No. 314391

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

State of Washington, Respondent

v.

Abraham Lopez, Appellant

BRIEF OF RESPONDENT

GRANT COUNTY PROSECUTOR'S OFFICE
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I. STATEMENT OF THE ISSUES

A. Were the defendants deprived of due process by a jury instruction when the jury instructions as a whole informed the jury of the standard of proof, the error was not "manifest" within the meaning of RAP 2.5 and the defendants assented to the instruction over the State's objection?

B. Were the defendants deprived of due process by prosecution closing arguments that referred to the evidence in the case and were not objected to by defense counsel?

II. STATEMENT OF THE CASE

A. Statement of Facts:

1. Summary:

On April 22, 2011, in the early afternoon, Alexis Hernandez met up with Abraham Lopez-Torres, Benjamin Lopez, and Roberto Murillo-Vera in Quincy, WA. Based on directions given by Benjamin, the four drove to the residence of Adan Beltran, a rival gang member. Abraham got out of the vehicle and fired multiple rounds at Adan Beltran as he tried to run away, thereby killing him. The four then fled toward Wenatchee where they were ultimately apprehended with the murder weapon.

2. Background and Motive:

Alexis Hernandez became close friends with Abraham Lopez and Benjamin Lopez (Benjamin) starting when he was in fourth or fifth grade. Vol. 7, RP 123-25. Abraham Lopez and Benjamin are brothers. Vol. 10, RP 169. Around 2009, the three friends joined the Marijuanos 13, a criminal street gang. Vol. 7, RP 125. The brothers stipulated to their membership in the gang. CP 96-97. The Marijuanos 13 gang and the West Side 18th Street gang are rivals that have physically fought with each other numerous times. Vol. 7, RP 127, 131-32. These fights often involve weapons including guns, and Alexis Hernandez had personally been shot at multiple times by 18th Street gang members. Vol. 7, RP 132-33.

Edwin "Chow" Davalos was a fellow member of the Marijuanos 13 gang and close friend of Benjamin until he was killed. Vol. 7, RP 129-30; Vol. 10, RP 217-18. Chow's murder angered Benjamin. Vol. 7, RP 136; Vol. 10, RP 218. On the day of the shooting, Alexis observed Benjamin with a new tattoo that read "RIP Chow Loco," in remembrance of Chow. Vol. 7, RP 130; *see also* Vol. 10, RP 177. Marijuanos gang members believed that it was rival gang member Adan Beltran (the victim in the present case) who killed Chow. Vol. 7, RP 25-27; Vol. 10, RP 218.

The State introduced testimony and exhibits regarding the gangs' rivalry. Deputy Harris, the State's gang expert, explained the meaning of

crossed out graffiti. Vol. 6, RP 47-53. Deputy Harris also testified regarding the duties of gang members to the gang, such as putting in work, including assaulting rival gang members, Vol. 6, RP 40-42, and increasing status in the gang by killing rivals. Vol. 6, RP 63. This testimony was verified as being applicable to the Marijuanos by Alexis Hernandez and Benjamin Lopez. Vol. 8, RP 127; Vol. 9, RP 225. There was evidence that a Marijuanos member smashed the window of an 18th Streeter's car. Vol. 6, RP 198-202. Det. Mancini testified that Benjamin Lopez was in a fight with an 18th Streeter at school because he was an 18th Streeter. Vol. 6, RP 225. Marijuanos members believed that Adan Beltran murdered Marijuanos member Edwin "Chow" Davalos. Vol. 7, RP 26-27. Alexis Hernandez also testified to the rivalry between the 18th Street and the Marijuanos, stating they had x-ed out graffiti and fought with the 18th Street more than 20 times. Vol. 7, RP 131-133. Even Benjamin Lopez admitted that killing an 18th Streeter would benefit his gang. Vol. 9, RP 225. He stated that he had been involved in fights with 18th Streeters that involved weapons. Vol. 9, RP 215. He also testified at an unrelated trial that the Marijuanos were rivals with the 18th Street. Vol. 7, RP 214.

3. April 22, 2011, Meeting:

On April 22, 2011, Alexis Hernandez went to Quincy, WA, to meet up with Abraham and Benjamin at a fellow gang member's house.

Vol. 7, RP 137. Upon arriving at the house, he saw Benjamin sitting in the front passenger seat, Abraham sitting in the rear driver's side passenger seat, and Roberto Murillo-Vera sitting in the driver's seat. Vol. 7, RP 138. Alexis got into the rear passenger-side seat. Vol. 7, RP 138. Although Abraham, Benjamin, and Alexis Hernandez all lived in Quincy, Roberto Murillo-Vera was from Wenatchee. Vol. 10, RP 139-40.

After Alexis got into the vehicle, Benjamin started giving directions to Roberto on where to drive. Vol. 7, RP 139-41, 172-73. Eventually the car turned into an alley and Alexis observed Abraham putting on some gloves. Vol. 7, RP 142.

4. The Shooting:

After putting on a pair of gloves, Abraham got out of the rear driver's side door (where he was seated). Vol. 7, RP 143. Shortly after seeing Abraham get out of the vehicle, Alexis heard multiple gunshots. Vol. 7, RP 143. Alexis then observed Abraham run back to the car with a bandana covering his face and a hoodie over his head, allowing only his eyes to be visible. Vol. 7, RP 143. Once Abraham was back in the vehicle, it sped off, and Alexis observed a .357 caliber handgun on the seat next to him. Vol. 7, RP 144. Once the vehicle was traveling again, the Defendant resumed directing the driver on where to go. Vol. 7, RP 144.

Numerous other witnesses saw the murder occur. Four members of the Garces family saw the shooting as they were driving by and testified to the events surrounding it (actions, participants, vehicle, flight, etc.); these witnesses were Gaudalupe Garces, Santana Garces, Alexia Garces, and Antonio Garces. Vol. 3, RP 44-51, 148, 152; Vol. 4, RP 25, 27, 33, 55.

Alexia Garces provided the most vivid description of the shooter gunning down Adan Beltran in his own yard as he tried to run away. Vol. 4, RP 55-56. She confirmed Alexis's testimony that the shooter was wearing a hoodie and gloves and estimated that he was about 10 to 15 feet away from the vehicle when he shot the victim. Vol. 4, RP 57-59. She also saw the shooter again after he was stopped by police near Wenatchee. Vol. 4, RP 62.

The Garces family also identified the occupants of the vehicle and the shooter as being Hispanic males. Vol. 3, RP 157; Vol. 4, RP 34. Three of the witnesses stated they saw the shooter get back into the rear driver's side door of a blue four-door sedan (the same door and seating location that Abraham was in after being stopped by police), and this was the same vehicle that police later chased and stopped on the way to Wenatchee. Vol. 3, RP 44-51, 53-56, 152, 159; Vol. 4, RP 58-59. Two of these witnesses also testified that the suspect vehicle nearly collided with them as it attempted to flee the scene. Vol. 3, RP 158; Vol. 4, RP 32.

5. Flight and Apprehension:

Once the murder was completed, Abraham got back into the vehicle and it sped off with Benjamin again directing the driver on where to go. Vol. 7, RP 144. Shortly after their immediate flight from the scene, the four vehicle occupants stopped in a semi-secluded area near a canal to smoke some spice. Vol. 7, RP 146.

Eventually, the vehicle headed towards Wenatchee when a high speed chase with police officers ensued, culminating in officers' use of spike strips to force the vehicle to stop. Vol. 7, RP 147. Initially, Abraham tried to pass two guns to Alexis to get rid of them, but Alexis would not accept them. Vol. 7, RP 148. These guns were a .357 caliber revolver as well as a .25 caliber semiautomatic handgun. Vol. 7, RP 179-82, 186. It was Benjamin who eventually took the guns from his brother. Vol. 7, RP 148. As the vehicle was stopping, Alexis observed Benjamin throw something out the window; officers located a gun in this same area. Vol. 7, RP 193-94.

6. Forensic Evidence:

a. Death and Autopsy:

Emergency medical personnel responded quickly to the scene of the shooting and concluded that the victim was not alive. Vol. 5, RP 70-71.

Medical Examiner Eric Kiesel performed an autopsy on the victim and concluded that the cause of death was multiple gunshot wounds. Vol. 7, RP 94.

b. Ballistics:

The Washington State Patrol Crime Lab determined that the bullet found in the victim's body by Eric Kiesel was fired out of the .25 caliber semi-automatic handgun found next to the front passenger-side door of the suspects' car after it was stopped by police (this was the same door that Benjamin got out of). Vol. 4, RP 194; Vol. 5, RP 77- 80; Vol. 6, RP 28, 32, 34. This was also the gun hidden in one of Benjamin's socks.

c. DNA:

DNA analyses was performed on numerous items found at the secondary crime scene. Vol. 6, RP 81. Inter alia, the annalist concluded that Abraham Lopez was a "substantial contributor" to a DNA profile extracted from a blue glove found during a search of the suspects' vehicle. Vol. 6, RP 83-84.

7. Procedural History:

Roberto Murillo, the driver of the car, plead guilty to 2nd degree murder. Vol. 10, RP 233. Alexis Hernandez agreed to testify for the State. Abraham Lopez was declined by the juvenile court pursuant to RCW 13.40.110. Benjamin Lopez was 17 and subject to auto adult jurisdiction

pursuant to RCW 13.04.030. The parties proceeded to trial in adult Superior Court. The charges were aggravated murder 1, murder 2 and drive-by shooting for both defendants, and unlawful possession of firearms for Abraham, in addition to various enhancements and aggravators. CP 45-47, 50-51.

At the conclusion of the State's case the court dismissed some aggravators, but left all charges in place, as well as the drive-by shooting aggravator under RCW 10.95.020(7), the gang aggravator under RCW 9.94A.535(3)(aa) and firearm enhancements under RCW 9.94A.533. These charges were submitted to the jury after several jury instruction conferences. CP 181- 204 The jury returned guilty verdicts for Murder 2 and Drive-by Shooting for both defendants, as well as a firearm enhancement for Abraham. CP 213-218.

In the jury instructions the concluding paragraphs of the to convict instruction for count 2 (murder 2) read, in relevant part:

> If you find from the evidence that either alternative element 1(a) or 1(b), and element 2 have been proved beyond a reasonable doubt, then you *should* return a verdict of guilty as to Count 2... On the other hand, if, after weighing the evidence, you have a reasonable doubt as to either one of elements 1 or 2, then you *should* return a verdict of not guilty as to Count 2.

CP 196. (emphasis added.) Count 3 has similar language relating to drive-by shooting. The jury instructions also informed the jury of the

burden of proof. CP 186. The WPICs for all crimes use the term "it is your duty to" instead of "you should." *E.g.* WPIC 27.02.

During the jury instruction conference the State raised the issue of using should vs. duty. The State objected on the grounds that the language could be interpreted to allow jury nullification for or against either party. Vol. 11, RP 71-74. The Court informed the parties that was the point, and that he had been giving this instruction for the last 25 years. Vol. 11, RP 72-73. The State argued that was inappropriate. Vol. 11, RP 73. Then Abraham's defense counsel argued to the court that "the proposed jury instruction does not tell the jury that they can nullify the verdict." Vol. 11, RP 74. Benjamin's defense counsel did not take exception to the instruction when explicitly asked. *Id.* The court ruled "since each defendant waives any objection, then I think I will not make that change [from should to duty to] and the jury will be instructed as set forth in the third draft." Vol. 11, RP 75. In addition, when Benjamin Lopez proposed jury instructions it contained the "should" language instead of the duty language. CP 127-130.

III. ARGUMENT

A. The "Should" Jury instruction correctly informed the jury of the burden of proof when read in context of other instructions, was not manifest error, and even if it was, was invited by Abraham.

1. The Jury instructions as a whole correctly informed the jury of the burden of proof.

As defense counsel for Abraham stated, the jury was not led to believe they could convict in the absence of sufficient proof. The jury was instructed on the burden of proof, who carried it and what they needed to find Abraham guilty. CP 186. Jury instructions are evaluated in the context of the instructions as a whole. *State v. Sublett*, 176 Wn.2d 58, 78, 292 P.3d 715 (2012). Jurors are presumed to follow instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

In this case the jurors were instructed the State carried the burden of proof, that Abraham had no burden of proof and that Abraham was presumed innocent. While the word 'should', depending on context, may mean obligatory or merely strongly recommended, (*see* case law from around the country on this issue, infra) the context of this instruction clearly puts the burden on the State and indicates the jury can only enter a verdict of guilty if they find so beyond a reasonable doubt.

2. The error, if any, was not Manifest Constitutional error.

RAP 2.5 cautions appellate courts against reviewing errors that were not objected to unless such errors are manifest constitutional errors. *State v. Smith*, 174 Wn. App. 359, 298 P.3d 785 (April 9, 2013) held that using duty vs should was manifest constitutional error without analysis. *Id.* at 365. In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) accord *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)). *Smith* was decided after the trial in this case. However, *Smith* was, to the State's knowledge, the first case *in the nation* to reverse on this issue, and the vast majority of courts have upheld the should language as appropriate. Indeed, the should language is in the pattern instructions of several states. This claimed error is simply not manifest within the meaning of RAP 2.5.

a. *"Manifest" Error is One that is Obvious on the Record Because it is Contrary to Controlling Authority.*

Courts in Washington generally will not review a claim of error raised for the first time on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). The State Supreme Court recently emphasized the reasoning behind this rule: "'There is great potential for abuse when a party does not object because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.'" *Id.* (quoting *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006)). The Supreme Court also noted several other concerns addressed by the rule requiring timely objections:

> It serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from 'riding the verdict' by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

Id. at 749-50 (quoting BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007)).

Despite these concerns, an "exception exists for a claim of manifest error affecting a constitutional right." *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). This exception allows an appellant to obtain review of a claim raised for the first time on appeal where the error is both (1) manifest and (2) of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (citing *State v. Kirkham*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)).

The appellant has the burden to meet both prongs in order to obtain review. *See, e.g., Gordon*, 172 Wn.2d at 680 (refusing to review claim and not reaching whether error was "manifest" where appellant failed to show error was of constitutional magnitude). Thus, not all constitutional errors are subject to review for the first time on appeal. *O'Hara*, 167 Wn.2d at 98 (noting that the exception in RAP 2.5(a) "encompasses developing case law while ensuring only certain constitutional questions can be raised for the first time on review"). Indeed, the "constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982)). "The exception actually is a narrow one, affording review only of certain constitutional questions." *Id.*

The "certain constitutional questions" that fall under the RAP 2.5(a) exception are those that present a "manifest" error. An error is "manifest" where the "error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99-100. Expanding on this meaning, our State Supreme Court has looked to the legal dictionary definition of "manifest error": "'an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence on the record.'" *Id.* at 100 n.1 (quoting BLACK'S LAW DICTIONARY 622 (9th ed. 2009)).

For better or worse, the "manifest error" prong of RAP 2.5(a) is often cast in terms of "actual prejudice." *See, e.g., Gordon*, 172 Wn.2d at 676 (noting that "[a] constitutional error is manifest if the appellant can show actual prejudice"). "This 'actual prejudice' language has frustrated and confused lawyers, clerks, and judges for years because the term of art, 'actual prejudice,' involves a different balance than does a harmless error analysis, which determines whether reversal is warranted." *State v. Bertrand*, 165 Wn. App. 393, 400 n.8, 267 P.3d 511 (2011). The Supreme Court has attempted to highlight the distinction between the "manifest" error prong of RAP 2.5(a) and the harmless-error analysis by pointing out that "the focus of the actual prejudice [*i.e.* the manifest-error finding] must be on whether the error is so obvious on the record that the error warrants

appellate review. *O'Hara*, 167 Wn.2d at 99-100; *see also Gordon*, 172 Wn.2d at 676 n.2 (quoting *O'Hara*, 167 Wn.2d at 100) ("To elaborate on the distinction between a manifest error and a harmless error, a manifest error is 'so obvious on the record that the error warrants appellate review.'")).

The "manifest" error analysis therefore focuses on whether the error is obvious on the record. And the natural benchmark for gauging the "obviousness" of the error is the legal authority in existence at the time of the alleged error—a notion our Supreme Court has alluded to in its "manifest" error jurisprudence. *See O'Hara*, 167 Wn.2d at 100 n.1 (quoting BLACK'S LAW DICTIONARY 622 (9th ed. 2009) (defining "manifest error" as, "'an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence on the record'")).

b. Substantial Body of Case Law Holds that Use of the Word "Should" in the Elements Instruction is Not Error.

Had the Lopez Brothers objected to the trial court's instructions in this case, the issue before the Court would be whether use of the word "should" in the elements instruction was error. However, because the Brothers failed to object, the question is much narrower: was use of the word "should" a "manifest" error—*i.e.* one that was obvious on the record

in light of controlling authority? Because a substantial body of legal authority holds that use of the word "should" in the elements instruction is not error at all, and even defense counsel urged that it was not error, the trial court's use of the word "should" in this case could not be a "manifest" error.

Consider the federal case law. In *Willingham v. Mullen*, 296 F.3d 917 (10th Cir. 2002), the jury was instructed as follows:

> If you find and believe beyond a reasonable doubt under the law and the evidence herein that the said defendant did commit the offense of murder in the first degree as charged in the complaint and information herein, *you will* find the defendant guilty of said offense and so state by your verdict. However, if you fail to find and believe the defendant guilty or if you entertain a reasonable doubt as to his guilt, then in either case *you should* return a verdict of not guilty.

Willingham, 296 F.3d at 929 (emphasis added).

Willingham argued that use of the word "should" "allowed the jury some discretion to convict even if they harbored a reasonable doubt about his guilt." *Id.* In rejecting this claim, the Tenth Circuit noted that "'the term 'should,' when used as it was used by the trial court, is defined as expressing an obligation or duty. 'Should' is never placed on the level with 'may,' which is clearly permissive.'" *Id.* (quoting *Willingham v. State*, 1997 OK CR 62, 947 P.2d 1074 (Okla. Crim. App. 1997)).

The Tenth Circuit went on to explain that "the [United States] Supreme Court has never indicated that the mandatory force inherent in the term 'should' is insufficient to properly guide a jury's application of the reasonable doubt standard." *Id.* The court further noted that the trial court referred to reasonable doubt multiple times during its instructions, emphasizing that a not guilty verdict "must" follow if there was reasonable doubt. *Id.* Thus, when viewed in the context of the entire instructions, use of the word "should" properly conveyed the obligatory nature of the jury's task and did not entitle Willingham to federal habeas relief. *See id.*; *see also United States v. Hamilton*, 792 F.2d 837, 840 (9th Cir. 1986) (finding no plain error based on jury instructions where "[t]he jury was properly instructed that [the defendant] was presumed innocent and that he should be acquitted if there was a reasonable doubt as to his guilt").[1]

The state case law is even more compelling, especially given the several states across the country that use "should" as part of their pattern elements instruction. In *State v. Munoz*, 240 P.3d 311 (Colo. 2009), for example, the Colorado Court of Appeals reviewed the propriety of their pattern elements instruction, which states:

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[1] Unfortunately, the *Hamilton* case does not quote the exact language of the challenged instructions.

> After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, *you should* find the defendant guilty of the offense charged.
>
> After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, *you should* find the defendant not guilty of the offense charged.

240 P.3d at 315. *Munoz* argued "that the use of the word 'should' in the court's instructions to the jury left the issue of whether the prosecution proved defendant's guilt beyond a reasonable doubt to the jury's discretion rather than informing the jury that it was obligated to return a not guilty verdict if the prosecution failed to present sufficient proof." *Id.* at 317.

The court rejected this argument, concluding that "the common meaning of 'should' conveys an obligatory command and not a permissive request." *Id.* The court noted that "courts interpreting the word 'should' in other types of jury instructions have also found that the word conveys to the jury a sense of duty or obligation and not discretion." *Id.* Further, the court explained that its conclusion was supported by reading the instructions in their entirety, one of which told the jury that it '*will* find the defendant not guilty' if the prosecution failed to meet its burden of proof. *Id.* at 318. Thus, the court held that "the jurors could not have interpreted the word 'should' to mean that they could base their decision on their own

discretion or that they were free to find defendant guilty even if the prosecution did not meet its burden of proof." *Id.* at 318-19.

Similarly, in *State v. Sanders*, 912 N.E.2d 1231 (Ill. 2009), the trial court instructed the jury that the defendant was presumed innocent and that this presumption remained unless the State proved the defendant guilty beyond a reasonable doubt. 912 N.E.2d at 1232. The jury was also given the pattern elements instruction, which stated:

> If you find from your consideration of all the evidence that this proposition has been proved beyond a reasonable doubt, *you should* find the defendant guilty.
> If you find from your consideration of all the evidence that this proposition has not been proved beyond a reasonable doubt, *you should* find the defendant not guilty.

Id. at 1233 (emphasis added). Sanders argued that "the word 'should' in [the pattern instruction was] permissive and would allow the jury to convict him even it had reasonable doubt about his guilt." *Id.* The Illinois Court of Appeals rejected this claim, noting that it could find no support for the contention that the word "should" diminishes the presumption of innocence or the burden of proof. *Id.* at 1234.

Like Colorado and Illinois, Florida's pattern elements instruction also uses "should." In *Torrence v. State*, 574 So.2d 1188 (Fla. 1991), the Florida Court of Appeals reviewed a pattern instruction that stated: "If you have a reasonable doubt, *you should* find the defendant not guilty. If

you have no reasonable doubt, *you should* find the defendant guilty." 574 So.2d at 1189. Echoing the same argument made by defendants in other states, Torrence argued that "use of the word 'should,' rather than 'must,' in this instruction convey[ed] the impression that it [was] *discretionary* with the jury whether to acquit if they [had] a reasonable doubt concerning the defendant's guilt." *See id.* The court disagreed, holding that "the instruction [gave] the jury only two choices depending on whether they [had] . . . a reasonable doubt and convey[ed] the clear meaning that an acquittal [was] the jury's only choice if they entertain[ed] such a reasonable doubt." *Id.*[2]

These decisions from states that use "should" in their pattern elements instruction are emblematic of a wider consensus that "should" properly informs the jury of its obligation in rendering a verdict. *Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000) (finding no error in instruction that informed the jury, "If . . . you think there is a real possibility that [the defendant] is not guilty, you should give him the benefit of the doubt and find him not guilty"); *State v. McCloud*, 891 P.2d 324, 334 (Kan. 1995) (finding no error in elements instruction using "should" and noting that "the word 'should' as used in instructions conveys a sense of duty and

[2] *Torrence* was recently cited by the Florida Court of Appeals as the sole basis for summarily affirming a conviction. *Marshall v. State*, 100 So.3d 224 (Fla. Dist. Ct. App. 4th Dist. 2012).

obligation and could not be misunderstood by a jury"); *Tyson v. State*, 457 S.E.2d 690, 691 (Ga. 1995) (finding no error in elements instruction that told jury it "should acquit" if there was reasonable doubt, and noting that "the term 'should acquit' is language of command"); *Commonwealth v. Hammond*, 504 A.2d 940, 941-42 (Pa. 1986) (finding no error in elements instruction using "should" and noting that the term "should" is defined "as implying a duty or obligation"); *State v. Caffey*, 365 S.W.2d 607, 611-12 (Mo. 1963) (finding no error in elements instruction that stated, "if you have a reasonable doubt of the defendant's guilt, you should acquit"); *cf. Tidwell v. State*, 118 So. 2d 292 (1960) ("The words 'it is your duty' are equivalent to the word 'should,' since 'should' as used in instructions to the jury conveys the sense of duty or obligation.").

As far back as 1914, the Montana Supreme Court rejected a claim of error based on use of the word "should" in the elements instruction, reasoning as follows:

> We venture the assertion that the average juror does not stop to speculate as to the distinctions in the meaning of such terms as 'must,' 'ought' and 'should,' all denoting moral obligation, but recognizes the obligation of his official duty enjoined by the use of one of them as not differing in any respect from that enjoined by the use of the other. The average juror understands without being told in terms that in no case may a defendant be convicted unless the evidence establishes his guilt beyond a reasonable doubt.

State v. Jones, 139 P. 441, 447-48 (Mont. 1914).

c. Even the cases relied upon in Smith were ambiguous at most, and none required reversal.

Smith cited to three cases regarding this issue. One of those cases actually approved the use of "should" in the elements instruction, holding that the term "clearly inform[ed]" the jury of its obligations. *Torrence*, 574 So.2d at 1189. The other case expressed concerns with using "should" rather than "must," but, as this Court's opinion noted, that case did not hold that the error alone warranted reversal. *Smith*, 174 Wn. App. at 790 (citing *Commonwealth v. Caramanica*, 729 N.E.2d 656, 659 (Mass. 2000)).

The Court's opinion cited another case which the Court read as supporting Smith's position "more strongly." *Id.* (citing *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004)). But the *Arave* case also stopped short of holding that use of the term "should" was error. *Arave*, 383 F.3d at 821 (disagreeing that the "should" instruction was "confusing, ambiguous, and possibly misleading to the jury"); *id.* at 822. ("*Whatever* error there was in [the 'should' instruction] was immediately cured.") (emphasis added); *id.* ("*[E]ven if* a layperson would have understood 'should' as precatory

rather than mandatory, any such impression was promptly corrected.") (emphasis added).[3]

In fact, the Ninth Circuit seemed dubious that the word "should" misstated the jury's obligations at all. In a footnote, the court explained that "[t]his [i.e. the notion that use of the term 'should' misstated the jury's obligation] is by no means clear, as common definitions of 'should,' 'shall' and 'must' include both an *obligatory* and an exhortatory connotation." *Id.* at 822 n.6 (emphasis added). This reasoning is consistent with the weight of authority discussed above: that the term "should" in the elements instruction carries an obligatory connotation that properly informs the jury of its responsibility in rendering a verdict.

The Trial Judge in this case stated that he had been using the "should" language for the past 25 years. Vol. 11, RP 72. A LEXIS search based on the trial judge's name reveals 50 criminal cases in the last 25 years this trial judge presided over that were the subject of published and unpublished opinions. It is hard to imagine that something that escaped review for 24 of the past 25 years could be considered "so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 100.

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[3] In the same breath, the Ninth Circuit noted a "caution[] against 'technical hairsplitting' of jury instructions." *Arave* 383 P.3d at 822 (citing *Boyde v. California*, 494 U.S. 370, 381, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990)).

Given the great weight of other jurisdiction authority is against the holding in *Smith*, and there was no Washington case on point at the time the trial court issued its jury instructions, there is simply no way to conclude "the error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99-100. This issue should be rejected as not manifest under RAP 2.5, and the Appellate Court should (has a duty to) not review it.

d. *Appellant cannot meet the Robinson test for new issues.*

Generally, a defendant must raise an issue at trial to preserve it for appeal. *State v. Robinson*, 171 Wn.2d 292, 306-07, 253 P.3d 84 (2011). Issue preservation encourages the use of judicial resources by ensuring the trial court has the opportunity to correct any errors and avoid unnecessary appeals. *Id.* at 304-05. The rule of issue preservation does not apply when the appellant establishes the following four conditions:

> (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

Id. at 305. Under the *Robinson* exception, all four factors must be satisfied to raise an issue for the first time on appeal. *State v. Fenwick*,

164 Wn. App. 392, 399, 264 P.3d 284 (2011). If any one condition is absent, the Robinson exception does not apply. *Id.*

There was no controlling precedent that *Smith* overruled. Instead it was a case of first impression in Washington. Appellant fails condition 2, therefore appellant cannot prevail on these grounds.

e. *Even Structural Error, if Invited, is not Grounds for Reversal.*

Under RAP 2.5 a party may appeal an issue not raised below if it is a manifest constitutional error. However, there is an exception to RAP 2.5, recognized in *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), for issues which an appellant had clear notice of and chose not to raise. "A conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver." *Id.* at 370. This follows the public policy expressed in RAP 2.5. Some rights are too important to allow an oversight by a defense attorney to preclude appellate review. However, an intentional choice not to pursue the issue by a defense attorney, that would still be appealable would allow "sophisticated defense counsel [to] deliberately avoid raising constitutional issues of little or no significance to the jury verdict but which might be a basis for a successful appeal." *Id.* This is exactly what is occurring in this case. "Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has

proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

In addition allowing this issue to go forward under these circumstances would provide a perverse incentive to both the prosecution and defendant. "The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). If a prosecutor recognizes an error made by the court that threatens a defendant's constitutional fair trial rights, it is incumbent upon the prosecutor to object. If all a defendant has to do is assent to the court's error, then take his chances for a verdict, with a reversal already in the bag on appeal, a prosecutor would be much better off remaining silent and hoping no one, including appellate counsel, picks up on the error, and the defendant would be incentivized to assent to the error, and not raise the objection if he catches the problem. This perverse set of incentives, advocated by the appellant here, undermine the primacy of trial and the values of judicial economy, as well as the rights of defendants.

The State Supreme Court has previously ruled that what would otherwise be structural error, when invited, is not grounds for reversal. In *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), the Court upheld a conviction after a courtroom closure where the defendant requested and

assented to the closure. In analyzing *Momah* the Court in *State v. Wise*, 176 Wn.2d 1, 14-15, 288 P.3d 1113 (2012), held that the two principle bases for holding *Momah* was not structural error was "(1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the Bone-Club factors." *Id.* This case is similar. Here, more than failing to object to the instruction, the error was affirmatively pointed out by the State, and the defense affirmatively assented to it, and actively participated in the error by proposing a jury instruction that contained the error. In *State v. Lewis*, 15 Wn. App. 172, 177, 548 P.2d 587 (1976), the court stated:

> [W]hen a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right. A criminal defendant is entitled to a fair trial *from the state*, including due process. He is not denied due process *by the state* when such denial results from his own act, nor may the state be required to protect him from himself.

The State attempted to protect the appellant from this potential error by its objections and arguments. The appellant refused this protection, he cannot now complain about it.

B. There was no prosecutorial misconduct, and even if there was, it did not create an enduring and resulting prejudice that it could not have been cured by an admonition to the jury.

1. Legal Standard.

"It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. However, prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility, and prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion." *State v. Allen*, 176 Wn.2d 611, 631, 294 P.3d 679 (2013).

> To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. The burden to establish prejudice requires the defendant to prove that "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict. *see, e.g., State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006) (defendant failed to prove that prosecutor's misconduct in eliciting testimony barred by pretrial ruling, to which he did not object, caused prejudice affecting the outcome of the trial). The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case.

State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011) (most internal citations deleted). A prosecutor may strike hard blows, but not foul ones. *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038; 84 L. Ed. 2d 1 (1985). "A prosecutor is not muted because the acts committed arouse natural indignation." *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). The State has wide latitude to argue inferences from the evidence. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

Benjamin fails to consider the prosecutor's comments within the context of the case, and the State's theory of the case, which clearly demonstrates there was no misconduct. He fails to establish that any comment was flagrant or ill-intentioned, and does not even try to establish specific prejudice, instead arguing a vague, overarching prejudice. He takes quotes out of context to establish his argument, and he never even attempts to establish that a timely objection would not have cured any prejudice.

The State's theory of this case is and always has been that the murder of Adan Beltran was part of the tit for tat back and forth between the Lopez Brothers' gang the Marijuanos, and the West Side 18th Street gang, including shootings on both sides and the murder of the Lopez Brothers' friend and fellow gang member Edwin "Chow" Davalos. The evidence and prosecutor's arguments reflect that theory.

2. There is no difference in the burden of proof or standard of review for a declined juvenile. Brief of App. at 10.

In his section heading Abraham argues that prejudice should be presumed because Abraham is a 15 year old murderer, and he was convicted solely on the testimony of an accomplice. First, Abraham cites no authority for this position. Thus the court should ignore it. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *State v. Soper*, 135 Wn. App. 89, 103, 143 P.3d 335 (2006). In addition Abraham was not convicted solely on Hernandez' testimony, but was convicted based on Hernandez' testimony, the testimony of the Garces family, the testimony of the police and the testimony of the forensic scientists involved.

3. Asking to do the right thing, decide the case based on evidence. Brief of App. at 11.

The prosecutor asked the jury to do what is right, decide the case on the evidence. The full quote from Vol. 12, RP 30 is "But when it's [deliberations are] done, I'm going to ask you to do one thing. I'm going to stand here and ask you to do what is right. Because it is proper and because the evidence in this case leaves you only one conclusion." In other words, the proper thing to do is decide the case from the evidence, and that evidence leads to only one conclusion. Of course the prosecutor

tried to align the Jury with the State's theory of the case. That is what closing argument is for. But he did so based on the evidence and the law contained in the jury instructions. The Jury instructions told the jury "What the lawyers say is not evidence. Disregard any statement or argument that is not supported by the evidence as you see it or by these instructions on the law." CP 182. Jurors are presumed to follow instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

Even if the appellant's out of context statement is taken at face value, it is still not reversible error. The out of context statement is similar to the "declare the truth" argument that was rejected as improper by the Supreme Court in *Emery*, 174 Wn.2d at 760. However, *Emery* held that such statements were not so prejudicial that they could not have been cured with a timely object. *Id* at 761-62, and therefore the appellant's challenge also fails for this reason.

4. Discussion of Alexis' Mother and credibility endorsed by other facts in the case. Brief of App. at 12.

Appellant again takes a statement out of context in the discussion of Alexis Hernandez's testimony. The full quote is:

> But he did decide to do the right thing after the police told him his mother wanted him to, and he quickly gave them an in itial (sic) outline that completely fit the facts of this case. He told them where everyone was sitting and generally

> what happened. A couple days later he gave a recorded interview. Where he again detailed what had happened.
>
> And what's interesting about the testimony of Alexis Hernandez is it's not just his testimony on the stand, it goes all the way back to just within a day of the murder. And his testimony is consistent with all the physical evidence, the DNA, the fingerprints, the third party eyewitnesses.

RP v12:53. Again this is a clear discussion of the evidence, linking the statement Alexis Hernandez made the night following the murder to the evidence at trial. It is true the statement about Alexis' mother referred to facts not in evidence. However, an attorney who spends a lot of time with a case, especially a lengthy case, may easily confuse the facts as he was aware of them prior to trial with the facts that actually come in. Defense counsel during this trial made exactly the same mistake. Vol. 8, RP 109-111. This mistake was not flagrant or ill intentioned, and could have easily been cured by a facts not in evidence objection. Indeed, such an objection was made and sustained by the court in reference to an earlier incident. Vol. 12, RP 32-33. The record clearly shows that again, the prosecutor was trying to explain to the jury his theory of the case based on the evidence. This is exactly what closing argument is for. The prosecutor did make a mistake in what evidence had been admitted, but this mistake, in the context of the trial, was not unduly prejudicial, could have easily been cured by a timely objection. The prosecutor did not

personally vouch for Mr. Hernandez' testimony, but stated how the evidence supported his testimony.

5. Gang evidence was properly admitted for motive, and to prove the gang aggravator, not as a play to the jury's fear of gang violence. Brief of App at 13.

Appellant again takes statements out of context when discussing the gang issue. The State's position, consistent throughout trial, consistent with the evidence, is that the murder of Adan Beltran was another incident in the long running war between the 18th Street and the Marijuanos. The prosecutor spends 12 pages of the record discussing the gang motivation for this killing without an improper argument objection. Vol. 12, RP 29-41. The State had Deputy Joe Harris testify about gang motivation. The record is replete with the conflict between the two gangs. In *State v. Scott,* 151 Wn. App. 520; 213 P.3d 71 (2009), the prosecution, in an offer of proof, submitted gang evidence for the purpose of motive. The court allowed it, as long as the gang expert tied the evidence to the crime. In *Scott* the gang expert failed to do so, so the court reversed. Here the State's expert, Deputy Harris, as well as the testimony from Alexis Hernandez and Benjamin, tied the gang evidence to the motive for the crime. Vol. 7, RP 32-53. This motive is what the prosecutor was discussing, and it is tied into the evidence.

The appellant argues that the inference that the prosecutor was trying to make was that the Lopez Brothers were responsible for shooting at Alexis Hernandez. Nothing could be farther from the truth. The evidence shows that Hernandez and the Lopez Brothers were part of the same gang, in a rivalry with the 18th Street. The reasonable inference is that Alexis Hernandez was shot at by the 18th Street gang, not the Lopez Brothers. Hernandez made this inference in his testimony, and the State never contradicted it. There was no attempt to tie the Lopez Brothers to that crime because there was no evidence they committed it. Instead it was offered to show the back and forth between the two gangs, which is consistent with the State's theory of motive in this case, and consistent with the evidence. Alexis Hernandez testified that he believed it was the 18th Street gang that shot at him, because who else would do so? Vol. 7, RP 159. The evidence of shots fired at Alexis Hernandez were properly admitted to show motive and the hatred between the two gangs.

These were not improper statements, and if they were they could have been headed off by an objection, although given the fact the statements were proper, it is hard to imagine what that objection would be. All of the prosecutor's statements on gang evidence were proper for motive and/or related to the charged aggravator, were tied into the evidence and were not unduly prejudicial.

6. *State v. Perez-Mejia*, 134 Wn. App. 907, 143 P.3d 838 (2006). Brief of App. at 14.

Appellant puts great emphasis on *Perez-Mejia*. However, a comparison with *Perez-Mejia* shows that the prosecutor's actions in this case were nowhere close to the prosecutor's actions in that case. First, *Perez-Mejia* involved a timely improper argument objection. *Id.* at 915, 917 fn 9. Thus that case was evaluated under the "improper and prejudicial in the context of the entire record and the circumstances at trial" standard. *Id.* at 917. However, in this case there was no objection, thus this case is evaluated under a standard that requires the remark was so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Thorgerson*, 172 Wn.2d at 443. The statements that the Court of Appeals reversed on in *Perez-Mejia* were:

> We can pick up the torch that Ms. Emmitt had been carrying.... We can continue her mission to try to stop this violence that has occurred.
>
> Now, although you as ladies and gentlemen of the jury will not be placed in harm's way, you will not physically be in the middle of a war as Ms. Emmitt was, you will not have someone behind you pointing a loaded gun at your back as Ms. Emmitt was. But what you can do as ladies and gentlemen of the jury is send a message.
>
> Send a message to Scorpion, to other members of his gang ... and to all the other people who choose to dwell in the

> underworld of gangs. That message is we had enough. We will not tolerate it any longer. That we as citizens of the State of Washington and the United States of America, we have the right to life, liberty and the pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights. And that message begins now.
>
> It begins now by finding that the defendant was involved in the death of Ms. Emmitt. That message can be sent by holding the defendant responsible for his actions, for his involvement in the gang. For him being an accomplice to his other gang members in the death of Ms. Margaret Emmitt.

There is simply nothing even close to these statements in this case. Appellant attempts to twist words and create inferences that simply aren't there in an attempt to bring this case close to *Perez-Mejia*, and fails. There was no reference by the prosecution to patriotism or racism in this case as there was in *Perez-Mejia* and cited to by the Appellant. App. Brief at 17. The appellant attempts to create comparisons that aren't there, and spends a significant amount of pages discussing what other prosecutors did wrong in other cases, but fails when it comes time to incorporate those cases to the facts and arguments presented at this trial.

7. Alexis Hernandez's intelligence. Brief of App. at 21.

In reference to the statement on Mr. Hernandez's intelligence, the prosecutor referenced his demeanor on the stand, not as a member of a group, but as an individual. The cases cited by the appellant hold that it is

improper to generalize a person's statements because they belong to a member of a group. However, it is without question that the demeanor of an individual on the stand is part of the evidence in a case. Indeed, that is why appellate courts defer to the finder of fact on issues such as witness credibility. It is not improper to comment on the demeanor and bearing of a witness, as that is part of the evidence in a case. And again, if this was improper, it could have been corrected by a timely objection.

8. If Alexis Hernandez were lying he would have made up a better story. Brief of App. at 22.

The State's comments on Mr. Hernandez's credibility all tie into the evidence, and thus were not improper. It is perfectly appropriate to bolster a witness' credibility on closing by pointing to the evidence that supports that witnesses' testimony, including pointing out he could have made up a better story. No court has held otherwise in a case that is currently good law. First, the statement that Alexis would have said more if he was making up a story is not the same as using an officer's repeated use of a CI, or using the categorical argument that children don't lie. Instead it is tied to the specific evidence in this case. Second, no Washington Court has disapproved of this tactic, no Federal Court that the State is aware of, except for the First Circuit cited by the appellant has disapproved of this tactic. And even that case is not good law. *U.S. v. Martinez –Medina*, 279

F.3d 105 (1st Cir. 2002), was explicitly disavowed on this issue as incorrect dicta by *United States v. Perez–Ruiz*, 353 F.3d 1, 10 (1st. Cir. 2003). (*See also Freeman v. Miller-Stout*, 2009 U.S. Dist. LEXIS 130574 at 23 (W.D. Wash 2009). (Not published in the Fed. Reg., *see* GR 14.1(b) and Fed. Rule App. Proc. 32.1). This was an explicit comment on the evidence as presented at trial. It is a reasonable inference that if a person is going to make up a story to please the prosecution, it would be a good one. The fact that Alexis Hernandez's story had gaps, and the reasonable inferences drawn from those gaps, were reasonable comments on the evidence.

Even if arguing Alexis Hernandez would have made up a better lie was improper, it is not so prejudicial that it could not have been cured by a timely objection. Even the discredited case of *Martinez-Medina* recognized that. No objection was made.

9. Alexis Hernandez could not have known whether his story would match up unless he told the truth. Brief of App. at 23.

As to the comment that the only way Alexis could know his story would not be contradicted if he told the truth, this is simply an argument based on the evidence. Alexis gave an initial overview of the murder the night it happened, and a more detailed version a couple of days later. The full context of the quote is:

> And what's interesting about the testimony of Alexis Hernandez is it's not just his testimony on the stand, it goes all the way back to just within a day of the murder. And his testimony is consistent with all the physical evidence, the DNA, the fingerprints, the third party eyewitnesses.
>
> Now, when Alexis gave that statement, he didn't know who the third party witnesses were or what they saw. He couldn't have. It had only been a couple of days. He didn't know what DNA evidence or fingerprint evidence would be testified to or would show, because it hadn't been found yet. The only way he could know that the story he was telling wouldn't be disproven by other evidence is if he told the truth.

The State introduced testimony by Detective Mancini relating Alexis' statements on the night of the murder as prior consistent statements pursuant to ER 801(d)(1)(ii). Vol. 10, RP. 9-18. It would be strange indeed that an evidence rule specifically approves of this sort of evidence, yet the prosecutor could not refer to it in closing argument. This is bolstering a witnesses' testimony by comparing it with other evidence in the case. There is absolutely nothing improper about that. Even if there was, it was not so prejudicial it could not have been cured by a timely objection.

The question of prejudice in prosecutorial misconduct cases when there has not been an objection is whether no curative instruction could have cured the misconduct. Regarding Alexis Hernandez's testimony there was a mistake in talking about Alexis Hernandez's mother.

However, this could have easily been cured, and was very minor in the scheme of a multi-week trial. In addition the jury was told to ignore arguments not predicated on the evidence. Nothing else complained about regarding Alexis Hernandez even rises to the level of error, much less incurable error.

10. Accomplice liability discussion. Brief of App at 24.

The prosecutor did not misstate the law of accomplice liability, when he discussed Hernandez's accomplice liability versus the Brothers, but instead was discussing the Lopez Brothers' motive and his links to the crime. A review of the record will show that the discussion was linked to evidence in the case, such as Benjamin giving directions to the scene of the homicide. Deputy Harris, the State's gang expert, testified about the concept of putting in work and gaining prestige in the gang. Vol. 7, RP 41-42, 63. Both Lopez Brothers stipulated they were members of a criminal street gang. Vol. 7, RP 81. Alexis Hernandez also testified that committing a murder would raise the standing of someone in the M13 gang. Vol. 8, RP 127. He also testified that a Marijuanos member would be expected to have everyone's back. Vol. 7, RP 126. Even Benjamin Lopez admitting killing an 18th Street member would be good for the gang. Vol. 10, RP 225-26. Again jurors are presumed to follow instructions as to accomplice liability. Those instructions specifically

stated mere presence was not enough. Here the prosecutor made arguments, not to weaken the burden of proof or change the jury instruction, but to point out the motive to be an accomplice, an entirely proper argument. There was certainly evidence that Benjamin Lopez was more than merely with the group, including giving directions to the driver. There was also evidence that Benjamin Lopez shared the animosity of the Marijuanos towards the 18th Streeters.

A review of Benjamin Lopez's testimony will reveal that he stated he heard a gun being racked from the back seat, and then it was handed up to the front seat to Murillo. Vol. 10, RP 197-98. As the car pulled up Roberto Murillo stated: "let's go." At that point, according to Benjamin, the car stopped and Hernandez, Murillo and *Abraham Lopez* got out of the car. Vol. 10, RP 200. Abraham stopped while Hernandez and Murillo went around the corner with Murillo in the lead with the gun and shot Beltran. Vol. 10, RP 202. A reasonable inference from this testimony, if believed, is that Abraham also saw or heard the gun chambered, heard Murillo say let's go, and he got out of the car to assist. This is more than mere presence, this is indicative of a willingness to assist. Thus if Alexis Hernandez was guilty by following Murillo around, so was Abraham by getting out of the car indicating his willingness to assist. Even defense counsel admitted these facts were problematic for his client. Vol. 12, RP

80. The prosecutor never said or implied that Abraham or Benjamin could be found guilty just for being there.

While there was an objection to this statement, it was an objection to the alleged mischaracterization of the defenses' argument, not an objection to an improper argument. Vol. 12, RP 159. ER 103(a)(1) requires an objection to state the specific grounds for objection unless it is readily apparent from the circumstances. *In re Det. of Coe*, 175 Wn.2d 482, 504, 286 P.3d 29 (2012). The court correctly characterized the prosecutor's statements as argument. The jury was instructed to disregard any argument not supported by the evidence or instructions. CP 182. A proper objection could have led to a striking of the prosecutor's argument or a reiteration of the court's instructions, if that were necessary. Because there was no improper argument objection, and the court could have easily cured any problem, if there was a problem, this argument must be rejected.

11. In the shoes argument. Brief of App. at 31.

The statement complained of is not "clearly designed to encourage the jury to "step into the shoes of Benjamin." Nobody asked the jury to speculate as to how gang member's think. Deputy Harris, Alexis Hernandez, and to a lesser extent, Benjamin Lopez, all testified to that. The argument was unnecessary to prove motive because argument proves nothing. The evidence provided proof of the motive. Instead argument

focuses the evidence and puts it into context. That is exactly what this argument does. Again appellant tries to shoehorn an argument into previous case law where it does not fit. Gang motivations were a substantial issue in this case, both for the aggravator and the underlying case. Even assuming this was improper argument, it could have easily been cured by a proper objection, and was not flagrant or ill intentioned, nor was it prejudicial in light of the entire case.

12. Comments on defense counsels arguments regarding Alexis' telling the truth Brief of App. at 33.

Again Benjamin mischaracterizes the State's argument by saying the State said defense counsel believed the appellants were guilty. The State said no such thing. The State said defense counsel was concerned about their case. There is no logic or supporting authority to equate "concerned about the case" to "belief in guilt." A defense counsel may well be concerned about a case in which he believes his client is innocent. Indeed, given human nature, defense counsel may be more concerned about his case if he believed his client was not guilty. Of course professional defense counsel would never let this be apparent to the jury, and the State does not imply that defense counsel did in this case. But it does not impugn defense counsel's integrity or insinuate that he believes

his client is guilty to say he is concerned about his case. Again, appellant places words in the prosecutor's mouth that simply aren't there.

Bolstering witness credibility by arguing that a witness' testimony is consistent with other evidence in the case simply is not misconduct, it is a simple argument based on the evidence. In addition emphasizing the significance of a witness' testimony is not misconduct. Abraham does not explain how the State prevented the defense from objecting, they had every right and ability to object, and the State did not stop them.

Again there was no objection to this argument, which, if it was in error, could have been cured by reemphasizing the jury instructions, therefore the appellant's argument fails on this ground as well.

13. Unable to walk down the street. Brief of App. at 34.

Here the appellant admits this is proper argument, but says the specific examples are outside the evidence, and are therefore misconduct. However, the evidence showed that gangs retaliate against those who testify against them, and was proper to counter the argument that testifying was only a benefit to Alexis. The prosecutor gave specific examples of going into a movie theater or a pizza parlor. The fact that Alexis cannot safely walk the streets of Grant County was clearly in evidence, given how gang members treat those who testify against them. Vol. 8, RP 131. The statements are both reasonable inferences and clear rhetorical devices used

to emphasis a point. No reasonable juror listening to this argument would think otherwise.

Again, the jury instructions told the jury to disregard facts not in evidence, and if this was error, could have easily been cured by a facts not in evidence objection. This does not merit reversal.

14. Summary of prosecutorial misconduct claim.

The prosecutor did make one error in referring to Alexis Hernandez's mother. However, in the grand scheme of the trial that error was de minimus and could have easily been cured by an objection that never came. All other statements complained about were reasonable comments on the evidence. Case law cited by Abraham is either inapplicable or not good law. Abraham cannot substitute lack of legal authority in his arguments by increasing their quantity. There were two very experienced defense counsels in this case, yet not one improper argument objection. If the argument was as flagrant as Abraham tries to make it appear on the record, there would have been at least one objection to improper argument. There are none. Even if the statements were inappropriate, they could have been cured by timely objections. The argument that dismissal with prejudice is the proper remedy is without foundation in law or fact. Assuming, arguendo, that the court could dismiss an extreme case of prosecutorial misconduct, this case is nowhere

near *Perez-Mejia*, which involved an objection and significantly more prejudicial comments. That case was remanded for a new trial. At most the prosecutor struck hard blows, not foul ones, and given the evidence in this case, they weren't even particularly hard. The Appellate Court should reject this basis for reversal.

IV. CONCLUSION

The Jury instructions did not deprive the Lopez Brothers of a fair trial. They got exactly what they asked for, the instructions as a whole properly informed the jury of the burden of proof, and this is not manifest constitutional error that can be appealed.

Finally, there was no prosecutorial misconduct, and only one minor reference to facts outside the record from which there was no basis to conclude any prejudice. Even if there was, there was no objection, and there certainly was no prejudice that was incurable by a timely admonition or upheld objection. The trial court should be upheld.

DATED: February 21, 2014

Respectfully submitted:

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Deputy Prosecuting Attorney

APPENDIX

Positive
As of: Feb 04, 2014

ROBERT LEE FREEMAN, Petitioner, v. MAGGIE MILLER-STOUT, Respondent.

Case No. 07-cv-1805-RAJ-JPD

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2009 U.S. Dist. LEXIS 130574

July 10, 2009, Decided
July 10, 2009, Filed

SUBSEQUENT HISTORY: Adopted by, Writ of habeas corpus denied, Dismissed by, Motion denied by, As moot *Freeman v. Miller-Stout, 2009 U.S. Dist. LEXIS 71841 (W.D. Wash., Aug. 12, 2009)*

PRIOR HISTORY: *State v. Freeman, 125 Wn. App. 1018, 2005 Wash. App. LEXIS 738 (2005)*

COUNSEL: [*1] For Robert Lee Freeman, Petitioner: Lance M Hester, HESTER LAW GROUP INC PS, TACOMA, WA.

For Maggie Miller-Stout, Superintendent, Respondent: Alex A Kostin, Gregory J Rosen, ATTORNEY GENERAL'S OFFICE (40116- OLY), OLYMPIA, WA.

JUDGES: JAMES P. DONOHUE, United States Magistrate Judge.

OPINION BY: JAMES P. DONOHUE

OPINION

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Robert Lee Freeman, a state inmate, has filed a *28 U.S.C. § 2254* petition for writ of habeas corpus, Dkt. No. 3, which challenges his convictions for three counts of rape of a child and three counts of child molestation in King County Superior Court. Respondent has filed an answer opposing the petition, Dkt. No. 26, to which Petitioner has replied, Dkt. No. 32. After careful consideration of the petition, all briefs in support and opposition thereto, all governing authorities, and the balance of the record, the Court recommends that the petition be DENIED and this case DISMISSED with prejudice.

II. FACTS AND PROCEDURAL HISTORY

A. Factual Background

Petitioner was charged with four counts of rape of a child in the first degree on March 14, 2002. Dkt. No. 29, Exh. 1. The information alleged that Petitioner repeatedly had sexual contact [*2] with his underage stepdaughter, Amie Freeman, over the course of several years. *Id.* Petitioner pleaded not guilty and the matter proceeded to trial. Shortly before trial, the information was amended to charge Petitioner with rape of a child in the first, second, and third degrees, and child molestation in the first, second, and third degrees.

The trial began on March 18, 2003. Dkt. No. 29, Exh. 24. Amie Freeman testified during the trial at length and in often difficult detail about the sexual abuse she was subjected to by Petitioner, her stepfather at the time, from the time she was in the fourth grade until she was in the ninth grade. *See* Dkt. No. 29, Exh. 24 at 451-660. At

the time of the abuse, Amie lived with Petitioner, her younger half-brother Tony, and her mother, Virginia. [1]

1 As all the members of the family have the same surname, the Court will refer to them by their first names.

Amie's testimony at trial revealed that Petitioner would frequently enter Amie's bedroom late at night, sit on her bed, and would rub Amie's upper legs, buttocks, and vaginal area under her clothing, including digitally penetrating her vagina. Petitioner did this between one and four times per week. [*3] Amie did not see what else Petitioner was doing when he was rubbing her with his hand because she turned away on her bed from him. On one occasion Petitioner lifted Amie on top of him and rubbed her vaginal area against his penis while he was laying down on her bed with his underwear on. After Petitioner finished, Amie testified that he would leave her room and wash his hands.

Amie testified that she eventually noticed wet spots on the carpet around her bed near where Petitioner had been. As she was young, she did not initially know what the spots were, but in time she began to assume that the spots were Petitioner's semen. Virginia also noticed stains on the carpet in Amie's bedroom. In addition, Amie noticed similar stains on a teddy bear that she kept on and around her bed.

Amie told some friends about the molestation, but did not tell Virginia until she was in the ninth grade. Virginia then confronted Petitioner, but he denied sexually abusing Amie. The sexual abuse ended at this time.

Amie personally confronted Petitioner about the abuse when she was 17 years old. She slapped him, and Virginia told Petitioner to leave the house. He would not leave, so Virginia called the police, [*4] who came to the home. Amie testified that she did not tell the police about the sexual abuse at that time because she believed she would be placed in foster care. In August 2001, when Amie was 18 years old, she testified that Petitioner admitted the sexual abuse to her and Virginia during a long conversation and he apologized.

Virginia reported the molestation to the police on September 17, 2001, after reporting a domestic violence assault by Petitioner. An investigation by the authorities ensued, and Virginia provided the stained teddy bear to Detective Vivian Dahlin. Detective Dahlin also took three carpet samples from Amie's bedroom; two of the carpet samples were stained and the third carpet sample was a control sample. A forensic scientist from the Washington State Patrol Crime Lab testified at trial that she tested the teddy bear and the two stained carpet samples, and found that the stains were Petitioner's pure semen; in other words, there was no DNA from Petitioner's wife (and Amie's mother) Virginia on any of the samples.

On March 27, 2003, the jury found Petitioner guilty of three counts of rape of a child and three counts of child molestation, as he was charged. Dkt. No. [*5] 29, Exh. 2. Petitioner fired his trial counsel and hired new counsel, who filed a motion for new trial based upon ineffective assistance of counsel. The trial court held a hearing on Petitioner's motion for new trial on September 11, 2003, during which the trial court heard testimony from Petitioner, Petitioner's trial counsel, and Detective Dahlin. Dkt. No. 29, Exh. 25. After the hearing, the trial court denied Petitioner's motion for a new trial. *Id.* On September 13, 2003, Petitioner was sentenced to 280 months in prison. Dkt. No. 29, Exh. 2.

B. Direct Review

Petitioner filed a notice of appeal on October 9, 2003. Dkt. No. 29, Exh. 3. Petitioner's appellate counsel alleged ineffective assistance of trial counsel in his brief, Dkt. No. 29, Exh. 4, and Petitioner also raised additional claims in his *pro se* appellate brief, including prosecutorial misconduct, Dkt. No. 29, Exh. 5. Before a decision was issued by the Washington Court of Appeals, Petitioner's counsel moved to file a supplemental brief and to supplement the record regarding a claim that Petitioner's right to a public trial had been violated by his fiancé's temporary exclusion during the trial. Dkt. No. 29, Exhs. 6, 7. The [*6] Court of Appeals denied Petitioner's claims and affirmed his convictions, and also summarily denied in a footnote Petitioner's motion to supplement his briefing and the record regarding the public trial claim. Dkt. No. 29, Exh. 9.

Petitioner filed a *pro se* petition for discretionary review with the Washington Supreme Court on March 23, 2005. Dkt. No. 29, Exh. 12. Petitioner raised the same claims that were raised before the Court of Appeals, and also challenged the Court of Appeals' denial of his motion to supplement his briefing and the record. *Id.* His petition for discretionary review was summarily denied by the Supreme Court on November 2, 2005. Dkt. No. 29, Exh. 13.

C. Personal Restraint Petition

Petitioner filed a personal restraint petition with the Washington Court of Appeals on June 26, 2006. Dkt. No. 29, Exh. 16. Petitioner raised, among other claims, his public trial, prosecutorial misconduct, and ineffective assistance of counsel claims. *Id.* The Court of Appeals dismissed the personal restraint petition in a written opinion on March 26, 2007. Dkt. No. 29, Exh. 18. Petitioner then petitioned the Washington Supreme Court for discretionary review, which denied the petition in [*7] a

written ruling on June 26, 2007. Dkt. No. 29, Exh. 20. Petitioner moved to modify the Commissioner's ruling, which was denied on September 5, 2007. Dkt. No. 29, Exh. 21.

D. Federal Collateral Review

The instant *§ 2254* petition was timely filed by Petitioner with the district court on November 6, 2007. Dkt. No. 1. Petitioner is currently incarcerated at the Airway Heights Corrections Center in Airway Heights, Washington.

III. ISSUES PRESENTED

Petitioner's *§ 2254* habeas petition raises three primary grounds for relief: ineffective assistance of counsel, prosecutorial misconduct, and denial of a public trial due to his fiancé's temporary exclusion. Dkt. No. 3.

IV. DISCUSSION

A. Petitioner Has Exhausted His Claims.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), governs petitions for habeas corpus filed by prisoners who were convicted in state courts. *See 28 U.S.C. § 2254.* In order for a federal district court to review the merits of a *§ 2254* petition, the petitioner must first exhaust his state court remedies. *28 U.S.C. § 2254(b)(1)(A); Fields v. Waddington, 401 F.3d 1018, 1020 (9th Cir. 2005).* The purpose of the exhaustion doctrine [*8] is to preserve federal-state comity which, in this setting, provides state courts an initial opportunity to correct violations of its prisoners' federal rights. *Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); Exparte Royall, 117 U.S. 241, 251-52, 6 S. Ct. 734, 29 L. Ed. 868 (1886).* A petitioner can satisfy the exhaustion requirement by either (1) fairly and fully presenting each of his federal claims to the highest state court from which a decision can be rendered, or (2) demonstrating that no state remedies are available to him. *Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996).* A petitioner fairly and fully presents a claim if he submits it "(1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan, 403 F.3d 657, 668 (9th Cir. 2005).*

Here, the Court finds that Petitioner has exhausted his claims in his habeas petition. [2] His ineffective assistance of counsel and prosecutorial misconduct claims were properly raised on both direct and/or collateral review in state court. Regarding his public trial claim concerning his fiancé's temporary exclusion, he attempted to raise it on direct review, but was denied the opportunity to [*9] supplement his briefing and the record to support the claim by the Washington Court of Appeals, presumably because his appellate counsel was late in seeking to do so. Petitioner challenged the Court of Appeals' summary denial of his motion to supplement, but was summarily denied by the Washington Supreme Court. However, while Petitioner was unsuccessful in presenting his public trial claim on direct review, on collateral review he presented the claim to both the Washington Court of Appeals and Supreme Court and the claim was considered and denied on the merits by each court. Accordingly, although Petitioner arguably did not provide a sufficient factual basis for his public trial claim in state court, the Court deems Petitioner's public trial claim to be properly exhausted. *See Wood v. Alaska, 957 F.2d 1544, 1549 (9th Cir. 1992)* (holding that federal courts may consider an otherwise barred claim on habeas review if state courts reached merits of claim).

2 For the sake of clarity, the Court notes that it did not consider Petitioner's claim regarding the voir dire of the jury, which he characterized as both an ineffective assistance of counsel claim and a denial of public trial claim. *See* [*10] Dkt. No. 17. Petitioner did not raise this claim in his state court proceedings and it was raised for the first time in federal court nearly a year after he filed his habeas petition, and the Court denied Petitioner's motion to expand the record in support of this claim. *See* Dkt. No. 22.

B. Standard Of Review For Exhausted Claims

AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).* A habeas petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is *"contrary to,* or involved an *unreasonable application of,* clearly established Federal law, as determined by the Supreme Court of the United States." *28 U.S.C. § 2254(d)(1)* (emphasis added).

Under the "contrary to" clause of AEDPA, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Bell v. Cone, 543 U.S. 447, 452-53, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005)* (citing *Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).* [*11] Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that

principle to the facts of the petitioner's case, or if the state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams v. Taylor, 529 U.S. 362, 407, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. *28 U.S.C. § 2254(d)(2)*.

In *Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*, the Supreme Court examined the meaning of the phrase "unreasonable application of law," ultimately correcting an earlier interpretation by the Ninth Circuit Court of Appeals which had equated the term with the phrase "clear error." The Court explained:

> These two standards . . . are not the same. *The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with* [*12] *unreasonableness. It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a "firm conviction" that the state court was "erroneous."* "... [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable.

Lockyer, 538 U.S. at 75-76 (citations omitted, emphasis added).

In sum, the Supreme Court has directed lower federal courts reviewing habeas petitions to be extremely deferential to state court decisions. A state court's decision may be overturned only if the application is "objectively unreasonable." *Id.* Whether a state court adjudication was reasonable depends upon the specificity of the rule: "the more general the rule, the more leeway courts have[.]" *Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)*.

C. Ineffective Assistance of Counsel Claims

Claims of ineffectiveness of counsel are reviewed according to the standard announced in *Strickland v. Washington, 466 U.S. 668, 687-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. In order to prevail on such a claim, the [*13] petitioner must establish two elements. First, he must establish that counsel's performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness" under "prevailing professional norms." *Strickland, 466 U.S. at 687-88*. Second, the petitioner must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*.

Considering the first prong of the *Strickland test*, the petitioner must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, 466 U.S. at 689*. The test is not whether another lawyer, with the benefit of hindsight, would have acted differently, but rather, whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Id. at 687, 689*; *see also Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000)* ("Under *Strickland*, counsel's representation must be only objectively reasonable, not flawless or to the highest degree of skill.").

To meet the second [*14] *Strickland* requirement of prejudice, the petitioner must show that counsel's deficient performance prejudiced the defense. *Id. at 687*. It is not enough that counsel's errors had "some conceivable effect on the outcome." *Id. at 693*. Rather, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 691*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the case. *Id. at 694*. Failure to satisfy either prong of the *Strickland test* obviates the need to consider the other. *Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002)*.

Here, Petitioner claims that his trial counsel rendered ineffective assistance by (1) failing to object to or limit the use of Amie's diary; (2) failing to object to Virginia's testimony about her fear of Petitioner and that she removed him from the home; and (3) failing to interview Amie and Virginia before trial. Dkt. No. 3.

The Washington Court of Appeals rejected these claims, concluding that Petitioner was not prejudiced by trial counsel's decisions since there was "overwhelming evidence supporting the jury's guilty [*15] verdict." Dkt. No. 29, Exh. 9. Petitioner's motion for discretionary review was denied by the Washington Supreme Court.

The Court has reviewed the record and finds that the state courts' adjudication of his ineffective assistance of counsel claims were neither contrary to, nor involved an unreasonable application of, clearly established federal law. Petitioner's first claim of ineffective assistance, that

his trial counsel failed to object to or limit the use of Amie's diary, does not meet either prong of the *Strickland test.* As an initial matter, Petitioner acknowledges that defense counsel objected to the diary's admission during pretrial motions, to no avail. Dkt. No. 32 at 19. In any case, once admitted, the diary was integral to the defense, which used the diary to attempt to impeach Amie's testimony and to support the defense theory that Amie and Virginia made up the sexual abuse allegations and were, in effect, "out to get" Petitioner. *See* Dkt. No. 29, Exh. 24 at 628-639. Tactical decisions by counsel during trial need only meet an objectively reasonable standard. *Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000).*

Even if allowing the diary's admission or failing to limit its use [*16] constituted deficient performance, Petitioner has failed to meet the second *Strickland* requirement; that is, he has failed to demonstrate how the admission of the diary prejudiced the defense. Amie testified to the sexual molestation by Petitioner at length and in detail; therefore, the jury learned of the incidents at issue regardless of whether the diary was admitted or not. The evidence beyond Amie's testimony was also substantial: the DNA evidence from the carpet samples and teddy bear supported Amie's and Virginia's testimony, and refuted Petitioner's explanations for the stains of his ejaculate being on Amie's bedroom's carpet. Accordingly, Petitioner has failed to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, 466 U.S. at 691.*

Petitioner's second claim of ineffective assistance, that his trial counsel failed to object to Virginia's testimony about her fear of Petitioner and her removal of him from the home, also fails to satisfy either prong of *Strickland.* This testimony was relevant and not unfairly prejudicial because it was used by the prosecution to help explain the delay [*17] in reporting the sexual abuse. Therefore, the Court cannot conclude that a failure to object to this testimony was objectively unreasonable. In any event, even assuming that trial counsel's failure to object was deficient, Petitioner has failed to show prejudice. Amie also testified to her fear of Petitioner, Dkt. No. 29, Exh. 24 at 620-21, making it unlikely that counsel's failure to object to Virginia's testimony on the matter would have had any effect on the result of the trial.

Petitioner's third claim of ineffective assistance, that his trial counsel failed to interview Amie and Virginia prior to trial, also fails the *Strickland* test. During the hearing on Petitioner's motion for a new trial based on his claim of ineffective assistance of trial counsel, Petitioner's trial counsel testified that he chose not to interview Amie and Virginia before trial because he had significant familiarity with them after representing Petitioner in prior domestic matters. Dkt. No. 29, Exh. 25 at 20. In addition, trial counsel testified that since part of the defense theory was that the semen in Amie's bedroom was planted, trial counsel did not want to reveal this approach to Amie, Virginia, and [*18] the prosecutor by interviewing Amie and Virginia prior to trial. *Id.* at 21-22, 25. Further, trial counsel testified that Petitioner did not want him to interview Amie prior to trial because Petitioner believed that Amie was being put up to "this whole scheme" that was orchestrated by Virginia, and Petitioner believed that Amie would reveal the truth that Petitioner did not sexually molest her when she took the stand. *Id.* at 24. Lastly, trial counsel testified that he prepared for trial with the state's discovery materials, information from his private investigator, interviews with other witnesses, Amie's diary, testimony from Petitioner's domestic violence case, and affidavits from Petitioner's divorce proceedings. *Id.* at 22-23, 25. At the hearing on the motion for new trial, the trial court found that trial counsel "knew exactly what" Amie and Virginia were going to say and was adequately prepared for both their cross-examinations. *Id.* at 58. Based on all of the foregoing, the Court finds that trial counsel's decision not to interview Amie and Virginia prior to trial was reasonable and falls within "the wide range of reasonable professional assistance." *Strickland, 466 U.S. at 689.*

Nevertheless, [*19] even assuming that trial counsel's decision not to interview Amie and Virginia prior to trial was objectively unreasonable, Petitioner has failed to show prejudice. The evidence against Petitioner at trial was considerable, and his explanations for his semen being in Amie's bedroom were contradicted by the DNA evidence. In view of this, Petitioner has failed to demonstrate how interviewing Amie and Virginia prior to trial would have revealed anything that would have led to a different outcome at trial.

D. Prosecutorial Misconduct Claims

As his second ground for relief, Petitioner raises four claims that he characterizes as prosecutorial misconduct: (1) that the prosecutor withheld DNA evidence and presented false DNA evidence; (2) that the prosecutor "vouched" for the credibility of a witness during his closing; (3) that the prosecutor introduced false testimony; and (4) that the prosecutor became an unsworn witness.

The Washington State Court of Appeals and Supreme Court each reviewed many of these claims on direct and collateral review, and they found that the record did not establish prosecutorial misconduct, and, even if there was misconduct, it could have been cured by limiting instructions. [*20] Dkt. No. 29, Exhs. 9, 18, 20.

Federal habeas review of prosecutorial misconduct claims is limited to the narrow issue of whether the alleged misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996)* (internal quotations omitted). Prosecutorial misconduct violates due process when it has a "substantial and injurious effect or influence in determining the jury's verdict." *Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996)* (internal quotations omitted).

After a careful review of the state court record, this Court finds no prosecutorial misconduct of a constitutional dimension sufficient to grant the petition for writ of habeas corpus. Petitioner's allegation that the prosecutor withheld DNA evidence and presented false DNA evidence at trial has no support in the record. The record establishes that there were only three carpet samples taken by Detective Dahlin from the Freeman home that were used for DNA testing, provided to Petitioner, and used at trial: VED 11, VED 12, and VED 13. Moreover, the only reasonable conclusion from the record is that the photograph taken by Detective [*21] Dahlin of the carpet near Amie's bed was of the VED 11, VED 12, and VED 13 carpet samples, which, as the record establishes, were the only three carpet samples taken from the Freeman home. Indeed, the forensic scientist from the Crime Lab testified that she only tested two carpet samples (VED 13 being the control sample). Dkt. No. 29, Exh. 24 at 369-370. Moreover, the trial court's order on Plaintiff's suppression motion makes clear that VED 1, VED 2, and VED 3 are not withheld carpet samples as Petitioner claims, but a blow-up doll and handwritten papers obtained from the Freeman property. Dkt. No. 1-3 at 75. There is simply no support in the record that three additional carpet samples labeled VED 1, VED 2, and VED 3 exist somewhere and were not provided to Petitioner, as he claims.

But even if that was the case, Petitioner has not shown how the existence of three additional carpet samples could have had any effect on the jury's verdict, particularly given that from the time Petitioner was first interviewed by the authorities, he did not challenge that it was his semen that was on the carpet of Amie's room: his explanation during the investigation and at trial was that the stains of [*22] his semen on Amie's bedroom's carpet either dripped from Virginia after she had sexual intercourse with Petitioner, was the result of sexual relations between him and Virginia in Amie's room, or was planted there by Virginia. *See, e.g.*, Dkt. No. 29, Exh. 24 at 743; Dkt. No. 29, Exh. 25 at 25; Dkt. No. 29, Exh. 25 at 31; Dkt. No. 29, Exh. 25 at 33-34. Because Petitioner never asserted that the semen in Amie's bedroom was someone else's, the Court cannot conclude that, even if the alleged three additional carpet samples existed, that it would have had any effect on the jury's verdict.

Petitioner's additional allegations that the prosecutor "vouched" for the credibility of a witness in his closing, introduced false testimony, and became an "unsworn witness," also lack merit. Regarding Petitioner's allegation that the prosecutor "vouched" for the credibility of a witness, in fact the prosecutor only asked the jury to think of what Amie and her mother "could have said if they were really out to get the defendant if they were willing to lie to get the defendant, think of what they could have said." Dkt. No. 29, Exh. 24 at 845. In asserting that this statement was inappropriate "vouching," [*23] Petitioner relies on the First Circuit's decision in *United States v. Martinez-Medina, 279 F.3d 105 (1st Cir. 2002)*, which held that a prosecutor's statement to the jury that four witnesses "would have concocted more damaging stories if they had been lying in order to curry favor with the government" was improper. *Martinez-Medina, 279 F.3d at 119-120.* However, as an initial matter, the language in *Martinez-Medina* disapproving of the prosecutor's statement was expressly disclaimed by the First Circuit less than two years later in *United States v. Perez-Ruiz, 353 F.3d 1, 10 (1st. Cir. 2003).* In *Perez-Ruiz*, the First Circuit held that its language in *Martinez-Medina* regarding the prosecutor's statement was dictum, based on an "understandable misreading" of prior First Circuit case law, and "not good law." *Perez-Ruiz, 353 F.3d at 10.* Second, while it disapproved of the prosecutor's statement, the *Martinez-Medina* court nonetheless held that the prosecutor's remarks did not warrant a new trial. *Martinez-Medina, 279 F.3d at 120.* Third, even if this Court were bound by the First Circuit's decision in *Martinez-Medina*, the prosecutor's statement in that case is materially different than the [*24] statement challenged by Petitioner: in *Martinez-Medina*, the prosecutor, in effect, stated that the witnesses were truthful because he knew they would have said something different if they were lying--but the prosecutor's knowledge was not evidence before the jury. That is not the case here: the prosecutor merely told the jury to "think" about what Amie and her mother "could have said" if they were "really out to get the defendant." Dkt. No. 29, Exh. 24 at 845. The prosecutor in the instant case did not tell the jury that he knew Amie and her mother "would have" said something different if they were lying, as the prosecutor effectively did in *Martinez-Medina.*

With respect to Petitioner's allegation that the prosecutor introduced false testimony, Petitioner alleges that the prosecutor had Amie testify falsely about statements made to her by a school counselor named Rose Russell. Petitioner alleges that Ms. Russell was never Amie's counselor, and that Ms. Russell never made the state-

ments that Amie testified to. There is no support in the record for Petitioner's allegations. Amie did not testify that Ms. Russell was her counselor; in fact, Amie testified that her entire conversation with [*25] Ms. Russell last only ten minutes. Dkt. No. 29, Exh. 24 at 653-655. Moreover, Amie did not testify to statements made by Ms. Russell; indeed, Petitioner's counsel objected on the basis of hearsay, which was sustained. *Id.* Amie only testified that it was her understanding that Ms. Russell approached her because of rumors of sexual abuse regarding Amie that Ms. Russell had heard around school. *Id.* Moreover, contrary to Petitioner's apparent claim, Ms. Russell did have a recollection of Amie; Petitioner's counsel testified at the hearing on the motion for new trial that Ms. Russell recalled who Amie was, but that she could not independently remember discussions with Amie regarding allegations of sexual abuse one way or the other. Dkt. No. 29, Exh. 25 at 29-31. This is not unexpected, given that the conversation occurred several years prior and, according to Amie, lasted only ten minutes. In any event, Amie's testimony regarding her brief conversation with Ms. Russell was favorable to Petitioner, because Amie testified that she *denied* the sexual abuse to Ms. Russell, although Amie explained that she did so because at the time she was afraid she would be taken away from her mother and younger [*26] brother. Dkt. No. 29, Exh. 24 at 653-655.

Lastly, Petitioner's allegation that the prosecutor became an "unsworn witness" during the trial is unavailing. Petitioner alleges that the prosecutor became an unsworn witness when he placed witness Debra McBain, a childhood friend of Amie's, on the stand and asked Ms. McBain about her conversation with Detective Dahlin about the case. Petitioner alleges that it was the prosecutor, not Detective Dahlin, who contacted Ms. McBain on the telephone and interviewed her about the case. Again, there is no support in the record for Petitioner's allegation. The record reveals that Detective Dahlin was initially unable to locate Ms. McBain to interview her. Thereafter, the prosecutor obtained Ms. McBain's telephone number by using the phonebook and speaking with every McBain listed in the book until he found a relative who could direct him to the correct Ms. McBain. Dkt. No. 29, Exh. 24 at 222. Then, the prosecutor provided the contact information to Detective Dahlin to contact and interview Ms. McBain. *Id.* Because the prosecutor was concerned about Ms. Dahlin specifically testifying that the prosecutor provided the contact information to her, and because [*27] the prosecutor did not want to give the jury the incorrect impression that Amie provided the contact information to Detective Dahlin, he raised the issue with the trial court, and all counsel and the trial court agreed that it would be fine if Detective Dahlin testified that "the State" went through the phonebook during the investigation to obtain Ms. McBain's contact information, or words to that effect. Dkt. No. 29, Exh. 24 at 223-225. Indeed, Detective Dahlin so testified, and testified that the contact information was not provided to her by Amie. Dkt. No. 29, Exh. 24 at 340-343. The prosecutor did not become an "unsworn witness."

In any case, the foregoing allegations of prosecutorial misconduct, even if they were error, did not so infect the trial with unfairness as to make Petitioner's resulting conviction a denial of due process. *See Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir. 1996).* Indeed, Petitioner has failed to demonstrate how any of his additional alleged improprieties by the prosecutor could have had a "substantial and injurious effect on or influence in determining the jury's verdict," *Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996),* in view of the overwhelming [*28] evidence against Petitioner at trial. Accordingly, federal habeas relief on the basis of Petitioner's prosecutorial misconduct claims is unwarranted.

E. Public Trial Claim

As his third ground for relief, Petitioner alleges that the trial court violated his right to a public trial under the *Sixth* and *Fourteenth Amendments* when his fiance, Aria Rozotti (now Freeman), was excluded from the courtroom during Virginia's and Amie's testimony. The prosecutor moved to have Aria temporarily excluded because an anti-harassment order was in place prohibiting Aria from having contact with Virginia and Amie. Dkt. No. 17, Exh. D at 12-14. [3] The trial court asked defense counsel if there were any objections, to which defense counsel stated that he did not "have a problem with her stepping out for that testimony." *Id.* Accordingly, the trial court granted the motion. *Id.*

> 3 Although the Court denied Petitioner's motion to expand the state court record in his federal habeas proceeding, Dkt. No. 22, review of this particular exhibit, which is a transcript of a pretrial proceeding, was necessary in order to give full consideration to Petitioner's public trial claim regarding his fiancé's temporary exclusion.

The [*29] Washington Court of Appeals and Supreme Court each reviewed Plaintiff's public trial claim regarding his fiancé's temporary exclusion on collateral review. The Court of Appeals found Petitioner's public trial claim to be "frivolous," Dkt. No. 29, Exh. 18, and the Washington Supreme Court found Aria's temporary exclusion to be within the trial court's discretion to regulate the conduct of the trial, Dkt. No. 29, Exh. 20.

Article I, Section 22 of the Washington State Constitution and the *Sixth Amendment of the United States Constitution* provide criminal defendants the right to a

public trial. *State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)*. The right to a public trial allows the public to see that the accused is treated fairly, helps ensure that the judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. *See Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)*. However, the right to a public trial is not absolute, and a full closure or a partial closure of a trial court proceeding may occur.

In Washington, a defendant's public trial right can give way to the trial judge's "power to control the courtroom consistent with the ends of justice." [*30] *State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (Wash. 1986)*; *see also State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (Wash. 2006)*. In *Gregory*, the defendant's aunt was temporarily excluded from the courtroom when the trial judge observed the aunt shaking her head "no" during defendant's grandmother's testimony; the aunt was ordered to be excluded for the remainder of the grandmother's testimony. In upholding the partial closure, the Washington Supreme Court distinguished full closures from partial closures, and found that the trial court never fully closed the courtroom by excluding one person for a limited period of time. Accordingly, the Supreme Court held that its prior case law regarding full closures did not limit or undermine "the trial court's inherent authority to regulate the conduct of a trial by excluding one person from the courtroom for a limited period of time." *Gregory, 158 Wn.2d at 816*. The Supreme Court noted with approval that the trial judge explained its reason for excluding the aunt, the defense had an opportunity to object, and the trial judge limited the exclusion to the duration of the grandmother's testimony. *Id.* The Supreme Court concluded that the defendant's right to a public [*31] trial was not violated. *Id.*

The Court of Appeals for the Ninth Circuit has also drawn a distinction between full closures and partial closures. *See United States v. Sherlock, 962 F.2d 1349, 1356-57 (9th Cir. 1992)*. In *Sherlock*, the Ninth Circuit held that the United States Supreme Court's decision in *Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)*, addressed total closures of a trial court proceeding, and therefore did not necessarily govern partial closures. *Sherlock, 962 F.2d at 1356*. The Ninth Circuit held that the more lenient "substantial reason" standard applied to partial closures, rather than the United States Supreme Court's "overriding interest" standard in *Waller*. *Id. at 1357*. In addition to the requirement that there be a "substantial reason" for the partial closure, the Ninth Circuit further held that the closure must be narrowly tailored to the extent necessary to satisfy the purpose for which it was ordered and that three procedural requirements be met: (1) the trial court must hold a hearing on the closure motion; (2) the court must make findings to support the partial closure; and (3) the court must consider reasonable alternatives to closing the courtroom. *Id. at 1357-59*. The [*32] first procedural requirement is met when the court gives the defendant the right to be heard. *Id. at 1358*.

Here, the Court finds that the trial court's temporary exclusion of Petitioner's fiancé meets the requirements under *Gregory*, *Sherlock*, and *Waller*. It is undisputed that a valid anti-harassment order prohibited Petitioner's fiancé from having contact with Virginia and Amie. Accordingly, the trial court had no choice but to order Petitioner's fiancé's temporary exclusion from the courtroom during the testimony of Amie and Virginia. The partial closure was narrowly tailored to the extent necessary to satisfy the purpose for which it was ordered: to comply with the valid anti-harassment order and minimize, if not preclude, contact between Petitioner's fiancé and Amie and Virginia. Moreover, the trial court gave defense counsel an opportunity to be heard, and defense counsel stated that he did not object to the partial, temporary exclusion. Dkt. No. 17, Exh. D at 12-14. While the trial court did not make express findings regarding reasonable alternatives to temporarily excluding Petitioner's fiancé, as a practical matter there were no reasonable alternatives that would have allowed [*33] Aria to comply with the anti-harassment order while also being present in the courtroom while Virginia and Amie testified. In any case, a trial court has some latitude in meeting the third procedural requirement, as the Ninth Circuit found the requirement to be met in *Sherlock* even though the trial court said very little regarding alternatives to a partial closure. *See Sherlock, 962 F.2d at 1359*. In sum, the temporary exclusion of Petitioner's fiancé from the courtroom for the duration of Virginia's and Amie's testimony due to a valid anti-harassment order did not violate Petitioner's right to a public trial.

V. CONCLUSION

For the foregoing reasons, this Court recommends that the petition be DENIED and this case DISMISSED with prejudice. Petitioner's motion for an evidentiary hearing, Dkt. No. 23, is DENIED as moot. A proposed Order accompanies this Report and Recommendation.

DATED this 10th day of July, 2009.

/s/ James P. Donohue

JAMES P. DONOHUE

United States Magistrate Judge

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent. v. ABRAHAM LOPEZ, Appellant.	)	No. 314391 DECLARATION OF MAILING

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Mitch Harrison, Attorney for Appellant, and to Appellant, containing a copy of the Brief of Respondent in the above-entitled matter.

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Dated: February 24, 2014.

Kaye Burns

Declaration of Mailing.