

NO. 43384-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

REYCEL PEREZ-MARTINEZ,

Appellant.

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

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to honor appellant's constitutional right to counsel.

2. Prosecutorial misconduct in closing argument denied appellant a fair trial.

Issues pertaining to assignments of error

1. Appellant moved for substitution of counsel three months prior to trial, and he renewed his motion four days before trial started. The court denied the motions without speaking to appellant privately and without asking specific questions regarding appellant's dissatisfaction with counsel. Where the court failed to conduct sufficient inquiry into the substantial conflict between appellant and counsel in response to appellant's timely motions, was appellant's constitutional right to counsel violated?

2. Despite the court's instructions to the jury on self-defense, the prosecutor argued in closing argument that there was no evidence of self-defense because appellant claimed the shooting was an accident. Where the prosecutor's argument misstated the law on self-defense and shifted the burden of proof to the defense, is reversal and remand for a new trial required?

B. STATEMENT OF THE CASE

1. Procedural History

On July 1, 2011, the Clark County Prosecuting Attorney charged appellant Reyce Perez-Martinez with one count of attempted first degree murder. CP 1. The information was later amended to add a charge of first degree assault based on the same conduct and adding allegations that the offense was committed with a firearm. CP 4. The case proceeded to jury trial before the Honorable Scott Collier. The jury found Perez-Martinez not guilty of attempted murder but entered a guilty verdict on the assault charge and found he was armed with a firearm. CP 144-47. The court entered a high-end standard range sentence plus a 60-month firearm enhancement, for a total sentence of 183 months. CP 219-20. Perez-Martinez filed this timely appeal. CP 229.

2. Substantive Facts

Eric Luna-Claro immigrated to the United States from Cuba in 2001. 2RP¹ 135. He settled in Vancouver, Washington, and he began selling drugs. 2RP 139. He and his wife enjoyed the lifestyle he provided with his drug proceeds, including a house filled with nice belongings and trips to Las Vegas, California, and Florida. 2RP 139-40; 3RP 391-92.

¹ The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—12/12/11 and 3/8/12; 2RP—3/12/12; 3RP—3/13/12; 4RP—3/14/12; 5RP—3/15-16/12, 4/27/12.

Luna-Claro and Reycel Perez-Martinez had been close friends in Cuba, and they reconnected after Perez-Martinez immigrated to the United States in 2005. 2RP 136-37; 4RP 517-18. Luna-Claro visited Perez-Martinez in Florida, and Perez-Martinez visited Luna-Claro in Washington, at one point staying with Luna-Claro and his family for about two months in the spring of 2011. 2RP 137, 141, 167; 3RP 388; 5RP 518. Luna-Claro's wife Antonia was not as fond of Perez-Martinez. She felt he had overstayed his welcome, and she argued with her husband about that. 3RP 376, 394. In April 2011, Perez-Martinez returned to Florida. 4RP 531.

On June 28, 2011, Perez-Martinez and another man, Arnaldo, arrived at Luna-Claro's home. 4RP 535, 551. The three men went into the garage to talk. 2RP 145. A few minutes later Luna-Claro had been shot in the abdomen, and Perez-Martinez and Arnaldo left, taking the gun. 2RP 146; 4RP 557. Once they were gone, Luna-Claro threw bags of drugs into the attic, so that police would not find them. 2RP 157; 3RP 383.

Over the next few days, Luna-Claro and his wife gave police conflicting versions of what had happened, lying to hide the fact that Luna-Claro was a drug dealer. 2RP 156, 211; 3RP 251, 255, 260. Police eventually found large quantities of cocaine and methamphetamine in the

house, and Luna-Claro was charged with possession of controlled substances with intent to deliver. 2RP 156-57; 3RP 255; 4RP 499.

Surveillance video from Luna-Claro's home showed Perez-Martinez arriving at and leaving the house on the day of the shooting, and Luna-Claro told police Perez-Martinez was the shooter. 3RP 253; 4RP 481-83. Perez-Martinez was arrested and charged with attempted murder. CP 1.

At trial Luna-Claro testified that Perez-Martinez called him in 2011 saying he needed a job, so he taught Perez-Martinez how to sell drugs. 2RP 140. They met up in southern California and returned to Washington, with Luna-Claro driving. 2RP 141. Perez-Martinez stayed with Luna-Claro and his wife for a few days, then went to Florida for two weeks, then returned to Washington, where he stayed with Luna-Claro and his wife for about two months. 2RP 141, 179-81.

Luna-Claro testified that he helped Perez-Martinez make connections with a Mexican drug cartel. 2RP 142, 150, 174-75. When Perez-Martinez returned to Florida in April 2011, Luna-Claro thought he would be selling drugs there. 2RP 143. But on June 28, 2011, Perez-Martinez and another man showed up at his house unexpectedly. 2RP 143. According to Luna-Claro, the three men moved to the garage to talk, where Perez-Martinez pulled out a gun and shot him. 2RP 145-46. He

said Perez-Martinez then approached and tried to shoot again, but the gun did not fire, so Perez-Martinez kicked him a few times and then left. 2RP 147.

Luna-Claro testified that his wife came to the door of the garage after he was shot and Perez-Martinez grabbed her by the shoulders as he was leaving. 2RP 207. He also said he heard Perez-Martinez tell the other man to grab the receiver from the security cameras. 2RP 208. Luna-Claro testified he believed the man with Perez-Martinez was a member of the Mexican cartel. He explained that he owed the cartel \$150,000 because a load of drugs he was responsible for was confiscated by law enforcement when the driver was arrested. 2RP 192. Luna-Claro testified that he believed Perez-Martinez and the other man were there to kill him. 2RP 149, 193.

Antonia Luna-Claro testified that when Perez-Martinez and the other man arrived at the house on June 28, 2011, Luna-Claro told her to take their daughter to the bedroom while the men moved into the garage. 3RP 379. About five minutes later she heard a gunshot, and she went to the garage, where she saw Perez-Martinez standing over Luna-Claro with a gun in his hand. 3RP 379. She yelled at Perez-Martinez to leave, and after a few seconds he walked toward the door. 3RP 380. Antonia testified that Perez-Martinez stopped and told the other man to get the

security cameras, although she had never told police about that. 3RP 381, 399. She testified that she told the men she would turn the surveillance system off, and they left. 3RP 381. On his way out, Perez-Martinez told her not to say anything. 3RP 381. Although Luna-Claro had testified that Perez-Martinez grabbed Antonia as he was leaving the garage, she testified he never touched her. 2RP 207;3RP 381.

Police investigating the shooting noted there were four surveillance cameras outside the house, and the digital recording device was located in the attic. 3RP 271, 284. The device was seized and the recording retrieved from it showed Perez-Martinez putting a gun into his waistband as he left the home. 4RP 481. In the garage police found a shell casing from a .40 caliber semi-automatic handgun as well as a live round under the pool table. 3RP 272-73. Both rounds were the same brand. 3RP 280. Although both were sent to the crime laboratory for analysis, no fingerprints were identified on them. 3RP 281-82. No other ammunition and no weapons were found in the home. 3RP 304. None of the evidence collected in the house was connected with Perez-Martinez. 3RP 312.

A firearms expert from the Clark County Sheriff's Office testified that he examined Luna-Claro's clothing for gunpowder residue and found none. 3RP 426, 432. After conducting a series of test fires using ammunition similar to that found in Luna-Claro's garage, the expert

concluded that no gunpowder residue was visible on clothing when the gun was fired from a distance of five feet. 3RP 433-34.

Perez-Martinez testified that he came to Washington in February 2011 at Luna-Claro's request. 4RP 519-20. Luna-Claro had asked him to drive a car from California to Washington, and Perez-Martinez went to California as instructed, where he was met by a Mexican man who was working with Luna-Claro. 4RP 521. Perez-Martinez understood that the plan was to put drugs in the car, but he did not agree to that. After delaying the trip for a few weeks, Perez-Martinez convinced Luna-Claro to pick him up in California and drive him to Washington. 4RP 522-24. Antonia was with Luna-Claro, and she did not seem happy with his decision to bring Perez-Martinez home with them. 4RP 525. Perez-Martinez stayed with Luna-Claro and his family for a few days, and then they all flew to Florida. 4RP 526.

When Perez-Martinez returned to Washington in March, Luna-Claro paid for his flight and met him at the airport. Again, Antonia was not happy to see him when he arrived. 4RP 527-28. During this visit, Luna-Claro took Perez-Martinez to rent a storage unit. The unit was registered in Perez-Martinez's name, because Luna-Claro said it would help Perez-Martinez establish residency in Washington. 4RP 528-29. Perez-Martinez became uncomfortable with the arrangement and asked

Luna-Claro to take his name off the unit, and Luna-Claro agreed. 4RP 529.

After about a month, Luna-Claro drove Perez-Martinez back to Florida. 4RP 530-31. Then, in June 2011, Luna-Claro asked him to move to Washington to help him with his business. 4RP 534. Luna-Claro paid for Perez-Martinez's flight to Las Vegas, where he was to meet with another man. 4RP 534. A Mexican man named Arnaldo met Perez-Martinez at the airport in Las Vegas, and they drove to Washington together. 4RP 535.

When they arrived in Vancouver, they went to the storage facility where Luna-Claro had previously rented a unit in Perez-Martinez's name. Luna-Claro had asked Arnaldo to rent another unit, instructing him to use Perez-Martinez's name again. Perez-Martinez did not agree with this plan, and he refused to fill out the paperwork. 4RP 537. He also discovered that Luna-Claro had continued to use the other storage unit in his name. 4RP 580.

Perez-Martinez and Arnaldo then drove to Luna-Claro's house. Luna-Claro had told them he did not want Antonia to see them, so they parked a block or so away, where Luna-Claro said he would meet them. When Luna-Claro did not show up, Perez-Martinez became upset and walked to the house. Arnaldo followed. 4RP 539.

Luna-Claro invited them in after sending Antonia to another room. Perez-Martinez asked Luna-Claro about the storage unit, and they began arguing. 4RP 551-52. During the argument, Luna-Claro slowly pulled a gun from his waistband. 4RP 554. Perez-Martinez was afraid for his life, and without thinking, he lunged at Luna-Claro and wrestled the gun from him. 4RP 554-55. As he was grabbing the gun away, it went off, shooting Luna-Claro in the abdomen. 4RP 554. Perez-Martinez did not remember pulling the trigger. He estimated the gun was about four feet away from Luna-Claro when it went off. 4RP 555.

Perez-Martinez testified that he did not have a gun when he went to Luna-Claro's house, and he did not see Arnaldo with a gun. 4RP 540. He also denied trying to shoot Luna-Claro a second time or kicking him. 4RP 556. After the shooting, Luna-Claro said the police would likely respond to the gunshot, and he told Perez-Martinez to leave and take the gun. 4RP 557. Perez-Martinez left with the gun, later disposing of it along a highway. 4RP 560.

Perez-Martinez testified that he was not a member of a Mexican drug cartel, and He denied Luna-Claro's claim that he was sent by the cartel to shoot Luna-Claro. 4RP 560-61. He testified he did not bring a gun to the house. Rather, he was defending himself when he grabbed the gun away from Luna-Claro and the gun went off accidentally. 4RP 568.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO HONOR PEREZ-MARTINEZ'S CONSTITUTIONAL RIGHT TO COUNSEL.

On December 1, 2011, Perez-Martinez filed a motion for new counsel. CP 16-28. The parties addressed the motion at a hearing on December 12, 2011². 1RP 4. Trial counsel informed the court that he believed someone who spoke English had prepared the motion, he suspected Perez-Martinez had not even read it, and he did not believe there were any legitimate grounds to remove him from the case. 1RP 4-5. The court then asked Perez-Martinez if he wanted a new attorney. Perez-Martinez said he did, because he did not feel counsel was doing a good job for him. 1RP 5. He felt his attorney was working for the prosecutors, and he believed counsel had said he killed somebody. 1RP 6. The court stated there must have been some miscommunication, because Perez-Martinez was never charged with killing anyone, and counsel said that the information charging attempted murder was read to Perez-Martinez through the interpreter. 1RP 6.

The court assured Perez-Martinez that his attorney did not work for the prosecutor, although they might work cooperatively to negotiate some issues. 1RP 9. The court denied Perez-Martinez's motion for new

² At all times during the proceedings, Perez-Martinez had the assistance of an interpreter.

counsel, stating that the main factor driving its decision was that appointing a new attorney would mean starting the case over, and there was no basis to discharge counsel. 1RP 8-9.

Defense counsel then moved for a continuance, indicating that critical DNA analysis and computer forensics analysis had not yet been completed. Counsel stated he would need at least three more months to prepare for trial. 1RP 10-13. The court asked Perez-Martinez if he would agree to the continuance, saying that opposing it would be dramatically tying defense counsel's hands in presenting the defense. 1RP 14. Perez-Martinez agreed, and despite the court's concern that substitution of counsel would delay proceedings, the court granted defense counsel's motion for a continuance. 1RP 14. The court urged Perez-Martinez to work with defense counsel. 1RP 14.

On March 8, 2012, Perez-Martinez again asked the court to appoint a new attorney. He told the court, "I'm not in agreement with the defense that he is giving me. I don't trust him. I wouldn't like to go to trial with him." 1RP 21. The court found the request problematic, saying it was raised on "the eve of trial," and Perez-Martinez should have brought the issue forward "some time ago." 1RP 22. The court again warned that a substitution of counsel would delay the proceedings, but it asked Perez-Martinez to explain why he wanted a new attorney. 1RP 22.

Perez-Martinez explained that counsel had only his testimony for the defense and no other evidence. Further, counsel had told him there would be a counteroffer, and he had kept that in mind. 1RP 23. Trial counsel said that he had approached the prosecutor with an offer which was rejected, and she proposed a counteroffer of 96 months. He presented that to Perez-Martinez, who said he did not want that sentence. 1RP 24. Counsel said he had discussed that offer with Perez-Martinez frequently over the last month. 1RP 24.

The court offered Perez-Martinez time to consult with counsel privately about the State's offer. 1RP 27. Perez-Martinez explained that he did not want to accept the offer, but he disagreed with counsel's representation that he had told the prosecution that, because only counsel had talked to the prosecutor. 1RP 27. When the court repeated that Perez-Martinez could have time to talk to counsel privately about the offer, Perez-Martinez again stated, "I just don't feel like I can trust him. I don't trust him....I wouldn't like to go to trial with him." 1RP 30.

The court told Perez-Martinez that he was not entitled to counsel of his choice. He assured Perez-Martinez that trial counsel was a very experienced attorney. 1RP 30. The court said it was confident counsel would do the best job he could and that he was competent and had the skills necessary to handle the case. 1RP 32-33. Noting again that it was

the eve of trial, the court denied the motion for substitute counsel. 1RP 33. The court recommended that Perez-Martinez cooperate with counsel. 1RP 33. Perez-Martinez told the court, “I mean sincerely without, you know, disrespecting anyone, I really – I don’t want to talk to him.” 1RP 34.

The case proceeded to trial on March 12, 2012, and on March 14, the court indicated that it had received a letter raising issues about trial counsel’s performance. 4RP 542-43. Perez-Martinez stated that a friend had written the letter for him prior to the court’s ruling on his motion for substitute counsel. 4RP 544. The court noted that it was very close to the end of trial, and it did not intend to replace counsel. After making that statement, it inquired whether Perez-Martinez was still requesting new counsel. Perez-Martinez responded that the letter was written based on his ideas. Although counsel appeared to be doing a good job at trial, he was still very afraid. 4RP 545.

A trial court has discretion to grant or deny a motion for substitution of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). Nonetheless, this discretion is constrained by the accused’s constitutional rights. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). A claim of denial of counsel is reviewed de novo. United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998).

Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend VI; Const. art. I, § 22. The right to counsel is violated when a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict, even if the attorney is competent. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); Nguyen, 262 F. 3d at 1003-04. An irreconcilable conflict exists where there is a “serious breakdown in communications.” Nguyen, 262 F.3d at 1003 (citing United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000)). As set forth in Nguyen,

A defendant is denied his Sixth Amendment right to counsel when he is “forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.”

Nguyen, 262 F.3d at 1003 (citing Craven, 424 F.2d at 1169). Where “the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant’s] Sixth Amendment right to effective assistance of counsel.” Moore, 159 F.3d at 1158.

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers (1) the adequacy of the trial court’s inquiry into the conflict, (2) the extent of the conflict between the defendant and his attorney, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724 (citing Moore, 159 F.3d at 1158-59). The trial

court denied Perez-Martinez's constitutional right by improperly denying his motions to substitute counsel.

First, the trial court made an insufficient inquiry into Perez-Martinez's requests for substitute counsel. "For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'" Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). "[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2002). An inquiry is adequate if it "ease[s] the defendant's dissatisfaction, distrust, and concern and provide[s] a sufficient basis for reaching an informed decision." Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing Adelzo-Gonzalez, 268 F.3d at 777).

In Nguyen, the Ninth Circuit Court reversed for violation of the defendant's right to counsel. Finding the trial court court's inquiry into the conflict insufficient, the court noted that the trial court "asked [the defendant] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses." Nguyen, 262 F.3d at 1005. Similarly, in Moore, while "[t]he court did give both parties a chance to speak and made limited inquiries to clarify what was said, ... the

court made no inquiries to help it understand the extent of the breakdown.” Moore, 159 F.3d at 1160. On review the Ninth Circuit reversed based in part on the lower court’s lack of inquiry. Id. at 1161.

Here, the court did not talk to Perez-Martinez privately, nor did it ask specific questions targeted at clarifying Perez-Martinez’s dissatisfaction with counsel, and it interviewed no other witnesses. When considering Perez-Martinez’s first motion, the court asked Perez-Martinez if he was requesting a new attorney. Perez-Martinez gave some examples of why he did not trust trial counsel, and the court merely assured him that there had been a miscommunication but counsel was doing his job. While the court cited the delay a substitution of counsel would require as its main reason for denying Perez-Martinez’s motion, it then granted trial counsel’s request for a three month continuance.

When Perez-Martinez renewed his motion prior to trial, the court again failed to conduct a sufficient inquiry. Even though Perez-Martinez told the court he did not trust trial counsel, he did not want to go to trial with counsel, and he did not even want to talk to him, the court did not question Perez-Martinez privately about the conflict. Again, the court was more concerned with the trial schedule than with Perez-Martinez’s right to counsel. It merely assured Perez-Martinez that trial counsel was competent and that Perez-Martinez was not entitled to counsel of his

choice. The court's inquiry into Perez-Martinez's conflict with counsel was insufficient to protect Perez-Martinez's constitutional right to counsel.

Second, although the record is incomplete because of the court's lack of inquiry, it is clear that the conflict between Perez-Martinez and trial counsel was substantial. Perez-Martinez had completely lost trust in his attorney. He said several times that he did not trust counsel and he would not want to go to trial with him. He declined the court's offer to allow him to consult with counsel privately, because he could not even talk to counsel. The breakdown in the attorney-client relationship constituted a substantial conflict that should have been addressed by granting the motion to discharge counsel. See Moore, 159 F.3d at 1160.

Third, Perez-Martinez's motions for substitute counsel were timely. He first moved for new counsel three and a half months prior to trial. Inexplicably, the court denied the motion because it would delay the proceedings but then granted trial counsel's motion for a three month continuance. Perez-Martinez renewed his motion for new counsel four days before trial started, and the court denied that motion, saying Perez-Martinez should have raised it sooner. In Nguyen the motion was timely when it was made the day trial was set to begin. Nguyen, 262 F.3d at 1003. This factor favors reversal as well.

The trial court violated Perez-Martinez's constitutional right to counsel by denying his motions to substitute counsel and forcing him to work with an attorney with whom he had serious breakdown in communication. The erroneous denial of the motions to substitute counsel is presumptively prejudicial and requires reversal. Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161. The error here requires reversal and remand for a new trial.

2. THE PROSECUTOR'S CLOSING ARGUMENT MISSTATED THE LAW ON SELF-DEFENSE AND SHIFTED THE BURDEN OF PROOF TO THE DEFENSE. THIS MISCONDUCT REQUIRES REVERSAL.

The right to a fair trial is guaranteed by the federal and state constitutions. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. In re Personal Restraint of Glasmann, ___ Wn.2d

___, 286 P.3d 673 (2012) (citing State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984))

It is misconduct for a prosecutor, with all the weight of the office behind him or her, to misstate the applicable law when arguing the case to the jury. See e.g. Davenport, 100 Wn.2d at 762. In this case, the prosecutor committed misconduct in closing argument by misleading the jury as to the law on self-defense.

Before closing arguments, the prosecutor argued against instructing the jury on self-defense. She argued that Perez-Martinez never claimed the gun was pointed at him, only that he dove for the gun when Luna-Claro pulled it out, and the gun accidentally went off. 5RP 622. She argued that Perez-Martinez had to admit doing a criminal act to stop another act, and since he did not, the jury should not be instructed on self-defense. 5RP 624. The court rejected this argument. It noted that there was evidence Perez-Martinez reasonably believed Luna-Claro was going to inflict personal injury when he pulled out a gun in the middle of an argument, and Perez-Martinez did not have to wait until the gun was pointed at him to defend himself. 5RP 627. The court ruled that a self-defense instruction was appropriate, and the prosecutor could argue Perez-Martinez did not use reasonable force. 5RP 630-31.

Instead, the prosecutor argued in closing that there was no evidence of self-defense because Perez-Martinez never said the gun was pointed at him, he was never faced with imminent danger, and he claimed the shooting was an accident. 5RP 651-52. Defense counsel did not object, choosing instead to address the prosecutor's argument by telling the jury it would not have been given a self-defense instruction if there was no evidence of self-defense. 5RP 669.

Whether the defense has presented evidence of self-defense is a question for the trial court in deciding whether to instruct the jury on the law of self-defense. State v. McCreven, ___ Wn. App. ___, 284 P.3d 793, 806 (2012) (citing State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). Once the trial court finds sufficient evidence to warrant a self-defense instruction, the inquiry ends, and the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. Id. The prosecutor's argument here improperly shifted the burden of proof on self-defense. See McCreven, 284 P.3d at 806-07 (where trial court properly instructed jury on self-defense, prosecutor's argument that there was no evidence of self-defense lowered the State's burden of proof and constituted misconduct).

The prosecutor further misstated the law when she told the jury it did not need to consider self-defense because Perez-Martinez claimed the

gun went off accidentally. It is well established that self-defense and accident are not mutually exclusive. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); State v. Callahan, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997).

For example, in Werner, the defendant was confronted by a pack of dogs, and he testified that he pulled out his gun, thinking he could scare them. He also asked the owner to call off the dogs, but the owner refused. The defendant decided to call 911, but when he was fumbling with his cell phone, the gun accidentally discharged. Werner, 170 Wn.2d at 336. The Supreme Court held that the defendant's claim that the gun went off accidentally did not preclude a claim of self-defense. Because he could have reasonably believed the dog owner posed a threat in refusing to call off his dogs, the jury should have been instructed on self-defense. Werner, 170 Wn.2d at 337.

Here, as in Werner, Perez-Martinez testified that he was afraid for his life during the confrontation with Luna-Claro, and in his response to that fear, the gun accidentally went off. Although the court properly instructed the jury on self-defense, the prosecutor told the jury there was no self-defense because Perez-Martinez testified the gun discharged accidentally. Because Perez-Martinez produced some evidence of self-defense, the State had the burden of proving the absence of self-defense

beyond a reasonable doubt. See Walden, 131 Wn.2d at 473-74. The prosecutor's argument that Perez-Martinez's testimony that the gun discharged accidentally automatically defeated a claim of self-defense misstated the law and eased the State's burden.

Defense counsel's failure to object to the prosecutor's misconduct does not preclude review. Reversal is required, notwithstanding the lack of defense objection, if the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict. Charlton, 90 Wn.2d at 664; Belgarde, 110 Wn.2d at 508. The prosecutor's misconduct cannot be deemed harmless unless the record shows there would have been a conviction regardless of the misconduct. Charlton, 90 Wn.2d at 664.

In this case, not only did the prosecutor's argument misstate the well-established law on self-defense, but the court had already ruled that Perez-Martinez's claim of accident did not preclude a finding that he acted in self-defense. 5RP 630-31. The prosecutor's argument in disregard of the law and the court's ruling was flagrant misconduct.

Moreover, there is a substantial likelihood this misconduct affected the jury's verdict. There was no physical evidence to support the State's case, and Luna-Claro and Perez-Martinez were the only witnesses present when the shooting occurred. Thus the State's case came down to whether the jury believed Luna-Claro without reservation, despite Perez-Martinez's conflicting testimony. By arguing that there was no evidence of self-defense, the prosecutor suggested that the burden lay with the defense to prove Luna-Claro wrong. The prosecutor's improper tactics presented the jury with a distorted view of its function, and it is unreasonable to believe the jurors would be able to ignore the prosecutor's misconduct, even given a curative instruction. See, e.g., State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (Where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell."), review denied, 118 Wn.2d 1013 (1992). There is a substantial likelihood the prosecutor's improper closing argument affected the jury's verdict and thus denied Perez-Martinez a fair trial. The Court should reverse and remand for a new trial.

D. CONCLUSION

The trial court failed to honor Perez-Martinez's constitutional right to counsel, and the prosecutor's improper closing argument denied him a

fair trial. His conviction should be reversed and the case remanded for a new trial.

DATED this 26th day of November, 2012.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI
WSBA No. 20260
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Certification of Service by Mail

Today I delivered copies of the Brief of Appellant and Designation of Exhibit in *State v. Reyce Perez-Martinez*, Cause No. 43384-2-II as follows:

Reyce Perez-Martinez DOC# 356885
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
November 26, 2012

NO. 43384-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

REYCEL PEREZ-MARTINEZ,

Appellant.

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

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to honor appellant's constitutional right to counsel.

2. Prosecutorial misconduct in closing argument denied appellant a fair trial.

Issues pertaining to assignments of error

1. Appellant moved for substitution of counsel three months prior to trial, and he renewed his motion four days before trial started. The court denied the motions without speaking to appellant privately and without asking specific questions regarding appellant's dissatisfaction with counsel. Where the court failed to conduct sufficient inquiry into the substantial conflict between appellant and counsel in response to appellant's timely motions, was appellant's constitutional right to counsel violated?

2. Despite the court's instructions to the jury on self-defense, the prosecutor argued in closing argument that there was no evidence of self-defense because appellant claimed the shooting was an accident. Where the prosecutor's argument misstated the law on self-defense and shifted the burden of proof to the defense, is reversal and remand for a new trial required?

B. STATEMENT OF THE CASE

1. Procedural History

On July 1, 2011, the Clark County Prosecuting Attorney charged appellant Reyce Perez-Martinez with one count of attempted first degree murder. CP 1. The information was later amended to add a charge of first degree assault based on the same conduct and adding allegations that the offense was committed with a firearm. CP 4. The case proceeded to jury trial before the Honorable Scott Collier. The jury found Perez-Martinez not guilty of attempted murder but entered a guilty verdict on the assault charge and found he was armed with a firearm. CP 144-47. The court entered a high-end standard range sentence plus a 60-month firearm enhancement, for a total sentence of 183 months. CP 219-20. Perez-Martinez filed this timely appeal. CP 229.

2. Substantive Facts

Eric Luna-Claro immigrated to the United States from Cuba in 2001. 2RP¹ 135. He settled in Vancouver, Washington, and he began selling drugs. 2RP 139. He and his wife enjoyed the lifestyle he provided with his drug proceeds, including a house filled with nice belongings and trips to Las Vegas, California, and Florida. 2RP 139-40; 3RP 391-92.

¹ The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—12/12/11 and 3/8/12; 2RP—3/12/12; 3RP—3/13/12; 4RP—3/14/12; 5RP—3/15-16/12, 4/27/12.

Luna-Claro and Reycel Perez-Martinez had been close friends in Cuba, and they reconnected after Perez-Martinez immigrated to the United States in 2005. 2RP 136-37; 4RP 517-18. Luna-Claro visited Perez-Martinez in Florida, and Perez-Martinez visited Luna-Claro in Washington, at one point staying with Luna-Claro and his family for about two months in the spring of 2011. 2RP 137, 141, 167; 3RP 388; 5RP 518. Luna-Claro's wife Antonia was not as fond of Perez-Martinez. She felt he had overstayed his welcome, and she argued with her husband about that. 3RP 376, 394. In April 2011, Perez-Martinez returned to Florida. 4RP 531.

On June 28, 2011, Perez-Martinez and another man, Arnaldo, arrived at Luna-Claro's home. 4RP 535, 551. The three men went into the garage to talk. 2RP 145. A few minutes later Luna-Claro had been shot in the abdomen, and Perez-Martinez and Arnaldo left, taking the gun. 2RP 146; 4RP 557. Once they were gone, Luna-Claro threw bags of drugs into the attic, so that police would not find them. 2RP 157; 3RP 383.

Over the next few days, Luna-Claro and his wife gave police conflicting versions of what had happened, lying to hide the fact that Luna-Claro was a drug dealer. 2RP 156, 211; 3RP 251, 255, 260. Police eventually found large quantities of cocaine and methamphetamine in the

house, and Luna-Claro was charged with possession of controlled substances with intent to deliver. 2RP 156-57; 3RP 255; 4RP 499.

Surveillance video from Luna-Claro's home showed Perez-Martinez arriving at and leaving the house on the day of the shooting, and Luna-Claro told police Perez-Martinez was the shooter. 3RP 253; 4RP 481-83. Perez-Martinez was arrested and charged with attempted murder. CP 1.

At trial Luna-Claro testified that Perez-Martinez called him in 2011 saying he needed a job, so he taught Perez-Martinez how to sell drugs. 2RP 140. They met up in southern California and returned to Washington, with Luna-Claro driving. 2RP 141. Perez-Martinez stayed with Luna-Claro and his wife for a few days, then went to Florida for two weeks, then returned to Washington, where he stayed with Luna-Claro and his wife for about two months. 2RP 141, 179-81.

Luna-Claro testified that he helped Perez-Martinez make connections with a Mexican drug cartel. 2RP 142, 150, 174-75. When Perez-Martinez returned to Florida in April 2011, Luna-Claro thought he would be selling drugs there. 2RP 143. But on June 28, 2011, Perez-Martinez and another man showed up at his house unexpectedly. 2RP 143. According to Luna-Claro, the three men moved to the garage to talk, where Perez-Martinez pulled out a gun and shot him. 2RP 145-46. He

said Perez-Martinez then approached and tried to shoot again, but the gun did not fire, so Perez-Martinez kicked him a few times and then left. 2RP 147.

Luna-Claro testified that his wife came to the door of the garage after he was shot and Perez-Martinez grabbed her by the shoulders as he was leaving. 2RP 207. He also said he heard Perez-Martinez tell the other man to grab the receiver from the security cameras. 2RP 208. Luna-Claro testified he believed the man with Perez-Martinez was a member of the Mexican cartel. He explained that he owed the cartel \$150,000 because a load of drugs he was responsible for was confiscated by law enforcement when the driver was arrested. 2RP 192. Luna-Claro testified that he believed Perez-Martinez and the other man were there to kill him. 2RP 149, 193.

Antonia Luna-Claro testified that when Perez-Martinez and the other man arrived at the house on June 28, 2011, Luna-Claro told her to take their daughter to the bedroom while the men moved into the garage. 3RP 379. About five minutes later she heard a gunshot, and she went to the garage, where she saw Perez-Martinez standing over Luna-Claro with a gun in his hand. 3RP 379. She yelled at Perez-Martinez to leave, and after a few seconds he walked toward the door. 3RP 380. Antonia testified that Perez-Martinez stopped and told the other man to get the

security cameras, although she had never told police about that. 3RP 381, 399. She testified that she told the men she would turn the surveillance system off, and they left. 3RP 381. On his way out, Perez-Martinez told her not to say anything. 3RP 381. Although Luna-Claro had testified that Perez-Martinez grabbed Antonia as he was leaving the garage, she testified he never touched her. 2RP 207;3RP 381.

Police investigating the shooting noted there were four surveillance cameras outside the house, and the digital recording device was located in the attic. 3RP 271, 284. The device was seized and the recording retrieved from it showed Perez-Martinez putting a gun into his waistband as he left the home. 4RP 481. In the garage police found a shell casing from a .40 caliber semi-automatic handgun as well as a live round under the pool table. 3RP 272-73. Both rounds were the same brand. 3RP 280. Although both were sent to the crime laboratory for analysis, no fingerprints were identified on them. 3RP 281-82. No other ammunition and no weapons were found in the home. 3RP 304. None of the evidence collected in the house was connected with Perez-Martinez. 3RP 312.

A firearms expert from the Clark County Sheriff's Office testified that he examined Luna-Claro's clothing for gunpowder residue and found none. 3RP 426, 432. After conducting a series of test fires using ammunition similar to that found in Luna-Claro's garage, the expert

concluded that no gunpowder residue was visible on clothing when the gun was fired from a distance of five feet. 3RP 433-34.

Perez-Martinez testified that he came to Washington in February 2011 at Luna-Claro's request. 4RP 519-20. Luna-Claro had asked him to drive a car from California to Washington, and Perez-Martinez went to California as instructed, where he was met by a Mexican man who was working with Luna-Claro. 4RP 521. Perez-Martinez understood that the plan was to put drugs in the car, but he did not agree to that. After delaying the trip for a few weeks, Perez-Martinez convinced Luna-Claro to pick him up in California and drive him to Washington. 4RP 522-24. Antonia was with Luna-Claro, and she did not seem happy with his decision to bring Perez-Martinez home with them. 4RP 525. Perez-Martinez stayed with Luna-Claro and his family for a few days, and then they all flew to Florida. 4RP 526.

When Perez-Martinez returned to Washington in March, Luna-Claro paid for his flight and met him at the airport. Again, Antonia was not happy to see him when he arrived. 4RP 527-28. During this visit, Luna-Claro took Perez-Martinez to rent a storage unit. The unit was registered in Perez-Martinez's name, because Luna-Claro said it would help Perez-Martinez establish residency in Washington. 4RP 528-29. Perez-Martinez became uncomfortable with the arrangement and asked

Luna-Claro to take his name off the unit, and Luna-Claro agreed. 4RP 529.

After about a month, Luna-Claro drove Perez-Martinez back to Florida. 4RP 530-31. Then, in June 2011, Luna-Claro asked him to move to Washington to help him with his business. 4RP 534. Luna-Claro paid for Perez-Martinez's flight to Las Vegas, where he was to meet with another man. 4RP 534. A Mexican man named Arnaldo met Perez-Martinez at the airport in Las Vegas, and they drove to Washington together. 4RP 535.

When they arrived in Vancouver, they went to the storage facility where Luna-Claro had previously rented a unit in Perez-Martinez's name. Luna-Claro had asked Arnaldo to rent another unit, instructing him to use Perez-Martinez's name again. Perez-Martinez did not agree with this plan, and he refused to fill out the paperwork. 4RP 537. He also discovered that Luna-Claro had continued to use the other storage unit in his name. 4RP 580.

Perez-Martinez and Arnaldo then drove to Luna-Claro's house. Luna-Claro had told them he did not want Antonia to see them, so they parked a block or so away, where Luna-Claro said he would meet them. When Luna-Claro did not show up, Perez-Martinez became upset and walked to the house. Arnaldo followed. 4RP 539.

Luna-Claro invited them in after sending Antonia to another room. Perez-Martinez asked Luna-Claro about the storage unit, and they began arguing. 4RP 551-52. During the argument, Luna-Claro slowly pulled a gun from his waistband. 4RP 554. Perez-Martinez was afraid for his life, and without thinking, he lunged at Luna-Claro and wrestled the gun from him. 4RP 554-55. As he was grabbing the gun away, it went off, shooting Luna-Claro in the abdomen. 4RP 554. Perez-Martinez did not remember pulling the trigger. He estimated the gun was about four feet away from Luna-Claro when it went off. 4RP 555.

Perez-Martinez testified that he did not have a gun when he went to Luna-Claro's house, and he did not see Arnaldo with a gun. 4RP 540. He also denied trying to shoot Luna-Claro a second time or kicking him. 4RP 556. After the shooting, Luna-Claro said the police would likely respond to the gunshot, and he told Perez-Martinez to leave and take the gun. 4RP 557. Perez-Martinez left with the gun, later disposing of it along a highway. 4RP 560.

Perez-Martinez testified that he was not a member of a Mexican drug cartel, and He denied Luna-Claro's claim that he was sent by the cartel to shoot Luna-Claro. 4RP 560-61. He testified he did not bring a gun to the house. Rather, he was defending himself when he grabbed the gun away from Luna-Claro and the gun went off accidentally. 4RP 568.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO HONOR PEREZ-MARTINEZ'S CONSTITUTIONAL RIGHT TO COUNSEL.

On December 1, 2011, Perez-Martinez filed a motion for new counsel. CP 16-28. The parties addressed the motion at a hearing on December 12, 2011². 1RP 4. Trial counsel informed the court that he believed someone who spoke English had prepared the motion, he suspected Perez-Martinez had not even read it, and he did not believe there were any legitimate grounds to remove him from the case. 1RP 4-5. The court then asked Perez-Martinez if he wanted a new attorney. Perez-Martinez said he did, because he did not feel counsel was doing a good job for him. 1RP 5. He felt his attorney was working for the prosecutors, and he believed counsel had said he killed somebody. 1RP 6. The court stated there must have been some miscommunication, because Perez-Martinez was never charged with killing anyone, and counsel said that the information charging attempted murder was read to Perez-Martinez through the interpreter. 1RP 6.

The court assured Perez-Martinez that his attorney did not work for the prosecutor, although they might work cooperatively to negotiate some issues. 1RP 9. The court denied Perez-Martinez's motion for new

² At all times during the proceedings, Perez-Martinez had the assistance of an interpreter.

counsel, stating that the main factor driving its decision was that appointing a new attorney would mean starting the case over, and there was no basis to discharge counsel. 1RP 8-9.

Defense counsel then moved for a continuance, indicating that critical DNA analysis and computer forensics analysis had not yet been completed. Counsel stated he would need at least three more months to prepare for trial. 1RP 10-13. The court asked Perez-Martinez if he would agree to the continuance, saying that opposing it would be dramatically tying defense counsel's hands in presenting the defense. 1RP 14. Perez-Martinez agreed, and despite the court's concern that substitution of counsel would delay proceedings, the court granted defense counsel's motion for a continuance. 1RP 14. The court urged Perez-Martinez to work with defense counsel. 1RP 14.

On March 8, 2012, Perez-Martinez again asked the court to appoint a new attorney. He told the court, "I'm not in agreement with the defense that he is giving me. I don't trust him. I wouldn't like to go to trial with him." 1RP 21. The court found the request problematic, saying it was raised on "the eve of trial," and Perez-Martinez should have brought the issue forward "some time ago." 1RP 22. The court again warned that a substitution of counsel would delay the proceedings, but it asked Perez-Martinez to explain why he wanted a new attorney. 1RP 22.

Perez-Martinez explained that counsel had only his testimony for the defense and no other evidence. Further, counsel had told him there would be a counteroffer, and he had kept that in mind. 1RP 23. Trial counsel said that he had approached the prosecutor with an offer which was rejected, and she proposed a counteroffer of 96 months. He presented that to Perez-Martinez, who said he did not want that sentence. 1RP 24. Counsel said he had discussed that offer with Perez-Martinez frequently over the last month. 1RP 24.

The court offered Perez-Martinez time to consult with counsel privately about the State's offer. 1RP 27. Perez-Martinez explained that he did not want to accept the offer, but he disagreed with counsel's representation that he had told the prosecution that, because only counsel had talked to the prosecutor. 1RP 27. When the court repeated that Perez-Martinez could have time to talk to counsel privately about the offer, Perez-Martinez again stated, "I just don't feel like I can trust him. I don't trust him....I wouldn't like to go to trial with him." 1RP 30.

The court told Perez-Martinez that he was not entitled to counsel of his choice. He assured Perez-Martinez that trial counsel was a very experienced attorney. 1RP 30. The court said it was confident counsel would do the best job he could and that he was competent and had the skills necessary to handle the case. 1RP 32-33. Noting again that it was

the eve of trial, the court denied the motion for substitute counsel. 1RP 33. The court recommended that Perez-Martinez cooperate with counsel. 1RP 33. Perez-Martinez told the court, “I mean sincerely without, you know, disrespecting anyone, I really – I don’t want to talk to him.” 1RP 34.

The case proceeded to trial on March 12, 2012, and on March 14, the court indicated that it had received a letter raising issues about trial counsel’s performance. 4RP 542-43. Perez-Martinez stated that a friend had written the letter for him prior to the court’s ruling on his motion for substitute counsel. 4RP 544. The court noted that it was very close to the end of trial, and it did not intend to replace counsel. After making that statement, it inquired whether Perez-Martinez was still requesting new counsel. Perez-Martinez responded that the letter was written based on his ideas. Although counsel appeared to be doing a good job at trial, he was still very afraid. 4RP 545.

A trial court has discretion to grant or deny a motion for substitution of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). Nonetheless, this discretion is constrained by the accused’s constitutional rights. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). A claim of denial of counsel is reviewed de novo. United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998).

Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend VI; Const. art. I, § 22. The right to counsel is violated when a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict, even if the attorney is competent. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); Nguyen, 262 F. 3d at 1003-04. An irreconcilable conflict exists where there is a “serious breakdown in communications.” Nguyen, 262 F.3d at 1003 (citing United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000)). As set forth in Nguyen,

A defendant is denied his Sixth Amendment right to counsel when he is “forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.”

Nguyen, 262 F.3d at 1003 (citing Craven, 424 F.2d at 1169). Where “the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant’s] Sixth Amendment right to effective assistance of counsel.” Moore, 159 F.3d at 1158.

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers (1) the adequacy of the trial court’s inquiry into the conflict, (2) the extent of the conflict between the defendant and his attorney, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724 (citing Moore, 159 F.3d at 1158-59). The trial

court denied Perez-Martinez's constitutional right by improperly denying his motions to substitute counsel.

First, the trial court made an insufficient inquiry into Perez-Martinez's requests for substitute counsel. "For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'" Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). "[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2002). An inquiry is adequate if it "ease[s] the defendant's dissatisfaction, distrust, and concern and provide[s] a sufficient basis for reaching an informed decision." Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing Adelzo-Gonzalez, 268 F.3d at 777).

In Nguyen, the Ninth Circuit Court reversed for violation of the defendant's right to counsel. Finding the trial court court's inquiry into the conflict insufficient, the court noted that the trial court "asked [the defendant] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses." Nguyen, 262 F.3d at 1005. Similarly, in Moore, while "[t]he court did give both parties a chance to speak and made limited inquiries to clarify what was said, ... the

court made no inquiries to help it understand the extent of the breakdown.” Moore, 159 F.3d at 1160. On review the Ninth Circuit reversed based in part on the lower court’s lack of inquiry. Id. at 1161.

Here, the court did not talk to Perez-Martinez privately, nor did it ask specific questions targeted at clarifying Perez-Martinez’s dissatisfaction with counsel, and it interviewed no other witnesses. When considering Perez-Martinez’s first motion, the court asked Perez-Martinez if he was requesting a new attorney. Perez-Martinez gave some examples of why he did not trust trial counsel, and the court merely assured him that there had been a miscommunication but counsel was doing his job. While the court cited the delay a substitution of counsel would require as its main reason for denying Perez-Martinez’s motion, it then granted trial counsel’s request for a three month continuance.

When Perez-Martinez renewed his motion prior to trial, the court again failed to conduct a sufficient inquiry. Even though Perez-Martinez told the court he did not trust trial counsel, he did not want to go to trial with counsel, and he did not even want to talk to him, the court did not question Perez-Martinez privately about the conflict. Again, the court was more concerned with the trial schedule than with Perez-Martinez’s right to counsel. It merely assured Perez-Martinez that trial counsel was competent and that Perez-Martinez was not entitled to counsel of his

choice. The court's inquiry into Perez-Martinez's conflict with counsel was insufficient to protect Perez-Martinez's constitutional right to counsel.

Second, although the record is incomplete because of the court's lack of inquiry, it is clear that the conflict between Perez-Martinez and trial counsel was substantial. Perez-Martinez had completely lost trust in his attorney. He said several times that he did not trust counsel and he would not want to go to trial with him. He declined the court's offer to allow him to consult with counsel privately, because he could not even talk to counsel. The breakdown in the attorney-client relationship constituted a substantial conflict that should have been addressed by granting the motion to discharge counsel. See Moore, 159 F.3d at 1160.

Third, Perez-Martinez's motions for substitute counsel were timely. He first moved for new counsel three and a half months prior to trial. Inexplicably, the court denied the motion because it would delay the proceedings but then granted trial counsel's motion for a three month continuance. Perez-Martinez renewed his motion for new counsel four days before trial started, and the court denied that motion, saying Perez-Martinez should have raised it sooner. In Nguyen the motion was timely when it was made the day trial was set to begin. Nguyen, 262 F.3d at 1003. This factor favors reversal as well.

The trial court violated Perez-Martinez's constitutional right to counsel by denying his motions to substitute counsel and forcing him to work with an attorney with whom he had serious breakdown in communication. The erroneous denial of the motions to substitute counsel is presumptively prejudicial and requires reversal. Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161. The error here requires reversal and remand for a new trial.

2. THE PROSECUTOR'S CLOSING ARGUMENT MISSTATED THE LAW ON SELF-DEFENSE AND SHIFTED THE BURDEN OF PROOF TO THE DEFENSE. THIS MISCONDUCT REQUIRES REVERSAL.

The right to a fair trial is guaranteed by the federal and state constitutions. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. In re Personal Restraint of Glasmann, ___ Wn.2d

___, 286 P.3d 673 (2012) (citing State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984))

It is misconduct for a prosecutor, with all the weight of the office behind him or her, to misstate the applicable law when arguing the case to the jury. See e.g. Davenport, 100 Wn.2d at 762. In this case, the prosecutor committed misconduct in closing argument by misleading the jury as to the law on self-defense.

Before closing arguments, the prosecutor argued against instructing the jury on self-defense. She argued that Perez-Martinez never claimed the gun was pointed at him, only that he dove for the gun when Luna-Claro pulled it out, and the gun accidentally went off. 5RP 622. She argued that Perez-Martinez had to admit doing a criminal act to stop another act, and since he did not, the jury should not be instructed on self-defense. 5RP 624. The court rejected this argument. It noted that there was evidence Perez-Martinez reasonably believed Luna-Claro was going to inflict personal injury when he pulled out a gun in the middle of an argument, and Perez-Martinez did not have to wait until the gun was pointed at him to defend himself. 5RP 627. The court ruled that a self-defense instruction was appropriate, and the prosecutor could argue Perez-Martinez did not use reasonable force. 5RP 630-31.

Instead, the prosecutor argued in closing that there was no evidence of self-defense because Perez-Martinez never said the gun was pointed at him, he was never faced with imminent danger, and he claimed the shooting was an accident. 5RP 651-52. Defense counsel did not object, choosing instead to address the prosecutor's argument by telling the jury it would not have been given a self-defense instruction if there was no evidence of self-defense. 5RP 669.

Whether the defense has presented evidence of self-defense is a question for the trial court in deciding whether to instruct the jury on the law of self-defense. State v. McCreven, ___ Wn. App. ___, 284 P.3d 793, 806 (2012) (citing State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). Once the trial court finds sufficient evidence to warrant a self-defense instruction, the inquiry ends, and the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. Id. The prosecutor's argument here improperly shifted the burden of proof on self-defense. See McCreven, 284 P.3d at 806-07 (where trial court properly instructed jury on self-defense, prosecutor's argument that there was no evidence of self-defense lowered the State's burden of proof and constituted misconduct).

The prosecutor further misstated the law when she told the jury it did not need to consider self-defense because Perez-Martinez claimed the

gun went off accidentally. It is well established that self-defense and accident are not mutually exclusive. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); State v. Callahan, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997).

For example, in Werner, the defendant was confronted by a pack of dogs, and he testified that he pulled out his gun, thinking he could scare them. He also asked the owner to call off the dogs, but the owner refused. The defendant decided to call 911, but when he was fumbling with his cell phone, the gun accidentally discharged. Werner, 170 Wn.2d at 336. The Supreme Court held that the defendant's claim that the gun went off accidentally did not preclude a claim of self-defense. Because he could have reasonably believed the dog owner posed a threat in refusing to call off his dogs, the jury should have been instructed on self-defense. Werner, 170 Wn.2d at 337.

Here, as in Werner, Perez-Martinez testified that he was afraid for his life during the confrontation with Luna-Claro, and in his response to that fear, the gun accidentally went off. Although the court properly instructed the jury on self-defense, the prosecutor told the jury there was no self-defense because Perez-Martinez testified the gun discharged accidentally. Because Perez-Martinez produced some evidence of self-defense, the State had the burden of proving the absence of self-defense

beyond a reasonable doubt. See Walden, 131 Wn.2d at 473-74. The prosecutor's argument that Perez-Martinez's testimony that the gun discharged accidentally automatically defeated a claim of self-defense misstated the law and eased the State's burden.

Defense counsel's failure to object to the prosecutor's misconduct does not preclude review. Reversal is required, notwithstanding the lack of defense objection, if the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict. Charlton, 90 Wn.2d at 664; Belgarde, 110 Wn.2d at 508. The prosecutor's misconduct cannot be deemed harmless unless the record shows there would have been a conviction regardless of the misconduct. Charlton, 90 Wn.2d at 664.

In this case, not only did the prosecutor's argument misstate the well-established law on self-defense, but the court had already ruled that Perez-Martinez's claim of accident did not preclude a finding that he acted in self-defense. 5RP 630-31. The prosecutor's argument in disregard of the law and the court's ruling was flagrant misconduct.

Moreover, there is a substantial likelihood this misconduct affected the jury's verdict. There was no physical evidence to support the State's case, and Luna-Claro and Perez-Martinez were the only witnesses present when the shooting occurred. Thus the State's case came down to whether the jury believed Luna-Claro without reservation, despite Perez-Martinez's conflicting testimony. By arguing that there was no evidence of self-defense, the prosecutor suggested that the burden lay with the defense to prove Luna-Claro wrong. The prosecutor's improper tactics presented the jury with a distorted view of its function, and it is unreasonable to believe the jurors would be able to ignore the prosecutor's misconduct, even given a curative instruction. See, e.g., State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (Where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell."), review denied, 118 Wn.2d 1013 (1992). There is a substantial likelihood the prosecutor's improper closing argument affected the jury's verdict and thus denied Perez-Martinez a fair trial. The Court should reverse and remand for a new trial.

D. CONCLUSION

The trial court failed to honor Perez-Martinez's constitutional right to counsel, and the prosecutor's improper closing argument denied him a

fair trial. His conviction should be reversed and the case remanded for a new trial.

DATED this 26th day of November, 2012.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I delivered copies of the Brief of Appellant and Designation of Exhibit in *State v. Reyce Perez-Martinez*, Cause No. 43384-2-II as follows:

Reyce Perez-Martinez DOC# 356885
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191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
November 26, 2012

GLINSKI LAW OFFICE

November 26, 2012 - 10:31 AM

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