

NO. 34761-3-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSE ABILO AGUILAR AGUILAR,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

In late 2012, police arrested Jose Aguilar for the death of Carmelita Lopez, who may have been his former girlfriend. Mr. Aguilar waited in jail for three and one-half years while the prosecution repeatedly amended the charges and altered the evidence it would offer at trial, despite having insisted it gave the defense all discovery in June 2013. The delay was particularly egregious because the prosecution had the necessary information from the case's inception.

Rather than granting Mr. Aguilar's motions to dismiss the case or suppress belatedly obtained tests and records due to governmental mismanagement, the court postponed the trial. The mismanagement and other misconduct substantially prejudiced Mr. Aguilar's rights to a speedy trial, effective assistance of counsel, fair notice, and due process. And despite taking almost four years to prepare its case, the prosecution did not offer evidence proving the critical element of premeditation for first degree murder, requiring reversal.

B. ASSIGNMENTS OF ERROR.

1. The prosecution did not prove Mr. Aguilar acted with the deliberate premeditation essential for a conviction of first degree murder, in violation of the Fourteenth Amendment and article I, § 3.

2. The prosecution's mismanagement of the case requires dismissal under CrR 8.3, CrR 3.3 and the constitutional guarantee of due process of law.

3. The court misconstrued the requirements of CrR 8.3 in denying Mr. Aguilar's motions to dismiss or suppress due to prosecutorial mismanagement.

4. The court improperly permitted the prosecution to continually amend the charges contrary to CrR 2.1 and in violation of Mr. Aguilar's right to fair notice of the charges under the Fourteenth Amendment and article I, section 22.

5. The prosecution's misconduct deprived Mr. Aguilar of a fair trial as guaranteed by the Fourteenth Amendment and article I, sections 3 and 22.

6. The cumulative effect of numerous pretrial and trial errors deprived Mr. Aguilar of a fair trial and demonstrated prejudicial mismanagement of the case.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To prove a person committed the most serious offense of premeditated murder, the prosecution must show beyond a reasonable doubt that the perpetrator acted not only purposefully, but also after

deliberation and reflection. Evidence of premeditation may not be purely speculative or equivocal. The prosecution offered no evidence of a plan, motive or other deliberation prior Ms. Lopez's death. In the absence of any information showing premeditation occurred, is the sheer speculation regarding what might have happened insufficient to prove this essential element beyond a reasonable doubt?

2. The prosecution's mismanagement of a case requires dismissal when it substantially delays the trial beyond speedy trial time or forces the defendant to give up his right to a speedy trial in order to receive effective assistance of counsel. Mr. Aguilar's case was delayed for three and one-half years due to the prosecution's many failures to investigate and produce key aspects of its case that were available from the outset. Where Mr. Aguilar was repeatedly forced to choose between his rights to a speedy trial or prepared counsel, did the court erroneously deny his motion to dismiss the charges or suppress the fruits of the substantially mismanaged investigation?

3. Prosecutors are also barred by court rule and rules of fundamental fairness from adding untimely amendments to the charging documents that force substantial trial delay. The prosecution surprised the defense by altering the charges just before the scheduled trial in

2013 and 2014, prompting several years of investigation and litigation over the amended charges, and even further amended the charges during the trial. Did the court misconstrue the legal standards and misunderstand the actual prejudice suffered when it allowed substantial changes to the charges that forced significant trial delay?

4. It is fundamentally unfair for the prosecution to urge the jury to convict the defendant for improper reasons. This misconduct includes injecting the prosecutor's personal opinion into the case, eliciting opinions about other witnesses, and using extraneous information to cast the defendant as a bad person. By engaging in this misconduct, over objection, was Mr. Aguilar denied a fair trial?

D. STATEMENT OF THE CASE.

On October 16, 2012, a hunter saw a body in some brush and called 911. RP 1009, 1018-19.¹ Police discovered Carmelita Lopez dead from several gunshot wounds. RP 1295, 1472, 1976-78, 1983, 1994.

¹ The primary verbatim report of proceedings from trial are consecutively paginated and referred to herein as "RP."

Most pretrial proceedings are separately contained in six consecutively paginated volumes, referred to by the volume number on the cover page, e.g., "1RP" refers to the first volume of pretrial proceedings from March 13, 2013 until September 5, 2013.

After Ms. Lopez died, her sister received several phone calls from an unidentified man using Ms. Lopez's cell phone. RP 1720. He said he found the phone in a parking lot and complained about people calling him. RP 1721, 1723. Later he said Ms. Lopez had left town with a boyfriend and her boyfriend wanted money. RP 1760, 1769-70. He did not say how much money and did not call again. RP 1770-71.

Police arrested Jose Aguilar on October 29, 2012. RP 1133, 1139, 2090. Mr. Aguilar denied knowing Ms. Lopez despite pictures of what looked like Ms. Lopez and Mr. Aguilar standing in front of the same backdrop. RP 2393, 2596. Ms. Lopez's family listened to Mr. Aguilar's voice and believed he was the person who called them using Ms. Lopez's phone. RP 1830.

Police found no witnesses to Ms. Lopez's death or anyone who saw her with Mr. Aguilar in October 2012. While Mr. Aguilar's roommate Jose Galban claimed Mr. Aguilar dated Ms. Lopez months earlier, Ms. Lopez's family and friends had not heard of him. RP 1839. Jorge Reyes said he was engaged to be married to Ms. Lopez, but Ms. Lopez's relatives had never heard of him either. RP 1615, 1686, 1776, 1839.

When the police arrested Mr. Aguilar, immigration officials took his three roommates into custody. RP 2575, 2929, 2933. Two left the country and the third, Mr. Galban, was released from immigration custody pending his testimony. RP 2933. He applied for a visa premised on proving he was a victim of Mr. Aguilar's assault. RP 2933.

According to Mr. Galban, Mr. Aguilar said he killed Ms. Lopez during an argument and later threatened Mr. Galban not to tell anyone. RP 2849, 2902. Mr. Galban also told police Mr. Aguilar was wearing bloody clothes. RP 2890. Police seized these bloody clothes from a bag in Mr. Aguilar's garage but kept them in the plastic bag in storage. RP 2389-90; 5RP 720-21, 729-30. They waited until late 2015 to test the clothes and found mixed DNA from Ms. Lopez and Mr. Aguilar in the shirt's armpit and jeans' waistband. RP 2807-08, 2817, 2821.

The police looked for a connection between Mr. Aguilar and Ms. Lopez. In Mr. Aguilar's car, they found no relevant traces of evidence. RP 2659, 2688, 2797-99. Although they found visible tire tracks at the scene of Ms. Lopez's death, they did not measure or make impressions of them. RP 2690. On the gun purportedly used in the incident, they did not find any DNA connected with Mr. Aguilar, but the slide and grip contained some DNA from Ms. Lopez. RP 2714,

2791, 2794, 2797-99. Boots in Mr. Aguilar's garage contained Ms. Lopez's DNA, while socks contained Mr. Aguilar's DNA. RP 2775-76, 2779, 2781-82. A tool mark examiner claimed the gun in Mr. Aguilar's home left impressions that matched the bullets recovered from the shooting. RP 3056, 3068-69.

On October 31, 2012, the prosecution charged Mr. Aguilar with first degree murder while armed with a firearm. CP 1-2. It also charged him with second degree assault and intimidating a witness for allegedly threatening his roommate, Mr. Galban, and with alien in possession of a firearm for a gun in Mr. Aguilar's apartment. CP 2-4.

Although Mr. Aguilar was arrested in October 2012, trial testimony did not start until April 1, 2016. RP 1009. Mr. Aguilar waited in jail on "high bail." 5RP 732. The court denied several defense motions to dismiss or suppress evidence due to governmental mismanagement. CP 133, 140, 630-35.

Mr. Aguilar was convicted, as charged in the fourth amended information, of first degree murder with a firearm with aggravating circumstances of deliberate cruelty and lack of remorse and second degree assault with a firearm. CP 895-98, 967-77. The court dismissed his conviction for intimidating a witness due to its double jeopardy

overlap with the assault. CP 1070; RP 3479. It imposed an exceptional sentence of 472 months based on lack of remorse. RP 3553-55.

E. ARGUMENT.

1. The absence of information about how, why, and when the shooting occurred rendered the prosecution's allegation of premeditated intent too unduly speculative to meet its burden of proving this necessary element of first degree murder.

Even when the evidence is viewed in the light most favorable to the prosecution, the circumstances of Ms. Lopez's death remain a mystery. The prosecution showed no motive, argument, dispute, planning, or purpose. Without evidence on which fact-finders could reasonably infer premeditation, Mr. Aguilar's conviction for first degree murder must be reversed.

a. The prosecution bears the burden of proving all essential elements beyond a reasonable doubt.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). “When intent is an element of the crime” it “may not be inferred from conduct that is ‘patently equivocal.’” *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

For first degree murder, “the State is required to prove both intent and premeditation, which are not synonymous.” *State v. Sargent*, 40 Wn. App. 340, 352, 698 P.2d 598 (1985) (citing *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982)). First degree murder requires the defendant act “with premeditated intent to cause the death of another person.” RCW 9A.32.030(1)(a). Premeditation distinguishes first degree murder from second degree murder. *Brooks*, 97 Wn.2d at 876.

b. Premeditation requires evidence of deliberation and reflection in forming the intent to kill beforehand.

Premeditation requires the prosecution to show “the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation,

reflection, weighing or reasoning for a period of time, however short.”
State v. Hummel, 196 Wn. App. 329, 354, 383 P.3d 592 (2016), *rev. denied*, 187 Wn.2d 1021 (2012) (internal citations omitted); RCW 9A.32.020(1).

In *Hummel*, this Court reversed a premeditated murder conviction due to the lack of evidence about how the defendant’s wife died. There was evidence of a possible motive, based on their daughter’s recent disclosure to her mother that Hummel was abusing her, as well as evidence Hummel and his wife fought, sometimes physically. But even if there was a confrontation between husband and wife, “there is no evidence to show deliberation or reflection before Hummel killed Alice.” 196 Wn. App. at 356.

Premeditation is not proven by showing the act causing death occurred over an appreciable amount of time, because to do so “obliterates the distinction between first and second degree murder.”
State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). “Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation.” *Id.*

Impulsive or spontaneous acts causing someone’s death are not premeditated. *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977).

Where killing occurred in the heat of passion, it may have been intentional but not premeditated. *State v. Bolen*, 142 Wash. 653, 666, 254 P. 445 (1927).

In *Bingham*, the defendant met the victim on a bus and they hitchhiked on a rural highway. 105 Wn.2d at 821. The victim was later found dead and evidence showed the defendant held his hand over her mouth, strangling her before raping her. *Id.* Although the Supreme Court found *time* for deliberation, it found no evidence from which the jury might have inferred *actual* deliberation. *Id.* at 827. The Court held the mere passage of time for the killing to occur, in that case the approximately 3 to 5 minutes it took to kill by manual strangulation, showed only an opportunity to deliberate and by itself was insufficient to sustain the premeditation element absent evidence that the defendant did in fact deliberate. *Id.* at 822, 826.

c. The State found no evidence showing Mr. Aguilar's deliberation prior to Ms. Lopez's death.

The prosecution had no evidence of the circumstances surrounding Ms. Lopez's death beyond the gunshot wounds that caused her death. There was no evidence the two argued, no evidence of planning, and no evidence of a motive. No one heard either Mr. Aguilar

or Ms. Lopez speak ill of each other before she died. According to Mr. Aguilar's roommate, the two had dated but broke up many months before Ms. Lopez died. RP 2884, 2957.

The roommate, Jose Galban, gave many inconsistent statements. RP 2926; *see* RP 2934, 2956-57, 2979, 2984-89 (examples of inconsistencies regarding whether he ever saw Ms. Lopez, Mr. Aguilar's interest in marrying her, whether they stopped seeing each other in May). He claimed Mr. Aguilar said he stabbed Ms. Lopez with a knife. RP 2902. Yet she had no knife wounds, showing this rendition of events unlikely.

Mr. Galban's testimony is also suspect because he was in the United States illegally and was seeking immigration relief as a crime victim. RP 2931, 2933-34. His application under the "U visa" program depended on him proving he was a victim of Mr. Aguilar's assault and assisted the prosecution, giving him an unmistakable incentive to persuasively testify against Mr. Aguilar. RP 2933-34. Even with his myriad inconsistencies and strong bias, Mr. Galban did not describe Mr. Aguilar's plan, forethought, preparation, or other acts of premeditation.

The prosecution's allegation of premeditation rested on sheer speculation, concocting what might have happened, yet "[w]e do not infer criminal intent from evidence that is patently equivocal." *Vasquez*, 178 Wn.2d at 14. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *Id.* at 16.

An unplanned or impulsive killing may be intentional, but without premeditated deliberation. *See Bingham*, 105 Wn.2d at 826. An unplanned and impulsive act is more likely to have caused Ms. Lopez's death, prompted by an argument or confrontation. Without evidence of any preconceived plan to kill Ms. Lopez, it is impermissible to take evidence connecting Mr. Aguilar to Ms. Lopez and concoct a deliberate plan to kill absent evidence of one. The State did not meet its burden of proving there was a purposeful, intentional killing resulting from premeditated deliberation.

d. Insufficient evidence of an essential element of a crime requires reversal.

Absent proof of every essential element, a conviction must be reversed and the charge dismissed. *Vasquez*, 178 Wn.2d at 18. The prosecution's failure to present sufficient evidence showing the essential element of premeditated intent requires reversal. *Id.*

2. The prosecution’s bumbling delays in investigating and preparing the case for over three years constituted substantial, prejudicial mismanagement depriving Mr. Aguilar of his right to a speedy and fair trial.

a. Governmental mismanagement may deny an accused person the right to a speedy and fair trial.

An accused person’s right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. Article I, section 10 further dictates that “[j]ustice in all cases shall be administered . . . without unnecessary delay.” Because an accused person has the constitutional rights to effective assistance of counsel and a speedy trial, the prosecution cannot force a person choose between these rights. *State v. Brooks*, 149 Wn.App. 373, 387, 203 P.3d 397 (2009).

Washington courts protect an accused person’s bedrock rights to fair and speedy trials by penalizing the prosecution for simple mismanagement of cases if it causes actual prejudice to the defense, without any requirement that the prosecution acted with nefarious intent. CrR 8.3(b).² Actual prejudice includes forcing a defendant to

² CrR 8.3(b) provides:

choose between his speedy trial rights and effective assistance of counsel. *Brooks*, 149 Wn. App. at 387.

In *Brooks*, shortly before trial, the prosecution gave the defense summaries of witness interviews but not full copies as required by CrR 4.7. It insisted it did not have control over the late discovery and the defense knew the substance of the information already, if not all specifics. *Id.* at 386.

On appeal, the *Brooks* Court examined whether the belated interjection of additional evidence compelled the defense to choose between a speedy trial or effective assistance of counsel. *Id.* at 387. It ruled, “[t]he delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion.” *Id.* at 391. The prosecution was aware of its failings and knew it needed to provide this discovery, yet did not do so. Consequently, dismissal was an appropriate sanction for the prosecution’s mismanagement. *Id.*; see also *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (when State “inexcusably fails to act with due diligence, and material facts are thereby not disclosed to

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right

defendant until shortly before a crucial stage” it may “impermissibly prejudice[]” the defendant’s right to a speedy trial or his right to be represented by prepared counsel.).

The prosecution’s belated amendment of charges may also constitute prejudicial governmental mismanagement, requiring dismissal. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997); CrR 8.3(d); CrR 2.1(d) (prosecution may not amend information if it prejudices substantial rights of defendant).

In *Michielli*, the prosecution was fully familiar with the essential allegations when it filed its original charge of theft. But three months later and five days before trial was set to begin, it added several more charges. *Id.* at 244. The prosecution’s delay did not stem from plea negotiation, because the prosecution knew for several months that the case would not be resolved with a plea. *Id.* It offered no reason for the late amendment other than its opinion that it could prove these additional charges at trial. *Id.*

The *Michielli* Court ruled that forcing the defense to ask for a continuance to prepare for additional charges established the type of

to a fair trial.

“prejudice to substantial rights” that precludes a late amendment to the charging document. *Id.* It affirmed the order dismissing these added charges.

In Mr. Aguilar’s case, the prosecution’s mismanagement spanned almost four years while Mr. Aguilar waited in jail. The mismanagement included unjustified, belated amendments to the charges and unnecessary investigatory delay forcing Mr. Aguilar to choose between a speedy trial and effective assistance of counsel.

For example, in October 2012, the prosecution seized clothing with apparent blood on it from Mr. Aguilar’s home. Despite the prosecution’s many claims it was ready for trial and had provided the defense all reports and test results, it did not obtain a DNA test for these bloody clothes until late 2015. The December 2015 report finding mixed DNA samples necessitated more defense investigation, causing more delay, over defense objection. The long time span of governmental mismanagement due to the State’s tardy disclosure of critical evidence and inexplicable late amendments to charges forced Mr. Aguilar to repeatedly choose between his right to a speedy trial and his right to meaningful assistance of counsel. The delay is detailed below.

b. The prosecution disregarded final discovery deadlines and mismanaged the basic investigation of evidence in its possession.

i. In June 2013, the prosecution assured the court it had provided all discovery, including all scientific tests.

The court issued its omnibus order on June 25, 2013, scheduling trial for July 31, 2013. CP 1140. Its omnibus order set July 12, 2013, as the final deadline for “any and all police reports, lab reports, experts the State intends to rely on at trial.” *Id.*; CrR 4.7(a)(iv). The prosecution confirmed, in writing, it had provided the defense with all reports and statements it would use at trial. CP 1141.

ii. In July 2013, the prosecution found more evidence in its possession that required additional defense investigation.

Shortly after the prosecution’s written assurance it provided the defense all evidence and reports it would use at trial, it turned over additional documents and photographs taken during the search of Mr. Aguilar’s home after his arrest. 1RP 50. This new disclosure required the defense re-interview witnesses. 1RP 48; CP 36.

The court chastised the prosecution for not tracking down this evidence in its possession earlier, because it knew the police had collected it and put it into a locker. 1RP 51-52. The court warned the

prosecution that the police department's failure to provide evidence could result in its exclusion from trial. 1RP 52-53. It further chastised the prosecution, calling it simply unfair to the defense's preparation in a first degree murder case when the prosecution was continually altering the evidence it would use at trial. 1RP 51-54.

Despite the court's warning and its firm discovery deadline, the prosecution continued to release other materials it wanted to use at trial, requiring the defense counsel to delay the trial to investigate this belatedly received information over the next two years.

iii. In 2013 through 2014, the State frivolously altered the charges over defense objections and kept injecting new discovery requiring more litigation and investigation.

In late 2013 through 2014, the case remained on the verge of trial as the parties litigated issues such as suppression challenges, a bill of particulars for new charges added by the prosecution, and a motion to dismiss count 5 of the charging document. *See* 1RP 62 (hearing starting September 5, 2013 on CrR 3.5 and 3.6 issues); 2RP 276-82 (February 11, 2014 hearing on bill of particulars); 2RP 284-301 (March 4, 2014 hearing on defense motion to dismiss recently amended charges as unsupported by evidence). Trial delays were caused by new

discovery, investigation needs, and amended charges. 2RP 279, 281; 6RP 770-71.

On September 15, 2014, the parties asked the court to “hard set” the trial in January 2015, to ensure a firm date for witnesses. CP 1145. The judge declined, saying it lacked authority to do so, but continued the case for a jointly requested trial date of January 5, 2015. *Id.* All parties were ready to proceed to trial.

iv. In 2015, the prosecutor left the office and the new prosecutor substantially delayed the trial.

But rather than start trial on January 5, 2015, the assigned prosecutor announced he was leaving his job. Supp. CP __, sub. no. 163; 5RP 731. The court continued the trial for two months. Supp. CP __, sub. no. 164. This continuance was simply to get the new prosecutor up to speed and no further delays were expected since discovery was complete. 5RP 730-31.

But when the new prosecutor entered the case in March 2015, the defense complained it was receiving substantial new discovery it needed to review and test, requiring continuances based on this belatedly provided information. Supp. CP __, sub. no. 169 (3/24/15, new discovery to review); Supp. CP __, sub. no. 170 (5/5/15, defense

requests one week because he “just got a bunch of dis[covery]”); Supp. CP _, sub. no. 171 (5/12/15, “lots of discovery” recently received).

On August 3, 2015, the prosecution was “not ready” and asked for a two-week continuance due to a detective’s one-week vacation and local witnesses “we can’t locate right now.” 2RP 305-06.

On August 17, 2015, the defense again “just received new discovery . . . of a critical nature.” 4RP 518. The prosecution said it had an unrecorded interview with Jose Galban in which he made “new detailed allegations” against Mr. Aguilar. 4RP 518, 521, 529-30. Because Mr. Galban was a key witness and the complainant for counts 3 and 4, the defense needed to investigate his new claims. 4RP 529-30. Also, the prosecutor had another trial he wanted to do first. 4RP 523, 528, 535. The court continued the trial until October 7, 2015, due in part to court congestion. 4RP 535. The parties asked the court to “hard set” October 7, 2015, as a firm trial date. 4RP 543.

On October 7, 2015, the prosecutor asked to continue the trial until October 14, 2015 due to the detective’s unavailability and some outstanding interviews. Supp. CP _, sub. no. 273. On October 12, 2015, the prosecution and defense announced they were ready for trial. 4RP 670-71. But the next day, the prosecutor asked for “a rather long”

continuance, despite having claimed it was ready to proceed. 4RP 688. The prosecutor said an interoffice email disruption made it hard for him to contact witnesses, even though he said he was ready the day before. 4RP 688, 692. The prosecutor also had an up-coming vacation November 6-14, 2015, and a second prosecutor acting as co-counsel had vacation on November 20-24, 2015. 4RP 689-91.

Due to the Christmas holidays and the defense investigator's unavailability for several days in mid-December, the court set the trial for January 6, 2016, as the expected date to "start the trial." 4RP 703. But the trial did not begin even at this late date, due to further prosecutorial mismanagement.

v. In late 2015, the defense was again forced to choose between a speedy trial and competent preparation of counsel due to late evidence disclosures.

On October 14, 2015, the prosecutor requested DNA testing of men's clothing and a woman's purse found in Mr. Aguilar's garage and seized immediately after Mr. Aguilar's arrest. CP 630-31, 634, 676. It also requested cell phone records from Ms. Lopez's purported boyfriend, Mr. Reyes. 4RP 709.

On December 15, 2015, the prosecutor received the results. CP 631. The prosecution was fully informed about the potential

significance of these items from the start of the case. CP 631, 392-93. Mr. Aguilar moved to dismiss the charges or alternatively suppress the evidence because it was now “forced to ask” to postpone the trial in order to investigate this newly received information so that counsel could be prepared for trial. CP 630, 632.

The State had collected the clothes and purse at the outset of the case. 5RP 720-21, 729-30. Although the State Crime Lab tested items for DNA in 2013, it decided not to test these items due to limited capacity. 5RP 733-34. The State waited until October 14, 2015, to request a DNA test of the clothes and purse. 5RP 732, 743.

The December 2015 DNA test results became critical evidence because the clothes contained the clearest statistically likely DNA matches from Mr. Aguilar and Ms. Lopez within mixed samples on the same items. RP 2810, 2817. Because these test results came from a complicated mixture of samples, the defense needed to consult a DNA expert and was “forced” to seek two months for a continuance. CP 632. Without this new information, the defense was ready for trial to start as it had been for the past year. 5RP 731.

The December 2015 disclosure included phone records from Jorge Reyes, Ms. Lopez’s boyfriend. 5RP 745. The prosecution had

tried to get a search warrant for these records before Mr. Aguilar's arrest, but the warrant application was denied and the State did not ask again until late 2015. *Id.* The investigating detective admitted he simply dropped his investigation until the prosecutor asked him to subpoena the phone records in October 2015. CP 693.

The court denied the defense request to dismiss or suppress the product of this late disclosure. 5RP 750. It continued the trial for over two months, setting a new date of March 9, 2016. The prosecution was not ready on March 9, 2016, because its lead detective was away for one week. 5RP 755. Over the defense's objection, the court found good cause to continue the trial until March 23, 2016. *Id.* Motions in limine and jury selection started March 30, 2016. 5RP 760.

c. The prosecution also unjustifiably amended the charges, causing substantial delay that prejudiced Mr. Aguilar.

i. In June 2013, the prosecution surprised Mr. Aguilar with significant changes to the charge after the discovery deadline and on the eve of trial.

An unjustified late amendment of charges forcing the defense to delay the trial to respond and prepare constitutes governmental mismanagement justifying dismissal. *Michielli*, 132 Wn.2d at 244.

Without prior notice, the prosecution announced at the June 2013 omnibus hearing that it would amend the information to substantially alter the charges. 1RP 39. Defense counsel objected, saying, “I’m shocked to find the prosecutor is planning to add these charges” because “all of the information” underlying the new charges was available for months and the State never gave notice. *Id.* No plea offer had ever been made in the case, so the delay was not due to plea negotiation. *Id.* The new charges would require further interviews and investigation; without the new charges almost all witness interviews were complete. *Id.*

The prosecutor promised “this is the last motion to amend prior to trial.” 1RP 55-56. In it, the State substantially altered count 1, which was first degree premeditated murder with a firearm. CP 1. It became aggravated first degree murder, requiring a mandatory sentence of life without the possibility of parole. CP 42-43. The “aggravating circumstances” necessary for this offense included first or second degree robbery, rape, and burglary; residential burglary; kidnapping in the first degree; or arson in the first degree, none of which had been previously alleged. CP 43.

It also alternatively charged felony murder with first or second degree kidnapping as the predicate felony; and added deliberate cruelty and lack of remorse as aggravating factors for an exceptional sentence. CP 42-43. Count 2 became a new charge of kidnapping in the first degree. CP 44.

Mr. Aguilar objected to this substantial, untimely amendment and moved to dismiss due to the lack of reasonable evidentiary support under CrR 8.3(c). CP 133, 141-41. He outlined the new investigation required by these belated additions and the absence of evidence supporting the aggravating factors and puzzling new kidnapping claim, which forced delay and denied him his speedy trial. 1RP 56, CP 138, 141-42. The prosecution never explained any reason for the delayed amendment or its substantial change in trial theory from premeditated killing to one predicated on a kidnapping with additional allegations of rape, burglary, robbery, or arson. It merely offered the boilerplate claim that it “more accurately reflect[ed] the criminal conduct of the defendant.” CP 1142-43.

The court denied the defense motion to dismiss or deny the amendment, finding no legal basis to refuse the prosecution’s

amendment despite the plain prejudice and unjustified nature of the late alterations to the charges. 1RP 56; *see Michielli*, 132 Wn.2d at 245.

ii. The prosecutor again amended the information in 2014, then retracted the first and second amendments in late 2015, after causing substantial delay.

On February 4, 2014, the prosecution further added drive-by shooting as another aggravating circumstance to aggravated first degree murder in count 1, which would require a life without parole sentence. CP 259. It again posited the boilerplate reason that it more accurately reflected the defendant's conduct. Supp. CP __, sub. no. 124. Mr. Aguilar objected, because there was no factual basis for this change, no new evidence, and it constituted mismanagement as well as a violation of speedy trial to add this claim at this late date. 6RP 770-71. The court accepted the amendment, finding it did not require substantial new investigation beyond the first amended information. 6RP 776.

On the eve of trial in October 2015, the prosecution conceded the alterations in the first and second amended information lacked evidentiary support. 4RP 672-73. It withdrew the kidnapping allegations as a separate count, dropped the felony murder claim, and took away the aggravated first degree murder charge because it did not reflect the alleged conduct. CP 625-26; CP 1146-47.

The specious and untimely introduction of these amended charges caused months of delay and unnecessary litigation, creating “a lot of extra work” for Mr. Aguilar to investigate and litigate claims of robbery, kidnapping, rape, and drive-by shooting. 1RP 38-39, 56; 2RP 278 (request bill of particulars for count 1 and 2 due to lack of information about new charges); 2RP 284-87 (defense motion to dismiss counts 1 and 2 due to insufficient evidence). These unjustified amendments unfairly prejudiced Mr. Aguilar’s right to a speedy trial and effective assistance of counsel due to the unnecessary delay they generated, demonstrating mismanagement.

iii. The prosecution’s final, mid-trial amendment caused further prejudice and demonstrates its on-going mismanagement.

Despite repeatedly amending the charging documents, the State maintained certain specific dates for allegations of murder and assault. CP 1, 42, 258, 625.

The original, first, second, and third amended information listed the date of count 1, first degree murder, as occurring from October 1 through 16, 2012. CP 1, 42, 258, 625. When the third amended information added second degree murder as count 2, it alleged this act occurred October 1, 2016, without any date range. CP 626.

Each amended information also listed the date of count 3, second degree assault, as October 1 through October 16, 2012. CP 2, 260, 627. Count 4, intimidating a witness, was consistently alleged to have occurred October 29, 2012. CP 3, 45, 261, 628.

But during trial, the prosecution again changed the dates – instead of claiming the assault against Mr. Galban occurred from October 1 until October 16, it shifted the date to sometime between October 16 through 28, 2012. RP 2405-07; CP 897. It changed the intimidating a witness charge from October 29, 2012, to October 16 through 28, 2012. CP 898. It changed the murder counts to October 15 through 16, 2012. CP 895-96.

Mr. Aguilar objected to this mid-trial amendment because it changed his strategy for challenging counts 3 and 4 involving Mr. Galban. RP 2407-10, 2514-16, 2613. It was “totally different” and an “unfair surprise” to shift the timing of the alleged assault. RP 2408-09. Mr. Galban had given numerous inconsistent statements and the defense intended to claim his allegation that he was assaulted before or immediately after the murder was not plausible. RP 2516. But the prosecution’s unexpected change deprived Mr. Aguilar of his intended

defense. The court allowed this amendment over Mr. Aguilar's objection. RP 2611.

This belated amendment deprived Mr. Aguilar of fair notice of the charges and demonstrates the prosecution's mismanagement. From the outset of the investigation, the prosecution knew Ms. Lopez was last seen on October 15, 2012. CP 9 (probable cause certification). No evidence supported an allegation she was killed on or about October 1 through 14, 2012, yet the prosecution never bothered to give fair notice of the actual time frame of its allegations in any of the charging documents.

It also insisted Mr. Galban's assault occurred between October 1 and 16, 2012, making Mr. Aguilar believe the State's assault allegation occurred nearly contemporaneously with the murder. RP 2408-09, 2516. Mr. Aguilar prepared his defense believing the prosecution would not be able to prove this assault occurred during or just after the murder. *Id.* But during trial, the prosecution altered its allegations and instead claimed the assault happened within two weeks after Ms. Lopez died. CP 897-98.

This belated amendment did not rest on new information but rather the prosecution's lack of preparation or intentional deception.

See Michielli, 132 Wn.2d at 245. It constitutes mismanagement and because it unfairly prejudiced the defense, the court should have granted Mr. Aguilar's objection to the amendment. *Id.*; CrR 2.1(d).

d. The prosecution's extensive mismanagement caused substantial prejudice, thus requiring dismissal.

As *Brooks* and *Michielli* explain, when the government's mismanagement delays an otherwise ready trial, the resulting prejudice requires dismissal. In some instances, the prejudice caused by the State's delay can be remedied by suppressing evidence. *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). This less drastic alternative may rectify the prejudice resulting from the prosecution's mismanagement. *Id.* at 238. Mr. Aguilar asked for this alternative remedy in December 2015, when Mr. Aguilar had been in jail for over three years and the defense was forced to ask for a continuance due to the prosecution's unexpected insertion of new DNA evidence into the case. CP 630, 635; 5RP 731-32, 736. The court refused. 5RP 752.

The prosecution had the ability to gather the evidence it needed and assess the accurate charges from the outset and certainly by the omnibus hearing in 2013. Yet even after promising they provided all

reports and evidence to the defense, the prosecution found more evidence in a police locker, failed to thoroughly questioning the complainant witness Mr. Galban so that his allegations shifted and changed, waited three years for DNA tests on bloody clothes in Mr. Aguilar's home, and required the defense to continually re-investigate issues due to late disclosures by the prosecution, all while Mr. Aguilar waited in jail.

This mismanagement left the defense scrambling to respond to a moving target of shifting allegations and evidence. Mr. Aguilar was ready and expected the trial to begin multiple times throughout 2013, 2014, and 2015, but the prosecution repeatedly caused delay at the last minute by failing to timely investigate evidence it long had ready access to and by neglecting to properly notify Mr. Aguilar of his charges.

The unfairness of such unnecessary delay is contrary the fundamental requirements of due process, as codified in CrR 8.3 and related court rules written to preclude this particular misbehavior. *See Michielli*, 132 Wn.2d at 245; *Brooks*, 149 Wn. App. at 391. It requires reversal and dismissal.

3. The prosecutor’s behavior during voir dire, trial, and closing argument denied Mr. Aguilar a fair jury trial.

a. The prosecution may not encourage the jury to decide the case based on improper reasons.

Trial proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Prosecutorial misconduct violates the “fundamental fairness essential to the very concept of justice.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); U.S. Const. amend. 14; Const. art. I, §§ 3, 22.

Prosecutors play a central ,influential role in protecting the fundamental fairness of the criminal justice system. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the public expects that the prosecutor acts impartially,

improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935). A prosecutor’s violation of rules for decorum or questioning of witnesses also impermissibly taints the jury when the behavior is

improper and prejudicial. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

b. The prosecutor vouched for his witnesses and injected his own opinion into the case despite repeated defense objections.

Prosecutors may not vouch for their witnesses' veracity or inject their own opinions or experience into the proceedings. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (prosecutor's expression of personal opinion of guilt is improper); *see United States v. Brooks*, 508 F.3d 1205, 1209-10 (9th Cir. 2007) (prosecutor "threatens integrity" of conviction by indicating information not presented to jury supports government's case).

"The question for the jury is not what a prosecutor believes to be true or what 'we know,' rather, the jury must decide what may be inferred from the evidence." *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005).

Arguments about what the prosecution believes or knows to be true are particularly harmful because a prosecutor "carries a special aura of legitimacy" as a representative of the State. *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 2000). Thus, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the

jury to trust the Government's judgment rather than its own." *Young*, 470 U.S. at 18-19. A prosecutor's "position of trust and experience in criminal trials may induce the jury to accord unwarranted weight to his opinions regarding the defendant's guilt." *United States v. Splain*, 545 F.2d 1131, 1135 (8th Cir. 1976).

Here, the prosecutor repeatedly explained to the jury what he personally believed. The prosecutor said "I believe" or "we believe" at least 20 times during its closing argument in chief. *See, e.g.*, 4/19/16RP 3323 ("we believe" three times); 3325 ("I believe"); 3327 ("I believe"); 3332 ("I believe"); 3333 ("State believes"); 3335 ("State believes"); 3337 ("I believe"); 3340 ("I believe"); 3343 ("Which I think – which the State believes"); 3344 ("I think," "we believe," "I believe" two times); 3346-47 ("we believe" four times); 3349 ("we believe"); 3350 ("I believe").

The defense objected the prosecutor "referring to his belief." after the prosecutor introduced his closing argument by saying his goal was "just to point out things that we believe that are beyond reproach in this case." 4/19/16RP 3323. The court did not rule but told the prosecutor, "Use the State's position." *Id.* at 3323-24. The prosecutor

used this suggested phrase at times, but just as often insisted his belief was relevant to the jury's decision.

Later, when the prosecutor said "we know" the date of Ms. Lopez's death, the defense objected "to the use of 'we know.'" RP 3335. The court overruled the objection and said, "I think the jury understands that that's meant to be that the evidence -- the position of one side is that's what the evidence supports." *Id.* at 3336. The prosecution immediately resumed discussing what he personally believed and what the State believed. *Id.* at 3336-37.

When the prosecution said his belief that certain evidence "gives credence and more credibility" to the prosecution's case, the defense objected to improperly inserting the prosecutor's opinion about credibility. *Id.* at 3343. The court overruled the objection.

The only objection the court sustained was near the end of the prosecution's closing argument when it said "we believe" Mr. Aguilar is guilty of first and second degree murder. RP 4446-47. But the prosecution continued by arguing "I believe the evidence is clear" that it established deliberate cruelty, and the court overruled the defense objection. RP 3350.

Because the prosecution repeatedly injected itself and its opinion into the jury's deliberations, it necessarily colored the views of the case. The court reinforced the relevance of the prosecution's beliefs about the case by sustaining only a single objection.

c. The prosecutor told the jury his job was to do justice and they needed to trust him.

The prosecutor set the stage for inserting his opinion about the case into the jury's deliberations during jury selection, when the prosecution asked jurors how long it would take them to trust someone. RP 799.

"The reason" he was asking jurors about their ability to trust someone was that "we hope you can trust what I'm telling you" and what the defense attorney or court "is telling you." *Id.* He continued by saying it is "going to take some time to develop or earn trust," and asked all jurors whether they would "give us the chance to earn your trust about the truth of what this case is about." 3/31/16RP 799-800.

A juror asked whether it would be "fair to the defendant" to trust them. RP 800. The prosecutor responded by addressing jurors' need to trust him personally, saying "you understand that I'd be concerned

about a juror that really felt like I was just lying to them and everything I was stating was a bunch of malarkey or nonsense.” RP 803.

Another juror asked whether the prosecutor’s job was “to get us to believe what you have to say,” the prosecutor responded that “I have a job and a responsibility to represent the state of Washington, the people of Grant County, in this case against Mr. Aguilar”

3/31/16RP 804. He further said, “I hope you don’t think I’m just too pie in the sky” but “what I think we’re trying to do here is have justice occur.” 3/31/16RP 805.

He added, “justice is whatever the jury decides about the case.” *Id.* Defense counsel objected “to these comments” as inconsistent with the purpose of voir dire. *Id.* at 806. The court did not rule but told the prosecution to “move along.” *Id.*

The prosecutor said he felt “it’s fair” to answer jurors’ questions but would move on. *Id.*

This voir dire conversation laid the groundwork for the prosecutor’s closing argument where he repeatedly referred to his own belief and opinion. It is improper for the prosecution to encourage a verdict based on trust or other emotion. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). It is impermissible for a prosecutor

to suggest he has a method of verifying the testimony presented. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Here, the prosecutor implied that having “justice occur” required trusting the prosecutor. The prosecution impermissibly used voir dire as a platform for encouraging the jury to trust the prosecution’s opinion of its case against Mr. Aguilar.

d. The prosecutor impermissibly asked the jury to put themselves in the shoes of the incident’s participants.

It is improper for the prosecution to fabricate a narrative of the crime and present it to the jury in its argument. *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012). The prosecutor may not pretend to know what the victim saw or what the defendant was thinking. *Id.* at 554. The “particular thoughts” the defendant had in his head are “outside the evidence” and not proper argument. *Id.* at 555.

Here, the prosecutor’s opening statement started as a description of what they would have observed if they watched the incident unfold. 4/1/16RP 954-57. The prosecutor presented his speculation about the incident as an actual rendition of events, as if the jurors could see into the defendant’s mind. *Id.* Yet this was not evidence expected at trial.

There were no first hand observers; the prosecutor's version of what happened was a concoction.

For example, the prosecutor said "Suddenly, the driver's side door opens, a man emerges." *Id.* at 955. The man is "holding a gun," he opens the door for a woman and "[t]hey're yelling something at each other again, it's in Spanish and you can't tell what it is, you don't speak Spanish." *Id.* Despite this opening statement, no witnesses heard or saw what happened and no one claimed to have heard arguing in Spanish.

After describing a concocted version of the shooting, the prosecutor said jurors would see "the man" next "decides" he would hide the body and "decides he wants to make sure the deal is done, bang, bang, bang, bang." *Id.* at 956. After shooting her more times, "you see him hurriedly walk away back to the Pathfinder, get in the Pathfinder and leave." *Id.*

This purely speculative rendition of the incident contained critical elements of the premeditation needed to obtain a first degree murder conviction, but it was not part of the evidence the prosecution would present. Instead, the prosecution used its opening statement to inject a story about how the incident unfolded that would not be in evidence at trial. The prosecutor's unfounded description of what

occurred as Ms. Lopez was killed should not have been presented in the prosecution's opening statement.

Because the court would not know what evidence the prosecution would elicit at the time of opening statement, the defense could not effectively object and expect the court to sustain the objection, further disadvantaging Mr. Aguilar.

e. The prosecutor improperly pressed a defense witness to repeat other witness's testimony.

Prosecutors may not ask witnesses to comment on the testimony of other witnesses. *See State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011). Basic rules of hearsay also bar the prosecution from asking a witness to repeat another person's statements. ER 801. It invades the province of the jury to ask a witness to judge another witness's testimony. *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). It is also "misleading and unfair" to make it appear that an acquittal requires concluding the State's witnesses are lying. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362, 810 P.2d 74 (1991).

Numerous times and despite multiple objections, the prosecutor asked defense investigator Karl Calhoun to repeat or vouch for the testimony of the State's witnesses. RP 3207-3245. He asked Mr.

Calhoun to comment on testimony given by police officers who described the scene, by a forensic scientist's test of shell casings, by officers regarding whether shoes matched and belonged to the complainant, and whether Detective Green testified about asking Mr. Aguilar if he knew Ms. Lopez., RP 3222-24, 2239, 3240-42, 45.

Defense counsel objected to the prosecutor's efforts to repeat his witnesses' testimony through Mr. Calhoun . RP 3222-24, 3239-42, 3245. He finally warned he would move for a mistrial due to the prosecutor's unrelenting use of improper questioning tactics. RP 3245.

f. The prosecution unreasonably pursued an alien in possession of a firearm charge despite never gathering necessary witnesses while prejudicing the defense regarding Mr. Aguilar's immigration status.

The prosecution charged Mr. Aguilar with the offense alien in possession of a firearm based on a firearm found in his home when arrested two weeks after Ms. Lopez's death. CP 4.

To prove this offense, the prosecution needed to show Mr. Aguilar was not a citizen or lawful permanent resident and he lacked a firearm permit. CP 4; RCW 9.41.973; RCW 9.41.175. The prosecution never located evidence to prove Mr. Aguilar remained unlawfully in the United States. It did not identify witnesses or other documentary

evidence to prove this critical element, but it insisted on pursuing this charge regardless.

Under the guise of trying to prove this charge, the prosecution emphasized Mr. Aguilar's lack of American citizenship to the jury. It is "grossly improper" to inject an accused person's immigration status into a criminal case when irrelevant to the issues in the case. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010), quoting *State v. Avendano-Lopez*, 79 Wn. App. 706, 718, 904 P.2d 324 (1995). Evidence that an accused person is not in the country legally appeals to the jury's passion and prejudice. *Id.*, citing *Avendano-Lopez*, 79 Wn. App. at 719.

In *Salas*, the plaintiff's immigration status was relevant to his future earning potential in a civil case. 168 Wn.2d at 670. But the Supreme Court ruled it was untenable to admit this evidence because it carries "a significant danger of interfering with the fact finder's duty to engage in reasoned deliberations." *Id.* at 672.

The prosecution introduced abundant evidence underscoring Mr. Aguilar's lack of United States citizenship, over objection. RP 123, 135-37, 181. It offered his birth certificate, identification card, and passport from Honduras, also translating them into English for further

emphasis. Exs. 186, 187, 199, 200, 203. It discussed his lack of citizenship in opening statements. RP 968, 975.

The court repeatedly warned the prosecution that it lacked critical evidence to prove this charge and voiced concern about the prejudicial effect of jurors hearing about Mr. Aguilar's illegal entry into the United States. RP 1863-64, 2031, 2039-41, 2301. But it refused to give a limiting instruction to the jurors during the prosecution's case in chief because it could not craft an accurate instruction until it knew whether the prosecution could prove the alien in possession of a firearm charge, and it would not know this firmly until the prosecution rested its case. RP 1188, 2177, 2249-50, 2419, 2612.

Ultimately, the court dismissed this charge when the prosecution rested. RP 3091-95. As the court forewarned, the prosecution failed to prove the critical element of Mr. Aguilar's current citizenship status, which was not established by an illegal entry years earlier. RP 3091-95.

The State's unreasonable pursuit of this charge enabled the State to elicit substantial evidence of Mr. Aguilar's lack of United States citizenship, without a proper limiting instruction, despite its extremely prejudicial effect. By putting this substantially prejudicial information before the jury when the court warned from the start of trial that it

lacked critical proof, the prosecution failed to meet its obligation to ensure a fair trial. *See Wheat*, 486 U.S. at 160.

g. The multiple instances of misconduct denied Mr. Aguilar a fair trial.

When there is a substantial likelihood the prosecution's improper arguments affected the outcome, reversal is required. *Lindsay*, 180 Wn.2d at 440. By overruling the defense's numerous objections, the court lent "an aura of legitimacy to what was otherwise improper argument." *Davenport*, 100 Wn.2d at 764. This lends the court's "imprimatur" to the improper argument and "increases the likelihood that the misconduct affected the jury's verdict." *Perez-Mejia*, 134 Wn. App. at 920.

The prosecution's injection of its belief and opinion throughout its closing argument, after telling jurors of the importance of trusting it, and its speculation about the incident, persuaded the jury to adopt the prosecution's version of events for improper reasons. It also impermissibly emphasized Mr. Aguilar's citizenship, encouraging jurors to dislike or mistrust him for impermissible reasons. The prosecution's improper conduct is substantially likely to affect the jury's verdict. *Ramos*, 164 Wn. App. at 337.

4. The cumulative harm from numerous errors requires reversal.

The combination of trial errors may deprive a person of a fair trial, even where some errors viewed alone might not be grave enough to require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); U.S. Const. amend. 14; Const. art. I, § 3.

The cumulative harm generated by errors in this case had an overarching prejudicial effect. Mr. Aguilar suffered substantial prejudice from the prosecution's mismanagement of its case. He faced shifting allegations and charges, making it difficult for defense counsel to prepare and forcing extensive delay for information that should have been investigated and disclosed at the outset. The prosecution used improper tactics to persuade the jurors to trust the State and distrust Mr. Aguilar through its arguments, voir dire, and questioning tactics. These multiple errors occurred in a case where the evidence of Mr. Aguilar's premeditation was notably weak or non-existent. These errors, viewed together, denied Mr. Aguilar a fair trial.

F. CONCLUSION.

Mr. Aguilar's convictions should be reversed and dismissed due to substantial governmental mismanagement. Alternatively, a new trial should be ordered and Mr. Aguilar's conviction for premeditated murder dismissed.

DATED this 14th day of July 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'N. P. Collins', written in a cursive style.

NANCY P. COLLINS (28806)
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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34761-3-III
)	
JOSE AGUILAR,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JULY, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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Appellate Court Case Title: State of Washington v. Jose Abilio Aguilar
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