

FILED
FEB 22, 2012
Court of Appeals
Division III
State of Washington

COA NO. 29645-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

VINCENTE RUIZ,

Appellant.

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

The Honorable Cameron Mitchell, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in allowing the State to call a witness to the stand knowing he would refuse to answer questions put to him on Fifth Amendment grounds.

2. The court violated appellant's constitutional right to confront the witnesses against him in allowing the State to pose questions to a witness implicating appellant as the murderer knowing the witness would refuse to answer on Fifth Amendment grounds.

3. The prosecutor committed misconduct when he called a witness to the stand knowing the witness would refuse to answer leading questions implicating appellant as the murderer and that he could not provide extrinsic evidence to support the innuendo contained in those questions.

4. The court erred in failing to grant a mistrial based on the witness taking the stand to invoke the Fifth Amendment.

5. The court deprived appellant of his constitutional right to present a complete defense in excluding identification evidence.

6. The court erred in admitting evidence of appellant's prior arrest for an unrelated offense under ER 404(b).

7. The court erred in failing to grant a mistrial based on reference to appellant's earlier arrest.

8. Cumulative error violated appellant's due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Outside the presence of the jury, Pedro Mendez-Reyna made it clear that he would refuse to answer any questions put to him on Fifth Amendment grounds. The trial court, over appellant's objection, nonetheless ordered Mendez to take the stand for the purpose of allowing the prosecutor to ask leading questions implicating appellant as the murderer. In so doing, did the court violate appellant's constitutional right to confront the witnesses against him? Did the prosecutor commit misconduct in seeking to convict appellant by means of innuendo?

2. The State relied on a store receipt found in a car linked to appellant as evidence that appellant committed the crime. The receipt showed a purchase of ammunition of the same caliber as that used in the shooting. When shown photo montages, the store owner could not positively identify Ruiz as being present when the ammunition was purchased, but did identify another individual. The court granted the State's request to exclude this identification evidence because the owner was deceased at the time of trial. Is reversal required because the court denied appellant his constitutional right to present a complete defense?

3. Did the court err in allowing the State to elicit evidence of appellant's prior arrest over defense objection on ER 404(b) grounds because the evidence was unnecessary and unfairly prejudicial?

B. STATEMENT OF THE CASE

In 1987, the State charged Vincente Ruiz with five counts of aggravated first degree murder and one count of attempted first degree murder. CP 762-65. A mistrial was declared in 2008. 2RP 95-99. A second mistrial was declared in June 2010. 1RP 966-69; CP 21-31. A jury found Ruiz guilty in a third trial. CP 21-31. The court imposed a mandatory sentence of life imprisonment without the possibility of parole. CP 4-14. This appeal follows. CP 3.

1. Introductory Facts

On October 13, 1987, five men were shot to death at Medina's auto body shop in Pasco. 1RP¹ 1088, 1478-79, 2673, 2924-36. Aldo Montes-

¹ The verbatim report of proceedings is referenced as follows: 1RP - 31 consecutively paginated volumes consisting of 5/5/10, 5/6/10, 5/10/10, 6/7/10, 6/8/10, 6/9/10, 6/10/10, 6/11/10, 6/21/10, 6/22/10, 9/17/10, 11/9/10, 11/12/10, 11/17/10, /11/18/10, 11/19/10, 11/22/10, 11/23/10, 11/24/10, 11/29/10, 11/30/10, 12/1/10, 12/2/10, 12/3/10, 12/6/10, 12/7/10, 12/8/10, 12/9/10, 12/10/10, 12/13/10, 12/14/10, 12/15/10, 12/16/10, 12/17/10, 12/20/10, 1/20/11; 2RP - one consecutively paginated volume consisting of 9/8/08, 9/9/08 and 9/11/08; 3RP - one consecutively paginated volume consisting of 9/18/08 and 5/14/10; 4RP - one consecutively paginated volume consisting of 6/14/10 and 6/15/10; 5RP - 6/17/10.

Llamas was wounded but survived. 1RP 3209. Montes was the only eyewitness to the shooting. 1RP 3209, 3219-3224. Back in 1987, Montes went by the false name of Jesse Rocio. 1RP 3209, 3273-74. He used that false name in a variety of circumstances, including court cases, immigration investigation, and driver's license procurement. 1RP 1114-15, 2057, 3274-85, 3287.

On October 13, 1987, Rocio was working at Medina's Body Shop. 1RP 3211-12. Luis Montes-Llamas, using the false name of Clifford Medina, owned the body shop. 1RP 2329, 3210-11, 3285-86. Medina was Rocio's brother. 1RP 3210. Sergeant Chambers, one of the officers involved in the case, considered Medina a drug dealer who probably engaged in narcotics trafficking. 1RP 1291, 1339. A federal drug investigation culminated in the execution of search warrants and arrests on October 13, 1987, shortly before the shooting took place. 1RP 1618, 1621-30, 1895-97, 3212.

2. Rocio's Version of Events

On October 13, 1987, Rocio, along with Medina and Medina's girlfriend, saw federal officers conducting a search at Eighth and A Street. 1RP 3212-14, 3290. Rocio and his group were joking and making fun of the people being searched. 1RP 3215, 3291. The people being searched noticed they were being laughed at. 1RP 3215.

At trial, Rocio identified "Antonio" and Vincente Ruiz as the subjects of the search. 1RP 3214-15. In an earlier statement to Detective Montelongo shortly after the shooting, Rocio said he never saw Ruiz there. 1RP 3303-04, 3306, 3591. In that earlier statement, he also stated he did not know if Ruiz's relatives were there. 1RP 3306. Instead, Rocio identified a family by the nickname of "Tatamals" as being present. 1RP 3592. Rocio also told Montelongo that he was positive the shooters came from Eighth and A Street. 1RP 3597.

Rocio went back to the body shop after laughing at the men being searched. 1RP 3216. Five other men were at the shop. 1RP 3216-17. Two mechanics were there as well. 1RP 3219. Two other people came into the shop. 1RP 3219. Rocio identified Ruiz at trial as one of these men. 1RP 3219-20. Rocio testified, "I look up, I saw him, but I didn't mind none of that because I had no relationship with them." 1RP 3220. Rocio saw the two men arrive in a light blue RX-7. 1RP 3225, 3335.

The two men talked to the mechanics and then walked out of the shop. 1RP 3220. Rocio testified, "we didn't mind, you know. We had nothing to do with the people that walk in." 1RP 3221. Rocio kept working on a car. 1RP 3221. He felt a poke in his back. 1RP 3221. He turned around and saw Ruiz holding two guns. 1RP 3221. Rocio testified he recognized one of the guns as a .357 and insisted the other gun was not

a .22. 1RP 3231-32. Rocio did not recognize the other man with Ruiz but had seen them together before. 1RP 3221-22. This other man was holding a rifle. 1RP 3222, 3232-33.

Ruiz said, "that's over." 1RP 3222. The men in the body shop were rounded up. 1RP 3222-23. Rocio did not take what was happening seriously. 1RP 3222, 3224. He went back to work on the car. 1RP 3224. Gunfire erupted. 1RP 3224, 3233. Rocio dove under the car. 1RP 3224. He later got up and saw the others lying there. 1RP 3224. The two men with the guns were gone. 1RP 3224-25. Rocio drove his vehicle to the Public Safety Building, which housed the police station. 1RP 3226.

3. Rocio's Initial Description of Suspects

At about 7 p.m., Rocio approached the public window at the Public Safety Building. 1RP 1123. According to the police services specialist on duty that night, Rocio said two Mexican males shot him and his five friends. 1RP 1123-25. The two men had driven what he described as a dark or black '79 to '80 Mazda "HR-7." 1RP 1125. Montes said the shooting occurred after "the drug raid." 1RP 1125, 1141.

Rocio also spoke with undersheriff Carle. 1RP 3177-80. When asked if he knew who had shot him, Rocio responded "no, he had seen them on the streets, that if he was showed some photos he may be able to identify them." 1RP 3179. Rocio himself testified he told Carle that he

did not know the names of anyone who shot him. 1RP 3297. According to Carle, Rocio commented he thought the shooting might have been drug-related. 1RP 3179. Carle further testified that Rocio expressed his belief that he was shot with a .22. 1RP 3179, 3186.

4. Post-Shooting Scene

A number of officers went to Medina's shop and observed the bodies. 1RP 1478-80. A car in the shop had a seat cushion pulled out. 1RP 2357. A detective testified drug trade operators hide drugs under seats for purpose of transport. 1RP 2357.

Spent shell casings were on the floor. 1RP 1479-80. Later testing showed cartridges found at the scene were .223 caliber manufactured by Winchester and all fired from the same weapon. 1RP 2484, 2486, 2502, 2710-23. Several kinds of known firearms could have fired the .223 caliber bullets. 1RP 2517-18. Some bullet fragments recovered from the scene came from a .357 Magnum or .38 caliber firearm. 1RP 2519, 2528. The cause of death for the five men was later determined to be multiple gunshot wounds. 1RP 2924-36. Rocio had a non-penetrating gunshot wound to the abdomen, likely caused by a ricocheted bullet. 1RP 2178-88.

Rocio acknowledged there would have been dust under the car he said he dove under at the time of the shooting. 1RP 3313-14. The

evidence technician who processed the scene did not observe any smear marks in the dust under the car. 1RP 2767, 2770-72.

5. Later Description Of Suspects

Detective Montelongo spoke with Rocio at the hospital later that evening. 1RP 1483. Rocio initially said two young Mexicans came in armed with pistols and an automatic rifle and started shooting. 1RP 1530, 1644. According to Montelongo, Rocio gave a description of a suspect vehicle as a RX-7, "silver in color, or dark in color." 1RP 1496, 1644-45. According to Officer Allen, Rocio described the suspect vehicle as a gray Mazda RX-7 with blue stripes. 1RP 2060.

When asked at the hospital who did it, Rocio told Detective Montelongo "you know who they are. They call them Calentones." 1RP 1485, 1531. Rocio then said "Vincente." 1RP 1485. Montelongo understood "Calentones" to refer to the Mendez family. 1RP 1486, 1531. Vincente Ruiz's full name is Vincente Ruiz-Mendez. 1RP 1568-69.

At Montelongo's direction, Detective Monroe made a photo montage that included Ruiz. 1RP 1487, 1490, 1647. Rocio picked out Ruiz as the one who shot him. 1RP 1491-92.

Clifford Medina, the body shop owner, spoke with Sergeant Chambers and named "Vincente Mendez" as a suspect, giving a description of a blue Camaro. 1RP 1362-63, 1387, 1445-46.

6. Rocio Denies Any Drug Involvement

Rocio denied involvement with drugs and denied that drugs were in Medina's shop. 1RP 3325-26. Rocio claimed he did not know if Medina was preparing cars to transport drugs. 1RP 3327. He conceded the seats had been removed from the car being worked on in the shop on the day of the shooting. 1RP 3216, 3327.

7. Rivera's Version of Events

Cecilia Rivera was the girlfriend of Elicio Llamas, one of the men killed that night. 1RP 3684-86. Elicio was a cousin to brothers Rocio (Aldo Llamas-Montes), Clifford Medina (Luis Montes), and David Montes. 1RP 3685. Rivera testified the men dealt drugs and transported drugs from Pasco to Chicago. 1RP 3686. According to Rivera, Elicio fixed cars to get them prepared for drug smuggling. 1RP 3687-88. Depending on the shipment size, seats or motors would be removed to install the drugs. 1RP 3687-88. She saw people taking apart vehicles for this purpose at David Montes's body shop. RP 3709.

A man by the name of Aguila was the head of the drug group that included Rocio and Medina. 1RP 3691-92. Antonio Mendez was Medina's business associate and would meet at the body shops, the restaurant owned by David Montes, and Rocio's residence. 1RP 3686-87, 3692-93. Antonio Mendez was Ruiz's cousin. 1RP 1568-69.

Rivera lived with Elicio, Rocio and others who were involved in the drug trade. 1RP 3688-89. Packaged cocaine was stored in the attic. 1RP 3689. Both Rocio and Elicio carried a gun every day. 1RP 3693-94.

A half hour or hour before the shooting took place on October 13, 1987, Rocio drove up and told Elicio to come with him in an anxious and hurried manner. 1RP 3695-96. They went to the body shop. 1RP 3696. About a half hour or hour later, another car later pulled up to Rivera's residence. 1RP 3694, 3696. Three people were inside. 1RP 3694. Aguila was sitting in the back. 1RP 3694. Rivera recognized the driver, who had been to the house before, based on his "bushy eyebrows" and inset eyes.² 1RP 3694, 3704-05.

Aguila came to the door and asked for Rocio. 1RP 3694-96. Rivera told him that Rocio was at the body shop. 1RP 3696. Aguila left. 1RP 3696-97. Rivera heard gunshots afterwards. 1RP 3697. Later that night, Rivera saw the driver and passenger at the hospital where Rocio was being treated. 1RP 3699-3700. David Montes and Medina were in the emergency room with their brother Rocio. 1RP 3699.

² Rivera thought the driver looked "like family" because the Montes family had the same bushy eyebrows and eye shape. 1RP 3704. Rivera picked Ruiz as the driver from a montage. 1RP 3704, 3706. She also identified Ruiz in court based on the eyes. 1RP 3711-13. Antonio Mendez had the same sort of eyes as Vincente Ruiz. 1RP 3705.

Rivera went to Mexico and left a book with her father-in-law that contained names and license plate numbers. 1RP 3701. Rivera expressed her belief to her father-in-law that Rocio and David Montes had something to do with the shooting. 1RP 3702. The father-in-law turned the book over to David Montes and Clifford Medina (Luis Montes). 1RP 3701. When Rivera returned to Pasco, David Montes choked Rivera and told her to "never say a word." 1RP 3702-03. Rocio's girlfriend had a gray, dark and dirty RX-7. 1RP 3697.

8. Police Search Of Residences

David Gamino managed an apartment building at 1530 North Ninth in Pasco. 1RP 1992-93. Ruiz rented apartment D in this building. 1RP 1995-96. A cousin or brother lived with Ruiz. 1RP 1996-97, 2054. Gamino knew Ruiz to drive a pickup truck. 1RP 1998. Sergeant Chambers went to the North Ninth apartment building after the shooting and saw a dark gray late '70's, early '80's Mazda RX-7 parked outside. 1RP 1294-95, 1392.

22 sacks of marijuana were found in apartment D. 1RP 1764-67, 3192-93. A scale found in the kitchen cupboard was of a kind typically used in narcotics trafficking. 1RP 1767-69. A .223 caliber shell was found in the bedroom closet. 1RP 1771. Both bedrooms were furnished and two people appeared to be living there. 1RP 1788-90.

Police received information that Ruiz was living in Kennewick. 1RP 1416, 3095-96. Denise Garcia, Ruiz's girlfriend at the time, lived in a Kennewick apartment. 1RP 2108. When police arrived at the address, there was a blue Firebird parked at the back of the apartment building — a type of car commonly mistaken for a Camaro and very close to the description of the vehicle given by Medina. 1RP 1421-22, 1424. Antonio Mendez was the owner of the blue Firebird. 1RP 1422-23. Police searched Garcia's residence and found an empty box of .38 caliber ammunition, Blazer brand. 1RP 2848, 2851, 2853-54.

Garcia had one son by Ruiz and was pregnant with another child. 1RP 2114. She testified Ruiz did not come over to her apartment on the night of October 13, 1987. 1RP 2110. Detective Montelongo testified that Garcia had told him that Ruiz and cousin Mendez-Reyna came to her apartment in Kennewick at about 7 p.m. on October 13, 1987. 1RP 1555-56. Police were unable to locate Ruiz or Mendez-Reyna. 1RP 1556.

9. Additional Facts Come To Light

Gilbert Rodriguez worked as a mechanic with Pete Ramos in the backyard of Medina's shop. 1RP 2971-73. Rodriguez did not recall anyone arriving at the body shop or seeing anybody when he left on the day of the shooting. 1RP 2973, 2989. Detective Montelongo testified Rodriguez identified Ruiz in 1987 as leaving the shop. 1RP 3159.

Sergeant Monroe testified Rodriguez picked Ruiz out of a montage in 1994 as a person who came to the shop before the murder. 1RP 3070-71.

The owner of the Pump & Pack mini-mart thought she saw the suspect's car described in a newspaper article about the murder at her store on the day of the shooting. 1RP 2639, 2642-43. She described it as a navy or midnight blue RX-7. 1RP 2642. She remembered two Hispanic teenage boys coming into the store. 1RP 2643-44. Store videotape showed two people entered the store and made a purchase. 1RP 2645-46, 2649-50. One wore a straw hat with a dark band. 1RP 2649.

Police found the hat and some beef jerky in the RX-7 seized from the North Ninth address. 1RP 1875-77. In the car, police found a receipt stamped 6:03 p.m. from Phil's Sporting Goods for .223 caliber ammunition. 1RP 1778-81. A fingerprint lifted from the car window of the RX-7 matched Ruiz. 1RP 1781-83, 2445-47, 3014.

Mauricio Ortiz testified that back in 1987 he was in negotiations to sell his RX-7 Mazda to a man he knew as "Oscar," making a less than positive identification of Ruiz as this man in court. 1RP 1703-06, 1730-31. Ortiz consented to letting Ruiz test drive the RX-7. 1RP 1707. Ortiz described the RX-7 as brown or brown with blue sparkles. 1RP 1731, 1733. Ortiz testified that around noon on the day of the shooting, Ortiz

saw Ruiz wearing a straw hat with a black band. 1RP 1537-38, 1707-09, 1721. Ortiz picked Ruiz out of a photo montage. 1RP 1534-35, 1712.

Ortiz agreed the Mendez brothers bore a striking resemblance to one another. 1RP 1720-21, 1737-39. At one point Ortiz thought he was talking to Vincente Ruiz on one occasion when it was actually a brother. 1RP 1720-21, 1734. Another witness testified a lot of the Mendez family members look alike and people get confused. 1RP 3770, 3796-98. The Mendez brothers and their cousins look alike in terms of eyes and eyelashes. 1RP 3774. Antonio Mendez was often confused with Vincente Ruiz. 1RP 3770-71.

In 2007, Detective Montelongo made contact with Ruiz in Los Angeles. 1RP 1558-59. During interrogation, Ruiz said he left Pasco in 1987 because he had a pre-planned vacation in Mexico. 1RP 1561-63, 1660-64, 1678-80. Evidence showed Ruiz left for Mexico to attend his sister's Quinceanera, which is a special celebration of a girl's 15th birthday. 1RP 3764-68, 3782, 3785.

10. Defense Theory

The defense theory was that this was a case of misidentification, either mistaken or deliberate on the part of Rocio. 1RP 1051, 1061, 3994. As for mistaken identification, Ruiz had family members in the area that had remarkably similar features, including distinctive dark set eyes. 1RP

1056-57. The motive for the shooting, meanwhile, was wrapped up in drugs and drug dealing. IRP 1052, 4063-66. Antonio Mendez may have shot the men in retaliation for being laughed at by Rocio and Medina during the federal drug bust. IRP 1057-58, 4062-63. Another theory was that Rocio was the shooter seeking to blame Ruiz. IRP 4063-67.

C. ARGUMENT

1. THE COURT AND PROSECUTOR VIOLATED RUIZ'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND THE STATE CANNOT BEAR ITS BURDEN OF OVERCOMING THE PRESUMPTION THAT THE ERROR WAS PREJUDICIAL.

Criminal defendants have a constitutional right to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. Defense counsel exercises a defendant's right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974).

The court wrongly allowed the State to call Pedro Mendez-Reyna to the stand knowing he would refuse to answer questions on Fifth Amendment grounds. The prosecutor committed misconduct in posing

questions to Mendez that implicated Ruiz as the shooter. The court's erroneous ruling and the prosecutor's misconduct violated Ruiz's constitutional right to confront the witnesses against him. Reversal of the convictions is required.

a. The Prosecutor Placed Innuendo Before The Jury.

The State wanted to call Ruiz's cousin, Pedro Mendez-Reyna, to the stand. 4RP 63-66, 69-77. Mendez pled guilty to the Medina body shop murders in 1994. 4RP 68, 70. Outside the presence of the jury, Mendez made it clear he would invoke his Fifth Amendment right not to answer questions on the advice of his attorney Zenon Olbertz. 1RP 2623-24; 4RP 58, 61-63. The court determined this was an invalid invocation of the privilege because Mendez's appeal options were exhausted. 1RP 2601-02; 4RP 68-69.

The State insisted Mendez be put on the stand so that the jury could observe his refusals to answer. 1RP 2604-08, 2611-14; 4RP 69-77. The State contended it was entitled to pose leading questions concerning the crimes so that the jury could draw the inference that Mendez was covering up for Ruiz. 1RP 2605. The defense vociferously objected. 1RP 2282-83, 2608-11, 2614-15, 2618-19; 4RP 70, 72-77, 152. The court permitted the State to do as it wished, relying on State v. Barone, 329 Or. 210, 986 P.2d 5 (Or. 1999). 1RP 2284-85, 2615-18; 4RP 68-69.

The following exchange took place in front of the jury:

BY MR. JENNY:

Q Sir, is your name Pedro Mendez-Reyna?

A That's my name.

Q Referring to the defendant here in court today, second man from the wall; is that gentleman your first cousin?

A I plead the fifth. I don't know that man.

Q I'm sorry, sir?

MR. OLBRETZ: Excuse me, Your Honor?

A I'm pleading the fifth.

MR. OLBRETZ: Excuse me, Your Honor, can I --

MR. JENNY: Your Honor, the State would ask that the witness be instructed to answer the question.

THE COURT: Mr. Mendez-Reyna, the court is directing you to answer the question.

THE WITNESS: Find me in contempt. I'm not -- I came here, I told --

MR. OLBRETZ: Excuse me, Your Honor.

THE WITNESS: -- four different times.

THE COURT: Excuse me.

MR. OLBRETZ: Can I talk to Mr. Mendez-Reyna for a moment?

THE COURT: Yes, you may.

(Whereupon Mr. Olbretz conferred with the witness.)

THE COURT: Mr. Mendez-Reyna, the court is directing you to answer the State's questions.

THE WITNESS: I take the fifth.

THE COURT: The court acknowledges your claim and does not believe at this time you have a right to remain silent, so the court is directing you to answer the questions. So Mr. Jenny, would you like to ask your question, please?

Q (By Mr. Jenny) Is the defendant, Vincente Ruiz, who is here in the courtroom today, is he your first cousin?

A I plead the fifth.

MR. JENNY: Your Honor, the State would ask he be instructed to answer the question.

THE COURT: Mr. Mendez-Reyna has been instructed to answer the question. Mr. Mendez-Reyna, are you refusing to -- well, he has refused to answer the question.

THE WITNESS: I plead the fifth.

THE COURT: The court has directed him to do so.

Q (By Mr. Jenny) Was your father and his mother brother and sister?

A I plead the fifth.

MR. JENNY: And again, Your Honor, we'd ask he be instructed to answer the question.

THE COURT: The court is instructing the witness to answer the question.

THE WITNESS: I plead the fifth.

Q (By Mr. Jenny) Move on to the next question. I want to take you back to October 13, 1987. On that date were you residing in Seattle, Washington?

A Plead the fifth.

MR. JENNY: Your Honor, we'd be asking he be instructed to answer the question.

THE COURT: The court is instructing Mr. Mendez-Reyna to answer the questions posed by the State at this time.

Q (By Mr. Jenny) On October 13th, 1987 were you visiting in Pasco, Washington?

A I plead the fifth.

MR. JENNY: Your Honor, we ask he be instructed to answer that question.

THE COURT: The court is instructing Mr. Mendez-Reyna -- I have heard your assertion of the Fifth Amendment. The court does not believe it's applicable in this particular matter, is directing you to answer questions from the State at this time, and any questions that may be asked by the defense; and the court is making that order regarding all questions asked at this time.

THE WITNESS: I'm pleading the fifth to all of them.

Q (By Mr. Jenny) All right. Mr. Mendez-Reyna, on October 13th, 1987, did you have contact with the defendant, Vincente Ruiz, who you see here in the courtroom today in the City of Pasco, Washington?

A I plead the fifth.

Q Did the defendant, Vincente Ruiz, ask your assistance in confronting six individuals with whom he had had a problem earlier in the day?

A I plead the fifth.

Q Did you accompany the defendant, Vincente Ruiz, to a business called Phil's Sporting Goods in Pasco, Washington?

A Plead the fifth.

Q Did you see ammunition being purchased at Phil's Sporting Goods for a Mini 14 rifle?

A Plead the fifth.

Q After leaving Phil's Sporting Goods, did you get back into a motor vehicle with the defendant?

A I plead the fifth.

Q Did you see that there were three firearms in the motor vehicle, a Mini 14 rifle, a .357 Magnum handgun and a .38 special handgun?

A I plead the fifth.

Q After leaving Phil's Sporting Goods, did you and the defendant, Vincente Ruiz, proceed to Javier's Seafood Restaurant to look for the individuals?

A I plead the fifth.

Q After not finding the individuals there, did you then go to Medina's Body Shop in Pasco, Washington?

A I plead the fifth.

Q Did you encounter two individuals outside Medina's Body Shop who appeared to be mechanics?

A Plead the fifth.

Q After the two mechanics had left, did you and the defendant, Vincente Ruiz, that you see here in the courtroom today, enter Medina's Body Shop carrying guns?

A I plead the fifth.

Q Was the defendant, Vincente Ruiz, carrying two handguns and were you carrying the Mini 14 rifle?

A I plead the fifth.

Q Once you were in the body shop, were all six individuals present rounded up and placed into one room?

A I plead the fifth.

Q Did some argument ensue at that point?

A Same, I plead the fifth.

Q Did you see the defendant, Vincente Ruiz, open fire with the handguns he had in his possession?

A I plead the fifth.

Q Did you also open fire with the Mini 14 rifle?

A I plead the fifth.

Q Did you see individuals fall to the ground?

A Plead the fifth.

Q Did you see any of the individuals in the body shop with firearms?

A I plead the fifth.

Q Okay. Did all of the individuals fall to the ground as far as you could see?

A I plead the fifth.

Q Did any of them appear to be moving?

A I plead the fifth.

Q Did you check the individuals to see if they were still alive?

A I plead the fifth.

Q Is it not correct none of the individuals, none of the individuals in the body shop, beside yourself and the defendant, had firearms that you could see?

A I plead the fifth.

Q Did you then leave the body shop without checking the individuals?

A I plead the fifth.

Q After leaving Medina's Body Shop on October 13, 1987, did you and the defendant, Vincente Ruiz, go first to Reno, Nevada, then to Los Angeles and then to Mexico?

A Plead the fifth.

Q All right, Mr. Mendez-Reyna, take a look at the individual in the courtroom today, second man from the right, your cousin, Vincente Ruiz, was that the man who was with you on October 13th, 1987, and along with you, shot and killed those other men?

A I plead the fifth.

MR. JENNY: Your Honor, the State would ask this witness be held in contempt.

THE COURT: Court will address that issue outside the presence of the jury. Ask the bailiff to escort our jurors out of the courtroom, please.

(Whereupon the jury was taken out of the courtroom.)

MR. CONNICK: Your Honor, at this point we'd again move for a mistrial with the prosecutor raising his voice, screaming at a witness, his witness that he called, that he knew would not respond to the questions put to him and to exercise his right to Fifth Amendment rights. Your Honor, that was uncalled for, screaming at the witness a minute ago. And basically screaming for contempt. We think it's prejudicial to our client, the conduct of the prosecutor, and we move for mistrial.

THE COURT: Thank you. Mr. Jenny.

MR. JENNY: Well, Your Honor, I'm sure I'm physically capable of screaming, but I was simply asking in a -- trying to -- attempting to ask him a question very consistent with the questions asked in State versus Barone.

THE COURT: Court's going to deny the motion for a mistrial in this case. The court has previously indicated that had found that Mr. Mendez-Reyna did not at this time have a Fifth Amendment right to refuse to answer questions regarding this particular case and that he was facing no additional jeopardy based on any answers he might give. Mr. Mendez-Reyna, apparently knowing that, I understand with the advice of counsel, did continue to refuse to answer those questions despite the court's ordering him to do so. The court will find Mr. Mendez-Reyna in contempt of this court. There really is not any additional sanction that I believe I

can place upon Mr. Mendez-Reyna at this time. The court is not going to attempt to do so. The court does in fact find Mr. Mendez-Reyna in contempt of this court for his refusal to answer the questions. Like to inquire of defense counsel if they wish to inquire of Mr. Mendez-Reyna.

MR. CONNICK: No, Your Honor, in view of the direct and assertion of Fifth Amendment rights.

THE COURT: Any objection to us releasing Mr. Mendez-Reyna at this time as a witness?

MR. THOMPSON: No, Your Honor.

MR. JENNY: No, Your Honor.

THE COURT: So we're going to excuse you, Mr. Mendez-Reyna, as a witness.

1RP 2627-35.

The defense later filed a written motion for mistrial based on the questioning of Mendez. CP 244-55; 1RP 3371-73, 3377-78. The court treated it as a motion for reconsideration and denied it. 1RP 3378-81.

b. The Court Wrongly Allowed Mendez To Take The Stand Knowing He Would Invoke The Fifth Amendment Privilege.

In State v. Nelson, the prosecutor called an accomplice by the name of Patrick to the stand, knowing he would assert his Fifth Amendment privilege not to testify. State v. Nelson, 72 Wn.2d 269, 281, 432 P.2d 857 (1967). The prosecutor asked a series of questions outlining the State's theory of the case against Nelson. Nelson, 72 Wn.2d at 278-79.

The Supreme Court held "[t]he conduct of the prosecutor in placing Patrick on the stand, knowing that Patrick intended to claim his privilege against self incrimination to questions relating to the alleged

crime, and seeking to get the details of Patrick's purported confession before the jury by way of impermissible inferences drawn from the witness' refusal to answer the questions propounded, constituted a denial of Nelson's right to confrontation under the Sixth Amendment." Id. at 285.

Ruiz's constitutional right to confrontation was likewise violated. The prosecutor knew Mendez would refuse to answer questions by invoking the privilege against self-incrimination. The prosecutor, with the trial court's blessing, put Mendez on the stand for the purpose of allowing the jury to witness the prosecutor asked loaded questions containing the details of Mendez's earlier description of the crime given as part of his plea agreement. Those suggestive questions detailing the State's theory of the case allowed the jury to draw impermissible inferences from Mendez's refusal to answer them.

Nelson involved a witness's valid invocation of the Fifth Amendment privilege. Id. at 287 (noted only in passing). Nelson did not limit its analysis and holding to cases where a valid privilege exists.

Citing the Oregon Supreme Court's decision in Barone, the State was able to convince the trial court that an exception to the rule exists where such invocation of the privilege is invalid. Barone held a witness did not possess a valid Fifth Amendment privilege to refuse to testify, which meant the prosecutor could call him as a witness knowing he would

refuse to testify. Barone, 329 Or. at 233. According to Barone, the jury could properly draw the inference that the witness was trying to protect the defendant through his silence. Id.

Barone is poorly reasoned. A number of jurisdictions hold it makes no difference whether a witness validly invokes the privilege and that any inference drawn against the defendant from a witness's refusal to testify is improper. As the Minnesota Supreme Court recognized, "defendants are just as likely to suffer from unfair inferences when a witness asserts an invalid Fifth Amendment privilege as when a witness asserts a valid privilege." State v. Morales, 788 N.W.2d 737, 752 (Minn. 2010). Regardless of whether the privilege was valid, the jury hears the witness claim that privilege, and every refusal provides the jury with an opportunity to make unfavorable inferences. Morales, 788 N.W.2d at 752.

"[T]he validity or invalidity of the privilege does not focus on the real issues: Does the prosecutor know that the witness will refuse to testify and will the defendant suffer possible prejudice?" People v. Gearns, 457 Mich. 170, 198, 577 N.W.2d 422 (Mich. 1998), overruled on other grounds, People v. Lukity, 460 Mich. 484, 596 N.W.2d 607 (Mich. 1999). The Oregon Supreme Court in Barone failed to grasp this simple principle.

"Juries are no less likely to draw improper inferences from an invalid assertion of privilege than from a valid assertion. In either case,

the witness avoids cross-examination." United States v. Griffin, 66 F.3d 68, 71 (5th Cir.1995); see also Shockley v. State, 335 So.2d 659, 662 (Ala. Cr. App. 1975) ("It is no answer to the prejudice done defendant that the witness . . . had waived his immunity from testifying. Regardless of such waiver . . . so that he could not lawfully refuse to testify, he did refuse and continued to do so during the extended questioning."), aff'd, 335 So.2d 663 (Ala. 1976); Martin v. United States, 756 A.2d 901, 906 (D.C. 2000) ("The rationale for not requiring a witness on the stand to assert a Fifth Amendment claim before the jury applies with substantially equal force to cases such as the one before us, where the witness refused to testify simply because he was unwilling to do so.").

It makes no difference to the hapless defendant that a witness invokes an invalid privilege as opposed to a valid one. The prejudicial effect remains in either event. Indeed, it is "more prejudicial to permit the jury to observe that the recalcitrant witness (a person likely to be associated in the juror's minds with the defendant) elects to remain silent notwithstanding the order of the court that he testify." Commonwealth v. DuVal, 453 Pa. 205, 217, 307 A.2d 229 (Pa. 1973).

The unstated premise of Barone is that a jury is entitled to draw prejudicial inferences against a defendant because the defendant is responsible for the invalid exercise of a witness's Fifth Amendment

privilege. But "[a] defendant's constitutional right of confrontation can be violated even when the witness improperly exercises the Fifth Amendment privilege so long as the defendant did not actively procure the witness' refusal to answer the prosecutor's questions on that ground." People v. Shipe, 49 Cal. App.3d 343, 349, 122 Cal. Rptr. 701 (Cal. Ct. App. 1975).

In Douglas v. Alabama, for example, the United States Supreme Court did not even reach the issue of whether a witness properly invoked the privilege against self-incrimination because the record did not show the witness's refusal to answer was procured by the accused. Douglas v. Alabama, 380 U.S. 415, 420, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965) (prosecutor violated right to confrontation in reading from alleged confession of the witness, pausing to ask if the witness made the statement, in response to which the witness invoked the right not to testify).

There is nothing in the record to show Ruiz procured Mendez's assertion of the Fifth Amendment. Ruiz "did not invite or instigate the refusal; he had to sit with his hands tied while the parade of innuendoes and inferences went on and was denied by such procedure the right of cross-examination. The only thing the defendant could do was to object, which he frequently did, and suffer the consequences." Shockley, 335 So.2d at 662.

c. The Prosecutor Committed Misconduct In Putting Mendez On The Stand And In Seeking Conviction By Means Of Innuendo.

Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A prosecutor commits misconduct in calling a witness to the stand knowing the witness will invoke the Fifth Amendment privilege. People v. Barajas, 145 Cal. App.3d 804, 806, 193 Cal. Rptr. 750 (Cal. Ct. App. 1983).

Moreover, "[a] person being tried on a criminal charge can be convicted only by evidence, not by innuendo." State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). A prosecutor who asks questions that imply the existence of a prejudicial fact must prove that fact. State v. Miles, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007).

It is therefore flagrant misconduct for a prosecutor to ask questions implying the existence of a prejudicial fact and then fail to introduce extrinsic evidence of the fact after the witness fails to confirm its existence. See, e.g., Yoakum, 37 Wn.2d at 143-44 (prosecutor tried to impeach defendant by questioning him about transcript of taped interview with police, but did not offer the interview as extrinsic evidence); Miles, 139 Wn. App. at 881, 888 (prosecutor committed flagrant misconduct by questioning defense witnesses about Miles's participation in specific

boxing matches during the time Miles claimed to be incapacitated without producing extrinsic evidence of those fights); State v. Babich, 68 Wn. App. 438, 441-42, 842 P.2d 1053 (prosecutor tried to impeach defense witnesses by questioning them about contents of recorded conversation; prosecutor did not enter conversation into evidence after witnesses either denied making the statements or stated they could not remember making them), review denied, 121 Wn.2d 1015, 854 P.2d 42 (1993).

The prosecutor attempted to place evidence before the jury that he could not prove. The State presented no extrinsic evidence of the statements Mendez made following his guilty plea. In fact, the State knew it could not produce that extrinsic evidence at trial without further violating Ruiz's confrontation rights because Ruiz has never had the opportunity to cross-examine Mendez. Without such extrinsic evidence, the prosecutor's questions were a "flagrant attempt to place evidence before the jury that appeared to have been otherwise unavailable." Miles, 139 Wn. App. at 888.

A prosecutor's impeachment of a witness by referring to extrinsic evidence that is never introduced violates a defendant's right to confrontation where the focus of the questioning is to impart evidence within the prosecutor's personal knowledge without the prosecutor formally testifying as a witness. Babich, 68 Wn. App. at 446. Regardless

of whether the prosecutor's deliberate use of Mendez's refusal to answer leading questions constitutes impeachment or something else, the confrontation violation remains. Ruiz was unable to cross-examine the prosecutor as to his personal knowledge of the prejudicial facts implied in the prosecutor's questions.

d. This Constitutional Error Was Not Harmless Beyond A Reasonable Doubt.

Prosecutorial misconduct that violates the right to confrontation is constitutional error. Babich, 68 Wn. App. at 446. The trial court's erroneous ruling is also constitutional error because it violated Ruiz's right to confront the witnesses against him. Nelson, 72 Wn.2d at 285.

Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Various bits of circumstantial evidence linked Ruiz in some sense to the shooting, but that evidence does not necessarily lead to the conclusion that Ruiz was the shooter. The only eyewitness to the crime was Jesse Rocio. 1RP 3219-3224. Rocio identified Ruiz as the shooter. But Rocio had credibility problems. Aside from his extensive use of a

false name, the jury heard testimony from Rivera showing Rocio was a liar. 1RP 1114-15, 2057, 3274-85, 3287. Rocio denied any involvement with drugs, but Rivera testified from firsthand observation that Rocio was involved in drug smuggling. 1RP 3325-26, 3686-89. Evidence showed the car Rocio was working on the night of the shooting at Medina's body shop had its seat removed, which is consistent with drug smuggling activity. 1RP 2357, 3216, 3327. The State's own police witness acknowledged Medina, the owner of the body shop where Rocio worked, was a drug trafficker. 1RP 1291, 1339.

Rocio is the one who identified Ruiz as the shooter, but Rocio was a shady character. 1RP 2767, 2770-72, 3313-14. The jury must have known it was not getting the whole story. Jurors had reason to conclude that Rocio, if he lied about his involvement in drugs, may have been lying about other things, such as Ruiz's involvement in the shooting.

Rocio's credibility was further damaged because his account of the shooting was contradicted by crime scene evidence. Rocio testified he dove under the car when the shooting started, but the officer processing the scene did not observe any marks in the dust under the car that would have been there had Rocio actually dove under it as he said.

Rocio also made inconsistent statements. At trial, Rocio maintained he and his group laughed at Ruiz and the Mendez family at

Eight and A Street as they were being searched. 1RP 3212-15, 3290-91.

In an earlier statement to Detective Montelongo shortly after the shooting, Rocio said he never saw Ruiz there but was positive the shooters came from Eighth and A Street. 1RP 3303-04, 3306, 3591, 3597.

Rocio's credibility was suspect. Meanwhile, questions posed to Mendez had a devastating impact on Ruiz:

Q After the two mechanics had left, did you and the defendant, Vincente Ruiz, that you see here in the courtroom today, enter Medina's Body Shop carrying guns?

A I plead the fifth.

Q Was the defendant, Vincente Ruiz, carrying two handguns and were you carrying the Mini 14 rifle?

A I plead the fifth.

Q Once you were in the body shop, were all six individuals present rounded up and placed into one room?

A I plead the fifth.

Q Did some argument ensue at that point?

A Same, I plead the fifth.

Q Did you see the defendant, Vincente Ruiz, open fire with the handguns he had in his possession?

A I plead the fifth.

Q Did you also open fire with the Mini 14 rifle?

A I plead the fifth.

Q Did you see individuals fall to the ground?

A Plead the fifth.

[. . .]

Q All right, Mr. Mendez-Reyna, take a look at the individual in the courtroom today, second man from the right, your cousin, Vincente Ruiz, was that the man who was with you on October 13th, 1987, and along with you, shot and killed those other men?

A I plead the fifth.

1RP 2632-33.

Such questions were flagrantly suggestive. Their clear import was to present Mendez as a co-participant who personally saw Ruiz gun the men down. A juror harboring any doubt about Rocio's credibility and whether the remaining circumstantial evidence showed Ruiz committed premeditated murder beyond a reasonable doubt would have been inclined to convict based on the facts obviously implied by the prosecutor's questions. The State's questions were heavily fact-laden and went directly to the substance of the charged offenses. The questions were leading and represented an extensive narrative of the murders, as well as events leading up the shooting to which no one else had testified.

In relation to Mendez's testimony, the court instructed the jury as follows: "Questions asked a witness that go unanswered are not substantive evidence of any matter, to the extent a question may suggest a particular answer, it should not be considered by you as any proof of such matters." CP 53 (Instruction 6).

The State cannot show beyond a reasonable doubt that this instruction erased the prejudice. In Nelson, the same type of error required reversal despite the presence of instruction stating "The defendant is to be tried only on the evidence which is before the jury, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted, or answers given by witnesses which have been

stricken and which you have been instructed to disregard." Nelson, 72 Wn.2d at 284. The Court concluded "We think that this instruction was wholly ineffective to dispel inferences that could have been improperly drawn by the jury from Patrick's claim of his privilege." Id.

The same conclusion follows here. The jury was not instructed to disregard Mendez's testimony. The jury was therefore expected to make use of it in some fashion. Indeed, it was instructed to consider all the evidence in reaching its verdict, which would have included Mendez's refusals to answer the State's loaded questions. CP 46 (Instruction 1).

Further, the spectacle involving Mendez's continual refusal to answer questions while being directed by the court to answer them must have left an indelible impression on jurors. The presentation was dramatic. See United States v. Lacouture, 495 F.2d 1237, 1240 (5th Cir.) ("[A] claim of Fifth Amendment privilege is likely to be regarded by the jury as high courtroom drama and a focus of ineradicable interest"), cert. denied, 419 U.S. 1053, 95 S. Ct. 631, 42 L. Ed. 2d 648 (1974). The prosecutor was screaming at Mendez-Reyna. 1RP 2634. The jury listened to 29 questions posed by the prosecutor and listened to Mendez invoke the Fifth Amendment as many times. 1RP 2627-35. Jurors repeatedly heard the court order Mendez to answer the questions and Mendez's expressed defiance. No juror could be expected to forget what happened.

Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). On this record, the trial court committed reversible error in allowing Mendez to take the stand knowing he would not answer. The prosecutor's misconduct in using that tactic to its advantage likewise constitutes reversible error. And because Ruiz suffered prejudice, the court erred in failing to grant his request for a mistrial. A trial court abuses its discretion when it fails to order a mistrial after jurors hear prejudicial evidence that denies a defendant his right to a fair trial. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). This Court should reverse the convictions and remand for a new trial.

2. THE COURT VIOLATED RUIZ'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE WHEN IT EXCLUDED FAVORABLE IDENTIFICATION EVIDENCE.

According to a police report, the owner of Phil's Sporting Goods could not positively identify Ruiz from a photo montage as being present at the time the ammunition was purchased. When shown a separate montage, the owner identified Antonio Mendez as being present. The court granted the State's request that the defense not be allowed to elicit this identification evidence because the owner was deceased. The court

violated Ruiz's right to present a complete defense in excluding the evidence because no compelling interest justified its exclusion.

a. The Court Excluded The Identification Evidence At The State's Request.

Captain Raymond of the Pasco Police Department prepared a report regarding photomontages he showed to Phil Van Hoy, the owner of Phil's Sporting Goods, on October 15, 1987. CP 223. One montage contained Vincente Ruiz and the other contained Antonio Mendez. CP 223. According to Captain Raymond report, Van Hoy was unable to pick Ruiz from the photo line up: "He stated he just wasn't sure." CP 223.

When Captain Raymond showed Van Hoy the second photo lineup, "he immediately picked out #4 as being there the night the ammo was bought. Picture #4 is Antonio Mendez a brother to Vincente." CP 223. Van Hoy remembered "two Mexicans" asking for .223 ammo. CP 223. The report continues: "Phil couldn't remember which one bought the ammo, just #4 was definitely there." CP 224.

During opening statement at the second trial, defense counsel referenced a montage. 1RP 165. The prosecutor objected. 1RP 165. At side bar, the prosecutor said defense counsel was preparing to mention a photo montage that was shown to Phil Van Hoy. 1RP 165. Van Hoy was an unavailable witness because he had died. 1RP 165-66. The prosecutor

argued the evidence was not admissible under ER 801(d)(1)(iii), which provides a prior statement by witness is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person[.]" 1RP 166. The court sustained the State's objection on the ground that evidence regarding Van Hoy's identifications failed to qualify as non-hearsay under ER 801(d)(1)(iii). 1RP 167-68.

When Captain Raymond took the stand at the second trial, there was further discussion about the court's ruling. 1RP 569-71. The court reiterated Captain Raymond would not be allowed to testify "regarding any identification, or lack thereof, by that witness." 1RP 571.

At the third trial, the court sustained the State's objection to a defense attorney question posed to Raymond regarding the Van Hoy identification. 1RP 1804. The court found that attorney in contempt because "it's clear that the Court had ruled previously that any reference to any identification by Mr. Van Hoy would not be admissible." 1RP 1806.

The defense later asked the court to reconsider its ruling because the jury was left with the impression that Ruiz had been picked from the montage. 1RP 3350. The defense argued, "we should be allowed . . . to bring up the fact that montages were shown and Mr. Ruiz was not

identified by people, and that we're entitled to do that as part of his defense." 1RP 3350. The court did not rule on the open door argument and it appears the issue was not revisited. 1RP 3353.

b. The Identification Evidence Should Have Been Admitted Because It Would Not Have Impaired The Fairness Of The Fact Finding Process.

Due process requires an accused be given a meaningful opportunity to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. A court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right, such as the right to present a defense, is reviewed de novo. Iniguez, 167 Wn.2d at 280; State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory are

relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978).

There can be no doubt that Van Hoy's identification statements were relevant. One defense theory of the case was that Ruiz was not the shooter and that Antonio Mendez may have been. 1RP 1051-52, 1056-58, 1061, 3994, 4062-67. 4062-63. The State, however, used the store receipt for ammunition found in the RX-7 as a link in the chain of evidence pointing to Ruiz as the shooter. 1RP 3961-62.

"[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). Relevant defense evidence is inadmissible only if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. Hudlow, 99 Wn.2d at 15-16; Darden, 145 Wn.2d at 621.

There is no compelling State interest requiring the exclusion of that identification evidence. It was undisputed Van Hoy did not pick Ruiz out of a photo montage as the man who bought the ammunition at the sporting goods store shortly before the shooting occurred. It was undisputed Van Hoy picked Antonio Mendez — the same man the defense theorized was the real shooter — as being present when the ammunition was purchased.

That information comes straight from Captain Raymond, who showed Van Hoy the montages containing Ruiz and Antonio Mendez. CP 223.

This relevant evidence would not have disrupted the fairness of the fact-finding process. The State did not show exclusion was necessary to further a compelling interest. Jones, 168 Wn.2d at 720; Darden, 145 Wn.2d at 622; Hudlow, 99 Wn.2d at 15-16; see also Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (state evidentiary rules that infringe upon a weighty interest of the accused to present evidence in his defense are not controlling when they are arbitrary or disproportionate to the purposes they were designed to serve). The court therefore erred in relying on the hearsay evidentiary rule as a basis to exclude this evidence.

c. Error In Excluding The Identification Evidence Was Not Harmless Beyond A Reasonable Doubt.

The denial of the right to present a defense is constitutional error. Crane, 476 U.S. at 690; Jones, 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. Miller, 131 Wn.2d at 90.

As set forth in section C. 1. d., supra, there was a basis for a rational trier of fact to conclude the State had failed to prove its case beyond a reasonable doubt. The identification evidence erroneously

excluded by the court would have supported the defense theory of the case while undermining the State's theory. Reversal is required because the State cannot show beyond a reasonable doubt that error in excluding identification evidence favorable to the defense theory of the case could not have possibly contributed to the guilty verdict. State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993); State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999). Even if this error, considered in isolation, does not merit reversal, it contributes to the cumulative error ground for reversal set forth in section C. 4., infra.

3. THE COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF RUIZ'S PRIOR ARREST UNDER ER 404(b).

Over defense objection, the trial court ruled the State could elicit evidence that Ruiz had been previously arrested and that police used a "booking" photo from that arrest as a basis to establish identity for the crimes charged. The court abused its discretion in so ruling because evidence showing Ruiz's arrest on an unrelated crime was irrelevant to any fact of consequence and unfairly prejudicial.

a. Ruiz's Previous Arrest On An Unrelated Matter Was Repeatedly Referenced At Trial.

During opening statement, the prosecutor told the jury "Detective Monroe was able to find a booking photo from December 11th, 1983 of the defendant in this case. He used that booking photo, which was about four years old at the time to make up a photo montage of six photographs of similar looking people." 1RP 1037. The prosecutor returned to the booking photo theme a short time later, telling the jury that the crime lab's computer database stored the prints of individuals who have been booked in county jails across the state. 1RP 1042-43. The prosecutor then told the jury "[a] match was found to a print taken from an arrest which had occurred on December 3rd, 1983." 1RP 1043.

Defense counsel objected. 1RP 1043. Counsel argued evidence of the 1983 arrest and booking photo was impermissible ER 404(b) evidence. 1RP 1043-45. The State maintained the arrest evidence was admissible because the defense made identification an issue in the case. 1RP 1043-44. Defense counsel responded there was "just no need to talk about the arrest and circumstances of the arrest. We can simply say we have his photo. We have his fingerprints." 1RP 1044.

The court overruled the objection on the basis that the prejudice of the evidence did not outweigh its probative value. 1RP 1045-46.

According to the court, "we're talking about a situation we're comparing photographs and fingerprint evidence. I believe there does have to be a basis for some foundation or a basis for that comparison." 1RP 1045.

Resuming opening statement, the prosecutor doggedly repeated "The print was ran and the print matched both the print taken from the 1983 arrest of the defendant and the prints taken from the defendant in 2007 when he was brought back to Franklin County." 1RP 1047-48.

Before the first witness took the stand, the parties returned to the issue outside the presence of the jury. 1RP 1062-68. The prosecutor wanted to elicit testimony that Ruiz was arrested and identified in 1983, and how the officer "booked him in and what they did when they booked him in, which was take his prints and take his picture." 1RP 1062. The prosecutor maintained it was "necessary" because identity was in dispute and that it was "critical" that "we be able to make very clear where we're getting fingerprints from and things like that." 1RP 1062. The prosecutor contended prejudice was limited because it was a "DUI" arrest. 1RP 1063.

Defense counsel responded, "The identity is an issue, no question. The identification, how it occurred, is an issue. There is no issue -- we're not challenging that the police obtained a photo of Mr. Mendez or his fingerprints." 1RP 1063. The defense pointed out "they can say that, did you obtain photos and fingerprints from Mr. Ruiz in 1983. They don't

need to talk about the circumstances. It puts us in a position where should we let them think he somehow got arrested in 1983 for some kind of heinous crime like the one he's charged with now or do we tell them, so they don't speculate, that it was for a misdemeanor DUI. We shouldn't have to be in that position. Prior arrests should be not be brought in." 1RP 1064. Counsel reiterated "the fact that the police obtaining a photo and fingerprints from Mr. Ruiz is not at issue. That's not what's being challenged." 1RP 1064.

The court maintained its ruling that the State should be allowed to explain the source of the fingerprint and photo obtained in 1983. 1RP 1067-68. The court further ruled the circumstances and basis of the arrest would be inadmissible. 1RP 1067-68.

The State's first witness was Officer Davison. When asked if he had occasion to have contact with Ruiz in 1983, the officer answered, "on a contact I made an arrest for --." 1RP 1085. The court sustained defense counsel's relevancy objection. 1RP 1085-86. The officer then said he did a traffic stop and ascertained the driver's identity. 1RP 1086.

The prosecutor asked if the officer booked Ruiz into Franklin County jail. 1RP 1087. The officer said yes. 1RP 1087. The prosecutor asked what name he was booked under. 1RP 1087. The court overruled defense counsel's relevance objection. 1RP 1087. The officer responded

Ruiz was booked under "Ruez." 1RP 1087. The officer then testified in response to the prosecutor's questions that Ruiz's photograph and fingerprints were taken in the process of being booked into jail: "That's a general thing. They fingerprint and photograph each arrestee." 1RP 1087.

Detective Monroe subsequently testified that he obtained a "booking photograph" of Ruiz and included it in a photo lineup. 1RP 1861. The prosecutor asked where the "booking photo" came from. 1RP 1863. Monroe answered it came from the Franklin County Jail. 1RP 1863. The prosecutor asked which "booking photo" was used. 1RP 1863. The defense objection on grounds of relevance was sustained. 1RP 1863.

Officer Hathaway later testified he sent the latent fingerprint found on the RX-7 and Ruiz's fingerprints to the Washington State Patrol (WSP). 1RP 2088-90. Before Officer Hathaway took the stand, defense counsel argued Hathaway should not be allowed testify about the criminal database used by the WSP crime lab because it "gets into 403, 404 potential bad acts evidence." 1RP 1990. Counsel wanted the testimony structured to avoid bad acts evidence. 1RP 1990. The prosecutor was agreeable, simply asking Officer Hathaway if he was "in fact able to obtain fingerprints from *public records* to send in for comparison for both [Pedro Mendez and Ruiz]?" 1RP 1990-91, 2091 (emphasis added).

WSP fingerprint analyst Marcoe testified her unit kept a repository of fingerprints for anyone that applies for a job in criminal justice or "who is arrested for any crime, misdemeanor or felony." 1RP 2432. Marcoe later testified she received a police report containing a fingerprint photocopy bearing the name "Ruiz, Vincente, date of birth 10-27, 1964. Date of arrest 12-11, 1983. He sent a 10-print fingerprint card from a Franklin County Sheriff's Office -- . . . -- arrest." 1RP 2435.

Defense counsel objected. 1RP 2435-36. The jury was removed. 1RP 2436. Counsel stated his understanding based on prior communication with the prosecutor that Marcoe would be referring to "official records" as opposed to bringing up Ruiz's criminal history. 1RP 2436-37. Counsel initially asked the court to strike Marcoe's remark about the 1983 criminal record and further moved for a mistrial "because they did it again, related their -- they keep bringing up criminal history from 1983." 1RP 2437.

The court denied the motion for mistrial. 1RP 2439. The defense withdrew its request for an instruction to disregard because it would "highlight what has happened." 1RP 2440. The court asked Marcoe to refer to "official records" rather than "arrest records." 1RP 2441.

b. Evidence of Prior Arrest Was Irrelevant And Unfairly Prejudicial.

ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion. A trial court must always begin with the presumption that evidence of prior misconduct is inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The burden of demonstrating a proper purpose for the admission of ER 404(b) evidence is on its proponent. State v. Gresham, __Wn.2d __, __P.3d __, 2012 WL 19664 at *5 (2012).

Evidence that a defendant has been previously arrested on an unrelated matter qualifies as ER 404(b) evidence. State v. Acosta, 123 Wn. App. 424, 433, 98 P.3d 503 (2004). Testimony on Ruiz's prior arrest and "booking" photos arising from that arrest carried the danger of raising a prejudicial inference that he is a criminal type of person. That testimony constituted prior bad act evidence under ER 404(b).

To admit evidence of prior misconduct, the trial court must identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Under ER 404(b), evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). "Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The fact that Ruiz had been arrested and jailed on an unrelated offense in 1983 did not make it any more probable that he committed premeditated murder in 1987. There is no dispute the photograph itself used in the montage and testimony regarding the photograph/montage was relevant because it explained how the police obtained a positive identification of Ruiz from Rocio and others. But reference to Ruiz's prior arrest and description of the photo as a "booking" photo unnecessarily called attention to Ruiz's criminal history. Such reference and description was unnecessary to prove an essential ingredient of the crime.

Similarly, it was unnecessary to reference Ruiz's prior arrest as a basis to support the fingerprint comparison testimony presented by State witnesses. In fact, the testimony of fingerprint analysts Hathaway and Marcoe was capable of being made simply by referring to "official" or "public" records as the source of the fingerprint information. 1RP 2091,

2437, 2441. The same reference to "official" or "public records" could have been made in relation to the source of Ruiz's photo used in the montage. There was no need to show the source of the photo and fingerprints was Ruiz's previous arrest. The defense was not challenging the accuracy of the photo and fingerprints.

"Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Ruiz's prior arrest and the repeated allusions to that arrest throughout the course of the trial lacked substantial probative value. The inherent prejudice derived from that evidence compelled its exclusion.

The trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion if the trial court correctly interprets the rule. DeVincentis, 150 Wn.2d at 17. Defense counsel's objection to testimony related Ruiz's prior arrest should have been sustained. The court abused its discretion in admitting evidence of Ruiz's prior arrest and reference to that arrest through the term "booking photo" because the facts do not meet the requirements of the correct ER 404(b) standard and the decision is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997) (articulating abuse of discretion standards).

c. There Is A Reasonable Probability That The Improper Admission Of Prior Misconduct Affected The Outcome.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The arrest evidence falls into this category. A juror's natural inclination is to reason that having previously committed a bad act, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

The repeated references to Ruiz's prior arrest essentially told the jury that Ruiz was a criminal or at least had committed a prior bad act that justified his arrest. As set forth in section C. 1. d., supra, there was a basis for a rational trier of fact to find the State failed to prove its case beyond a reasonable doubt. If a rational juror entertained any reasonable doubt that Ruiz was not the shooter, that doubt was likely laid to rest by the inference that Ruiz was a criminal. This is not evidence the jury was likely to forget.

Evidentiary error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The fact of Ruiz's prior arrest was presented to the jury time and again. Evidence of other acts of misconduct "inevitably shifts the jury's attention

to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987).

The admission of the ER 404(b) evidence unfairly prejudiced Ruiz because it allowed the jury to infer Ruiz had criminal propensities. Ruiz's convictions should be reversed because error in admitting the improper testimony was not harmless. Because the evidentiary error in this case prejudiced Ruiz's right to a fair trial, the court erred in failing to grant Ruiz's motion for mistrial after Marcoe referenced the arrest. 1RP 2439. A trial court abuses its discretion when it fails to order a mistrial after jurors hear prejudicial evidence that denies a defendant his right to a fair trial. Escalona, 49 Wn. App. at 254. Even if this error, considered in isolation, did not affect the outcome, it contributes to the cumulative error ground for reversal set forth in section C. 4., infra.

4. CUMULATIVE ERROR VIOLATED RUIZ'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. V and XIV; Wash. Const. art. 1, § 3. A defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the

outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984);
State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

As discussed above, an accumulation of errors affected the outcome of Ruiz's trial and produced an unfair trial. These errors include (1) violation of the right to confrontation based on Mendez's invocation of the Fifth Amendment on the stand as set forth in sections C. 1., supra; (2) violation of the right to present a complete defense as set forth in section C. 2., supra; and (3) improper admission of prior arrest evidence as set forth in section C. 3., supra.

D. CONCLUSION

For the reasons stated, Ruiz requests reversal of his convictions and remand for a new trial.

DATED this 22nd day of February 2012

Respectfully Submitted,

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State v. Vincente Ruiz

No. 29645-8-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 22nd day of February, 2012, I caused a true and correct copy of the **Amended Opening Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Shawn Sant
Franklin County Prosecutor's Office
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Signed in Seattle, Washington this 22nd day of February, 2012.

X *Patrick Mayovsky*

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	COA NO. 29645-8-III
vs.)	
)	
VINCENTE RUIZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF FEBRUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF FEBRUARY 2012.

x *Patrick Mayovsky*