No. 42897-1-II

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

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS, JAIME LLAMAS-HERNANDEZ,

Defendant.

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

The Honorable John P. Wulle, Judge
Clark County Cause No. 10-1-00351-7

BRIEF OF JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS, JAIME LLAMAS-HERNANDEZ

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x. ***Whether the court erred when it sentence the Defendant based upon an inaccurate sentencing range, and by giving the Defendant credit for only approximately one third of the time he had already served before sentencing.***

STATEMENT OF THE CASE

ARSON CASE:

On March 5, 2010, Clark County Sheriff's responded to a suspected arson which involved two vehicles which had been set on fire at a private residence in Vancouver, Washington. RP 111. Upon arrival, police and firefighters found the homeowner, Melquiades Carlos, attempting to put the fire out himself together with the help of a neighbor, and his son, Jonathan Tapia Farias. RP 116. Carlos had knocked a small, red plastic gas can from the hood of one of the burning vehicles. RP 122. Another, similar gas can was found nearby. RP 133.

After the fire was put out, police began their investigation, traveling to several nearby gas stations and a 7-11 to search for evidence of someone purchasing gas cans and gasoline. RP 174, 5. At the nearby 7-11, police discovered that two such gas cans had been sold earlier that day. RP 175. Several days later, the store manager was able to provide a copy of video surveillance footage which showed two men entering the store and

purchasing two red gas cans along with two bottles of V-8 juice and other sundry items. RP 352, 66. One of the two men in the video is wearing a red jacket with a white stripe down the sleeve and the other man appears to be wearing a pair of tan boots.

At a nearby AM/PM station, a police detective was instructed on how to operate the video surveillance playback system and was allowed to operate it as he saw fit. The detective copied a selection which showed a dark colored SUV pulling in and two individuals purchasing gasoline. One of the individuals appears to be wearing a red jacket with a white stripe down the sleeve, which individual placed cash into the cash machine presumably to purchase the gasoline. RP 388.

Staying overnight at the home that night where the two vehicles were burned was Karissa Courtway, who was at the time, Tapia Farias' girlfriend, RP 450, and an on-again, off-again girlfriend of the Defendant. RP 457. Courtway's vehicle was one of the vehicles that was burned. RP 453.

During the investigation, Courtway was interviewed by police and told them that she suspected that the Defendant may have been the person who started the fire. RP 381. Courtway also told police that the Defendant lived at the Meadow Wood Apartments in Vancouver, Washington. With some prompting, Courtway also told police that the Defendant may have

owned a Range Rover SUV similar to the one police had seen in the AM/PM surveillance video . RP 383. Police traveled to the Meadow Wood Apartments where they found a dark colored Land Rover SUV and where they located the apartment which had been associated with the Defendant in the past. RP 872.

A search of the Land Rover yielded two plastic collars which appeared to be associated with the 7-11 gas cans, and a number of other items associated with the purchases made by the two individuals in the 7-11 surveillance video, including empty V-8 juice bottles. RP 444-46. DNA testing later found a relatively low quality match between one of the bottles and the Defendant. RP 801.

A search of the apartment yielded a jacket appearing similar to the one seen in the 7-11 surveillance video, and a pair of tan boots which one police officer believed appeared similar to the ones worn by the other individual in the 7-11 surveillance video. RP 880, 1036. Both items were seized by Sgt. Duncan Hoss, Id., RP 1442 No other evidence related to the arson was found in the apartment.

DRUGS AND GUNS CASE:

The apartment search also yielded just over one pound of methamphetamine, a digital scale, surveillance equipment, various expired forms of identification with the Defendant's picture and various names on

them, and a number of firearms. Later DNA testing established that the Defendant handled, or may have handled, several of the firearms. Also found was a statue of Jesus Malverde. RP 1135. Malverde, according to State's witness ,Spencer Harris, is a narcotics patron saint for drug trafficking. RP 1189, 1208. Upon cross-examination, however, Harris admitted that he was not aware of the many positive meanings associated with Malverde. RP 1209-11, 13, 27. In spite of being untrained in the many positive associations with Malverde, Harris was allowed to testify as an expert on the subject. RP 1226-8.

Harris was also allowed to testify as an expert in all aspects of the Drugs and Guns case in spite of the fact that he was not disclosed as an expert by the State prior to his appearance in court at trial. RP 1620, 25. The Court allowed Harris' expert testimony because it believed that "every police officer's an expert, about what his own experience has been". RP 1626. With regard to the claimed discovery violation of not disclosing an expert, the Court stated that defense counsel "had the ability to interview all the witnesses in the case and he's been on the witness list." RP 1633. Detective Harris went on to testify before the jury regarding the relative size of this drug case; the percentage of investigations that involve firearms, and that the likelihood of firearms being present increases with the size of the case; the average price of methamphetamine; the purpose of zip lock

baggies, heat sealers, digital scales, surveillance systems, large quantities of US currency, cutting agents such as MSM; the typical quantity of meth amphetamine held for personal use rather than distribution; and, of course, the negative significance of the statue of Jesus Malverde. RP 1634-9

Defense counsel attempted to attack Harris', credibility under Rule 608 due to the fact that he had been suspended for a violation of department policy. RP 1627, 8. The specific violation dealt with concealing the fact that a fellow officer was romantically involved with a drug informant. RP 1630, 32. The Court denied the attempt without explanation. RP 1632.

With further regard to Malverde, the judge further ordered the State to elicit testimony from an officer indicating that Malverde is not recognized by the Catholic church. RP 1234, 5. The State later had detective Sofianos so testify, in spite of the fact that the he was not a member of the Catholic church and has no such knowledge. RP 1237, 1384, 1446, 57.

KIDNAPPING CASE:

By March 22, 2010, the Defendant and Courtway had reconciled and Courtway agreed to travel with the Defendant to California so that he could help his brother with a matter. RP 1678. On the first day of the trip, the two made it only as far as Eugene Oregon where they stayed with the Defendants childhood friend, Saul Carrillo. RP 1730. Within an hour of arriving at the

friend's Eugene home, Courtway changed her mind about the trip and asked to be taken home. RP 1681, 1730.

Upon returning to the Portland area, the Defendant dropped Courtway off at a car dealership and gave her $9500 so that she could purchase a vehicle, saying that he "felt bad" that her vehicle had been burned. RP 1692.

Later, in a recorded telephone call between Courtway and Tapia Farias, who was in jail on some unrelated matter, Courtway told Tapia Farias that the trip she had taken to Eugene with the Defendant had actually been a kidnapping. RP 1679. Courtway told Tapia Farias the kidnapping story so that he would not be angry with her for having been with the Defendant, and to get some sympathy. RP 1713, 14. After learning of the kidnapping allegation, police recovered the recorded telephone call and contacted Courtway. Courtway repeated the kidnapping story to the police. The State played recording for the jury, accompanied by a transcript they had prepared to assist the jury in understanding what was being said. RP 1802. Prior to playing the recording in open court, the Court reviewed the recording and transcript. RP 1812. Several minutes into the recording, Courtway characterized her "kidnapping" as "no big deal", according to the transcript. RP 1827. Detective Sofianos who cochaired the trial with the State told the Court that he believed the statement to have been "it's not a ...

Good deal". RP 1827. Defense counsel requested that no clarification be given, but that the jury decide for itself what had actually been said. RP 1828. Contrary to the defense requests, however, the judge decided to clarify the discrepancy for the jury with his own understanding. Addressing the jury he said,

> Ladies and gentlemen, turn to page 7, please. Down to line 23, when you get there. Is everyone there? Okay. Now, remember I said I want you to listen because I was hearing errors in the transcribed version, too. For example, at line 23, it reads, "it's not a big deal." I heard, "it's not a good deal." And the same again at the last line it said, "I said it wasn't a big deal at all," I heard good deal. Okay? So, again, I reinforced with you, it's what you heard that's the evidence, it's not that printed page, okay?

RP 1835.

When the State asked that the recording be played again at the location to which judge had referred, defense counsel indicated that he did not object as long as the jurors were allowed to decide what had been said for themselves. RP 1836. "I think the jurors should be left to their own judgment. That's my position, judge." RP 1837.

APPREHENSION AND APPEARANCE IN COURT:

The Defendant was arrested in California on March 11, 2010 pursuant to a Clark County, Washington warrant and was returned to Clark

County, Washington Where he made his first appearance, in custody. RP 15. The Defendant remained in custody through his trial. RP 15.

The Defendant first hired an attorney from California who, it turned out, was not licensed to practice law in the State of Washington, but traveled to Vancouver Washington to attend court with the Defendant, but was not allowed to make an appearance. CP 134. The Court then appointed an attorney to represent the Defendant. CP 134. The Defendant then hired another attorney from Seattle who failed to advance Defendant's case or to visit with him in the many months that he had a case . CP 134. Defendant then hired private local counsel who replaced the Seattle attorney on January 14, 2011. CP 134.

TRIAL PREPARATION AND TRIAL:

Defense Counsel had not received any discovery or the Defendant's file from the prior attorney until February 7, 2011. CP 134. Absolutely no work appeared to have been done by the prior attorney prior to that time, and of the 28 witnesses on the State's witness list, 28 remained yet to be interviewed. CP 134. Five weeks before trial, on September 22, 2012, the Court assured defense counsel that the setting of the October 31 trial date would be only for "tracking" purposes, and that Court would be willing to move the trial to a later date to accommodate defense counsel. RP 12. In fact, the Court offered November 21, November 28 and December 12 as

other possible dates. In the Court's own words, the judge said, "[l]et's just put it on the 31st for now. We can discuss next week what changes we may need to adjust for everyone's schedule." RP 14. Later, however, on October 27, 2011, the Court indicated that October 31 would be the actual trial date. RP 49. At this time, defense counsel alerted the court to the fact that she had relied upon the Court's earlier assertion, and that a great deal of preparation was yet needed. RP 26-33. On October 31, 2012, defense counsel again requested a continuance, setting forth the Court's earlier assurance, and indicating that there were yet 18 witnesses to be Interviewed, and that, until that very morning, the State had provided only heavily redacted police reports with all witness contact information obscured. RP 57. The Court maintained its position that October 31 would be the trial date and faulted defense counsel for not addressing the need for a later trial date sooner. RP 49.

On the first morning of trial, two custody officers wearing guns, bulletproof vests and tasers were conspicuously seated just behind and to either side of the Defendant. When defense counsel requested of the court that the custody officers not be seated quite so close, the Court summarily dismissed the request. RP 66.

At trial, Defendant moved to sever the Arson case, the Drugs and Guns case, the Kidnapping case, and the Alien in Possession of a Firearm

case into separate trials to avoid confusion and undue prejudice. CP 129. The Court granted the motion regarding the Alien in Possession of a Firearm charges once the State conceded that joining such charges was unduly prejudicial, but denied remainder of the motion.

At trial, rather than deliver on its promise of judicial economy, State tried each case separately, recalling many of the witnesses to testify on separate dates, as many as two or three times.

During the arson phase, the jury was exposed to the homeowners family describing the horrors of the fire in front of their home, along with numerous police officers and the fire marshal describing what they had seen, along with dozens of photographs of charred vehicles. RP 208 – 666.

The jury was also shown the 7-11 surveillance video multiple times, which was admitted into evidence, over the Defense objection, upon the foundation thatt the video appeared to be the same video that the police had obtained from the 7-11. RP 331, 34, 6, 296, 7. Also over objection, the State was allowed to show 7-11 video to the jury while the State laid its "foundation". RP 347, 49.

The surveillance video from the AM/PM station was admitted, over objection, based solely upon an officer saying that it was the same video that he had seen on March 5th. RP 425.

Went defense counsel renewed his objection to the videos before the jury, the judge displayed a surprised look, rolled his eyes and abruptly denied the motion, for which emotional display defense counsel moved for a mistrial. RP 474.

The Unlawful Possession of the Firearm charges were predicated upon the Defendant having a prior conviction for a "serious offense".

Defense counsel renewed his severance motion on November 3rd, but the judge denied the motion saying that it was "not timely". RP 499. The severance motion was renewed again at the close of the State's case. RP 1849. The motion was denied. RP 1854. Defense counsel renewed his motion for severance a final time at the close of the case, which motion was denied. RP 1928.

At the close of the State's case, defense counsel also moved to dismiss the charges of Intimidating a Witness and Tampering with a Witness. RP 1856. The Court dismissed the Intimidating a Witness charge, but denied the motion on the other charge. RP 1863, 4. The State voluntarily withdrew the Felony Harassment charge at the same time due to an admitted lack of evidence.

During the State's rebuttal closing argument, in response to the defense closing theory that the Defendant had moved from the Meadow Wood Apartments prior to the search, the prosecuting attorney said, " I heard

no evidence about changes of address. Usually when somebody moves away they do some kind of changed (sic) address. That would have been good evidence for the defense, that there was a change of address." Defense counsel promptly objected saying, "I'm going to object. The argument ---". The judge cut defense counsel off saying "overruled.". In trying to complete his objection, defense counsel said "the argument seeks to shift the –", but the judge stopped him and overruled the objection without further discussion. RP 2158.

After the jury was dismissed, defense counsel clarified his objection, saying "I wanted to say the objection I was attempting to make was based upon improper argument. The argument sought to shift the burden of proof to the defense, that's a violation of the Constitution." RP 2185.

SENTENCING:

The Defendant was ultimately found guilty on counts one through five and was sentenced on November 28, 2011. RP 2191. Using the school bus zone enhancement and firearm enhancement, and the doubling provision under RCW 69.50.435, the State indicated that class B felony of Possession of Intense to Distribute Meth amphetamine became a class a felony for sentencing purposes, and that the total sentencing range in this matter was 152 to 184 months. RP 2192, 3. The Defense argued that class B felony

remained a class B felony for sentencing purposes and that he sentencing range was actually 128 to 160 months. Without deciding which sentencing range was the proper one, the Court sentenced the Defendant to 160 months, with credit for 172 days served. RP 2217.

ARGUMENT-

A. Whether the Court should have granted Defendants request for continuance.

A court may," upon a proper showing of materiality and diligence, grant a continuance for a defendant to obtain additional evidence or when otherwise required in the administration of justice. *State v. Kinzer*, 142 Wn. App. 1043 (2008). Whether to grant a continuance is within the trial court's discretion, and we will not overturn such a decision unless the court abuses that discretion . *State v. Downing*, 151 Wn.2d 265, 272,87 P.3d 1169 (2004). A court abuses its discretion when it is manifestly unreasonable or rests its decision on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12,26, 482 P.2d 775 (1971). In exercising its discretion for a motion to continue, a court should consider factors such as diligence, due process, surprise, the need for orderly procedure, materiality, and redundancy. *Downing*, 151 Wn.2d at 273.

In this particular case, defense counsel had been preparing this case for approximately 8 ½ months. It appears that a steady effort to interview

witnesses was made by defense counsel and there appears to be no indication by the court that defense counsel had not exercised due diligence. The Court's ruling shows only that Court felt that defense counsel should have come to him "sooner". This position, however, is not supported by the record. Approximately 5 weeks earlier, the court had set the October 31 trial date with the assurance that a later date would be given if the Defendant were willing to waive speedy trial. In justifiable reliance on this assurance, defense counsel continued preparation anticipating a later trial date. Instead of a later trial date, defense counsel was forced to go to trial 18 witness interviews short of completion. The Court's sudden change in position was capricious and an abuse of discretion. The Defendant should be allowed a new trial after a full preparation.

B. The court should have granted Defendan'ts motion for severance.

CrR 4.3 permits two or more offenses to be joined in trial when they are of the "same or similar character" (CrR 4.3 (a)); or when the offenses are based upon the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan" (CrR 4.3 (b)). The chief, but not only, justification for joining offenses in a single trial is judicial economy.

When considering whether counts should be joined in a single trial, the trial court must consider the following four factors:

> (1) the jury's ability to compartmentalize the evidence,
>
> (2) the strength of the State's evidence on each count,
>
> (3) the cross admissibility of evidence between the various counts, and
>
> (4) whether the trial court can successfully instruct the jury to decide each count separately.

State v. MacDonald, 122 Wn. App. 804, 815 (2004), (see also *State v. Kalakosky*, 121 Wn2. 537, (citing *State v. Bythrow*, 114 Wn.2d 713, 717-18, 790 P.2d 154 (1990)).

A criminal defendant seeking to sever counts for separate trial must show that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Smith*, 74Wn.2d744, 755, 446 P.2d 571 (1968).

None of the charges brought herein share a single element of proof, with the exception of the identity of the Defendant. Moreover, there was little, if any, cross admissibility of evidence among the charges.

In this matter, only the jacket and boots found in the apartment in the Drugs and Guns case was cross admissible with the Arson case. The Kidnapping case shared no single piece of evidence with the Drugs and Guns case, and the only aspect it shared with the Arson case was the Defendant's

alleged anger at Ms. Courtway.

On the other hand, the extreme and undue prejudicial effect of exposing the jury to a dramatic conflagration, a frightening drug trafficking operation featuring a number of firearms, and a violent kidnapping -- all being blamed on the Defendant is both obvious and unmitigable. Add to this jungle of charges the fact that the Defendant has a "prior serious offense", which evidence would not be admissible in his Arson or Kidnapping cases were he to choose not to testify, extreme prejudice becomes a presumption of guilt.

From the words of the Court itself that the Kidnapping related charges were "weak"; the conduct of the State voluntarily dismissing the Felony Harassment charge due to lack of evidence; and the result of the jury acquitting the Defendant on the remaining related charge, it is clearly established that those charges were the weakest in the trial by far.

A limiting instruction was given to the jury, however, it is very naïve to expect that the jury would be able to separate the three factual patterns in a trial with over two dozen witnesses and lasting over two weeks.

As for judicial economy, the trial stretched to 2 ½ weeks and, rather than bring each witness on for one appearance on all of their activity, the State brought many of the witnesses back two or three times during the trial as he tried the cases separately.

For all of these reasons, these three disparate cases should never have been joined, and at the very least, should have been severed in the interests of justice.

C. The court erred when it admitted the 7-11 and AM/PM station surveillance videos into evidence without proper foundation.

ER 901 Provides that a video or motion picture may be admitted it upon a showing of how it was made and the circumstances under which it is made. And in addition to relevance, just as with a photograph, there must be testimony that the contents of the video accurately represents the subject matter for which it is being offered.

As for the 7-11 video, several individuals were asked if that was what the store looked like, but the one person who was present at the time the video was taken, Bahadur the clerk, was not asked if the contents of the video accurately reflected the conditions in the store on the night it was taken. The 7-11 video was admitted over objection and without proper foundation.

The AM/PM station surveillance video was offered with even less foundation. The officer who seized the video was simply shown how to operate the video equipment and was allowed to copy and take with him whatever he deemed appropriate.. There was no foundational testimony offered regarding the subject matter of the video. The AM/PM station

surveillance video was admitted over objection and without proper foundation.

The two surveillance videos admitted at trial showed an individual resembling the Defendant, purchasing gasoline cans, a lighter, a bottle of V-8 juice, and gasoline, and represented the only direct evidence of the Defendant's involvement in the arson. Without the videos, the State's case would have been purely circumstantial. And though the jury is instructed that circumstantial evidence is just as good as direct evidence, few pieces of evidence can surpass the value of a movie showing a criminal defendant apparently preparing for a crime shortly before it occurred.

The Defendant should be afforded a new and fair trial where the State is only allowed to introduce video evidence upon a proper showing of foundation and reliability.

D. The court erred when it allowed deputy Sofianos to testify as an expers with regard to Jesus Malverde not being a saint accepted by any church.

ER 702 allows opinion testimony from qualified experts if it 'will assist the trier of fact to understand the evidence or to determine a fact in issue. In order to be qualified as an expert, however, a person must hold special knowledge which is not common to the average person. ER 702.

Upon voir dire cross examination, Detective Sofianos not only admitted that he was not an expert on Jesus Malverde, but that he had no idea what connection, if any, the figure had to the Catholic or any other church.

In order to avoid "offending" any member of the jury, the Court not only allowed, but instructed, the State to elicit from him that the figure was not accepted by "any church". By doing so, the Court assisted the State in branding the Defendant a drug dealer with no respect for religion.

The Courts efforts were unnecessary, misguided and highly prejudicial to the Defendant. There was also no basis in the law for the Courts decision and it was a violation of ER 702.

The Defendant deserves a new and fair trial with the constitutionally guaranteed presumption of innocence intact.

E. Whether the court erred when it denied defense counsel's request to impeach Detective Harris with his suspension for a breach of Department policy.

ER 608 provides that specific instances of the conduct of a witness may be introduced for the purpose of attacking or supporting the witness' credibility.

During trial, the State went to great lengths to show what an experienced and capable detective Detective Harris was. When defense counsel attempted to impeach his credibility as an "expert", the Court summarily denied the request saying, "I'm not going to let that in". The instance of conduct was that Detective Harris had conspired with a fellow officer to conceal that officer's romantic relationship with an informant who was actively engaged in drug investigations with the officers. Had this inquirey been allowed, it would have been relevant to the Detective's qualifications, and would have lessened the detective's credibility as an expert drug investigator, and it should have been allowed.

Detective Harris' testimony was instrumental in assisting the State in presenting its theory of the case and by preventing defense counsel from attacking the credibility of the witness, the Court left the Defendant defenseless against this evidence and denied him due process and a fair trial.

F. Whether the court erred when it gave the jury its impression of what had actually been said in the jailhouse recording.

A judge is constitutionally prohibited from conveying to the jury an opinion about the merits of a case, or instructing the jury that a fact issue has been established. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); Wash. Const. art. IV, § 16. "Thus, any remark that has the potential effect of

suggesting that the jury need not consider an element of an offense could qualify as judicial comment." Levy, 156 Wn.2d at 721.

At issue here was whether Ms. Courtway had referred to her vehicle trip with the Defendant as "no big deal", as the States transcript indicated, or as "not a good deal", as Detective Sofianos remarked. In an apparent effort to be helpful to one side or the other, the Court decided to draw the jury's attention to the specific passage, and to indicate that "not a good deal" was, in the court's opinion, what was actually said. The significance of the distinction between the two versions is substantial. The version in the transcript refers to the trip as a neutral event whereas the judge's version refers to the trip as a negative event.

The Judge's conduct was also a violation of ER 605 (4), which provides that "a judge may not summarize evidence.

The Court's decision to share his belief about the evidence with the jury is more than a mere comment, it is akin to a directed verdict should one choose to believe what Ms. Courtway was saying in the recorded telephone call.

Though the Defendant was acquitted on all kidnapping related charges, the inherent prejudice of blending two completely incompatible

cases combined with the Cour'ts obvious disposition on the case created a highly prejudicial atmosphere for the Defendant. The Defendant deserves a new, fair trial before a different judge.

G. Whether the court erred when it refused to consider instructing the heavily armed custody officers to be seated in a more neutral location.

The duty of the trial court is to administer it trial in a way which promotes the fair administration of justice. In running a trial, a judge has considerable latitude in making provisions that will help preserve the constitutional rights of a criminal defendant.

Although there was never a single allegation of a security risk, or any indication that the Defendant had caused any trouble during his 18 months of incarceration prior to trial, during trial, seated only several feet behind the Defendant and flanking him from the sides were two custody officers wearing bulletproof vests, firearms and Tasers in a most conspicuous manner. The two custody officers were further present throughout the entire two weeks of trial and the Defendant never appeared in court without them sitting close by.

When defense counsel asked the court to order an adjustment in the seating arrangement to make the Defendant appear like less of a monster that

needed to be kept under the scope of a rifle, the Court completely dismissed the request without consideration or further comment.

By failing to address the appearance of the high-security atmosphere at the defense table, the Court allowed the impression that the Defendant was a highly dangerous character to continue throughout the two had a half weeks of trial. By doing so, the Court failed in his duty to provide a fair trial for the Defendant and infringed on his constitutionally protected presumption of innocence. The Defendant deserves a new, fair trial free of a needless presumption of guilt before a different judge.

II. The court erred when it refused to grant a mistrial when the judge rolled his eyes and gave a look of surprise when ruling on Defendant's motion to strike the surveillance videos.

The Court again violated its duty to refrain from commenting on evidence when the judge gave an open look of surprise and rolled his eyes when defense counsel renewed his motion to strike the videos. In so doing, the Court denied the Defendant a fair trial guaranteed under the Sixth and 14th Amendments of the United States Constitution, and gave the jury the distinct impression that he was in favor of the State's evidence. The Defendant deserves a new and fair trial before a different judge.

I. The court erred when it did not allow defense counsel to object fully when State attempted to shift the burden of proof in its rebuttal closing argument

An attorney representing a criminal defendant has an obligation to make any and all reasonable objections he deems necessary to protect the rights of his client at trial. At a criminal trial, the State bears the burden of proof on each and every element of any crimes charged. Jury Instructions. A judge in a criminal trial has a duty to allow the attorneys to make a record of their objections.

By suggesting that certain evidence was missing that would've been helpful to the defense to rebut the Defendants claim that he had moved from the residence months prior, the State attempted to shift the burden of proof on the element of the crime which required the State to establish that the Defendant had dominion and control over the Meadow Wood Apartment. When defense counsel attempted to object, the Court cut him off sharply and refused to allow him to make a full record. Further, the State's argument in fact shifted the burden of proof on that particular element and the judge failed to address the error.

Due to the State's violation, and the Court's error, we cannot be assured that the jury required the State to prove that element, therefore, confidence in the conviction regarding the guns and drugs is undermined

and not constitutionally sound. A proper remedy demands reversal of all related counts.

J. Whether the court erred when it sentenced the Defendant based upon an inaccurate sentencing range, and by giving the Defendant credit for only approximately one third of the time he had already served before sentencing.

Though it appears from the Judgment and Sentence that the Court accepted the State's proposed sentencing range, the Court made no such ruling on the record and the sentencing range in the Judgment and Sentence is error.

Although RCW 69.50.435 requires a doubling of the maximum sentence for a school bus zone and enhancement, a full and fair reading of the statute does not require elevation of the predicate class B felony to a class a felony, and a compound increase of the sentencing range by 48 months. This ruling was error and this matter should be remanded for resentencing.

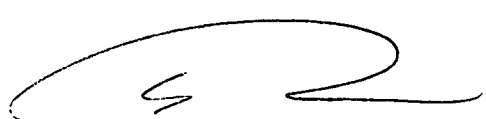
Similarly, the record shows that the Defendant was in custody from March 11, 2010 until November 28, 2011, the time of sentencing, yet he received only 171 days credit for time served rather than the 627 days he actually served prior to sentencing. This ruling was error in this matter and should be remanded for resentencing.

CONCLUSION

For all of the reasons above, the Defendant's convictions should be vacated and this matter should be remanded for a new trial. At the very least, this matter should be remanded for resentencing under the correct sentencing range, with the appropriate number of days set forth as credit for time served.

DATED this 24 day of August, 2012.

Respectfully Submitted,



BRIAN A. WALKER, WSBA # 27391
Attorney for Appellant Llamas

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DIVISION II

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STATE OF WASHINGTON

BY _____
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WASHINGTON STATE COURT OF APPEALS
DIVISION II

JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS, JAIME LLAMAS-HERNANDEZ, Plaintiff, v. STATE OF WASHINGTON, Respondent.	**NO. 42897-1-II** **Clark County Superior No. 10-1-00351-7** DECLARATION OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF CLARK)

THE UNDERSIGNED, states that on the 24th day of August, 2012, declarant deposited into the mail of the United States of America, a properly stamped envelope directed to Jaime Llamas Hernandez, 11919 W Sprague Avenue, PO Box 1899, Airway Heights, WA 99001-1899, and to Randolph St. Clair, Clark County Prosecutor, PO Box 5000, Vancouver, WA 98666; and that said envelope contained the following: Brief of Appellant.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 27 day of August, 2012.

BRIAN A. WALKER

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900 Washington Street
Suite 790
Vancouver, WA 98660
(360) 695-8886 Phone
(360) 695-1926 Fax

9/5/2012 3:33 PM

WASHINGTON STATE COURT OF APPEALS
DIVISION II

JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS, JAIME LLAMAS-HERNANDEZ, Plaintiff, v. STATE OF WASHINGTON, Respondent.	**NO. 42897-1-II** **Clark County Superior No. 10-1-00351-7** **AMENDED** DECLARATION OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF CLARK)

THE UNDERSIGNED, states that on the 24th day of August, 2012, declarant deposited into the mail of the United States of America, a properly stamped envelope directed to Jaime Llamas Hernandez, DOC# 301220, 11919 W Sprague Avenue, PO Box 1899, Airway Heights, WA 99001-1899, and to Randolph St. Clair, Clark County Prosecutor, PO Box 5000, Vancouver, WA 98666; and that said envelope contained the following: Brief of Appellant.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 5 day of September, 2012.

BRIAN A. WALKER

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