

No. 66674-6-I
Consolidated with No. 66658-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

2012 JUN -4 PM 2:36
COURT OF APPEALS
STATE OF WASHINGTON
DIV 1

STATE OF WASHINGTON,

Respondent,

v.

PEDRO JOSE MARTINEZ,

Appellant.

REPLY BRIEF OF APPELLANT MARTINEZ

James E. Lobsenz
Attorney for Appellant

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

ORIGINAL

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A. ARGUMENT IN REPLY

1. MIRANDA VIOLATION

a. Martinez Raised His *Miranda* Claim Below.

The State contends that “[i]n his challenge on appeal to the admission of his statements Martinez makes a new argument.” *Brief of Respondent* (“BOR”). At 29. But the State does not and cannot deny that Martinez raised a *Miranda* claim in the trial court. RP I, 51.¹ Instead, it complains that “[t]he fact that [Martinez] was stopped at gunpoint was not elicited at the CrR 3.5 hearing and was never argued to the trial court.” *BOR*, at 30.

The State admits that Martinez *was* in fact stopped at gunpoint and *concedes* that this undisputed fact was elicited at trial. Officers Reyes and Ragillo were the first officers to arrive at the scene. RP III, 329. Officer Reyes testified, “we have our guns drawn. I tell him [robbery victim Flores-Cruz] to get back. And we contact the two subjects.” RP III, 334. Reyes and Ragillo then frisked Martinez and Barrera for weapons. RP III, 334. The video taken by the camera in Reyes’ patrol car was admitted into evidence and while it was played Reyes testified that it showed that Ragillo had his firearm drawn. RP III, 338. By the time Officer Terry arrived, Martinez had *already* been ordered at gunpoint to get on the

¹ Martinez’ attorney argued, “it’s our position that [Martinez] was obviously under arrest when he was sat down on the ground and when there was probable cause to arrest him. So the statements that he makes before he’s advised of Miranda should be excluded.”

ground, so naturally Terry did not see that happen and did not testify about that. RP III, 367. But no one denies that it happened.²

The State fails to explain how it was prejudiced by the fact that the initial responding officers did not testify until trial, thus delaying the time when explicit testimony was given (confirming what is on the video) that Martinez and Barrera were ordered to go to the ground at gunpoint. What if Officer Reyes had been called as a witness at the CrR 3.5 hearing? He still would have testified that the defendant was ordered at gunpoint to get on the ground. The State fails to explain what possible additional evidence it would have elicited from Reyes (or Ragillo) that would have changed the analysis of the *Miranda* question.³

b. Both Spearman and Campos-Cerna Explicitly State That an Issue May Be Raised on Appeal If It Was Raised Either At the 3.5 Hearing Or During Trial.

The State purports to rely on *State v. Spearman*, 59 Wn. App. 323, 796 P.2d 727 (1990), and *State v. Campos-Cerna*, 154 Wn. App. 702, 226 P.3d 185 (2010). And yet the opinions in both cases state that the *Miranda* issue the defendant sought to litigate “cannot be raised on appeal because

² The prosecution simply ignores the fact that it has the burden of proving compliance with the rule of *Miranda*. When the State has “an adequate opportunity to obtain and present the corroborating testimony of other officers present at the scene of apprehension and custody,” and yet fails to do so, it fails to carry its burden of proof. *State v. Erho*, 77 Wn.2d 553, 559, 463 P.2d 779 (1970).

³ Compare *State v. Huzoll*, 38 Wn. App. 360, 364, 685 P.2d 628 (1984) (irrelevant that Officer Gilbreath did not testify at CrR 3.5 hearing since “the officer could have testified only that the defendant refused to sign the confession, a fact which was not disputed.”).

it was not raised during the CrR 3.5 *or the fact-finding portion of the proceedings.*” *Spearman*, at 325; *Campos-Cerna*, at 710 (italics added).⁴

In the present case, while the fact that Reyes directed Martinez to sit down at gunpoint was not mentioned during the 3.5 hearing, it was mentioned at trial. Thus Martinez’ case comes within the recognized rule of *Spearman* and *Campos-Cerna* and he *can* raise his *Miranda* claim on appeal because the facts were elicited, partially at the 3.5 hearing, and partially at trial.

c. Moreover, a *Miranda* Claim Can Be Raised for the First Time on Appeal When It Is Manifest Constitutional Error.

Moreover, both *Spearman* and *Campos-Cerna* recognize that a claim of *Miranda* error which truly is an error of constitutional magnitude *can* be raised for the first time on appeal, if the error is “manifest.” *Campos-Cerna*, 154 Wn. App. at 710; *Spearman*, at 325. In both cases the juvenile defendants *did* receive *Miranda* warnings before they were questioned. On appeal they raised claims that their *Miranda* rights were violated because the warnings they received were inadequate because they misled them into thinking that their incriminating statements “can only be used against them when juvenile jurisdiction is declined.” *Spearman*, at 325; accord *Campos-Cerna*, at 710. Both Courts *reached the merits* of the appellants’ claims and both held that there was no constitutional error.

⁴ *Campos-Cerna* and *Spearman* were both juvenile cases, so their trials are called “fact-findings.” Martinez was tried as an adult, so his “fact-finding” is denominated a “trial.”

Spearman, at 325-26. *Accord Campos-Cerna*, 154 Wn. App. at 712-713.

d. Martinez’ “Primary Authorities” Are *Keohane* and *Daniels*.

The prosecution complains that Martinez’ “primary authority to support his new argument on appeal, *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993), was never cited to the trial court.” *BOR*, at 30. To begin with, *Perdue* is not Martinez’ “primary authority.” The key cases cited by Martinez in his opening brief are *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) and *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007). These are the cases which hold that whenever a “reasonable person [would] have felt he or she was not free to terminate the interrogation and leave,” such a person “must be given *Miranda* warnings before the police ask any question likely to provoke an incriminating response.” *Daniels*, at ¶ 19, quoting *Keohane*, at 112.

The prosecution essentially ignores these cases when it fails to address the question of whether a reasonable man, ordered at gunpoint to get down on the ground, would feel free to leave. Since the answer to this question is obviously, “no,” it is clear that Martinez was in custody and thus given the failure to give him *Miranda* warnings his statements to Officer Reyes should have been suppressed.⁵

⁵ Moreover, the fact that the *Perdue* case was not cited in the trial court is completely irrelevant. There is no rule that says if a case is not cited in the trial court it cannot be

e. This Was Not a “Routine Traffic Stop”.

The State would have this Court believe that the controlling case is *Berkemer v. McCarty*, 468 U.S. 420 (1984). *Berkemer* involved the stop of motorist for the suspected offense of driving under the influence. While stopped on the side of the road, Trooper Williams asked the driver if he had been drinking and he responded he had two beers and smoked several joints of marijuana. *Id.* at 423. Because this questioning was not preceded by *Miranda* warnings, the motorist argued that his incriminating answer should have been suppressed. The Supreme Court posed the question “whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered ‘custodial interrogation’ for purposes of the *Miranda* rule. *Id.* at 435. This, in turn, led to the question of “whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of the privilege against self-incrimination to require that he be warned of his constitutional rights.” *Id.* at 437. The Court concluded that the characteristics of an “ordinary traffic stop” weighed against the conclusion that traffic stops are so inherently coercive that *Miranda* warnings are required.⁶

cited on appeal. The State correctly asserts that “[a]s a general rule, *issues* cannot be raised for the first time on appeal.” *BOR*, at 30. But a case is not an “issue.”

⁶ “[D]etention of a motorist pursuant to a traffic stop is presumptively temporary and brief.” *Id.* “A motorist’s expectations, when he sees a policeman’s light flashing behind him, are that he will be obliged to spend a short period of time answering questions and

Pedro Martinez was not a motorist, and he was not stopped for “a routine traffic offense.” He was stopped as a suspect in a first degree robbery that had just been committed. Unlike a person who is guilty of some traffic infraction or offense, he did not have a motorist’s expectation that even if he was found to be one of the persons who had just committed an armed robbery that he might “be given a citation, but that in the end he most likely [would] be allowed to continue on his way.” *Id.* at 437.

Moreover, he was not detained simply by means of “a policeman’s light flashing behind him.” *Id.* Instead, he was detained at gunpoint. Thus, his detention was not similar to “the comparatively nonthreatening character” of a “routine traffic stop,” and the exemption for routine traffic stops provided by *Berkemer* is not applicable.⁷

f. There is No Blanket Rule Which Excludes All Terry Stops From the Rule of Miranda.

The State pretends that there is some kind of blanket rule which exempts all *Terry* stops from the Miranda rule no matter what the circumstances were at the time of the questioning. *BOR*, at 27 (“Washington courts have repeatedly held that police are not required to

waiting while the officer checks his license and registration, that he may be given a citation, but that in the end he most likely will be allowed to continue on his way.” *Id.*

⁷ The *Berkemer* Court held even though a detention may have started as just a “routine traffic stop” with no more coercion than just a flashing light, if the circumstances escalated and became more coercive, then it could easily become the equivalent of custodial interrogation which would “entitle[] [the driver] to the full panoply of protections prescribed by *Miranda*.” *Id.* at 440.

provide *Miranda* warnings during a *Terry* stop.”) But the cases cited by the State do approve of any such blanket rule. The State cites *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004), where the facts showed a very non-threatening encounter between privately employed park security guards and Heritage. “The guards did not physically detain or search anyone in the group. They immediately made it clear that ***they did not have the authority to arrest.***” *Heritage*, 152 Wn.2d at 219. The guards did not approach Heritage with their guns drawn, and they did not order him to get on the ground. Unlike the guards in *Heritage*, Officers Reyes and Ragillo did not inform Martinez that they had no authority to arrest him. *Heritage* does state that “a ***routine Terry*** stop is not custodial for the purposes of *Miranda*.” *Id.* at 349. But the circumstances of *Heritage* fit within that category of a “routine” *Terry* stop, which like routine traffic stops are typically “substantially less ‘police dominated’” than the police interrogations contemplated by *Miranda*. *Id.* at 349, quoting *Berkemer*, at 439. (The questioning agents in *Heritage* were not even police officers!).⁸

⁸ The State also cites to *State v. Walton*, 67 Wn. App. 127, 834 P.2d 624 (1992) where the detaining authority was a police officer. But again, the opinion clearly discloses that there was nothing coercive or threatening about that particular *Terry* encounter. As the opinion states, “[B]ecause Officer Gitts acted in a noncoercive, routine investigatory manner, Walton’s inculpatory statement was not a product of custodial interrogation.” *Id.* at 131(emphasis added). As Judge Pekelis wrote, “a ***typical Terry*** stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less police dominated, and does not easily lend itself to deceptive interrogation practices.” *Id.* at 130. Finally, the State cites to *State v. Marcum*, 149 Wn. App. 894, 205 P.3d 969 (2009). Although there the officer stopped Marcum’s truck because he suspected

Courts have routinely rejected the prosecution's contention that *Miranda* warnings are never required in the context of a *Terry* stop. In *Daniels* the court explicitly *rejected* the State's contention that *Miranda* warnings are only required when a formal arrest has been made. 160 Wn.2d at 266. Courts in other jurisdictions have similarly held that just because a detention can be classified as a *Terry* stop that does not mean that *Miranda* warnings are never required. *See, e.g., Commonwealth v. Gordon*, 47 Mass. App. Ct. 825, 827 (1999)⁹; *People v. Breidenbach*, 875 P.2d 879, 885-86 (Colo. 1994).¹⁰

“[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.” *Berkemer*, 468 U.S. at 442.

Accordingly, this court

must determine whether, given [the] factual setting, a “reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). If not, she must be given *Miranda* warnings before the police ask any question likely

Marcum of dealing drugs, he told Marcum that he had stopped him for speeding even though Marcum had, in fact, been driving under the speed limit. *Id.* at ¶ 9. Thus, from Marcum's point of view his detention was nothing more than a routine traffic stop, and therefore *Miranda* warnings were not required.

⁹ “The *Terry* justification for the stop, however, did not insulate it from the possible application of *Miranda* principles. *Miranda* warnings are necessary even during a *Terry* stop if the suspect has been taken into custody or if the questioning otherwise takes place in a police dominated or compelling atmosphere.”

¹⁰ “[A]n investigatory stop usually involves no more than a very brief detention without the aid of weapons, and an atmosphere which is less threatening than that surrounding the kinds of interrogation at issue in *Miranda*. [Citations omitted]. That is not to say, however, that *Miranda* rights can never be implicated during a valid investigatory stop. Rather, a court must examine the facts and circumstances surrounding the encounter in order to determine whether *Miranda* applies.”

to provoke an incriminating response.

Daniels, 160 Wn.2d at 266.

g. As This Court Recognized in *State v. Petty*, Persons Detained At Gunpoint Are in Custody for Purposes of *Miranda*.

A person detained at gunpoint, like Martinez, would understand that his freedom of action was “curtailed to a degree associated with a formal arrest.” *Daniels*, 160 Wn.2d at 266. Courts are virtually unanimous in holding that *Terry* stops effectuated at gunpoint trigger the requirement of *Miranda* warnings. See, e.g., *People v. Shivers*, 21 N.Y.2d 118, 122, 233 N.E.2d 836, 286 N.Y.S.2d 827 (1967);¹¹ *State v. Intogna*, 101 Ariz. 275, 419 P.2d 59, 65 (1966);¹² *Miley v. United States*, 477 A.2d 720, 722-23 (Dist. Col. Ct. App. 1984);¹³ *People v. Taylor*, 178 Cal. App.3d 217, 223 Cal. Rptr. 638, 645 (1986) (same).

In *State v. Petty*, 48 Wn. App. 615, 740 P.2d 879 (1987), this Court addressed the same issue, and reached the same conclusion. In that case police executing a search warrant entered the house of the defendant with their guns drawn and immediately after entering questioned the occupants of the house. When questioned, Petty made the incriminating statement

¹¹ “[O]nce the officer does draw his gun, the individual interrogated is actually deprived of his freedom and, under *Miranda*, he may no longer be questioned without first being warned of his rights . . .”

¹² “Certainly a defendant questioned by an officer with a drawn gun within three feet of him was deprived of his freedom in a meaningful way.”

that he lived at the house. This court cited with approval to several of the cases cited above, and held that Petty's statement was properly suppressed because Miranda warnings were not given prior to his questioning: "When an officer draws a weapon in a confrontation with a suspect, it is a strong indication to the suspect that he is in custody." *Petty*, 48 Wn. App. at 623-24, citing *Miley v. United States, supra*; *People v. Shivers, supra*; and *State v. Intogna, supra*. Applying the rule of *Petty*, Martinez' statements made to Officer Reyes should have been suppressed.

h. The *Miranda* Issue is Properly Addressed Under RAP 2.5 Because the Admission Of Martinez' Incriminating Statements Had Identifiable and Practical Consequences.

Although Martinez disputes the contention that a *Miranda* claim is being raised for the first time on appeal, even if this Court accepts this characterization of the record the *Miranda* claim is still properly raised as manifest constitutional error under RAP 2.5(a). The State claims that it cannot be manifest constitutional error because "Martinez makes no attempt to show that the asserted error had practical and identifiable consequences in the trial of the case." *BOR*, at 31.

This is clearly untrue. Martinez has already identified the practical consequences of the error on pages 109-110 of his opening brief where he noted that since Officer Terry never mentioned a gun or a weapon to

¹³ "[I]n drawing his weapon, Officer Rohlfs asserted his authority over appellant and gave

Martinez, Martinez' statement "I don't have nothing" was incriminating because it seemingly showed knowledge that only one of the robbers of Duran would have had. The trial prosecutor made this argument in his closing;¹⁴ this argument could never have been made if Martinez' statement had been suppressed, as it should have been.

i. The *Miranda* Error Was Not Harmless. It Unfairly Strengthened The State's Weak Case on the Firearm/Deadly Weapon Elements and Special Enhancements.

The *Miranda* error is clearly *not* harmless beyond a reasonable doubt for several reasons. First, even if this Court were to apply the *Guloy* test for harmless error, the prosecution did *not* present overwhelming untainted evidence of his guilt. Wholly aside from whether the State presented overwhelming evidence that Martinez was one of the robbers (it did not), there is the more focused question of whether the State presented overwhelming untainted evidence that Martinez was armed with a gun, or

a clear indication that the confrontation had escalated beyond a general investigation."

¹⁴ The prosecutor argued: "Remember, at this point Pedro Martinez has no idea what other people have said. He has no idea what's going on at the other scene. The police don't even connect it, right? At this point the Eliezer Duran robbery and the Walter Flores-Cruz robbery isn't connected at all. They're not talking to each other. That's one of – well, they're not talking to each other. But Walter Flores-Cruz never said he had a gun. He never implied it because he didn't know. Eliezer Duran, other side of the parking lot, is telling the police the guy in the white shirt had a gun, and that's the robbery that Pedro Martinez just finished attempting when the police got there. And his first reaction to the question is, "Did you tell them we were gangsters?" Let's watch that one more time, just those few seconds. (Video played)

MR. GAHAN: It's little, it's subtle, but it's hard to argue against that type of evidence. "I don't have nothing." What's he do? He lifts up his shirt, because whatever something he had was in his shirt, it ain't there no more. His own gestures unconsciously betray his guilt more than anything he could have said to the police." RP IX, 1514.

a machete, or with a deadly weapon of any kind. Clearly it did not, since no gun, no machete, and no weapon of any kind was ever found.

And yet the *Miranda* error clearly contributed to the State's proof that Martinez was armed with some kind of deadly weapon. It was the fact of being armed with a deadly weapon which elevated the crime against Cruz to Robbery 1, and the crime against Duran to Attempted Robbery 1. Moreover, the State obtained firearm enhancements for the offenses against Duran and Lopez-Pando, and a deadly weapon enhancement for all three offenses. Therefore, even if this Court were persuaded that the error was harmless insofar as the State's proof of the lesser included crimes of Robbery 2 of Cruz and Attempted Robbery 2 of Duran were concerned, it could not find the error harmless as to higher degree offenses or as to the firearm and deadly weapon enhancements.

2. THE ADMISSION OF THE IMMUNITY AGREEMENTS CAN BE RAIDED FOR THE FIRST TIME ON APPEAL.

a. There Is No *Per Se* Rule That The Giving of WPIC 1.02 Precludes Any Reliance on RAP 2.5 By Necessarily Negating Any Showing of Prejudice.

Citing to *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), the State contends that Martinez cannot raise this issue on appeal pursuant to RAP 2.5. In order for an error to constitute a "manifest constitutional error" the appellant must be able to show that the error was prejudicial.

“[I]t is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).¹⁵ According to the State, *Montgomery* constitutes a bar to appellate review of his claim regarding the immunity agreements because it categorically precludes appellate review of an improper opinion issue whenever the jury receives the standard WPIC jury instruction on witness credibility. The State asserts, “the court held *Montgomery* had failed to establish the necessary prejudice because the jury had been properly instructed that they were the sole judges of credibility.” *BOR*, at 49. Similarly, the State relies on *State v. Curtiss*, 161 Wn. App. 673, 697, 250 P.3d 496, *review denied* 172 Wn.2d 1012 (2011) where this Court stated that “[o]pinion testimony does not constitute reversible error where the trial court properly instructs the jury, as it did here, that it is the sole judge of witness credibility and not bound by witness opinions.” But there are several flaws in the State’s reasoning.

First, the improper opinions admitted in *Montgomery* were the opinions of expert *witnesses* who *testified* under oath. In that case a police detective and a forensic chemist both *testified* that they believed that the defendant possessed pseudoephedrine with the intent to manufacture methamphetamine. But the trial prosecutor in this case was *not a witness*

¹⁵ *Accord State v. Oseguera-Acevedo*, 137 Wn.2d 179, 199, 970 P.2d 299 (1999); *State v.*

and he never *testified* under oath. Thus, the standard jury instruction stating that the jurors were “the sole judges of the credibility of witnesses,” was not likely to be construed by them as affecting their use of the prosecutor’s opinion that Monetti had nothing to do with the robberies and was not the robber with the machete. Why should they apply that instruction to the prosecutor’s opinion when the prosecutor was never a witness? Similarly, even if they thought the prosecutor was some kind of a witness, it is highly unlikely that they thought of him as an “expert” witness of some kind. The jurors were instructed that an expert was someone with specialized knowledge. A chemist or a narcotics detective who investigates meth manufacturing cases, does have specialized knowledge and thus does constitute an expert. But the prosecutor is not likely to be seen as an expert on Mr. Monetti. Therefore, *neither* of the standard jury instructions given in *Kirkman* and referred to by the Court in *Montgomery* have any ability to soften or mitigate the prejudicial impact of the evidence that the prosecutor believed Monetti was telling the truth and was not one of the robbers.

Second, the prosecutor’s opinions came in through the admission of documentary exhibits. Ordinarily, a juror would not conceptualize an exhibit as something that could be “credible” or “not credible.”

Roberts, 158 Wn. App. 174, 181, 240 P.3d 1198 (2010).

Third, the jurors were instructed that they *could* consider as evidence “the exhibits admitted into evidence.” CP 325. Thus, they were specifically told that it was perfectly legitimate for them to consider a document which contained the prosecutor’s opinion that Martinez’ defense – it was not me, it was Monetti – was bunk.

Fourth, the State ignores the fact that Martinez’ counsel *did object* to what the prosecutor had to say about Monetti during his closing argument, and yet his objection was *overruled*.¹⁶

Fifth, the trial judge *overruled* defense counsel’s objection that the trial prosecutor was “testifying.” This ruling clearly signaled to the jurors that it was *permissible* for the prosecutor to be talking about what he did and what he thought when he decided not to charge Monetti with robbery. The jurors could not possibly escape the conclusion that the trial judge thought the prosecutor could tell them what he thought about Monetti’s role in the crime and Monetti’s veracity.

Sixth, it is well established law in this State that a defendant can raise prosecutorial vouching for the first time on appeal. Recently, the Supreme Court reaffirmed the principle that a trial prosecutor may not “throw the prestige of his public office,” or “the expression of his own belief of guilt

¹⁶ The State tends to lump Martinez and Veteta-Contreras together and treats them as having both failed to object. But Martinez’ counsel did object to the prosecutor’s closing

into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1949). The *Case* decision, which is over half a century old, holds that whenever a prosecutor does clearly engage in vouching, a new trial is required *regardless* of whether any objections were made. *Id.* at 76.¹⁷

Seventh, it should be noted that the *Montgomery* Court *reversed* the defendant’s conviction in that case on other grounds, thus everything said about the appellate reviewability of the improper “expert” opinion testimony in that case was dicta because it was completely unnecessary to the disposition of the case.¹⁸

Lastly, the facts of this case, unlike *Montgomery*, show repeated

argument on the explicit ground that the prosecutor was “testifying,” RP IX, 1585, whereas Veteta-Contreras’ counsel made no objection.

¹⁷ “The defendant did not, either by his failure to make proper and timely objections, motions to strike, and requests for instructions to disregard the improper and prejudicial argument, or by his failure to move for a new trial, waive his right to urge the improper and prejudicial argument as error in this court, for the reason that the misconduct was so flagrant that no instruction given by the trial court could have cured it.”

¹⁸ The language of *Montgomery* also contradicts the State’s contention that there is a *per se* rule against appellate reviewability whenever the standard WPIC 1.02 jury instruction on the evaluation of witness credibility is given. *Montgomery* relied upon *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), which it described as a case where “this court concluded there was no prejudice *in large part* because despite the *allegedly* improper opinion testimony on witness credibility, the jury was properly instructed that jurors ‘are the sole judges of the credibility *of witnesses*,’ *and* that jurors ‘are not bound’ by *expert witness opinions*.” *Montgomery*, 163 Wn.2d at ¶ 34 (emphasis added). *Montgomery* noted that the result in *Kirkman* also rested in part on the fact that the Court was *not* convinced that any improper expert witness opinion testimony had been admitted; the *Kirkman* Court ultimately concluded that there was no improper opinion testimony. To the extent that this Court’s subsequent opinion in *Curtiss* characterizes *Montgomery* as stating a rule that there can never be reversible error due to the admission of improper expert witness opinion so long as the standard WPIC instruction had been given, it mischaracterizes the *Montgomery* opinion.

prosecutorial vouching. From the very outset of his closing argument, the prosecutor told the jurors that the issue was “who do *we believe* and do *we believe* them enough. Because ultimately, how do *we know* that *our eyewitnesses* are reliable.” RP IX, 1488 (emphasis added). Thereafter, he repeatedly used the pronoun “we.” See RP IX, 1517 (“we” can’t turn our backs on the victims); RP IX, 1582 (scorning the contention that “we got the wrong guy”); RP IX, 1585 (asking rhetorically “What are we going to charge him [Monetti] with?”). The only people who can bring charges are prosecutors. The prosecutor told the jurors that “we” – the prosecutors – couldn’t charge Monetti with anything; that “if Monetti was the machete guy” then he would have been charged, but since he wasn’t, the prosecutors couldn’t charge him with “being a drunken idiot.” RP IX, 1585. And woven into the heart of the case were the immunity agreements, which even more clearly stated the prosecutor’s belief that Monetti was *not* “the machete guy”: “*I do not believe* that you played a criminal role in the robbery of either Eliezer Duran or Walter Flores Cruz . . .” Exhibit 32 (emphasis added). “[S]hould *I remain convinced* of the lack of evidence against you, *I* will provide you with transactional immunity . . .” *Id.*

Under all these circumstances, the erroneous admission of the immunity agreements is an issue which can be raised for the first time on

appeal as manifest constitutional error. And the improper closing argument is something that *was* objected to at trial, and thus can be raised by Martinez, regardless of whether Veteta-Contreras can raise this issue.

b. The Error Was Not Harmless.

The State makes the strained argument that these errors were harmless because “the prosecutor did not opine as to the defendants’ guilt,” and “did not even directly opine as to Monetti’s credibility.” *BOR*, at 53.

This is total sophistry. That the prosecutor never said the words, “I believe Martinez is guilty,” is true enough. But consider the following:

- (1) the prosecutor *did* directly state that he did not believe that Monetti played a role in the robberies;
- (2) he said that he did not believe that Monetti was “the machete guy”;
- (3) he said that there was nothing he could charge Monetti with;
- (4) in front of the jury he told Monetti he was not going to charge him with possessing marijuana and instructed him to tell the truth (RP V, 845-46);
- (5) he elicited from Monetti a “yes” answer to the question, “Did all parties sign that paperwork indicating that *as long as you testified truthfully*, you would not be charged for crimes in connection with the robberies of the individuals involved?” (RP V, 815-16);
- (6) Monetti testified that Martinez *was* the gun guy (RP V, 829); and
- (7) the prosecutor argued that the jurors should find that Monetti was the guy armed with a gun, RP IX, 1514.

Taken together, these *are* the equivalent of directly opining *that*

Martinez was guilty, and that Monetti, although he might be a “drunken idiot,” had testified truthfully. The State’s evidence was not strong. These errors were not harmless.

3. THE TRIAL JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED TATTOO IDENTIFICATION EVIDENCE.

a. Tattoos on the Body And Items of Clothing Are Not the Same. Case Law Regarding Articles of Clothing Is Not Applicable.

Citing to *State v. King*, 31 Wn. App. 56, 639 P.2d 809 (1982), the State argues that the applicable cases are those which deal with the identification of articles of clothing. The State notes that in *King* “[a]lthough the trial judge found the identification procedure inherently suggestive, it refused to apply the constitutional standards governing the identification of persons because the witness identified the jacket, not King.” *BOR*, at 68. But here the witness identified the person – Martinez – by the tattoo on his arm. Just like a person who says, “That’s the mustache I saw on the robber,” or “that’s the hair style and hair color I saw,” the witness in this case identified *the person* by identifying *a part of his body*.¹⁹ The State’s attempt to place this case within the scope of the

¹⁹ Generally most of the items of clothing worn in this county are mass produced by clothing manufacturers. There may be tens of thousands of virtually identical black leather Harley Davidson motorcycle jackets. But since every tattoo is individually drawn on the body of its wearer, each tattoo is a separate artistic creation. Even if a tattoo artist tries to draw the exact same picture on two individuals, he will not succeed because he is not a machine. And unless the two individuals are identical twins, its appearance will vary depending on the body to which it is applied.

King case fails on its own terms.

b. The State Misrepresents Some of the Authorities It Cites.

The State asserts that “most courts considering the issue have held that constitutional standards governing the identification of persons do not apply to the identification of tattoos.” *BOR*, at 70. In support of this categorical statement that constitutional standards of eyewitness reliability simply do not apply, the State cites *Belisle v. State*, 11 So.3d 256 (Ala.Crim.App. 2007), *affirmed*, 11 So.3d 323 (Ala. 2008) and *State v. Newcomb*, 934 S.W.2d 608 (Mo.Ct.App. 1996). But *neither* of these cases supports the State’s assertion. In fact, in *both* cases the appellate courts *did* apply those same constitutional standards.

The *Belisle* Court explicitly considered the claim that the display of a single photo of the defendant’s tattoo was impermissibly suggestive and held, under the factual circumstances of that case (which were very different from the circumstances here)²⁰, that it was not a suggestive

²⁰ Unlike witness Duran, who when asked about Martinez’ tattoos twice testified “I do not remember how they looked,” and acknowledged that on the night of the robbery “I did not remember what they looked like,” RP 711-713, the witness in *Belisle* gave a detailed description of the tattoo he remembered seeing on the back of a man he saw in a mini-mart that was later robbed by a man and a woman. *Before* he was shown *Belisle*’s tattoo, the witness described it. “The tattoo included script in ‘Old English’ and a hurricane. . . . he believed he could identify the tattoo. The State then moved that *Belisle* remove his shirt so that the witness could see his tattoo. Scott identified *Belisle*’s tattoo as the same as the one he saw on the individual in the store the night before the murder. . . he described the tattoo to police. He told Detective Stanfield that the tattoo was big and the lettering looked like ‘Old English.’ He said that after he described the tattoo

procedure. The *Belisle* witness described the tattoo in detail *before* he was shown the defendant's tattoo and he testified that he got a good look at both the man in question and at his tattoo. Instead of refusing to apply the constitutional standards for suggestive identification procedures, the *Belisle* court applied them and found that under the circumstances the procedure used was not unduly suggestive. 11 So.3d at 297.²¹

The State similarly misrepresents the decision in *State v. Newcomb*, 934 S.W.2d 608 (Mo.Ct.App. 1996). There again, the victim *was* able to describe her assailant's tattoos *prior* to being shown photos of them. "She recalled that he had a panther tattoo on his arm and a tattoo further down on the arm containing two words, of which she remembered the two initial letters." *Id.* at 609. Only *after* giving this description was she shown photos of the defendant's tattoos, which she "immediately identified as being those she saw on her attacker." *Id.* The Missouri appellate court applied well-settled constitutional law which places the burden of proof on the defendant to show that the identification procedure used was both impermissibly suggestive and unreliable. *Id.* The Court cited to that portion of *Neil v. Biggers*, 409 U.S. 188 (1972), where the U.S. Supreme

Detective Stanfield showed him a picture of Belisle's tattoo. He testified that he got a 'pretty good look' at the two individuals and a good look at the tattoo." 11 So.3d at 297.

²¹ Moreover, since Belisle admitted to police that he had been in the store the day before the murder, the Alabama Court of Appeals found that "if any error did occur" it was harmless beyond a reasonable doubt. *Id.* at 298.

discretion standard applies, there clearly was an abuse of discretion in this case, and *Kenard* is obviously distinguishable. In *Kenard* the trial judge “found that there was little likelihood of irreparable misidentification,” and the appellant never challenged any of the trial judge’s factual findings in support of that ruling. *Id.* at 430. In the present case, the trial judge never made any ruling on the likelihood of misidentification, and never even considered the question. He said that the procedure used was “clearly suggestive,” RP V, 718, but he never engaged in the second step of the analysis, and he never analyzed the *Brathwaite* reliability factors.

A trial court judge “necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law.” *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (internal quotations omitted). “An abuse of discretion is found if the trial court . . . applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.2d 1251 (2007).²⁵ In addition, “[A] trial court’s failure to exercise its discretion [is] an abuse of discretion.” *State v. Fliieger*, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).²⁶

decided that a show up identification of a tattoo was more akin to a showup identification of a car than to a showup identification of a face.

²⁵ *Accord State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009) (same); *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012) (“A decision rests on untenable grounds if it . . . was reached by applying the wrong legal standard.”); *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012) (same).

²⁶ *Accord State v. Landsiedel*, 165 Wn. App. 886, 889, 269 P.3d 247 (2012); *State v. Elliot*, 121 Wn. App. 404, 88 P.3d 435 (2004).

In this case, the trial judge never applied the correct legal standard, because he failed to apply any standard at all. He should have analyzed the *Brathwaite* reliability factors, but he never did so. He failed to apply the right legal standard, based his ruling on an erroneous view of the law, and therefore by definition he abused his discretion.

d. The Error Was Not Harmless

The State seeks to minimize the impact of the tattoo identification testimony by mischaracterizing it. The State notes that witness Duran testified that the tattoo in the photos was “consistent” with the tattoo he saw on the arm of one of the robbers. RP 719. But Duran went further. When the prosecutor asked Duran, “Is that [the tattoo in the photos] what you remember?” Duran replied, “Yeah.” RP 719.

Given that the fact that (1) the description of the robber with the gun matched Garcia better than it matched Martinez, (2) no gun was ever found; and (3) that Garcia and Monetti both ran from the scene when police arrived whereas Martinez did not; it cannot conceivably be said that this error in this case was harmless. Moreover, the cumulative prejudicial effect of this error plus others, such as the admission of the immunity agreements, prosecutorial misconduct in closing argument, and the failure to suppress Martinez’ un-*Mirandized* statement, cannot be deemed harmless. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 688 (1984).

4. SINCE MARTINEZ' COUNSEL SAID THAT HE "JOINED" IN ALL OF THE STATE'S PROPOSED INSTRUCTIONS, MARTINEZ ACKNOWLEDGES THAT HE IS BARRED BY THE INVITED ERROR DOCTRINE FROM CHALLENGING THE TO-CONVICT INSTRUCTION FOR COUNT ONE.

In his opening brief Martinez pointed out that he was never charged with Robbery 1 by means of being armed with a firearm, and yet the to-convict instruction given on count 1 (CP 339), permitted the jury to convict him on the basis of being armed with a firearm. This violates the constitutional prohibition against being convicted of a charge that was never brought. *Cole v. Arkansas*, 333 U.S. 196 (1948). In response, the State notes that the trial prosecutor induced Martinez' counsel to state that he joined in all of the State's proposed instructions. *BOR*, at 79.²⁷ In light of this statement by his trial attorney, Martinez acknowledges that he is barred by the doctrine of invited error from challenging Instruction No. 14 on appeal. He reserves, however, the right to raise a claim of ineffective assistance of counsel in a collateral attack proceeding.

5. THE STATE CONCEDES THAT THERE WAS EVIDENCE THAT THE MACHETE WAS NOT A MACHETE, BUT WAS INSTEAD A PIECE OF CABLE OR A CLUB. THEREFORE, THE DEFENDANTS WERE ENTITLED TO LESSER DEGREE OFFENSE INSTRUCTIONS.

The State concedes, as it must, that there was evidence that the item

²⁷ "MR. GAHAN: I just want the record, then, to reflect that aside from the exceptions made by Defense, Defense *is joining in the State's proposed instructions . . .*" (Emphasis added). Martinez' attorney acknowledged that this was true. RP 1281.

The State concedes that around the time of statehood, juries were held to be entitled to lesser offense instructions without “affirmative” evidence that only the lesser crime was committed. But the State contends that this should not be viewed as evidence that the right to a lesser was part of the art. 1 §21 right to a jury trial which must be “preserved inviolate.” And yet this is precisely the type of evidence which the Supreme Court has considered when deciding the scope of the constitutional right. *See, e.g., Sofie v. Fireboard*, 112 Wn.2d 636, 771 P.2d 711 (1989) (because juries had always had an unrestricted and uncapped power to award noneconomic damages, the right to unrestricted consideration of noneconomic damages was a part of the constitutional right to jury trial). “Our basic rule is to look at the right as it existed at the time of the constitution’s adoption in 1889. [Citations]. We have used this historical standard to determine the scope of the right as well as the cause of action to which it applies.” *Id.* at 645.

Applying this standard, given cases such as *State v. Gottstein*, 111 Wash. 600, 602, 191 P. 766 (1920) and *State v. Donofrio*, 141 Wash. 132, 250 P. 951 (1926), Martinez was entitled to have the jury consider lesser offenses even without producing any affirmative evidence that only the lesser were committed, because that was the prevailing practice at that time. Juries used to be instructed on lessers whenever it was possible that

the jurors could have been unconvinced that the greater offense was committed simply because they disbelieved the State's witnesses. Since this was the practice, prior to *Fowler*, under art. 1, §21 Martinez was constitutionally entitled to have that practice followed in his case.

B. CONCLUSION

For these reasons stated above, appellant Martinez asks the Court to grant him the forms of relief specified on page 111 of his opening brief.

DATED this 4th day of June 2012.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant Martinez