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Court of Appeals
Division I
State of Washington

NO. 72849-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO ORTUNO-PEREZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

When Jesus Castro was shot by someone in a crowd, several people present blamed Santiago Ortuno-Perez and testified in court against him. But other people had an equal opportunity to have been the shooter; one admitted he had a gun with him and he had a motive to shoot Mr. Castro. At the State's insistence, the court prohibited Mr. Ortuno-Perez from offering evidence, cross-examining the State's witnesses, or even arguing to the jury that one of the other people present could have been the shooter based on its misapprehension of rules governing evidence of "other suspects." Mr. Ortuno-Perez was denied his right to meaningfully present a defense and confront the witnesses against him.

B. ASSIGNMENTS OF ERROR.

1. The court's restrictions on the evidence and argument Mr. Ortuno-Perez could make about another person's culpability and credibility violated his rights to present a defense and confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments and article I, sections 3, 21, and 22.

2. The court's evidentiary rulings exacerbated the violation of Mr. Ortuno-Perez's rights to present a defense and confront witnesses,

which cumulatively denied him a fair trial as guaranteed by the Fourteenth Amendment and article I, section 3, 21, and 22.

3. The court erroneously admitted irrelevant and prejudicial testimony of threats the witnesses believed they received from unnamed or unknown sources.

4. The court improperly restricted Mr. Ortuno-Perez's cross-examination of the medical examiner about relevant evidence.

5. The prosecution impermissibly bolstered its case and vouched for its witnesses by offering opinions about witness credibility.

6. The prosecution shifted the burden of proof, trivialized the standard of proof beyond a reasonable doubt, and asked the jury to base its decision on improper considerations in its closing argument.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Evidence or argument that another person committed the charged offense is admissible if there is evidence tending to connect the person to the offense. It violates the right to present a defense to restrict the defense from offering relevant evidence that casts doubt on the prosecution's case. By barring Mr. Ortuno-Perez from offering evidence or arguing that another person present during the incident was the perpetrator, did the court violate his right to present a defense?

2. A person accused of a crime is guaranteed the right to cross-examine the people who testify against him and to cast doubt on their credibility. The court prohibited Mr. Ortuno-Perez from cross-examining the prosecution's witnesses about their motives to lie about another person committing the crime or to infer that they were covering for another person. Did the court restrict Mr. Ortuno-Perez from confronting the witnesses against him and meaningfully challenging the credibility of the prosecution's case?

3. Evidence that witnesses are afraid to testify may unfairly imply the defendant's guilt and improperly bolster the witnesses by giving the jury a reason to excuse their inconsistent statements. Mr. Ortuno-Perez did not threaten anyone, but the court let the prosecution offer repeated evidence that the witnesses were afraid of him and had received serious threats of harm from unknown sources. When there was no evidence the defendant threatened anyone, was it unduly prejudicial to admit claims that witnesses felt threatened?

4. Did the court erroneously bar Mr. Ortuno-Perez from questioning the medical examiner about physical evidence resulting from a shooting that was within his area of expertise?

5. Police officers and prosecutors may not vouch for the credibility of witnesses because jurors are likely to place undue weight in their opinions due to the prestige of their offices. Several police officers and the prosecutor told the jury that certain witnesses were credible, trying to do the right thing, forthcoming, and convincing. Did the State offer impermissible opinion testimony and argument?

6. In her closing argument, the prosecutor vouched for its witnesses, trivialized its burden of proof, disparaged defense counsel, and asked the jury to premise its verdict on sympathy for a young child. Did the prosecution's improper appeals to the jury, taken together with the numerous evidentiary errors in the case, deny Mr. Ortuno-Perez a fair trial?

D. STATEMENT OF THE CASE.

Standing outside the home of Matilda Cartagena after two a.m. on October 12, 2013, someone fired one shot that hit Jesus Castro in the head. 11/3/14RP 12; 11/4/14a.m.RP 147; 11/5/14RP 329.¹ He fell to the ground and died several days later without regaining consciousness. 11/4/14a.m.RP 147; 11/13/14RP 101-02; 11/19/14RP 71.

His on-and-off-again girlfriend, Erika Lazcano called 911, telling the operator and responding police that she did not know how the shooting happened because she did not see it. 11/5/14RP 304, 330; 11/13/14RP 26, 30-31, 39. She heard the gunshot as she was getting her daughter out of the car as she arrived at a party. 11/5/14RP 326, 329; 11/12/14RP 4; 11/13/14RP 26, 30-31, 39; 11/17/14RP 21, 28. She was unable to identify the shooter and gave a description similar to Austin Agnish, who was standing near Mr. Castro when he was shot. CP 208; 11/13/14RP 39; 11/17/14RP 34; 10/27/14RP 18. But Mr. Agnish told police that Santiago Ortuno-Perez was the shooter, although in court he said he did not know who fired the shot and his statement to police was made “out of fear of prejudice” and “might not be true.” 11/4/14a.m.RP 154-56, 162, 179.

Several days after Mr. Ortuno-Perez was arrested, Ms. Lazcano told police she was not able to identify anyone in the montage. 11/12/14RP 36; 11/19/14RP 35. At Mr. Ortuno-Perez’s trial, she insisted she selected his photograph in the montage and the police were

¹ The verbatim report of proceedings are referred to by the date of proceeding. The volumes for several dates are divided into morning and afternoon sessions, and those dates are noted as “a.m.” or “p.m.”

wrong when they said she did not identify anybody. 11/13/14RP 50-52; 11/19/14RP 35.

Mr. Agnish had arrived at the party with four other people, Mr. Ortuno-Perez, Joey Pedroza, Dechas Blue, and Zach Parks. 11/3/14RP 59. He claimed to be friends with Mr. Ortuno-Perez but had only met him a few times and asked if he could see his Facebook page before attempting to identify him in a montage; the others did not know Mr. Ortuno-Perez. 11/3/14RP 54, 61-62; 11/4/14a.m.RP 191-92; 11/5/14RP 207; 11/19/14RP 26. Mr. Agnish was close, like brothers, with Mr. Pedroza and Mr. Blue, whom he saw almost daily before the incident. 11/4/14a.m.RP 188-89. Yet after the shooting, he never again spoke with Mr. Pedroza and barely saw Mr. Blue again. 11/3/14RP 105, 108; 11/4/14a.m.RP 117.

Mr. Castro was shot by a gun that fired a .22 caliber bullet from reasonably close range, within two feet. 11/19/14RP58, 61, 93. The gun was never recovered. *Id.* at 39-40. Mr. Parks, Mr. Agnish, and Mr. Pedroza were all standing near Mr. Castro when he was shot. CP 105, 206. Ms. Lazcano described five or six men there; Mr. Pedroza said 10 or 12 people were present. 11/5/14RP 280; 11/12/14RP 4.

After the shooting, Mr. Agnish fled quickly. 11/13/14RP 103. In his haste to leave, Mr. Ortuno-Perez's bumper caught on an object and fell off his car, leaving his license plate at the scene. *Id.* at 106, 108.

No forensic evidence indicated Mr. Ortuno-Perez was the shooter. The police seized multiple sets of clothes matching the description of what he wore that night and scientists conducted sensitive tests for blood traces but found none. 11/18/14RP 59-62. Police found a single .22 caliber bullet of a different type than used in the shooting in the outside pocket of the jacket Mr. Ortuno-Perez wore when arrested, but he was not wearing that jacket at the time of the shooting, as the State conceded. 11/18/14RP 74-75; 11/19/14RP 61; 11/24/14p.m.RP 9.

The prosecution charged Mr. Ortuno-Perez with first degree murder while armed with a firearm. CP 126. Before his trial, the prosecution moved to preclude Mr. Ortuno-Perez from offering evidence or arguing that another person was the shooter. CP 194-98. It claimed that "other suspect" evidence is regulated by "a tight standard." CP 183. It insisted that offering evidence, cross-examining witnesses, and arguing about other suspects is prohibited unless the defense shows "some step taken by a third party" to act, not just another person's

motive and opportunity. CP 183, 195. Because only Kiki, whose full name was not offered at trial, had told police someone else shot Mr. Castro, and the State did not believe Kiki or call her as a witness, it objected to any evidence or argument about another perpetrator. CP 197-98.

The defense repeatedly objected to being prohibited from offering any evidence or cross-examining witnesses about another suspect. CP 106-08, 121-22; 10/23/14RP 56-65, 78-80; 10/27/14RP 17-20; 11/4/14p.m.RP 2; 11/17/14RP 162; 11/24/14a.m.RP 60-61. It explained that the State's case rested entirely on testimony from people claiming to be eyewitnesses, including Mr. Agnish, Mr. Pedroza, and Mr. Parks, who stood within a few feet of Mr. Castro when he was shot and each could have been the shooter. CP 105, 110. Mr. Agnish admitted that he was carrying a loaded gun at the time of the shooting and he knew Mr. Parks and Mr. Pedroza to carry guns. CP 107, 110. These men left the shooting together and had phone contact afterward, giving them an opportunity to confer about how to paint the incident to the police. *Id.*

The court ruled that the admissibility of other suspect evidence “requires a very careful look by the Court.” 10/23/14RP 77. It believed

case law required evidence establishing that someone else was the shooter and “it’s not sufficient that others were merely present.” *Id.* Because the defense had not shown “steps taken” by others to commit the crime, it prohibited any other suspect evidence or argument. *Id.* at 77-78; 11/17/14RP 162-63. As a result, the court barred Mr. Ortuno-Perez from eliciting any evidence about Mr. Agnish’s possession of a gun at the time of the shooting, labeling his possession of a gun during the shooting as “not relevant” and “propensity” evidence. 10/23/14RP 79. It also barred the defense from “pointing the finger at other people,” including exploring Mr. Agnish’s motive; his statements that he wanted to “get Nortenos outta here,” referring to a gang with which Mr. Castro was affiliated; and his public posturing about his toughness and willingness to carry a gun as posted on Facebook close in time to the incident. 10/23/14RP 79-81; 10/27/14RP 20-21; CP 113-18. No other suspect evidence was presented to the jury based on the court’s ruling. 11/17/14RP 162-63 (court maintains ruling barring defense from inferring witness lying to protect Mr. Agnish); 11/24/14a.m.RP 60-62 (court denies motion for mistrial based on ruling barring defense from eliciting and arguing other suspect theory).

Mr. Ortuno-Perez was convicted of the lesser offense of second degree murder with a firearm. CP 153-54. He received a standard range sentence of 280 months and was ordered to pay \$41,1128.17 in restitution for medical and funeral expenses. CP 158; Supp. CP __, sub. no. 142. The court found him indigent for purposes of appeal and refused to impose any non-mandatory legal financial obligations.

12/18/14RP 97.

E. ARGUMENT.

By refusing to let Mr. Ortuno-Perez confront and cross-examine the State's central witnesses about their biases and motivations to falsely blame Mr. Ortuno-Perez, the court violated his rights to present a defense, confront witnesses against him, and have a fair trial by jury.

1. The court may not limit relevant testimony central to a meaningful defense.

The rights to present a defense and meaningfully cross-examine the prosecution's witnesses are among the "minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 296 (1973); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 22. An accused person has "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Rules excluding

evidence from a criminal trial may not infringe upon the “weighty interest of the accused” in having a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) and *Rock v. Arkansas*, 483 U.S. 44, 56-58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

Holmes involved a rape prosecution where the prosecution had clear forensic evidence that the defendant committed the crime but the defense claimed this evidence was mishandled, planted by police, and unreliable. *Id.* at 321-22. He also sought to introduce evidence that another person was in the neighborhood at the time of the incident and this other person made incriminating statements suggesting he committed the crime. *Id.* at 323. The court refused to let the defense offer evidence implicating this other person, finding the clear forensic link between the defendant and the crime made it unreasonable to infer another person committed it. *Id.* at 324.

The Supreme Court reversed, holding evidence implicating a third party may not be excluded because the prosecution has strong evidence showing the accused person’s guilt. *Id.* at 329. A judge’s refusal to admit evidence of another person’s culpability may not rest

on crediting the State's evidence that the defendant was the perpetrator. *Id.* at 330. Questions about the credibility of the State's case are reserved for the jury, not the court. *Id.* When the defense has evidence that, if believed, would show another person was the perpetrator, a court denies the defendant the constitutionally guaranteed meaningful opportunity to present a complete defense if it prohibits the introduction of such evidence. *Id.* at 330-31.

The right to present a defense prohibits a judge from limiting the defendant's elicitation of relevant evidence about the incident. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Evidence relevant to a theory of defense may be barred only where it is of a character that undermines the fairness of the trial. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State bears the burden of showing that the evidence is "so prejudicial as to disrupt the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Id.*

Likewise, cross-examination is essential to test the accuracy and credibility of a witness while the jury observes the witness's demeanor

while testifying under oath. *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Confronting the prosecution’s witnesses about their biases or reasons to give inaccurate testimony is the core guarantee of the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Limiting a defendant from cross-examining a prosecution witness must be justified by a compelling state interest that overcomes the defendant’s right to produce relevant evidence. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

2. *A court denies the right to present a defense and confront witnesses by barring evidence tending to show another person was the perpetrator.*

As our Supreme Court explained recently in *Franklin*, it violates the dictate of *Holmes* to improperly inflate the threshold for admitting “other suspect” evidence. *State v. Franklin*, 180 Wn.2d 371, 378, 381-82, 325 P.3d 159 (2014). Evidence that another person may have committed the crime is not subject to a different set of rules of evidence. Instead, “[a]ll relevant evidence is admissible” unless barred by the constitution, the rules of evidence, or other applicable rules. ER 402; *State v. Garcia*, 179 Wn.2d 828, 844-45, 318 P.3d 266 (2014). Evidence that another person may have committed the offense is

relevant if it tends to connect someone other than the defendant.

Franklin, 180 Wn.2d at 378. Like any evidence, evidence implicating another person is inadmissible if it is remote and disconnected from the crime; it is admissible if it tends to connect someone other than the defendant to the crime or casts doubt on the defendant's guilt. *Id.* at 380-81.

In *Franklin*, there was abundant evidence indicating the defendant sent threatening emails to or made malicious internet postings about his ex-girlfriend, because he referred to these internet posts and emails when personally threatening his former girlfriend. *Id.* at 375. But the defense wanted to introduce evidence that the defendant's current girlfriend was responsible for the internet-based harassment. His current girlfriend had access to the email accounts and computer that sent these threats, was jealous of the relationship between Franklin and the victim, and had engaged in threatening conduct toward the victim in the past. *Id.* at 376.

The trial court granted the prosecution's motion to exclude evidence about the current girlfriend's ability and motive to post the internet messages or send emails because there was no specific

evidence she did, as compared to the evidence incriminating the defendant. *Id.* at 377.

The *Franklin* Court criticized the trial court for requiring a strong showing of another person's culpability before admitting the evidence tending to implicate her. *Id.* at 378-79. The proper inquiry is whether the evidence offered "tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of a *third party* beyond a reasonable doubt." *Id.* at 381 (quoting *Smithart v. State*, 988 P.2d 583, 588 & n.21 (Alaska 1999) (emphasis in original)). As applied to Franklin's case, the current girlfriend had a motive and opportunity to commit the crime, which established a nexus between her and the offense. *Id.* at 382. This logical connection was proved by her access to the computer and her jealousy of the former girlfriend. *Id.* No more was required to show that she was potentially the perpetrator even if other evidence implicated the defendant. *Id.*

Franklin also affirmed the court's analysis in *State v. Maupin*, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). Maupin was accused of abducting and killing a child. The defense was not allowed to call a witness who saw two other men carrying the child after the prosecution claimed Maupin had kidnapped and killed her. The *Maupin* Court ruled

this evidence should have been admitted. Even though the witness's testimony would not have necessarily exculpated Maupin, as he could have been acting in concert with these other people, "it at least would have brought into question the State's version of the events of the kidnapping." *Id.* at 928. Taking this proffered testimony as true, it cast a substantial doubt on the State's version of the crime and its exclusion required a new trial. *Id.* at 930.

As *Franklin* explained, case law requires a non-speculative link between the other perpetrator and the crime. 180 Wn.2d at 380-81. It suffices if the evidence pointing to the involvement of others casts doubt on the State's version of events, as in *Maupin*. *Id.* When the trail of evidence could implicate another person who had a motive and opportunity to commit the crime, this other person's potential culpability is admissible. *State v. Clark*, 78 Wn.App. 471, 479, 898 P.2d 854 (1995).

Whether other people may have framed the defendant is a question for the jury to decide. *State v. Hawkins*, 157 Wn.App. 739, 752 & n.2, 238 P.3d 1226 (2010). Evidence identifying reasons why other people "might be setting [up]" the defendant "would be admissible" without engaging in "other suspect" analysis. *Id.* at 751-52.

Evidence implicating another suspect may be excluded only where there is no logical link between this other person and the incident. For example, in *State v. Wade*, 186 Wn.App. 749, 346 P.3d 838, *rev. denied*, 184 Wn.2d 1004 (2015), the victim had been previously mistreated by her ex-boyfriend, but she was killed in her apartment where there was extensive video surveillance and there was no evidence the ex-boyfriend “was anywhere near the apartment when the crime occurred.” 186 Wn.App. 749, 846. In *State v. Strizheus*, 163 Wn.App. 820, 829, 262 P.3d 100 (2011), *rev. denied*, 173 Wn.2d 1030 (2012), the defendant’s son made incriminating statements that he later recanted. But there was no evidence he was present during the incident, he was never identified as the attacker by the victim, and there was no showing that he took any step toward committing the act. *Id.* at 832. Similarly, in *State v. Starbuck*, _Wn.App. _, 355 P.3d 1167, 1174-75 (2015), the victim had sexual relations with several people close in time to when she was killed but the court did not admit other suspect evidence for people whose alibi proved they could not have been near the scene because they had no opportunity to commit the crime. These cases are far afield from the court’s ruling prohibiting Mr. Ortuno-Perez

from pointing the finger at the other people actually present and equally capable of shooting Mr. Castro.

3. *The court improperly granted the State's motion to bar evidence or argument about other people present at the scene with a motive and opportunity to be the perpetrator or lie about who did it.*

At the State's insistence, the court broadly barred Mr. Ortuno-Perez from offering evidence indicating another person was the shooter, questioning the prosecution's witnesses about circumstances that tended to implicate them in the shooting, and arguing to the jury that one of the other people present was the shooter. 10/23/14RP 77.

The court reasoned that "other suspect" evidence may not be elicited unless the defense had "admissible evidence to establish a foundation to conclude that someone else was the shooter and not the defendant in this case." *Id.* It believed that being "merely present" is insufficient unless the defendant shows "steps taken" by the other person to commit the crime. *Id.* The court's legal analysis was incorrect under *Franklin*. The defense did not need to prove that someone other than the defendant shot Mr. Castro, but rather there was evidence of another person's ability to have committed the crime which tended to create reasonable doubt as to the defendant's guilt. 180 Wn.2d at 381.

Mr. Ortuno-Perez had a good faith basis to cross-examine his accusers about their own motives and biases and to argue to the jury that they lied about Mr. Ortuno-Perez's actions to protect themselves or their friend, yet the court prohibited him from doing so.

As the defense set forth in lengthy proffers, the link between Austin Agnish and the shooting was not speculative. CP 105-23; 205-09. Mr. Agnish was present at the shooting, stood near Mr. Castro without obstruction, and admitted he was armed with a loaded gun. CP 107. The State claimed Mr. Agnish's gun possession was inadmissible because none of its witnesses said he used his gun during the incident, but the jury should have determined whether this was credible. CP 200; *Franklin*, 180 Wn.2d at 381. The prosecution also asserted that Mr. Agnish's possession of a gun at the time of the shooting did not prove his involvement because Mr. Agnish later showed police a .40 caliber gun he owned, which was a larger caliber than the bullet used to kill Mr. Castro. CP 196; 10/23/14RP 67-68, 73. The defense countered that Mr. Agnish's Facebook posts showed he had access to other guns, the gun he later showed the police may not have been the gun he had during the incident, and it should be allowed to question Mr. Agnish about the gun he had during the shooting. CP 107, 110-13, 206.

The court barred any evidence about Mr. Agnish's gun possession as "not probative" and "goes to propensity." 10/23/14RP 79. It later struck a police officer's testimony when he mentioned documenting a weapon belonging to Mr. Agnish, despite the defense objection that the State had opened the door to Mr. Agnish's gun possession. 11/20/14RP 4-5, 12-13, 16. The jury never heard Mr. Agnish was armed when he stood near Mr. Castro during the shooting.

Joey Pedroza and Zachary Parks were also standing near Mr. Castro and each were known to carry weapons. CP 107. While neither Mr. Pedroza nor Mr. Parks admitted having a gun that day, the defense was barred from questioning them about their access to guns or their motive to lie to cover for Mr. Agnish. CP 121-22, 208; 10/23/14RP 82; 10/27/14RP 18-21.

Further casting doubt on the State's theory that Mr. Ortuno-Perez alone fired the fatal shot, Mr. Agnish behaved in an incriminating manner after the shooting. He asked for an attorney when the prosecution questioned him about whether it was true that Mr. Ortuno-Perez was the shooter. 11/4/14a.m.RP 162. He lied about his gun ownership. CP 112-13. He called his father and asked if he should leave town. 11/4/14a.m.RP 172. He said he made statements to police

implicating Mr. Ortuno-Perez out of “fear of prejudice” and yet the defense was not permitted to question whether he was afraid because he was lying about his involvement. 11/4/14a.m.RP 156; 11/4/14p.m.RP 2.

Mr. Agnish’s friends were angry with him and rarely spoke to him again after the shooting. 11/3/14RP 105, 108; 11/4/14a.m.RP 117; 11/13/14RP 114. He took an extraordinary “cocktail” of prescription pain medication before the shooting. 11/4/14a.m.RP 182-83. He was an extremely reluctant witness for the prosecution who said many outrageous things while testifying. He claimed he hated all white people and did not speak with them or learn their names.

11/4/14a.m.RP 167, 185-86. He referred to Erika Lazcano, Mr. Castro’s girlfriend who was at the scene and extremely distressed after the shooting, as “the bitch carrying the baby.” 11/4/14a.m.RP 166. He said he remembered little of the incident due to his ingestion of an extreme amount of prescription medication. 11/4/14p.m.RP 9. He testified only after he was arrested on a material witness warrant. 11/4/14a.m.RP 122.

In addition to his presence and possession of a gun at the shooting, Mr. Agnish had a motive to shoot Mr. Castro based on his gang connections. Shortly before the incident, Mr. Agnish posted Facebook remarks about his animosity toward Nortenos, including a

comment that he was “get[ting] these Nortenos outta here.” CP 114. Mr. Agnish said in a recorded deposition, under oath, that he thought Mr. Castro was a Norteno. CP 115. Mr. Blue also believed Mr. Castro was a Norteno and the Nortenos were looking for him as a result of the shooting. CP 115.

Mr. Agnish’s Facebook posts also showed that he presented himself as a gangster and he admitted he joined a gang when younger. CP 113-18. Evidence that a person belonged to a gang and “perceived [the victim] to be associated with a rival gang is relevant” to establish motive. *State v. Yarbrough*, 151 Wn.App. 66, 84, 210 P.3d 1029 (2009). Gang evidence is not unduly prejudicial when probative of a legitimate theory of the case and the circumstances surrounding the crime. *Id.* at 85. Mr. Agnish’s gang membership was documented by the defense, based on his insistence of using the color blue, a color identified with the Surenos gang, flashing gang signs, Facebook postings about Nortenos as rivals or enemies, and his bragging about his criminal behavior. CP 116-18, 206-08. Mr. Ortuno-Perez was not permitted to raise any inference that Mr. Agnish had a motive to harm Mr. Castro premised on his belief that Mr. Castro was part of a rival gang or his own desire to increase his status as a gang member.

This motive evidence was at least equivalent to Mr. Ortuno-Perez's motive, of which no evidence was offered at trial. The State conceded it had no evidence of Mr. Ortuno-Perez's motive.

11/24/14p.m. RP 30. It did not show Mr. Ortuno-Perez had a prior relationship with Mr. Castro or a reason to shoot him, other than the claim by the prosecution's witnesses that the two men exchanged words in Spanish before the shooting occurred.

The State's case rested on claims by Mr. Agnish and his friends that Mr. Ortuno-Perez was the shooter. There was no forensic evidence and no murder weapon recovered. Ms. Lazcano was also in the area at the time of the shooting, and at trial, she claimed Mr. Ortuno-Perez was the shooter, but she gave numerous statements to the police right after the incident in which she said she only heard, and did not see, the shooting. 11/5/14RP 304, 330; 11/13/14RP 26, 30-31, 39; 11/17/14RP 21, 28. She did not identify Mr. Ortuno-Perez as the shooter to the police in the days following the shooting, described the shooter as a person matching Mr. Agnish's description, and said to Mr. Agnish, "Don't shoot me," after Mr. Castro was shot. 11/4/14p.m.RP 15; 11/12/14RP 36; 11/19/14RP 35; CP 208.

Mr. Ortuno-Perez was denied a meaningful opportunity to present a defense by the court's rulings precluding him from questioning Mr. Agnish or his friends about their motives and opportunities, including Mr. Agnish's possession of a gun at the shooting. The court told Mr. Ortuno-Perez he could not even point a finger at someone else. 10/27/14RP 20-21. Mr. Ortuno-Perez had the constitutional right to explore the nexus between Mr. Agnish and the crime as part of his rights to present a meaningful defense and confront the witnesses against him. There was no compelling need to exclude this evidence or to prohibit Mr. Ortuno-Perez from confronting the State's witnesses during cross-examination about their veracity based on their own complicity or culpability.

4. The court's ruling and prosecutions tactics exacerbated the prejudicial effect of the improper restrictions on the defense.

a. The State must prove the error is harmless beyond a reasonable doubt.

The prosecution bears the burden of proving the violation of the right to present a defense and cross-examine witnesses is harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. This harmless error analysis does not simply weigh the evidence offered by the prosecution at the flawed trial, but rather must examine whether, had

the defense been allowed to challenge the State's case and present the defense he sought, it might have affected the jury's deliberations. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). The State's case against Mr. Ortuno-Perez rested entirely on witness testimony, without corroboration from physical or forensic evidence, making the restrictions on cross-examination and argument particularly prejudicial.

b. The court exacerbated the error by offering out-of-context claims that the witnesses were afraid of Mr. Ortuno-Perez.

A witness's fear or reluctance to testify "could lead the jurors to conclude that the witness is fearful of the defendant" because he is guilty. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). When the defendant has not threatened the witness, the evidence of the witness's fear or reluctance to testify should not be admitted as substantive evidence against the accused. *Id.* It also impermissibly bolsters witnesses' credibility to offer evidence that they were afraid to testify before the witnesses' credibility is attacked. *Id.*

Over defense objection, the court allowed the prosecution's witnesses to testify in their direct examination that they had been

threatened after the shooting, which made them afraid. CP 82-83, 186-88; 10/23/14RP 6-12. These threats were vague, without specificity of when they were made or what was said. No one claimed Mr. Ortuno-Perez made any of these threats, and it was unlikely he did because the State had monitored his phone calls and knew of his jail visitors since his arrest on the day of the incident. CP 83.

Mr. Agnish claimed he received “death threats” and was labelled as “a snitch, as a mark,” meaning a target. 11/4/14RP 122, 129. He did not detail when or what was said. Mr. Pedroza said he received “death threat calls, like unknown numbers, saying some stuff, like gang-related stuff, and you know, ‘You’re going to get in trouble,’ or something like that.” 11/5/14a.m. RP 206. He did not remember more other than he got these calls at unknown date. *Id.* Mr. Parks said he did not want to testify because he “didn’t want to die,” and “people die for stuff like this.” 11/13/14RP 157-58. Mr. Agnish and Mr. Parks claimed Mr. Blue had been shot and it may have been “over this” but Mr. Blue did not testify that he was shot or threatened. 11/13/14RP 158-59.

The State insisted the threats and witnesses’ fears explained why these witnesses gave inconsistent statements to police and were reluctant witnesses. CP 186-88. “Fear” was the first word of the State’s

closing argument and its central focus was the witnesses' fear of Mr. Ortuno-Perez. 11/24/14p.m.RP 3-4. The State used their purported fear of Mr. Ortuno-Perez to excuse their refusal to expressly blame Mr. Ortuno-Perez at trial. *Id.* at 10, 12-13, 15, 19-20. It claimed they were afraid of the consequences of testifying against Mr. Ortuno-Perez. 11/24/14p.m.RP 3-4. There was no evidence that Mr. Ortuno-Perez was involved in any such threats.

The defense was not permitted to counter that the witnesses were afraid was because of their actual involvement in the shooting or because they were falsely accusing Mr. Ortuno-Perez. They could not argue Mr. Agnish received death threats due to his culpability. They could not tell the jury that Mr. Pedroza did not want his friend Mr. Agnish to be found responsible, and that was why he said he was too drunk to remember and did not see the shooting.

In violation of a motion in limine barring evidence Mr. Ortuno-Perez was in a gang, a detective testified that Mr. Agnish was afraid due to "gang affiliation." 11/19/14RP 40; *see* 10/23/14RP 81-82; CP 81. This implied Mr. Ortuno-Perez was a gang member and the incident was association with his gang, but the defense was not permitted to ask questions about or argue that the threats were triggered by Mr. Agnish's

gang affiliation, or from Mr. Castro's gang, which may have been the reason Mr. Agnish was afraid and should not have been used to infer Mr. Ortuno-Perez's guilt. 10/23/14RP 81.

Simultaneously letting the State introduce evidence that the witnesses were afraid because Mr. Ortuno-Perez was guilty and dangerous yet barring the defense from showing the witnesses were afraid due to their own culpability unfairly impacted Mr. Ortuno-Perez's right to present a defense. He was unable to meaningfully contest the State's evidence while the State was able to seek a verdict based on an inflated fear of Mr. Ortuno-Perez as a threatening and dangerous person.

c. The court exacerbated the error by limiting the defense's cross-examination of the medical examiner.

Wide latitude should be permitted in cross-examination of an expert. K. Tegland, 5B Wash. Prac., Evidence Law and Practice § 705.7 (5th ed.). It is "perfectly proper" for defense counsel to ask hypothetical questions that embrace facts not in evidence and to test the witness's knowledge and skill. *Wharton v. Dep't of Labor & Indus.*, 61 Wn.2d 286, 289, 378 P.2d 290 (1963); *Tegland, supra*, at § 705.7. Although a judge has discretion to limit the extent of the examination, it

does not have discretion to bar relevant cross-examination of an expert. *Tegland, supra*, at § 705.7.

Medical examiner Dr. Timothy Williams testified in his direct examination that Mr. Castro's skin showed "stippling," which is fragments of gun powder caused by a gun fired from a distance of two inches to two feet away. 11/19/14RP 76-78. This evidence was important to the prosecution because it argued that Mr. Ortuno-Perez was the only person standing close enough to shoot Mr. Castro. 11/24/14p.m.RP 27. In response, Mr. Ortuno-Perez cross-examined Dr. Williams about "spatter," which is a possible effect of being shot like Mr. Castro, where the bullet penetrates but does not exit the body. *Id.* at 91-92. Blood or tissue may emanate from the body in the direction of the shot, spattering outward. *Id.* at 92.

The court would not let Mr. Ortuno-Perez's cross-examine the medical examiner about whether, based on the nature of the wound, blood or tissue could have spattered toward the gun that caused the wound. *Id.* at 93. The court similarly sustained a hypothetical question based on the doctor's training and experience whether it would be possible for spatter to come from the wound. *Id.* This information was within Dr. Williams' knowledge and pertinent based on the direct

examination that discussed the physical effects of being shot at a relatively close distance.

These questions were relevant because there was no evidence of blood spatter on Mr. Ortuno-Perez. The State extensively tested Mr. Ortuno-Perez's clothes for evidence of blood and found none. 11/24/14RP 20-28. The prosecution used Dr. Williams' testimony to show the shooter stood close to Mr. Castro and yet the court precluded the defense from meaningfully countering that the jury also needed to consider blood spatter in weighing the evidence against Mr. Ortuno-Perez. 11/24/14p.m.RP 27. This restriction on cross-examination further undercut Mr. Ortuno-Perez's ability to cast doubt on the prosecution's claim that he was the shooter.

d. The court exacerbated the error by letting police officers vouch for the credibility of the State's witnesses.

Whether a witness has testified truthfully is entirely for the jury to determine. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). The prosecution cannot indirectly vouch for a witness by eliciting testimony from a police officer about a key witness's credibility. *State v. Chavez*, 76 Wn.App. 293, 299, 884 P.2d 624 (1994); *see State v. Korum*, 157 Wn.2d 614, 651, 141 P.3d 13 (2006). "Testimony from a

law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." *State v. Kirkman*, 159 Wn.2d 918, 928-29, 155 P.3d 125 (2007).

Several officers vouched for the credibility of the prosecution's witnesses. Detective Onishi interviewed Mr. Agnish after the incident and the prosecution asked if he was "pretty forthcoming." 11/18/14RP 88. The detective said, "I believe so. I didn't see any real signs of deception, It didn't seem like he was hiding things at all." *Id.* By saying what he "believed" about Mr. Agnish's truthfulness, the officer gave his opinion of Mr. Agnish's credibility.

The prosecution also asked Detective Edwards if Ms. Lazcano was "forthcoming," during their interview, over defense objection. 11/19/14RP 22. The court overruled the objection. *Id.* Detective Edwards said yes, she was. 11/19/14RP 22. Detective Montemayor said Mr. Agnish "seemed to want to do the right thing." 11/19/14RP 118. The defense objection was sustained, but the prosecution repeated in its closing argument that Mr. Agnish and the others wanted to "do the right thing" and "did the right thing" by testifying about Mr. Ortuno-Perez. *Id.*; 11/24/14p.m.RP 13, 20, 22.

Detective Montemayor also described Mr. Parks as “cooperative” when questioned about the incident, over objection, in contrast to Mr. Parks’ testimony that he disliked cooperating with the police. 11/13/14RP 116; 11/19/14RP 141. Even though the detective acknowledged Mr. Parks was concerned about cooperating, in the prosecutor’s closing argument she asserted her own opinion that Mr. Parks “was convincing and credible.” 11/24/14p.m.RP 23; *Id.* at 22 (also arguing Mr. Parks “testified convincingly” about the incident).

These instances of vouching were particularly prejudicial because Mr. Ortuno-Perez was not permitted to cross-examine Mr. Agnish or his friends to show their biases or motives to falsely accuse Mr. Ortuno-Perez. The witnesses were reluctant and inconsistent in court, yet the police opinions reassured the jury that they meant to be helpful and truthful and the prosecution echoed this testimony in its closing argument to place the prestige of the prosecution and police behind the credibility of the witnesses. This testimony and the vouching by the prosecution increased the prejudicial effect of the court’s ruling barring other suspect evidence or argument.

e. The prosecution trivialized its burden of proof, impermissibly disparaged the defense, and asked the jury to premise its verdict on sympathy and vengeance.

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). A prosecutor’s 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, 21, 22.

Prosecutors play a central and 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). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

A prosecutor’s closing arguments impermissibly taint the jury’s deliberations when the comments made “were improper and prejudicial.” *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Comparing the State’s burden of proof to a jigsaw puzzle or an everyday experience improperly trivializes the burden of proof. *Id.* at 436-37. The Supreme Court expressly warned prosecutors that it

constitutes misconduct to compare proof beyond a reasonable doubt to a jigsaw puzzle, particularly when implying that beyond a reasonable doubt is the equivalent of being able to guess what a picture will look like despite missing many of the pieces of the puzzle. *Id.*

Despite the clear dictate of case law cautioning prosecutors against analogies to puzzles or other games to explain its burden of proof, the prosecutor told the jury that “‘Beyond a reasonable doubt’ means that there is just enough pieces of the puzzle that have been put together for you to point to the defendant’s guilt.” 11/24/14p.m.RP 33. The prosecutor further said that for proof beyond a reasonable doubt, “‘there is enough where you are pretty confident that you know what this picture is you are looking at.’” *Id.*

In *Lindsay*, the prosecutor also compared proof beyond a reasonable doubt to crossing a street when “‘you’re confident you can walk across that crosswalk without getting run over.’” 180 Wn.2d at 436. The Supreme Court held that this kind of analogy trivialized and minimized the State’s burden of proof. *Id.* The prosecutor’s comments were similar in the case at bar, where the prosecutor described proof beyond a reasonable doubt as being “‘pretty confident’” of a puzzle’s picture, as when you have completed “‘just enough pieces’” that it can

“point to the defendant’s guilt.” 11/24/14p.m.RP 33. By minimizing its burden of proof, the prosecution exacerbated the error stemming from the limitations on the defense’s ability to meaningfully cast doubt on the State’s version of events.

In addition, “[i]t is improper for the prosecutor to disparagingly comment on defense counsel’s role or impugn the defense lawyer’s integrity.” *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). The prosecution told the jury that the defense presented “a lot of distraction about trivial” and unimportant issues, and was “playing fast and loose with the facts to distract you.” 11/24/14p.m.RP 31-32, 65. It complained that the defense asked “nothing about the actual incident” when questioning Mr. Agnish or the other witnesses who were at the scene. *Id.* at 31-32. The defense asked about conduct before and after the shooting, but “[n]one of these things inform your finding of the defendant’s guilt,” showing the defense was only distracting the jury.” *Id.* at 32. Yet the jury did not know that the defense had been prohibited from asking the questions it wanted to ask these witnesses about the shooting.

The State took further advantage of the prohibition on “other suspect” evidence when insisting “we know” from Mr. Agnish’s

testimony that “nobody else was involved” in the altercation other than Mr. Ortuno-Perez and Mr. Castro. *Id.* at 16. The only reason this testimony was uncontested was because the court expressly prohibited the defense from “pointing the finger” at anyone else. 10/27/14RP 20.

The prosecution also criticized defense counsel for questioning Ms. Lazcano about her many inconsistent statements to police, and the court overruled the defense objection. 11/24/14p.m.RP 24-25. The prosecution said defense called her a liar because she was upset after she lost a loved one and asked the jury to put themselves in her shoes, seeking a decision on sympathy for Ms. Lazcano. *Id.* It further appealed to the jury’s sympathy by repeating in opening and closing statements that Mr. Castro’s three-year-old daughter Lexus, deserved to know that “her father’s murderer was held accountable.” *Id.* at 35; 11/3/14RP 2. Asking the jury to decide the case by putting themselves in the position of the victim or her family is improper because it invites the jury “to decide the outcome of the case based on sympathy, prejudice or bias, rather than on the evidence and the law.” *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988).

These various arguments further undermined fairness of the trial. Taken cumulatively with the other erroneous restrictions on the

evidence and introduction of prejudicial testimony about vague threats and opinion testimony, Mr. Ortuno-Perez was denied a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956) (“cumulative effect of repetitive prejudicial error” may deprive a person of a fair trial).

f. Reversal is required.

In *Franklin*, some of the evidence about the alternate suspect’s potential involvement in the offense was elicited through other witnesses but “some of it did not” emerge at trial. 180 Wn.2d at 383. And the trial court barred the defense from arguing this limited evidence implicated the defendant’s girlfriend. *Id.* The *Franklin* Court reversed because the jury had not been allowed to consider “all of the other suspect evidence” and the defense was unable to meaningfully argue about evidence implicating this other person as the perpetrator. *Id.*

Like *Franklin*, the jury did not hear critical evidence undercutting the reliability and accuracy of the State’s theory of events. While jurors had some reason think Mr. Agnish was not usually a good citizen, the State assured them he was trying to do the right thing when he spoke to police. The jurors heard no evidence or argument that Mr. Agnish he may have been responsible. The jury may have reached a

different result if it knew Mr. Agnish had a loaded gun, learned of his motivations and anti-Norteno posturing, and heard how the State's witnesses' behavior after the incident may have stemmed from their decisions to shift blame from themselves. Mr. Ortuno-Perez is entitled to a new trial at which he receives a meaningful opportunity to present a defense and confront the witnesses against him.

g. No costs of appeal should be imposed.

In the event Mr. Ortuno-Perez does not prevail in his appeal, he asks that no costs of appeal be authorized under RAP 14. Legal Financial Obligations are defined as restitution, costs, fines, and other assessments as required by law. RCW 9.94A.760. Trial courts must make an individualized finding of current and future ability to pay before the court it imposes LFOs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This is because the legislature intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual's circumstances. *Id.* In recognizing that "national and local cries for reform of broken LFO systems demand" review of LFO orders, this court must make finding of Mr. Ortuno-Perez's ability to pay before imposing costs in this case. *Id.* at 835, 838.

In fact, no discretionary costs were imposed against Mr. Ortuno-Perez in the judgment and sentence. CP 157. The trial court waived all non-mandatory fees, including court costs and recoupment fees for the costs of counsel. CP 157; 12/18/14RP 97. It found him indigent for the purposes of appeal. 12/18/14RP 97. Based on the evidence of his continued indigence, and without a basis to conclude otherwise, this court should not assess appellate court costs against him in the event he does not substantially prevail on appeal.

F. CONCLUSION.

Mr. Ortuno-Perez's conviction should be reversed and a new trial ordered. If his conviction is not reversed, no costs should be ordered on appeal because he remains indigent while serving a long prison sentence and any possible resources should be put toward the restitution allotted the victim's family.

DATED this 11th day of December 2015.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 72849-1-I
)	
SANTIAGO ORTUNO-PEREZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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