

**FILED**

APR 19, 2017  
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,  
WILLIAM MARTINEZ,**

Appellants.

---

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

The Honorable Richard Bartheld, Judge

---

**APPELLANT RODRIGUEZ-PEREZ'S REPLY BRIEF**

---

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

**TABLE OF CONTENTS**

	Page
<b>A. ARGUMENT.....</b>	<b>1</b>
<b>1. The prosecutor improperly vouched for Martinez’s credibility by changing his theory of the case from Martinez as the shooter to Rodriguez-Perez as the shooter only after Martinez testified and pointed a finger of blame at Rodriguez-Perez.....</b>	<b>1</b>
<b>2. Prosecutorial misconduct in the State’s PowerPoint presentation during closing argument denied Mr. Rodriguez-Perez a fair trial.....</b>	<b>3</b>
<b>3. The State agrees incarceration costs should be waived....</b>	<b>3</b>
<b>4. The State will not request appellate costs.....</b>	<b>4</b>
<b>B. CONCLUSION.....</b>	<b>4</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>5</b>

**TABLE OF AUTHORITIES**

Page

**Washington Supreme Court Cases**

*In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012)..... 3  
*State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988) ..... 2  
*State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984)..... 1  
*State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009)..... 1  
*State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010) ..... 1  
*State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) ..... 1

A. ARGUMENT

**1. The prosecutor improperly vouched for Martinez's credibility by changing his theory of the case from Martinez as the shooter to Rodriguez-Perez as the shooter only after Martinez testified and pointed a finger of blame at Rodriguez-Perez.**

Improper vouching 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 is truthful is entirely within the province of the jury as the trier of fact. *Id.* Prejudicial error occurs when it is clear and unmistakable that the prosecutor 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).

In the absence of an objection, appellate review of prosecutorial misconduct is appropriate when the misconduct is so flagrant and ill-intentioned no curative instruction could have erased the prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The touchstone of due process analysis is the fairness of the trial regardless of whether the prosecutor deliberately committed misconduct. The ultimate question is whether the misconduct prejudiced 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). Prejudice is

established if there is a substantial likelihood the misconduct in vouching for a witness' credibility affected the verdict. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In context, in his opening statement, the prosecutor assured the jury Martinez shot Morgan. "You will hear powerful evidence that William Martinez shot Mr. Morgan ... with a pistol." RP (3/9/15) 650. In closing argument, only after Martinez testified and pointed a finger of blame at Rodriguez-Perez as the shooter, RP (3/27/15) 2928, the prosecutor adopted Martinez's testimony as the truth. "[Martinez] knew Luis had the pistol. He knew Luis intended to fire." RP (3/31/15) 3304.

Martinez's counsel highlighted the prosecutor's changing position and endorsement of Martinez as a truthful witness in closing argument. "[I]t appears from listening to the argument of [the prosecutor] that they have adopted my position that, in fact, Mr. Martinez was not the shooter." RP (3/31/15) 3315.

The prosecutor's adoption of Martinez as truthful made a difference. After weeks of sorting through testimony, Martinez was no doubt a compelling witness. After all, with his bushy hair, red cap, and camo jacket, Martinez 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. But then Martinez took the stand and pointed the finger of blame straight at Rodriguez-Perez. RP (3/27/15) 2928. The prosecutor similarly pointed a finger of blame at Rodriguez-Perez as the shooter but only after Martinez swore that it was true. “A [f]air trial certainly implies a trial in which the attorney representing the state does not [express] ... his own belief of guilt into the scales against the accused.” *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The prosecutor’s adopting Martinez’s finger-pointing as true denied Rodriguez-Perez a fair trial. His conviction should be reversed.

**2. Prosecutorial misconduct in the State’s PowerPoint presentation during closing argument denied Mr. Rodriguez-Perez a fair trial.**

Mr. Rodriguez-Perez adopts the argument of (joined) appellant William Martinez in his Appellant’s Reply Brief filed February 24, 2017.

**3. The State agrees incarceration costs should be waived.**

The State’s concession is well taken as the trial court agreed to strike the costs of incarceration. RP (6/12/15) 3470-71. Amended Brief of Respondent at 65.

**4. The State will not request appellate costs.**

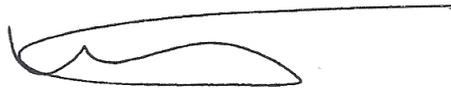
The State agrees it will not request appellate costs if Rodriguez-Perez does not substantially prevail on appeal. Amended Brief of Respondent at 65.

**B. CONCLUSION**

The State's improper vouching for the credibility of co-defendant Martinez requires reversal and remand as does the State's prejudicial use of a PowerPoint presentation during closing argument.

Alternatively, on remand, the court should strike Rodriguez-Perez's legal financial obligation to pay incarceration fees.

Respectfully submitted April 19, 2017.



---

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

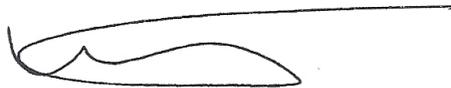
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Reply Brief to (1) Yakima County Prosecutor's Office, [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us); (2) the Court of Appeals, Division III; (3) Skylar Brett, [skylarbrettlawoffice@gmail.com](mailto:skylarbrettlawoffice@gmail.com); and (4) I mailed it to Luis Guadalupe Rodriguez-Perez/DOC#383517, Washington Corrections Center, PO Box 900, Shelton, WA 98584.

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

Signed April 19, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

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

**LISA E TABBUT LAW OFFICE**  
**April 19, 2017 - 11:03 AM**  
**Transmittal Letter**

Document Uploaded: 335712-Reply Brief.pdf  
Case Name: State v. Luis Rodriguez-Perez  
Court of Appeals Case Number: 33571-2  
Party Respresented: appellant  
Is This a Personal Restraint Petition?  Yes  No  
Trial Court County: \_\_\_\_ - Superior Court #: \_\_\_\_

**Type of Document being Filed:**

- Designation of Clerk's Papers /  Statement of Arrangements
- Motion for Discretionary Review
- Motion: \_\_\_\_
- Response/Reply to Motion: \_\_\_\_
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill /  Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_  
Hearing Date(s): \_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition /  Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: \_\_\_\_

**Comments:**

No Comments were entered.

Proof of service is attached

Sender Name: Lisa E Tabbut - Email: [ltabbutlaw@gmail.com](mailto:ltabbutlaw@gmail.com)