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NO. 36524-7-III

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

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR PANIAGUA,  
Appellant.

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

The Honorable Samuel P. Swanberg, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor's prejudicial misconduct violated Paniagua's Sixth and Fourteenth Amendments and Wash. Const. art. I, § 22 rights to a Fair Trial.

2. The trial court abused its discretion when it denied Paniagua's motion for a mistrial.

3. The prosecutor impermissibly shifted the burden of proof by arguing to the jury that Paniagua could have called an important witness.

4. Paniagua was denied his right to a fair trial by cumulative error.

B. ISSUES PRESENTED ON APPEAL

1. The prosecutor engaged in a pervasive pattern of asking the state's witnesses leading questions and questions which elicited hearsay. Was this prejudicial misconduct when the pattern essentially directed the witnesses' answer, which the jury heard, and likely believed the defense was trying to hide information, even though the trial court ultimately sustained the objections?

2. Did the prosecutor commit prejudicial misconduct during closing argument by arguing facts not in evidence when he

stated Paniagua was “no super shedder” –meaning he was not an individual who shed more DNA than the average person, implying that Paniagua was the shooter because he held the gun longer than anyone of the other DNA contributors?

3. Did the prosecutor improperly shift the burden of proof during rebuttal closing argument, thus, committing prejudicial misconduct when he asked, “Well, why didn’t the Defense call Lucero?” and stated “They could have used the subpoena powers of the court to bring her to testify but they didn’t and they don’t have to”?

4. Did the prosecutor use leading questions as a tool to express his personal feeling on Paniagua’s guilt by supplying the witnesses the answers the prosecutor desired regardless of the actual evidence?

5. Did the trial court abuse its discretion when it denied Paniagua’s motion for a mistrial after Detective Aceves violated Paniagua’s presumption of innocence by disclosing Paniagua’s pre-trial custody status?

C. STATEMENT OF THE CASE

1. Procedural history

Victor Paniagua was charged and convicted of Count I, Murder in the Second Degree (RCW 9A.32.050(1)(a)); Count II, Unlawful Possession of a Firearm in the Second Degree (RCW 9A.41.040(2)(a)(i)); Count III, Assault in the Second Degree (RCW 9A.36.021(1)(c)); and Count V, Tampering With a Witness (RCW 9A.72.120(1)(c)). CP 514.

The jury also returned a special verdict that the defendant used a deadly weapon in the commission of Counts I and III. CP 515. This timely appeal follows. CP 528.

2. Substantive facts

a. Introduction

Abel Contreras was shot and killed in a house full of people who all disbursed except for homeowner Rosello Romero, and Betsabe Quinones whom the police found hiding in the closet. RP 147, 150-51, 228, 705-06. Romero met the police at the door of his 3 bedroom home. Romero occupied one room and he leased the other two rooms to Contreras and Betsabe Quinones. RP 677, 705-

06, 978. Contreras sometimes shared his room with Ariel Contreras.<sup>1</sup> CP 980. Because Ariel was homeless, Abel and Romero agreed to allow Ariel to reside at the residence in exchange for performing work on the home. RP 980.

Abel was shot in his bedroom. RP 823-24, 901. It was undisputed that at the time of the shooting Romero was vacuuming the residence, Efron Gonzalez was in the hallway installing a new floor, and Quinones was sleeping in her bedroom. RP 302, 684, 899. Gonzalez testified that Victor Paniagua, Ariel, Abel, and a man named Jonah<sup>2</sup> were in Abel's room. RP 899, 911. Ariel testified that no one named Jonah was in the room; rather only Paniagua, Ariel and Abel were present. RP 1007. Witnesses gave conflicting testimony about the location of Lucero Porcayo and Dulce Moreno during the shooting. RP 684, 723, 899-900. Romero testified Porcayo and Moreno were both outside the house. RP 684. Moreno testified she was outside and Porcayo was inside the house. RP 723. Gonzalez testified both Porcayo and Moreno were sitting on the sofa in the living room. RP 899-900.

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<sup>1</sup> To avoid confusion, this brief will refer to Abel Contreras and Ariel Contreras by their first names. No disrespect is intended.

<sup>2</sup> Jonah's last name was never identified.

Both Gonzalez and Ariel testified that Paniagua shot Abel, but each had conflicting testimony about the events immediately before and after the shooting and whether Paniagua pointed the gun at Gonzalez. RP 904-05, 993, 994-95.

Gonzalez testified that when Abel arrived, he insulted Paniagua because he was upset that Paniagua was in his room and he demanded Paniagua leave. RP 901. When Paniagua did not leave, Abel insulted Paniagua's mother and according to Gonzalez, Paniagua drew a gun. RP 901. Abel continued to insult Paniagua and told him to pull the trigger if he was a man. RP 903. According to Gonzalez, Paniagua pulled the trigger and shot Abel in the chest. RP 904, 967.

In contrast, Ariel testified Abel arrived armed with a weedwhacker he was showing Ariel when Abel began insulting Paniagua. RP 982. However, Gonzalez testified Abel did not have anything in his hands. RP 911. Ariel further testified Paniagua left the room immediately after shooting Abel. RP 994-95.

Gonzalez testified Paniagua then pointed the gun at him and asked, "what about you?" RP 905. This was the basis for the assault charge. RP 905-06. Gonzalez further testified that Porcayo and

Moreno came into the room and distracted Paniagua, while Gonzalez escaped. RP 907-08. Ariel testified the girls did not come into the room. RP 994-95.

After the shooting, Paniagua and Porcayo met at the Tahitian Inn, where Porcayo resided in room 152. RP 407, 429, 489, 521. Porcayo arrived on a bicycle and Paniagua obtained a ride from Juan Villa. RP 407, 429. Both Porcayo and Paniagua each brought a black drawstring backpack with them to the Tahitian Inn. RP 398-99, 421. Later when police searched Porcayo's hotel room they found three backpacks nested inside each other like a Russian Doll, with a Taurus 709 Slim 9-millimeter pistol inside. RP 335, 767.

The gun contained a mixture of DNA which originated from four separate contributors. RP 869. Both Paniagua and Porcayo were contributors. RP 869-70. Paniagua's contribution was 82%, Porcayo's contribution was 9%, a third contributor was 6% and a fourth contributor was 3%. RP 871. Neither Ariel's DNA nor Jonah's DNA was tested for comparison. RP 883-84. In fact, there was no evidence in the record the police looked for or located Jonah.

Analyst Brittany Wright, a WSP forensic scientist, testified that some individuals are "super shedders," which means they tend to

shed more DNA than others. RP 884. Males tend to be super shedders more than females. RP 885.

Forensic tool marks expert Brett Bromberg-Marin was unable to conclude the bullet that fatally wounded Abel came from the 9mm Taurus found at the Tahitian Inn. RP 611.

At trial, Quinones hesitated about several details including the name of the deceased, the last name of the homeowner, and who she saw when she looked out her bedroom door after hearing the gunshot. RP 299, 303. Romero testified there were times he could tell Paniagua had a gun on his person but when asked if he ever saw Paniagua with a gun he answered, "not exactly." RP 681. When the prosecutor questioned Romero about whether he asked Paniagua to leave his home because Paniagua possessed a gun, Romero was hesitant and answered, "Not exactly because of that." RP 683. When the prosecutor questioned Moreno about Paniagua's backpack, she hesitated and said that everyone carried bags like the one Paniagua carried including Ariel. RP 709.

b. Prosecutor's conduct at trial

i. Leading questions

While questioning Sgt. William Parramore, the prosecutor

used a leading question to suggest Paniagua was nonresponsive to police officer's commands:

Q: However, when Mr. Paniagua, before he came out and was handcuffed he did not respond right away, did he?

A: No.

Q: In fact, you had to call several times; is that right?

[Defense Counsel] Objection Leading.

Court: sustained.

RP 378.

Again, the prosecutor asked a leading question to elicit testimony about Paniagua's behavior at the police station:

Q: Officer Cobb, while awaiting at the jail for intake was the defendant unable to stand still?

A: Yes.

Q: Was he passing back and forth?

Defense Counsel: Objection, Your Honor. Leading.

Court: Sustained.

RP 394-95.

When questioning the neighbor about who she saw running from Romero's home the prosecutor asked:

Q: Did you recall seeing a female with black hair?

A: Yes

Q: Wearing a white shirt?

A: Yeah.

Defense Counsel: Objection Leading

Court: Sustained

RP 449.

When the prosecutor questioned Detective Jed Abastillas

about the vehicle from which Paniagua exited at the Tahitian Inn he asked the following:

Q: What color is that vehicle?

A: I would say it's orange. Some people have called it peach, but to me it looks like it's orang-ish.

Q: And in the videos the orange vehicle stops at the Tahitian; is that right?

A: That's correct.

Defense counsel: Objection. Leading

Court: Sustained

RP 399.

When Quinones was unable to identify the deceased by name

the prosecutor asked:

Q: Who else was living there?

A: The guy that's pronounced dead, and then...

Q: What's his name?

A: I am not sure. I didn't know him to [sic] well.

Q: Would Abel Contreras sound about right?

Defense Counsel: Objection, Your Honor. Leading

Court: Sustained.

RP 299-300.

The prosecutor questioned Sgt. Parramore about how they

found Ariel:

Q: And she was the sister of the Abel Contreras; is that right?

A: Yes.

Q: And she had some information as to where to locate Ariel; is that right?

A: Yes.

[Defense Counsel]: Your Honor, I am going to object to – he is leading, the last couple questions.

The Court: Sustained

Q: You were given information to contact a Griselda Contreras; is that right?

RP 370.

At the beginning of Juan Villa's testimony, the witness with whom Paniagua was charged with tampering, the prosecutor told Villa when these events occurred:

**Prosecutor:** On June 3<sup>rd</sup> of 2018 did you come into contact with Mr. Paniagua?

**Villa:** Was that the day of the incident?

**Prosecutor:** June 3<sup>rd</sup> was the date of the incident.

**Defense Counsel:** Objection. I am not sure why the witness is asking [Prosecutor] a question and [Prosecutor] is answering.

RP 488.

The court sustained the objection. RP 488.

When the prosecutor questioned Villa about some 9mm bullets found in his vehicle, in which he gave Paniagua a ride to the Tahitian, the prosecutor asked as follows:

Q: Do you remember giving a statement to law enforcement?

A: Yeah. I remember giving them a statement, but...

Q: Do you remember telling law enforcement –

Defense Counsel: Objection, Your Honor. He can ask a question but he is leading the witness.

Court: Sustained

RP 492.

Eventually, the court held a side bar and explained to the Prosecutor how to ask a non-leading question. RP 682. The following conversation was held at a sidebar:

**Court:** This is conduct that should not come in. If it's because of the fact he had a firearm, you could indicate, Did it make you uncomfortable having a firearm? You can certainly ask him a question like that, but it's not leading to be more specific in your question than simply: Did you have a problem with him? All right?

**Prosecutor:** Okay. All right. Thank you. (whereupon sidebar concluded.)

Immediately after the sidebar concluded, the prosecutor asked another leading question, which the court sustained as follows:

Q: Is it true, Mr. Romero, that you asked the defendant –  
Defense counsel: Objection. The way he is asking the question is leading.  
Court: Sustained

RP 682-83.

During Dulce Moreno's testimony, the prosecutor attempted to elicit testimony that Paniagua warned Moreno to be careful around his backpack:

Q: At any point in time did [Paniagua] indicate to you to be careful when touching that bag?

A: No.

Q: Was he concerned that something in that bag –

Defense Counsel: Objection. Leading. It's also state of mind too.

Court: I will sustain on the last, not on the first.

RP 708-09.

Later in Moreno's testimony the prosecutor asked a leading question mischaracterizing Moreno's answer.

Q: So this is where everybody was located at the time of the shooting; is that right?

A: From what I could **hear**, yes.

Q: From what you could **hear and observe**; is that right?

A: Yes. But I mean, people could move around. I couldn't see inside. I was outside.

RP 714.

Defense counsel did not object to this question. RP 714.

The prosecutor continued to ask leading questions as follows:

Q: Okay. So you hear a gunshot. You are doing your hair, and then you run around. You were trying to get out of there; right?

A: Yeah.

Q: It's natural; right?

A: Of course.

Q: When you hear a gunshot?

A: Yes.

Q: You were thinking about your kids?

Defense counsel: Objection. Leading  
Court Sustained.

RP 716.

The trial court requested another side bar and held the

following conversation with the prosecutor:

**Court:** [Prosecutor], may I ask you to refrain from asking leading questions. If you finish a question by saying, "right," it is suggesting what you just told them is the right answer. Do you understand that?

**Prosecutor:** All right.

**Court:** I am talking about, do you understand what a leading question is?

**Prosecutor:** Yes.

**Court:** It's one that suggest the answer to be given. So if you say, isn't it true; isn't it correct; am I right in saying this; or, also say, "right" when you finish you are suggesting to them what the answer should be that you want. Do you understand?

**Prosecutor:** Okay. I will refrain from using the word, "right."

RP 728.

However, the prosecutor continued to ask leading questions, which the trial court continued to sustain.

Q: And to the best of your knowledge, did Ashley Lucas, the evidence tech, document a –

A: Objection. Leading.

Court: Sustained

RP 739.

A: ... Nothing here was indicative that there was a struggle or anything happened here. This is all consistent with pretty much [Abel] just ending up here and falling down into that location.

Q: Consistent with somebody getting shot and then walking and then collapsing?

Defense Counsel: Objection. Leading, you honor.

Court: Sustained

RP 798.

A: I just called that a spatter pattern, meaning it's just, they are small blood stains on that surface.

Q: Would it be fair to say that based on your testimony what you are doing is trying to exclude other explanations for –

Defense Counsel: Objection. Leading.

Court: Sustained.

RP 815.

Q: Based on your observations did it appear to be consistent with a bullet entering from the southeast and then –

Defense Counsel: Objection. Leading.

Prosecutor: I will back up

Q: What did you see?

Court: Sustained.

RP 821.

Ultimately, the court sustained 57 objections, including approximately 30 for leading questions.<sup>3</sup> However, only three of the answers were stricken.

Q: So on June 3<sup>rd</sup>, 2018, I believe you testified that you were working at a home in Pasco, Washington; right?

Defense Counsel: Objection, Your Honor. Leading.

Prosecutor: I will –

Court: Sustained as to the last part.

A: Yes.

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3 RP 146, 152, 217, 227, 229, 234, 236, 268, 270, 300, 323, 370, 372, 378, 394, 395, 399, 447, 449, 452, 464, 471, 481, 481 (a second time), 488, 492, 503, 530, 534, 634, 683, 683 (a second time), 687, 709, 716, 717, 718, 719, 719 (a different objection), 739, 798, 815, 821, 854, 862, 891, 896, 905, 907, 909, 919, 982, 984, 989, 989 (a second time), 992, 1125.

Prosecutor: May I approach the witness?

Court: You may.

Defense Counsel: Your Honor, I move to strike his answer.

Court: The court will strike the last answer that was given by the witness and tell the jury to disregard.

RP 895-96.

A: I could hear people inside when I knocked. And then when we opened [sic] I could hear a shower going inside the room.

Q: Water was running?

A: Yes.

Q: And then what happened next?

A: I asked the females is there was anyone inside.

Q: And did they reply whether there was anybody inside?

A: They did. They said Victor was inside.

Q: And then what happened?

Defense Counsel: Objection. We are going to move to strike. Hearsay.

Court Sustained. And the last response as far as how the females responded will be struck from the record and the jury will be told to disregard it.

RP 270.

- ii. Prosecutor elicited hearsay testimony about Paniagua being a suspect

The prosecutor elicited hearsay testimony that individuals the police investigated gave the police Paniagua's name as a suspect.

RP 481.

Q: After you were done at the - finished with our portion of the investigation at 502 South 22nd where did you go next?

A: So we had information coming in from Rosello and others in the area that he had told us that Victor Paniagua -

Defense Counsel: Objection. Hearsay.....

Court: Sustained.

RP 480-81.

Q: Okay. And were you advised of who was a suspect in this?

A: Yes, I was.

Q: And who was that?

A: Victor.

Defense Counsel: Objection, Your honor. Calls for hearsay....

Court: I am going to sustain the objection.

RP 323.

Officer Bernard Boykin testified that after the shooting he went to the Tahitian Inn and sat in the parking lot to observe who entered and exited the property. RP 268. The prosecutor elicited the following testimony:

A: ... I explained to him that I was told there was possibly someone in that room. So he decided that we should go make contact and asked me if I wanted to go knock on the door with him.

Q: Were you given a name of a person whom might be there?

A: Yes, sir.

Q: And what was that name?

A: Victor

Defense counsel: Objection, Your Honor. There is no basis or any information as to where that name came from and hearsay.

Court: I am going to sustain the objection.

RP 269.

iii. Prosecutor elicited testimony about Paniagua being in jail

Detective Anthony Aceves was tasked with obtaining DNA swabs in this case. RP 734. In response to the prosecutor asking

Aceves how he obtained DNA swabs from Paniagua, Aceves answered:

“... I went to – on the 6th of June I went to the Franklin County jail because we knew that’s where the defendant was at.” RP 735. Defense counsel objected and requested Aceves’ testimony be stricken and moved for a mistrial outside the presence of the jury. RP 735, 875. The court denied Paniagua’s motion for a mistrial but struck Aceves’ testimony and gave a curative instruction as part of the jury instructions. RP 735, 880. The curative instruction read as follows:

The fact that the defendant was arrested and/or in jail cannot be used to infer guilt.

RP 1072; CP 282.

iv. Prosecutor’s comments during closing argument

In the state’s closing argument, the prosecutor stated the following:

... Next was the defendant, Victor Paniagua, who contributed 82 percent of the DNA found on that firearm. He is no super shedder... RP 1124.

The court sustained defense counsel’s objection because there was no evidence at trial that Paniagua was not a super

shedder. RP 1125.

v. Discussions and closing argument about missing witness

Paniagua did not request a missing witness instruction, but prior to trial, the court ruled that even though the defense did not request a missing witness instruction, a not guilty plea puts every issue before the jury and, thus, the defense could argue the failure to call a certain witness is a lack of evidence. RP 47.

During trial, the prosecutor chose not to call Porcayo because Porcayo's attorney indicated if she was called to the stand Porcayo would invoke her Fifth Amendment right not to incriminate herself.

RP 1011. The following exchange took place:

Prosecutor: Judge, I don't believe that the State will be calling Ms. Porcayo as a witness. It's my understanding that she will be invoking the Fifth Amendment.

Court: Is the defense intending on calling her at any point on this?

Defense Counsel: I think she still needs to be called.

Court: You understand she can't invoke her Fifth without her – you can choose not to call her if you want to. But it can't be because of the fact that she is invoking her Fifth, unless she is called and invokes her Fifth, then that's not on the record as far as...

Prosecutor: We do not intend on calling her at this time.

RP 1011.

Prior to closing argument, the state objected to the defense

making any reference to Porcayo failing to testify unless the court allowed the state to re-open its case and take testimony from Porcayo that she intended to invoke her Fifth Amendment right against self-incrimination. RP 1076-77. The court declined to re-open the state's case and ruled that the defense could question why Porcayo did not testify provided the defense made no assertion about what Porcayo would have testified to had she been called. RP 1077.

During the defense closing argument, defense counsel reiterated that reasonable doubt comes from evidence or lack of evidence and questioned why the state did not call Porcayo to testify since she was present at the time of the shooting. RP 1081, 1141.

Despite the parties' two separate discussions with the court about the defendant's right to question the state's failure to call Porcayo, in rebuttal closing argument the prosecutor asked, "Well, why didn't the Defense call Lucero? They could have used the subpoena powers of the court to bring her to testify but they didn't and they don't have to." RP 1149. The court sustained defense counsel's objection but did not strike the comment or provide any further curative instruction, and defense counsel did not request a

curative instruction. RP 1150.

D. ARGUMENTS

1. THE PROSECUTOR'S PREJUDICIAL  
MISCONDUCT VIOLATED  
PANIAGUA'S SIXTH AND  
FOURTEENTH AMENDMENT AND  
ART. I, § 22 RIGHTS TO A FAIR TRIAL

The prosecutor's prejudicial misconduct violated Paniagua's right to a fair trial under both the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington State Constitution. *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012).

Prosecutorial misconduct deprives a defendant of this right, when in the context of the record and all the circumstances of trial, the conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704 (citations omitted).

Prejudicial misconduct requires reversal when the defendant is denied his right to a fair trial even if there is sufficient evidence to justify upholding the verdicts. *Glasmann*, 175 Wn.2d at 711 (citing *State v. Monday*, 171 Wn.2d 667, 678–80, 257 P.3d 551 (2011))

(racist arguments required reversal; no weighing of evidence by the court); *State v. Belgarde*, 110 Wn.2d 504, 507–10, 755 P.2d 174 (1988) (inflammatory remarks associating defendant with an organization the prosecutor described as “deadly group of madmen”; misconduct required reversal; no weighing of evidence by the court)).

When a defendant fails to object, the errors are waived unless the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Glasmann*, 175 Wn.2d at 704 (citing *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)).

- a. The prosecutor committed prejudicial misconduct by improperly shifting the burden of proof during closing argument

A prosecutor may not comment “on the lack of defense evidence because the defendant has no duty to present evidence.” *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009) (quoting *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990)). A prosecutor may offer rebuttal in direct response to a defense argument so long as the remarks do not “go beyond what is necessary to respond to the defense and [they] must not bring before the jury matters not in the record, or be so prejudicial that an

instruction cannot cure them.” *Dixon*, 150 Wn. App. at 56 (quoting *State v. Francisco*, 148 Wn. App. 168, 178–79, 199 P.3d 478 (2009) (quoting *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005))).

In *Dixon*, the Court of Appeals reversed Dixon’s conviction and remanded for a new trial when the prosecutor improperly suggested that Dixon should have called a witness to testify. *Dixon*, 150 Wn. App. at 56, 59. Dixon was charged with possession of amphetamine found in her purse while she was in a vehicle with an unknown passenger. The central issue at trial was whether Dixon had the requisite dominion and control over her purse. *Dixon*, 150 Wn. App. 49, 56.

In closing argument, defense counsel attempted to raise reasonable doubt by questioning the arresting officer’s failure to investigate the passenger and emphasizing the state presented incomplete information about the passenger’s presence. *Dixon*, 150 Wn. App. at 56.

In response, the prosecutor, in closing rebuttal argument, suggested Dixon should have called the passenger to testify. *Dixon*, Wn. App. at 56-57. The Court of Appeals held the prosecutor’s implication that Dixon should have presented evidence to support

her defense improperly shifted the burden of proof to the defendant *Dixon*, 150 Wn. App. at 58-59. Because Dixon's guilt was based solely on the arresting officer's testimony, there was a substantial likelihood the prosecutor's comments affected the trial's outcome and no instruction could have cured the prejudice. *Dixon*, Wn. App. at 59.

The Court of Appeals further held that Dixon did not invite or provoke the prosecutor's remarks by properly addressing the state's lack of evidence. *Dixon*, 150 Wn. App. at 56. And even if the remarks were invited, the prosecutor's remarks went beyond what was necessary to rebut Dixon's argument because the prosecutor adequately rebutted Dixon's argument of reasonable doubt by emphasizing the lack of evidence the passenger placed anything in Dixon's purse. *Dixon*, 150 Wn. App. at 56.

Similarly, here, defense counsel attempted to raise reasonable doubt about the thoroughness of the investigation and the state's case by highlighting the state's failure to call one of the witnesses who was present during the shooting. RP 1141. Like in *Dixon*, this argument did not invite or provoke the prosecutor's implication that the defense should have called Porcayo because it

went beyond what was necessary to rebut Paniagua's argument. The prosecutor adequately rebutted Paniagua's argument by emphasizing the testimony of Gonzalez and Ariel who both testified they saw Paniagua shoot Abel. RP 1149.

The prosecutor's remark created an incurable prejudice because there was a substantial likelihood it affected the trial's outcome. Instead of merely rebutting Paniagua's argument by reiterating the state's case was not incomplete, the prosecutor went further and suggested that if Paniagua thought the state's case was incomplete he could have called the witness himself. This is the same type of comment the Court held improperly shifted the burden of proof to the defendant in *Dixon*. The prosecutor's remark eroded both the presumption of innocence and the concept of reasonable doubt because it led the jury to believe Paniagua had a duty to present evidence to rebut the state's witnesses or to fill in any holes in the prosecution's case.

If the jury believed there were holes in the state's case, they may have considered it reasonable doubt. However, the prosecutor's comment likely influenced the jury not to consider those holes as reasonable doubt but to instead consider them as the defendant's

failure to present evidence. Suggesting Paniagua should have called a witness likely led the jury to believe the state did not have an absolute burden to prove Paniagua's guilt but that Paniagua bore some burden to rebut the state's evidence.

This mischaracterized the state's burden and impermissibly shifted the burden of proof to Paniagua. The fact the prosecutor stated Paniagua did not "have to" call Porcayo did not alleviate the prejudice because the remarks as a whole likely led the jury to believe Paniagua had some duty. This misstatement of the burden of proof was the last comment the jury heard before deliberation. Therefore, there was a substantial likelihood it affected the trial's outcome.

Although a prosecutor's improper comment may wield a stronger influence in a weaker case, the inquiry is not whether there was sufficient evidence to convict and this Court should not consider the sufficiency of the evidence against Paniagua when determining whether the prosecutor's misconduct requires reversal. *State v. Salas*, 1 Wn. App. 2d 931, 946, 408 P.3d 383 (2018), *review denied*, 190 Wn.2d 1016, 415 P.3d 1200 (2018) (citing *Glasmann*, 175 Wn.2d at 711). Because the prosecutor's improper remark likely

affected the verdict this Court should reverse and remand for a new trial. *Dixon*, Wn. App. at 56, 59.

b. The prosecutor's pattern of inappropriate questions constituted prejudicial prosecutorial misconduct

In *State v. Alexander*, the Court of Appeals held the prosecutor's repeatedly asking the same inappropriate question constituted misconduct because the question essentially told the jury the answer to it even though the court sustained each objection. *State v. Alexander*, 64 Wn. App. 147, 155, 822 P.2d 1250 (1992). In addition, the prosecutor's repeated attempt to elicit inadmissible evidence about who the victim named as her abuser left the jury with the impression the court was allowing the witness to conceal information favorable to the state. *Alexander*, 64 Wn. App. at 155.

Although the Court in *Alexander* reversed the defendant's conviction for cumulative error and not for the misconduct alone, there the misconduct was not as pervasive as it was here. Here, the prosecutor asked so many leading questions the trial court questioned whether he knew what constituted a leading question. RP 728.

In reviewing the prosecutor's leading questions, he suggested that Paniagua was not responsive or cooperative with the arresting

officers, which implied guilt (RP 378); that the defendant displayed unusual behavior of passing back and forth at the police station, which implied a consciousness of guilt (RP 395-96); that Villa had previously told the police something different regarding the bullets in his car (RP 492), which implied Villa was covering for Paniagua; the state of mind of one of the witnesses during the shooting in order to inflame the jury's passion (RP 716); a description of the individuals leaving the home after the shooting (RP 449); and told the only witness to the witness tampering charge the date the witness spoke with Paniagua (RP 488). And these were only some of the leading questions.

The prejudicial nature of the leading questions was compounded by some of the witnesses' hesitation and inability to recall the sequence of events and the contradiction among witnesses because the questions allowed both the jury and the witness to hear the suggested answer RP 299, 303, 681-83, 708-09, 904-05, 993, 994-95. Striking the answers did not cure the prejudicial effect of repeated leading questions because it gave the witness the opportunity to give the answer the state suggested was correct. RP 299, 370, 378, 394-95, 399, 449, 488, 708-09, 714, 716, 739, 798,

815, 821, 895-96.

Further, the prosecutor also asked inappropriate hearsay and state of mind questions. For example, the state was successful in telling the jury the police were told Paniagua was a suspect. RP 269, 323, 481. This left the jury free to infer that the other witnesses told the police Paniagua was the shooter. Even more, the inappropriate form of the prosecutor's questions was so pervasive that he was able to create the narrative instead of allowing it to be developed by the witnesses.

Even though the court sustained all but a few objections, here as in *Alexander*, the defense was prejudiced by the prosecutor continuing to ask improper questions thereby eliciting inadmissible evidence the jury heard, despite the defense repeatedly objecting. *Alexander*, 64 Wn. App. at 155. Defense counsel's repeated objections also likely prejudiced Paniagua because it created the impression the defense was trying to conceal information that, but for the court's ruling, would have been revealed. *Id.*

The prosecutor's misconduct prejudiced Paniagua. The remedy is to reverse and remand for a new trial. *Alexander*, 64 Wn. App. at 155; *Glasmann*, 175 Wn.2d at 711, 713.

- c. The prosecutor committed misconduct when he stated the defendant was “no super shedder” because the statement was unsupported by admitted evidence

A prosecutor commits misconduct when he or she makes arguments unsupported by the admitted evidence. *In re Yates*, 177 Wn.2d 1, 58, 296 P.3d 872 (2013).

In *State v. Jungers*, 125 Wn. App. 895, 898, 905, 106 P.3d 827 (2005), the Court of Appeals reversed and remanded for a new trial when the prosecutor referenced previously stricken testimony in her closing argument. The referenced testimony contained the officer’s personal belief regarding a witness’s credibility. This created an incurable prejudice because credibility was a central issue in the case. *Junger*, 125 Wn. App. at 900-01.

Here, as in *Jungers*, the prosecutor referenced critical and prejudicial facts not in evidence: that Paniagua was not a “super shedder.” RP 1124. The central dispute in this case was the identity of the shooter. There were four separate DNA profiles on the gun, indicating four contributors. RP 869. Without evidence in the record, the prosecutor’s statement that the defendant was “no super shedder” amounted to an expression of personal opinion that Paniagua contributed a larger portion of the DNA because it was his

gun and he held it longer. Although the court sustained defense counsel's objection to this mischaracterization of the evidence, it likely affected the verdict because the jury was likely persuaded by the prosecutor's argument and not the scientific evidence presented days earlier.

2. THE CUMULATIVE EFFECT OF THE  
PROSECUTOR'S MISCONDUCT  
REQUIRES REVERSAL

Even if this Court finds that each inappropriate question and each instance of prosecutorial misconduct on its own was harmless, the cumulative effect of these errors prejudiced Paniagua.

This Court may reverse a defendant's conviction when the combined effect of errors denied the defendant his right to a fair trial even if each error alone is harmless. *Salas*, 1 Wn. App. 2d at 952 (citing *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 678, 327 P.3d 660 (2014)).

The cumulative error doctrine does not apply when the evidence against the defendant is overwhelming (*Salas*, 1 Wn. App. 2d at 952) or the errors are few and have little or no effect on the trial's outcome (*State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010) (citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006))).

In *State v. Walker*, the Court of Appeals reversed Walker's conviction when the evidence against Walker conflicted, the prosecutor repeatedly made improper comments during closing argument, including the mischaracterization of the reasonable doubt standard, and made improper argument about the jury's role. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn. 2d 1022, 295 P.3d 728 (2012). The Court of Appeals held the conflicting evidence and the frequent use and repetition of improper statements created a substantial likelihood the combined errors affected the verdict. *Walker*, 164 Wn. App. at 739.

Here, similar to *Walker*, the errors were voluminous and the evidence against Paniagua was not overwhelming. The state's two eyewitnesses to the shooting told conflicting versions of the events that occurred just before and after the shooting; no other witness corroborated Gonzalez's testimony that Paniagua pointed the gun at him, two of the four DNA contributors found on the Taurus were unknown, two individuals present in the room at the time of the shooting were not tested for DNA, the state's expert was unable to confirm under *Walker* the bullet that killed Abel came from the Taurus

found at the Tahitian and no witness testified the Taurus belonged to Paniagua. RP 869, 883-84.

In addition, similar to *Walker* as well, the prosecutor's comments shifting the burden of proof to Paniagua, prejudicially mischaracterized the reasonable doubt standard. This cumulative improper burden shifting in a case with conflicting evidence denied Paniagua his right to a fair trial, where the frequency of the misconduct under *Walker* was not nearly as prevalent as the 57 objections to misconduct in Paniagua's case. *Id.*

Even though the court sustained most of the defense counsel's 57 objections to leading questions, inadmissible hearsay and state of mind testimony, this left the jury with the impression the defense was concealing evidence favorable to the state and it allowed the state to tell the witnesses and the jury the "correct" answer to the questions. These questions further allowed the prosecutor to interject his own personal beliefs instead of eliciting facts about the sequence of events. The combination of these prejudicial errors deprived Paniagua of his right to a fair trial.

For these reasons, this Court should reverse Paniagua's convictions and remand for a new trial. *Salas*, 1 Wn. App. 2d at 952.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL WHEN DETECTIVE ACEVES DISCLOSED THAT PANIAGUA WAS IN JAIL PRIOR TO THE TRIAL

Allowing a witness or prosecutor to directly or inferentially make reference to a defendant's incarcerated status during trial is an improper comment on the defendant's guilt. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014) (trooper impermissibly testified that defendant was "impaired"); *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). The error requires reversal when the evidence violates the defendant's constitutional right to have the jury determine the verdict based on the evidence, rather than based on improper comments that may sway the jury. *Quaale*, 182 Wn.2d at 199 (citing *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)).

The trial court has wide discretion to cure trial irregularities, *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979), and the standard of review is an abuse of discretion. *State v. Smith*, 7 Wn. App. 2d 304, 433 P.3d 821 (2019), *review denied*, 193 Wn.2d 1010, 439 P.3d 1065 (2019). A trial court's denial of a motion

for mistrial “will be overturned only when there is a ‘substantial likelihood’ the prejudice affected the jury's verdict. *State v. Young*, 129 Wn. App. 468, 472–73, 119 P.3d 870 (2005).

To determine whether the irregular occurrence affected the trial's outcome, the court examines: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Young*, 129 Wn. App. at 473. The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that Paniagua did not receive a fair trial. *Weber*, 99 Wn.2d at 164.

Here, the trial court agreed that Detective Aceves’ reference to Paniagua’s custody status was more prejudicial than probative. RP 735. Although the court sustained the objection, this did not likely cure the prejudice because the jury heard the improper comment. RP 735. Providing a curative instruction likely did not remove the taint, because once stated, the instruction only served to reiterate the fact of incarceration. *State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991): “... I went to – on the 6th of June I went to the Franklin County jail because we knew that’s where the defendant was at.” RP

735. Instruction: “The fact that the defendant was arrested and/or in jail cannot be used to infer guilt.” RP 1072; CP 282. The last word in the instruction is “guilt”, preceded by “arrest” and “jail”. *Id*

In *State v. Mullin-Coston*, 115 Wn. App. 679, 693-94, 64 P.3d 40 (2003), *aff'd*, 152 Wn.2d 107, 95 P.3d 321 (2004), in the context of the jury learning that the defendant was in jail when he had a conversation with state witnesses, the court held that such reference was not overly prejudicial in the same manner that viewing a defendant in shackles created prejudice because it may be common knowledge that a person charged with an offense is detained in jail during the pendency of the trial . *Id*.

*Mullin-Coston*, is distinguishable primarily because the Court determined that *Mullin-Coston*, under an ER 403 analysis, the fact of prejudice was far outweighed by the probative because the four conversations involved witnesses whose credibility was an issue. *Mullin-Coston*, 115 Wn. App. at 964.

Here by contrast, the reference to jail came from a detective rather than a witness, which carries more prejudice due to the detective’s official status as law enforcement. *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (Court reversed for misconduct

where the prosecutor told the jury there were “incredible safeguards” in place to ensure the officer’s credibility).

Here, the detective, not a lay witness referred to Paniagua’s incarceration in a manner that eroded Paniagua’s presumption of innocence because the jury heard that several people were taken to the jail on June 3 as part of a routine investigation, including Porcayo who did not testify at trial and whose DNA was on the gun, but heard Paniagua remained in jail as of June 6 when Detective Aceves went to obtain Paniagua’s DNA. RP 282-83, 372, 735, 869-70. The jury did not hear about any other individual being charged in connection with this incident, so it is also likely the jury inferred Paniagua was the only individual that remained in custody because after the interviews concluded he was the only one the police believed was guilty. This testimony went beyond a juror’s common knowledge and implied Paniagua remained in custody because he was guilty. Therefore, the prejudicial disclosure was a serious irregularity.

a. Detective Aceves’ disclosure was not cumulative

Here, there was no other evidence introduced that called attention to Paniagua’s custody status after the initial interviews that took place on June 3. To the contrary, the defense stipulated to

Paniagua's qualifying felony for the unlawful possession of a firearm charge to avoid discussion of any prior conviction or custody. Therefore, the prejudicial effect of the disclosure regarding Paniagua's pre-trial custody status was not diluted.

b. The jury instructions did not cure the prejudice

While juries are presumed to follow the jury instructions no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

*State v. Charlton*, is illustrative. *State v. Charlton*, 90 Wn. 2d 657, 661, 585 P.2d 142 (1978). There, the Supreme Court found the prosecutor was aware of the defendant's marital privilege because it is "an elementary rule of evidence," yet in closing argument he asked why Mrs. Charlton did not testify. *Charlton*, 90 Wn.2d at 660-61. Thus, the Supreme Court found the prosecutor's comment was flagrant and ill-intentioned because he not only anticipated the jurors may draw the impermissible inference the defendant was withholding unfavorable evidence, but he hoped and desired that outcome.

*Charlton*, 90 Wn.2d at 663-64.

The case against Charlton was based on a substantial amount of hearsay and a key prosecution witness was unavailable. Thus, the improper comment was reversible error because the jury may have believed Charlton's version of the incident but were instead persuaded by the impermissible inference of guilt drawn from the prosecutor's improper comment. *Charlton*, 90 Wn.2d at 664.

Here, the state's case against Paniagua was weak. The identity evidence came from Gonzalez and Ariel whose testimony contradicted each other. RP 904, 993 The state's expert could not confirm the gun found at the Tahitian Inn was the murder weapon. RP 611. But, even if the jury believed it was the murder weapon, there were two unknown DNA contributors and even though witnesses placed both Ariel and Jonah in the room at the time of the shooting the state did not obtain a DNA sample from Ariel or Jonah and Jonah was never found or interviewed. RP 871, 883-84.

Both the prosecutor and Detective Aceves were experienced in courtroom procedures. RP 735, 875. Just as the prosecutor in *Charlton* should have been aware of the elementary rule of marital privilege, both the prosecutor and Detective Aceves should have

been aware of the prejudicial effect of referencing a defendant's custody status.

When the jury heard Paniagua was in jail three days after the initial interviews, it is likely the jury used that information to draw the impermissible inference that Paniagua only remained in jail after the interview because he was guilty. Like in *Charlton*, the prosecutor's and Detective Aceves' experience makes it clear they not only anticipated the jurors would draw that impermissible inference but counted on it, knowing it would make an incurable impression on the jury.

Because the jury may have had reasonable doubt but instead relied on the impermissible inference of guilt drawn from Detective Aceves' disclosure, it was reversible error and this Court should reverse and remand for a new trial. *Charlton*, 90 Wn. App. at 664.

#### E. CONCLUSION

Victor Paniagua respectfully request that this Court reverse his convictions and remand for a new trial.

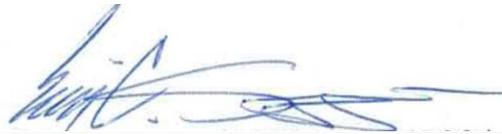
DATED this 1<sup>st</sup> day of August 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Franklin County Prosecutor's Office [appeals@co.franklin.wa.us](mailto:appeals@co.franklin.wa.us) and Victor Paniagua/DOC#385240, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on August 1, 2019. Service was made by electronically to the prosecutor and Victor Paniagua by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**August 01, 2019 - 10:07 AM**

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