... 27

Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) . 15

State v. Arredondo, 190 Wn. App. 512, 360 P.3d 920 (2015), *review granted in part on unrelated issue*, 185 Wn. 2d 1024, 369 P.3d 502 (2016)..... 28

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)..... 27

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) 13

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007)..... 23, 24, 26

State v. Berube, 171 Wn. App. 103, 286 P.3d 402 (2012)..... 23

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 30

State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997)..... 23

State v. Charlton, 90 Wn. 2d 657, 585 P.2d 142 (1978)..... 16

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984)..... 15

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) 14

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012)..... 14, 23, 24, 25, 26

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)..... 11, 14

State v. Gregory, 159 Wn.2d 759, 147 P.3d 1201 (2006)…… 17

State v. Imhoff, 78 Wn. App. 349, 898 P.2d 852 (1995)..... 16

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) 12

State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014) 12

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006) 12

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) 11

State v. Naillieux, 158 Wn. App. 630, 241 P.3d 1280 (2010)..... 27

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000) 29, 30

State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012)..... 21, 22

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) 25

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) 12

State v. Rose, 62 Wn.2d 309, 382 P.2d 513 (1963) 16

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016)..... 29, 30, 31

State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993)..... 16

State v. Walker, 182 Wn.2d 463, 341 P.3d 976, *cert. denied*, 135 S.Ct. 2844, 192 L.Ed.2d 876 (2015) 19, 20

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993)..... 26

U.S. v. Frederick, 78 F.3d 1370 (9th Cir. 1996) 12

United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992)..... 14

United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) 11

Statutes

RCW 10.73.160…….30

RCW 10.73.160(1)..... 29

RCW 10.82.090(1)..... 32

RCW 9.94A.729(2)..... 31

RCW 9.94A.729(3)(a)……..31

Other Authorities

American Bar Association Standards for Criminal Justice 35.8(b)(2d ed. 1980) 12

CrR 7.8(a) 27

RAP 14.2..... 29, 30

U.S. Const. Amend IV…… 26

U.S. Const. Amend. VI 11

Wash. Const. Art. I §3. …….1

Wash. Const. Art. I, §21 ..... 1, 26

Wash. Const. Art. I, § 22.……....1, 11, 26

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))…….18

ASSIGNMENTS OF ERROR

1. The prosecutor's clear and unmistakable expression of personal opinion during closing argument denied Rodriguez-Perez a fair trial.

2. The prosecutor committed misconduct in closing argument by vouching for the credibility of Martinez.

3. The prosecutor committed misconduct during his PowerPoint presentation by displaying exhibits altered to add inflammatory captions.

4. Prosecutorial misconduct deprived Rodriguez-Perez of his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.

5. Prosecutorial misconduct deprived Rodriguez-Perez of his right to a fair trial by an impartial jury under Wash. Const. Art. I. §§ 3, 21, and 22.

6. The trial court's reasonable doubt instruction undercut the burden of proof and confused the jury's roll in the judicial process.

7. The trial court erred when, because of a scrivener's error, it failed to strike the costs of incarceration from the Judgment and Sentence.

8. This court should not impose costs on appeal.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In his opening statement, the prosecutor assured the jury he would prove Martinez shot and killed Damarius Morgan. After Martinez took the stand and testified Rodriguez-Perez was the shooter, the

prosecutor used closing argument to assure the jury Rodriguez-Perez was the shooter. Did the prosecutor's explicit vouching for Martinez's credibility on this point deny Rodriguez-Perez a fair trial?

2. A prosecutor may not show the jury exhibits 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?

3. The jury's roll is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. The jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal?

4. The remedy for a scrivener's error in a judgment and sentence is remand for the sentencing court to correct the error. The court found Rodriguez-Perez did not have the ability to pay costs of incarceration but failed to strike from the Judgment and Sentence the obligation to pay incarceration costs. Is this court required to remand this matter to the sentencing court to correct its error?

5. If an appellant does not prevail on appeal, this court has authority to not impose appellate costs. Rodriguez-Perez is indigent,

burdened with a victim assessment, restitution, and DOC supervision costs, and is serving a 22-year prison sentence. Should this court use its discretion to not impose appellate costs?

STATEMENT OF THE CASE

1. William Martinez and Luis Rodriguez-Perez are arrested for the shooting death of Damarius Morgan.

Several hundred people turned out at Yakima's Seasons Performance Hall for the launch of a magazine. RP (3/9/15) 703. The evening featured performances by local rap musicians. Id. After the performances were underway, a large group of the attendees suddenly left the hall and went outside where a large street fight was taking place. RP (3/9/15) 708-09; RP (3/11/15) 1006-08. Damarius Morgan, a person supposed to perform that night, was shot in the leg and chest and died shortly thereafter. RP (3/19/15) 2136-37; RP (3/20/15) 2186, 2196-97.

After the shooting, people scattered. The police arrived at a hectic scene. RP (3/10/15) 805-06. Daniel Cerda, who was at Seasons to watch his son perform, told the police he saw the shooter, the shooter ran down a nearby alley, and the shooter probably was still in the alley. RP (3/10/15) 809; RP (3/11/15) 1003-05. The police spread out in search of witnesses and suspects to include a search of the alley.

In the alley, an officer watched as a group of people rush a bush and kicked two people hiding in the bush. RP (3/10/15) 936. The police pulled Martinez and Rodriguez-Perez from the bush. RP (3/10/15) 936; RP 3/17/15 1825-26. Officers brought prospective witnesses to do show ups on Martinez and Rodriguez-Perez. RP (3/9/15) 739-40; RP (3/10/15) 953-60; RP (3/10/15) 886, 910-11; RP (3/11/15) 1013. Several witnesses identified Martinez as the shooter based on his bushy hair, camo jacket, and red cap. Id; RP (3/19/15) 2163.

As part of the investigation, the police discovered that Alonzo Prince had been wounded in the shooting when a bullet pierced his lower leg. RP 3/19/15 2087. Prince did not identify his shooter. RP (3/23/15) 2359.

2. The police develop a lukewarm case against Rodriguez-Perez.

The police arrested Martinez and Rodriguez-Perez and took both to the Yakima Police Department. RP (3/18/15) 2014, 2035. During an interview, Martinez identified Rodriguez-Perez as the shooter. RP (3/27/15) 2944. Martinez showed the police a video on his phone that showed Rodriguez-Perez holding a pistol and pointing it at the camera. RP (3/23/15) 2308-10. The video was taken a month earlier. RP (3/20/15) 2518.

The next morning, Augustin Borato was walking his dog near the Seasons. RP (3/19/15) 2075. His dog's leash got caught in a bush and in untangling the leash, he saw a pistol in the dirt. RP (3/19/15) 2074-75. He called the police. RP (3/19/15) 2077. Detective Drew Shaw retrieved the pistol as evidence and submitted it for fingerprinting and DNA swabbing. RP (3/23/15) 2317, 2324, 2393. The pistol's magazine has a smudged fingerprint matching Rodriguez-Perez's fingerprint. RP (3/25/15) 2665. DNA testing showed nothing more than the pistol having a mixed sample of DNA from four donors that was too difficult to test for further specification. RP (3/25/15) 2735 A forensic investigator believed the bullet removed from Morgan's body at autopsy, and spent casings from the street where the shooting occurred, were shot from the pistol later discovered under the bush. RP (3/25/15) 2627-30.

Both Martinez and Rodriguez-Perez were charged with murder in the second degree (Morgan) and assault in the first degree (Prince). CP 16-17.

During their investigation, the police obtained surveillance video from a nearby building, COBAN[1] recordings from responding officers, and the "Telakish" video (so named after a person who filmed much of the street fight on his iPhone). RP (3/19/15) 2159; RP (3/23/15) 2297-2308.

[1] Audio and video recorded by video/audio equipped police cars and police officers.

The surveillance video showed three people running from the area of the shooting and down the alley. RP (3/24/15) 2447. The police believed the video captured Rodriguez-Perez throwing something in the same bush where the pistol was recovered the next day. RP (3/24/15) 2444.

During trial, the jury saw selected portions of the collected videos and screen captures taken from the videos. RP (3/19/15) 2159; RP (3/23/15) 2297-2308.

3. The court refused to give Rodriguez-Perez and Martinez's proposed jury instruction on the State's burden of proof.

Rodriguez-Perez proposed the same "reasonable doubt" pattern instruction as the State. CP 45, 68; RP (3/26/15) 2786. In discussing jury instructions, however, Rodriguez-Perez asked the court to instead adopt the instruction proposed by Martinez that omitted an optional bracketed sentence from the pattern instruction. Id. 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 95; RP (3/26/15) 2785.

The court refused Rodriguez-Perez and 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 45, 95; RP (3/26/15) 2787.

4. The prosecutor vouched for Martinez's credibility in closing argument.

In his opening statement, the prosecutor assured the jury Martinez was the shooter. RP (3/9/15) 650. But after Martinez testified, the prosecutor's perspective changed. In closing argument, he instead assured the jury Rodriguez-Perez was the shooter. RP (3/31/15) 3281.

5. 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. Supplemental Designation, Trial Ex. SE-A; RP (3/31/15) 3283. 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 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).

RODRIGUEZ-PEREZ POINTING PISTOL

The next slide showed Martinez slumped on a couch with the words "GOOD TIMES." Ex. SE-A (slide 43).

"GOOD TIMES"

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.

Later, the prosecutor showed the jury a slide with two images from a surveillance video. The slide also stated "RODRIGUEZ-PEREZ WALKS TO CAR FOR PISTOL CAR." Ex. SE-A (slide 49). No testimony established Rodriguez-Perez walked to a car to get a pistol. RP (3/27/15) 2955, 2985; Ex. SE-A (slide 49).

RODRIGUEZ-PEREZ WALKS TO CAR FOR PISTOL CAR

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).

FLIGHT IN THE ALLEY

Alley Camera
11:28:54 – 11:28:57
Martinez, Rodriguez-Perez and third man run down alley toward Yakima Avenue

During this portion of the argument, the prosecutor told the jury that Rodriguez-Perez had run from the police and that his flight was evidence of his guilt. RP (3/31/15) 3310.

6. The jury lacked confidence in the evidence and had to deliberate for five days before reaching a verdict.

Lacking confidence in how to resolve the case, the jury deliberated for five days before convicting Martinez and Rodriguez-Perez of second degree murder. RP (4/7/15) 3425; CP 360. The jury acquitted both of first degree assault. CP 127.

7. A scrivener's error at sentencing leaves Rodriguez-Perez with hundreds of thousands of dollars of unintended debt.

At sentencing, the court struck all discretionary legal financial obligations (LFOs). CP 140. It imposed the mandatory $500 victim penalty assessment and $5,750 of joint and several restitution. CP 140. The court noted in sentencing co-defendant Martinez that he did not have "reasonable prospects within the next 20-plus years to be able to pay towards the costs of incarceration." RP (6/12/15) 3470-71. When imposing the identical sentence on Rodriguez-Perez, the court also stuck all discretionary LFOs but failed to strike the incarceration fee of up to $100 a day for the duration of the sentence. CP 140.

This timely appeal follows. CP 145.

ARGUMENT

1. The prosecutor's clear and unmistakable expression of personal opinion and vouching for witness credibility during closing argument denied Rodriguez-Perez a fair trial.

a. A prosecutor commits misconduct when vouching for a witness's credibility.

The prosecutor, as representative of the people, is presumed to act with impartiality. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Prosecutors are "quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *Fisher*, 165 Wn.2d at 746. A prosecutor's misconduct in closing argument may deny a defendant his right to a fair trial as guaranteed by the Sixth Amendment and Article I, Section 22 of the Washington Constitution. *State v. Monday*, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). "A [f]air trial certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Although the prosecutor has wide latitude to argue reasonable inferences from the evidence, "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *United*

States v. Young, 470 U.S. 1, 8, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (quoting American Bar Association Standards for Criminal Justice 35.8(b)(2d ed. 1980)); *see also State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (impermissible for prosecutor to express personal opinion on credibility or guilt); *State v. Reed*, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (misconduct for prosecutor to express personal opinion regarding credibility of witness or guilt of defendant); *U.S. v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996).

Improper vouching is a form of expressing an opinion on a witness's credibility and occurs when the prosecutor expresses a personal belief in the veracity of a witness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact. *Id*. Prejudicial error occurs when it is clear and unmistakable that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

b. The prosecutor vouched for Martinez's credibility by adopting Martinez's testimony as fact in closing argument.

To put the error in context, in his opening statement, the prosecutor, Mr. Knittle, assured the jury Martinez shot Damarius Morgan.

> You will hear powerful evidence that William Martinez shot Mr. Morgan and Mr. Prince with a pistol. You'll also hear evidence that Luis Rodriguez-Perez supplied the pistol for Mr. Martinez's use.

RP (3/9/15) 650.

However, in closing argument, after Martinez testified Rodriguez-Perez was the shooter, the prosecutor adopted Martinez's testimony as the truth and argued Rodriguez-Perez was the shooter,

> [Martinez] knew Luis had the pistol. He knew Luis intended to fire. Luis fired the pistol at Morgan, that fool.

RP (3/31/15) 3304.

The prosecutor's changing position and endorsing Martinez's credibility was not lost on Martinez in closing argument.

> I must have done something right, though. Because it appears from listening to the argument of Mr. Knittle that they have adopted my position that, in fact, Mr. Martinez was not the shooter. Because it sure sounded to me like he was making a lot of argument that it was Luis Rodriguez-Perez that fired the gun.

RP (3/31/15) 3315.

c. There is a substantial likelihood the prosecutor's improper vouching affected the verdict.

Prejudice is established if there is a substantial likelihood the misconduct affected the verdict. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Washington courts have repeatedly denounced the type of argument made by the prosecutor in this case. It is well established

that "a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case." *Glassmann*, 175 Wn.2d at 706. A juror is likely to be impressed by what a prosecutor says given his position as representative of the State and the aura of special reliability he enjoys. *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001). In a strongly worded opinion, the Ninth Circuit held, "A prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus." *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992).

In the absence of an appropriate objection,[2] appellate review of prosecutorial misconduct is appropriate when the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *Fisher*, 165 Wn.2d at 747. The focus is "less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The touchstone of due process analysis is the fairness of the trial regardless of whether the prosecutor

[2] Defense counsel objected to the prosecutor's impermissible argument but characterized it as an inconsistent theory of prosecution. RP (3/31/15) 3305.

deliberately committed misconduct. In other words, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (*citing Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). Here the answer is "yes."

d. Rodriguez-Perez's conviction should be reversed.

The prosecutor's change of heart and change of theory mattered. To the jury, especially after they had sat through weeks of testimony, Martinez was a compelling witness. Just after the shooting, with his bushy hair, red cap, and camo jacket, he was repeatedly identified by eye-witnesses as the shooter. RP (3/9/15) 739-40; RP (3/10/15) 953-60; RP (3/10/15) 886, 910-11. To change the momentum of the State's case, Martinez had to take the stand and blame the person standing next to him at the fight, Rodriguez-Perez. Absent Martinez's testimony, the evidence against Rodriguez-Perez, even as an accomplice, was weak. Rodriguez-Perez's fingerprints were on the pistol's magazine but the jury had seen a photo of Rodriguez-Perez holding a pistol a month weeks prior to the shooting. DNA testing on the pistol's exterior provided an unidentifiable mixed sample of at least four people. Rodriguez-Perez depositing the pistol in a bush after the shooting told the jury nothing more than he acquired the pistol after Martinez used the pistol to shoot Morgan.

Rodriguez-Perez running after the shooting and hiding in the bushes with Martinez demonstrates nothing more than misplaced loyalty to a person Martinez identified as his best friend. RP (3/27/15) 2934.

The jury is instructed the "lawyers' statements are not evidence." CP 92 (Court's Instruction to the Jury, Instruction No. 1). The jury is presumed to follow the court's instructions. *State v. Imhoff*, 78 Wn. App. 349, 352, 898 P.2d 852 (1995). Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. *State v. Stith*, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). "The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks." *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). If this court is unable to conclude from the record whether the jury would or would not have reached its verdict but for the misconduct, then it may not deem it harmless. *State v. Charlton*, 90 Wn. 2d 657, 664, 585 P.2d 142 (1978).

The prosecutor's improper argument tipped the scales. The evidence of Rodriguez-Perez's involvement in the shooting is not overwhelming as confirmed by the jury's five days of deliberation to return a verdict. There is a substantial likelihood that the improper arguments caused prejudice that could not have been cured by instruction and that tipped the scales against Rodriguez-Perez. His conviction should be reversed.

2. The prosecutor's use of a prejudicial PowerPoint in closing argument deprived Rodriguez-Perez a fair trial.

As noted in Issue 1, a conviction must be reversed where the prosecutor's misconduct prejudices the accused even absent objection if the misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704. 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.

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, 51-54, 59-61, 62, 63, 65-68).

One of the slides shows 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 Rodriguez-Perez pointing the gun at the viewer. Ex. SE-A (slides 42, 43).

At least six other slides display surveillance photos of unidentifiable people on the street, with captions claiming that they showed Rodriguez-Perez "walking to car for pistol," "headed to car for pistol," "returning from car," "throws pistol in bushes" and "flight." Ex. SE-A (slides 49, 51, 52, 60, 65). All 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 Rodriguez-Perez in a negative light. SE-A (slide 42); *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 Rodriguez-Perez'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, 51-54, 59-61, 62, 63, 65-68).

The prosecutor committed misconduct by displaying slides containing exhibits altered to include inflammatory captions. *Glasmann*, 175 Wn.2d at 706; Exh. SE-A 42, 43, 48, 49, 51-54, 60, 65, 67.

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 Martinez slumped on the couch and proclaiming that he was enjoying "GOOD TIMES" while Rodriguez-Perez brandished a pistol was designed to inflame the jury's passion and prejudice and to depict Rodriguez-Perez in a negative light. *Id.*; *Glasmann*, 175 Wn.2d at 704. The image of Rodriguez-Perez's smiling face invited the jury to conclude he thought violence was fun. SE-A (slides 42, 43). The slides' purpose was to evoke a negative emotion.

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 Rodriguez-Perez in a derogatory negative light for no purpose other than to evoke negative emotion. *Id*.

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

Rodriguez-Perez 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 Rodriguez-Perez was not overwhelming. Although his partially smudged fingerprint was on the pistol's magazine, DNA swabs from the pistol showed a mixed sample from four different

persons, none of which were identified. The eye-witness identifications pointed to Martinez as the shooter. RP (3/9/15) 739-40; RP (3/10/15) 953-60; RP (3/10/15) 886, 910-11; RP (3/11/15) 1013. There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Rodriguez-Perez'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 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.

c. *Rodriguez-Perez's conviction must be reversed*.

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*. Rodriguez-Perez's conviction must be reversed. *Id*.

3. The abiding belief instruction undercuts the State's burden of proof by erroneously equating the jury's job with a search for the truth rather than a test of the State's case.

During the discussion of jury instructions, Rodriguez-Perez objected to the court's use of the State's proposed reasonable doubt instruction informing the jury that, "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." RP (3/26/15) 2786; CP 45 (WPIC 4.01). Counsels for both Rodriguez-Perez and Martinez argued this language diluted the State's burden of proof and gave the jury an incorrect understanding of how to weigh the evidence. RP (3/26/15) 2785-86. Both counsel asked the court to give the instruction without the problematic language. Id. The court noted counsel's objection and gave the offending instruction. RP (3/26/15) 2787; CP 95 (Instruction 3).

A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. *Emery*, 174 Wn.2d at 760*; see also State v. Berube*, 171 Wn. App. 103, 120, 286 P.3d 402 (2012) ("…truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the jury instruction blurs the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*. The presumption of innocence may, in turn, be diluted or even "washed away" by such a confusing jury instruction. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. *Id*. The instruction invites the jury to replace the required "reasonable doubt" with a watered-down "abiding belief" standard.

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" as it was inaccurate and misleading. *Bennett*,

161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. *Id*. at 318. The pattern instruction reads

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

WPIC 4.01.

The *Bennett* court did not comment on the "belief in the truth" language. More recent cases demonstrate the problem with such language, however. In *Emery*, the prosecutor told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges" is that the defendants are guilty. *Emery*, 174 Wn.2d at 751. The court noted these remarks misstated the jury's role, but because they were not

part of the court's instructions, and the evidence was overwhelming, the error was harmless. *Id*. at 764 n.14.

In *Pirtle*, the Court held the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995). The Court ruled that "[a]ddition of the last sentence [regarding an abiding belief in the truth] was unnecessary but not an error." *Id*. at 658. The *Pirtle* Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth. Instead, it looked at whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. *Id*. at 657-58.

Pirtle concluded this language was unnecessary but not necessarily erroneous. *Emery* now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language fosters confusion about the jury's role and serves as a platform for improper arguments about the jury's role in looking for the truth. *Emery*, 174 Wn.2d at 760.

Rodriguez-Perez objected to the addition of this last sentence in the court's instruction defining the prosecution's burden of proof.[3] RP

[3] Defense counsel, Mr. Smith, originally proposed the same reasonable doubt instruction as the State. However, during argument on the instruction, he specifically objected to the

(3/26/15) 2786. This "belief in the truth" language inevitably minimizes the State's burden and suggests that the jury should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan*, 508 U.S. at 281-82). Appellate courts have a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. *Bennett*, 161 Wn.2d at 318. This court should find that instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the State's burden of proof, confuses the jury's role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. Amend. VI; Wash. Const. Art. I, §§ 21, 22.

"abiding belief" and submission of a contrary instruction was in error. RP (3/26/15) 2786; CP 68.

4. The court should remand for correction of the incarceration fee scrivener's error in the Judgment and Sentence.

a. Scrivener's errors may be challenged.

A defendant may challenge an erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010).

b. If not stricken, the challenged error will cost Martinez-Perez hundreds of thousands of dollars.

At sentencing, the court specifically treated Rodriguez-Perez and Martinez identically. They each received a 270 month sentence despite different standard ranges. RP (6/12/15) 3467-69. In striking Martinez's discretionary LFOs the court acknowledged Martinez's inability to pay the cost of his incarceration – a discretionary cost – given the 20-plus years he is sentenced to serve.

> THE COURT: I'm going to strike the costs of incarceration in this particular case, the court finding that you are indigent and do not have any reasonable prospects within the next 20-plus years to pay towards the costs of incarceration.

RP (6/12/15) 3470-71. The court similarly struck all of Rodriguez-Perez's discretionary LFOs. The court's failure to strike the incarceration fees from Rodriguez-Perez's Judgment and Sentence was mere oversight. Left unstricken, the incarceration fees obligate Rodriguez-Perez to pay the Yakima County Jail up to $87.95/day for each day he was incarcerated there.[4] CP 140. Now at DOC, Rodriguez-Perez must pay a $50/day incarceration fee. If Rodríguez-Perez served just 20 years at DOC, he would owe the State $365,000[5] before accrued interest. That was not the trial court's intent when it acknowledged Rodriguez-Perez's indigency and intent to treat him the same as Martinez.

This court has recognized the extraordinarily high cost of ordering a defendant to pay incarceration fees. *State v. Arredondo*, 190 Wn. App. 512, 538, 360 P.3d 920 (2015), *review granted in part on unrelated issue*, 185 Wn. 2d 1024, 369 P.3d 502 (2016). The trial court's oversight in failing to strike the incarceration should be remanded for correction. CP 140.

---

[4] It is unclear from this record how many days Rodriguez-Perez served at the Yakima County Jail.
[5] 365 days x 20 years at $50/day = $365,000

5. This court should not impose appellate costs.

a. Appellate costs are discretionary.

Appellate courts have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612 (2016). A defendant's inability to pay appellate costs is an important consideration to consider when deciding whether to impose costs on appeal. *Sinclair,* at 385.

Under RAP 14.2 the State may request the appellate court order a defendant to pay appellate costs if the State substantially prevails. The rule states a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *Nolan*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it grants this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2

> with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160, the Washington Legislature also granted the appellate courts discretion to not grant an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). In *Sinclair*, the Court affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *Sinclair*, 192 Wn. App. at 388. "[I]t is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *Sinclair*, 192 Wn. App. at 390.

In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. An appellate court should deny an award of costs to the State in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, at 391. Imposing costs against indigent defendants raises problems well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Id*. at 391 (citing *State v.*

Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). As the court notes in Sinclair, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *Sinclair*, 192 Wn. App. at 391.

b. This Court should exercise its discretion and disallow appellate costs against Rodriguez-Perez should the State substantially prevail.

The trial court found Rodriguez-Perez indigent and entitled to the appointment of counsel at both the trial and appellate level. Supp. DCP Order on Request for Attorney at Public Expense (sub. nom. 3); Supp. DCP Order on Indigency for Appeal (sub. nom. 115). He stands convicted of second degree murder with a firearm enhancement. He is serving 270 months. CP 138. He may be entitled to up to 15% off of 210 months of his sentence as good time credits, or as earned early release credits, but the 60 month firearm enhancement will be served in full. RCW 9.94A.729(2), (3)(a). Overall, Rodriguez-Perez, now 22 years old, will likely serve, if unsuccessful on appeal, about 20 years in prison. CP 16.

Once released from prison, he will be on community custody for 36 months and required to pay DOC supervision fees. CP 139. Because the trial court found Rodriguez-Perez indigent and without a present and future ability to pay discretionary legal financial obligations, it struck all non-mandatory fees from the Judgment and Sentence leaving Rodriguez-

Perez still obliged to pay the $500 victim assessment and $5,750 restitution. CP 140. Interest has been accruing since the June 12, 2015 signing of the Judgment and Sentence. RCW 10.82.090(1); CP 137. Rodriguez-Perez has one prior felony conviction for burglary in the second degree. CP 138. Having been out of the workaday world for 20 years, and just released from prison for committing a serious violent crime, Rodriguez-Perez will not be an attractive candidate for an employer and an even less likely candidate for employment with more than a subsistence wage. Given the nature of his conviction, Rodriguez-Perez may also find it difficult to obtain housing.

Given these factors, it is unrealistic to think Rodriquez-Perez will have the ability to pay appellate costs. This court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail on appeal. Because of his present and long-term indigency, Rodriquez-Perez should not have to pay appellate costs if he does not substantially prevail on appeal.

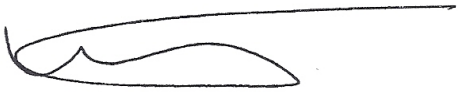
CONCLUSION

The prejudice created by the prosecutor vouching for Martinez's testimony and the PowerPoint presentation require reversal of Rodriguez-Perez's conviction. Alternatively, the case should be remanded to the

superior court to correct the scrivener's error by striking incarceration fees from Section 4 D 4 of the Judgment and Sentence.

If Rodriguez-Perez does not substantially prevail on appeal, this court should use its discretion to strike any appellate costs requested by the State.

Respectfully submitted June 23, 2016.



LISA E. TABBUT/WSBA 21344
Attorney for
Luis Guadalupe Rodriguez-Perez

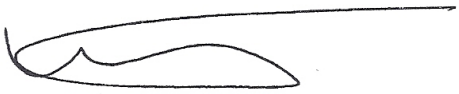
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Yakima County Prosecutor's Office, appeals@co.yakima.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Luis Guadalupe Rodriguez-Perez/DOC#383517, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

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

Signed June 23, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Luis Guadalupe Rodriguez-Perez, Appellant