

No. 74209-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ENCARNACION SALAS IV,

Appellant.

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Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Advocacy has its limits. Prosecutors have a duty to ensure that criminal defendants receive a fair trial. They should make rational arguments supported by the evidence, not emotional appeals. Seeking to convict Mr. Salas of premeditated murder, the prosecutor used an improper slideshow containing modified exhibits and evidence not admitted at trial. The slideshow juxtaposed images and text in a manner designed to persuade the jury to convict on emotion rather than reason. Still, the court overruled Mr. Salas's objection to the slideshow. The prosecutor exacerbated the misconduct by making arguments not supported by the evidence and by offering her personal opinion that it would be a "cop-out" to find Mr. Salas guilty of manslaughter. Because prosecutorial misconduct deprived Mr. Salas to a fair trial, this Court should reverse. This Court should also reverse because the court erred in admitting statements obtained in violation of Miranda and in excluding highly probative evidence.

B. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Salas of a fair trial, in violation of the guarantees of due process under article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution.

2. In violation of article I, § 9 and the Fifth Amendment, the court erred in admitting statements elicited during custodial interrogation after Mr. Salas invoked his right to counsel.

3. Lacking substantial evidence, the court erred at the CrR 3.5 hearing in finding that, “the paramedics said that the defendant would be taken to the hospital for treatment prior to being booked into jail.” CP 189 (FF 1(C)(dd)).

4. The court erred in determining that neither the doctor nor the nurse who saw Mr. Salas were “State agents.” CP 190 (FF 1(C)(pp)).

5. The court erred in determining that the questions asked by the nurse and doctor were unlikely to elicit an incriminating response. CP 190 (FF 1(C)(rr)).

6. The court erred in determining that the statements elicited from Mr. Salas by the doctor and nurse “were not the result of interrogation by a State agent” and were voluntary. CP 190 (FF 1(C)(ss)).

7. In violation of the Rules of Evidence, the court erred in ruling that the door had not been opened and in excluding highly probative evidence concerning whether the decedent was aggressive when intoxicated.

8. Cumulative error deprived Mr. Salas of a fair trial, in violation of due process under article I, § 3 and the Fourteenth Amendment.

C. ISSUES

1. It is misconduct to invite the jury to convict based on emotional appeals. It is also improper to present altered evidence or make arguments based on unadmitted evidence. Appealing to the passions and prejudices of the jury, the prosecutor juxtaposed an unadmitted and unflattering photo of Mr. Salas (akin to a mugshot) with a flattering photo of the decedent enjoying himself at a theme park. The prosecutor also made arguments unsupported by the evidence, resulting in two sustained objections. She expressed her personal opinion to the jury that a conviction for manslaughter would be a “cop-out.” Did prosecutorial misconduct deprive Mr. Salas of a fair trial?

2. When a suspect in custody asks for an attorney, all interrogation must cease. Interrogation consists of words or actions likely to elicit an incriminating response from the suspect. Such elicited statements by any “state agent” are inadmissible. After being read his Miranda rights, Mr. Salas asked for an attorney, but was not placed in contact with one. Police took him to a hospital to secure a medical clearance—necessary to book Mr. Salas into jail. Handcuffed and guarded by an officer, a nurse and a doctor asked Mr. Salas how he was injured, eliciting responses from Mr. Salas related to his arrest. Did the court err in admitting these statements?

3. A party may “open the door” to otherwise inadmissible evidence if a topic is raised during examination and it would be unfair to not permit further inquiry into the topic. At the State’s request, the court precluded testimony about the decedent’s aggressive sexual overtures while drinking. At trial, however, the State asked the decedent’s friend and former paramour about how the decedent acted socially and if he was “flirty.” The witness testified that the decedent was “flirty,” that he was friendly and supportive, and “just liked to have a good time.” Still, the court refused to allow evidence tending to show that the decedent was aggressive, particularly when intoxicated. Did the court err?

D. STATEMENT OF THE CASE

In September 2013, Encarnacion Salas, Jr., called “EJ” by his friends and family, moved from California to Washington. RP 519, 1272-73. He moved to an apartment in Lynnwood with his two aunts, Ruby and Cristal Salas. RP 470, 477, 523, 1273.

Ruby previously lived in a different unit at this apartment complex, which she shared with a man named Jesus (Jesse) Lopez and his mother, Antonia Lopez. RP 353-54, 520-21. Ruby was friends with Mr. Lopez and communicated frequently with him by text message. RP 519-20, 537.

Mr. Salas, about 22 years old, introduced himself to Mr. Lopez, who was about 34 years old. CP 209; RP 396, 473, 1274. A few months

later, they became friends. RP 1274. Among other things, they liked to drink alcohol, smoke marijuana, and watch television together. RP 1274. They spoke and exchanged text messages frequently. RP 1275. Mr. Salas went over to Mr. Lopez's apartment about once or twice a week. RP 357. Mr. Lopez also visited the Salas's apartment. RP 493.

Cristal too became friends with Mr. Lopez. RP 479. She went to "Enchanted Village" amusement park with Mr. Lopez. RP 479-80. She also went with Mr. Lopez and her sister to the "Crab Pot" restaurant in Seattle to celebrate Ruby's birthday. RP 481-82. Pictures of herself and Mr. Lopez were taken at the "Great Wheel," a nearby Ferris wheel. RP 480-81; Ex. 52. Mr. Salas did not attend these events.

Mr. Salas, who grew up in Texas, enjoyed nature. RP 483-84; Ex. 26-31. He watched a survival show on television and spoke to his aunts about surviving in the wilderness. RP 483-84, 500-01, 525. He owned several knives and hatchets. RP 465, 562. As with many people from Texas, it was normal for him to carry a knife. RP 465, 500, 1280. While he did not box regularly, he had twice participated in boxing at a "fight club." RP 1299. In middle school and during his sophomore year of high school, Mr. Salas played football. RP 1298.

Ruby recalled seeing Mr. Lopez trying to teach Mr. Salas how to juggle his hatchets in her apartment. RP 562. Mr. Lopez's mother testified that he had juggled while in the band in high school. RP 352.

Mr. Lopez was sexually interested in men and was described as "flirty" by his friend, Ralph Frescas. See RP 942-44. Mr. Frescas had sexual interactions with Mr. Lopez twice in late summer 2014. RP 943, 937-38. Although Mr. Lopez lived with his mother his entire life, she did not know his sexual preferences. RP 396. Mr. Salas did not share his sexual preferences with his aunts or brother, but Cristal thought he might be bisexual. RP 444, 479, 501, 536-37, 557.

Mr. Lopez made sexual advances on Mr. Salas in August 2014. RP 1275, 1292. Mr. Salas told Mr. Lopez he was uncomfortable and not ready. RP 1292. Nevertheless, Mr. Salas described his relationship with Mr. Lopez as being homosexual afterward. RP 1292. Mr. Salas testified that he felt conflicted about having a homosexual relationship. RP 1339. Mr. Frescas believed Mr. Lopez and Mr. Salas started a relationship around August 2014. RP 962. Around the time Mr. Frescas had intimate contact with Mr. Lopez that summer, Mr. Lopez referred to Mr. Salas as "his husband" to Mr. Frescas. RP 961-62.

On September 3, 2014, Mr. Lopez's mother called Ruby while she was at work. RP 357-58, 559, 1291. Ruby worked in the afternoon to the

late evening. RP 538. Ms. Lopez said that Mr. Salas was on the floor at her apartment, that he had been drinking with her son, and that she should come get him. RP 358, 559. Cristal and Ruby went over. RP 559. There was vomit on the floor from Mr. Salas throwing up. RP 358, 504. Mr. Salas was very intoxicated. RP 357, 504, 561. Mr. Lopez was present. RP 505. Cristal helped Mr. Salas into the shower. RP 505. Ruby and Cristal noticed many bite marks all over his back. RP 505-06, 560. Cristal suspected there had been sexual activity between Mr. Lopez and Mr. Salas. RP 509.

Mr. Salas and Mr. Lopez did not socialize together for about a week or two. RP 510. Mr. Lopez attended Mr. Salas's birthday party, held on October 11, 2014. RP 452, 941. They appeared to be getting along well. RP 452.

On Friday, October 24, 2016, Mr. Salas socialized with his younger brother, Elias Salas, who was visiting and staying at the Salas's apartment. RP 443, 454. Elias is about one year younger than his brother. RP 442-43. They drank alcohol at their apartment that evening. RP 455-56. Mr. Salas left to pick his aunt Ruby from work. RP 546, 1309. On his way back, Mr. Salas was unable to hold his bladder and he accidentally urinated in the car. RP 547, 1309. He changed when he got home. RP 1310-11.

Around 9:00 p.m., Mr. Lopez sent text messages to Mr. Salas, asking about drinking and smoking. RP 1007. Mr. Salas went over to Mr. Lopez's apartment, where they drank. RP 1276-77. He brought his backpack, which contained alcohol and his knife. RP 1276, 1312. Mr. Salas usually brought his backpack when he left home. RP 465, 501, 562.

Mr. Salas testified that they drank for around two to three hours. RP 1277. At some point, Ms. Salas took his knife out so that Mr. Lopez could show him how to twirl it, similar to how one might flip a poker chip. RP 1281, 1318. The mood was good. RP 1277. However, the mood changed when Mr. Lopez started to make sexual advances, grabbing Mr. Salas's buttocks at one point. RP 1277-78. Mr. Salas told Mr. Lopez that this made him uncomfortable. RP 1277. For a while, the mood improved, but changed once they went out to the balcony. RP 1278. There, Mr. Lopez grabbed Mr. Salas's genital area. RP 1278-79. Mr. Salas yelled at Mr. Lopez and told him to stop. 1279. Mr. Lopez then hit him with what Mr. Salas first thought was a bong, but was actually his knife. RP 1280.

A struggle ensued. RP 1281-82. Eventually, Mr. Salas got his knife back, but Mr. Lopez kept trying to get it. RP 1283. He thought if Mr. Lopez got the knife, he would kill him. RP 1282. Mr. Lopez kept coming at him, so Mr. Salas used the knife to defend himself. RP 1282-83. During the struggle, Mr. Lopez fell in the kitchen. RP 1283-84.

Seeing blood everywhere and Mr. Lopez bleeding from the neck, Mr. Salas at first decided to apply pressure to the wound. RP 1283-84. Mr. Lopez's mother then appeared and started to pull him away. RP 1323. Panicking, Mr. Salas went to the front door, grabbed his backpack, and then fled out the balcony, climbing down from the third story to the ground level. RP 1284.

Ms. Lopez's testimony differed. That night, she saw Mr. Salas and Mr. Lopez in the kitchen area when she got out of the shower. RP 363-66. Mr. Lopez was drinking. RP 366. She went to her room. RP 364. After hearing loud noises, she came out and saw Mr. Lopez and Mr. Salas struggling at the balcony door. RP 368. Mr. Salas appeared to be trying to pull Mr. Lopez outside and Mr. Lopez was resisting. RP 368-69. Mr. Lopez had blood on his arm. RP 369. She pulled Mr. Lopez inside and they went to the kitchen. RP 369-70. She did not see any weapon. RP 370.

Ms. Lopez recalled that Mr. Salas went to the front door and put on his backpack and shoes. RP 371. She followed and asked whether Mr. Salas was going to help her. RP 372. She heard Mr. Lopez fall in the kitchen and cry for help. RP 372. Mr. Salas then purportedly took off his shoes and backpack, and removed something from the backpack. RP 372-73. He then knelt over Mr. Lopez, and started making motions resembling cutting over Mr. Lopez's neck. RP 389. In her signed statement, she

stated she did not see what Mr. Salas did to Mr. Lopez. RP 678. Still, Ms. Lopez tried to stop Mr. Salas, grabbing his ears and nose. RP 385-87, 685-86. Mr. Salas then ran outside to the balcony. RP 387. Ms. Lopez closed the sliding glass door and locked it. RP 387. She then sought help from neighbors. RP 390-91.

Three 911 calls were received by emergency services at about 11:30 p.m. RP 573, 655; Ex. 425. Law enforcement and paramedics arrived shortly thereafter. RP 391, 422. There was much blood in the apartment. RP 422. Mr. Lopez was deceased. RP 410-11, 422. According to the autopsy, Mr. Lopez bled to death, having six stab wounds and nine cuts. RP 1042, 1045. He had a blood alcohol level of .24, about three times the legal limit for driving. RP 1091.

Mr. Salas testified that he wanted to get away from the whole mess. RP 1286. He recalled walking down a road and stopping to lay down in some bushes. RP 1286. He was bleeding. RP 1286. When he woke up, he started to walk back in the direction of the apartment complex. RP 1286.

Around 8:30 a.m., Deborah Leander and her adult son, Deja Jackson, noticed a disheveled barefoot man walking as they were driving to work. RP 750-51, 768-69. He was limping. RP 765, 769. They stopped and gave him a ride. RP 753. The man had a big green coat. RP

772. He said his name was “Jaun.” RP 759. There were cuts on the man’s arms and blotches of blood on his jacket. RP 784. After letting him out, Mr. Jackson went on the internet and determined that the man, actually Mr. Salas, was wanted by law enforcement. RP 762. He called police. RP 783.

Mr. Salas made his way back to his apartment. RP 1287. He planned to clean himself and treat his wounds. RP 1288. The police had earlier searched the Salas’s apartment and permitted Ruby, Cristal, and Elias back in. RP 496, 551, 739. The three went to sleep. RP 461, 551. When Mr. Salas arrived, he showered. RP 1288. He treated his wounds, including the wound on his arm. RP 1288. He washed his clothing. RP 1288. Gathering supplies, he planned to go live in the mountains. RP 1288. Ruby woke up and spoke to Mr. Salas, telling him that she had been told Mr. Lopez was dead. RP 553.

Around 2:00 p.m., police were dispatched after a neighbor reported hearing activity in the Salas’s apartment. RP 918-19. Ruby answered the door. RP 919-20. She told the officers that Mr. Salas was there. RP 921. The officers found Mr. Salas in his room and arrested him. RP 794, 926. Mr. Salas asked to speak with an attorney. CP 188 (FF 1(B)(q-r)).

A medical unit evaluated Mr. Salas. RP 855, 866. A medic saw that Mr. Salas had a very large laceration on his arm under a bandage. RP

865. He recommended that Mr. Salas be taken to a hospital. RP 867. The police took Mr. Salas to the hospital, but did not put him in touch with an attorney despite public defenders being available by phone. 9/3/15RP 27, 33, 36-37. Handcuffed and in the presence of an officer, Mr. Salas answered inquires by a nurse and a doctor as to how he was wounded. CP 189 (FF (1(C)(hh, jj, mm))).

The State charged Mr. Salas with premeditated first-degree murder while armed with a deadly weapon. CP 169, 193, 213. Before trial, Mr. Salas moved to exclude statements elicited from him after he had asked to speak with an attorney. CP 202-05. The court denied his request and admitted all of his statements. CP 186-192.

The court instructed the jury on the lesser included offenses of second-degree murder, first-degree manslaughter, and second-degree manslaughter. CP 46, 48, 50. The court also instructed the jury on self-defense. CP 53. During closing arguments, the court overruled Mr. Salas's objection to the prosecutor's slideshow. RP 1383-84. Mr. Salas argued he had acted in self-defense. RP 1400-14. The prosecutor urged the jury to convict Mr. Salas of first-degree murder and that a conviction for manslaughter would be a "cop-out." RP 1413, 1417. The jury did not reach a verdict on the charge of first-degree murder, but convicted Mr. Salas of second-degree murder. CP 30, 33-34.

E. ARGUMENT

1. Prosecutorial misconduct deprived Mr. Salas of a fair trial.

a. Due process entitles criminal defendants to a fair trial.

The right to a fair trial is a fundamental liberty secured by the United States Constitution and the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. Prosecutorial misconduct may deprive defendants of their right to a fair trial. Glasmann, 175 Wn.2d at 703-04.

A “prosecutor’s duty is to ensure a verdict free of prejudice and based on reason.” State v. Clafflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). Prosecutors have “the duty to subdue courtroom zeal, not to add to it, in order to ensure the defendant receives a fair trial.” State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (internal quotation and citations omitted). Hence, prosecutors “should not use arguments calculated to inflame the passions or prejudices of the jury.” Glasmann, 175 Wn.2d at 704 (internal quotation and citations omitted). By appealing to the jury’s passions or prejudices, or by arguing facts not in evidence, a prosecutor commits misconduct. State v. Belgarde, 110 Wn.2d 504, 507-

08, 755 P.2d 174 (1988) (inflammatory assertions that defendant was part of a deadly group of madmen was misconduct).

b. The use of slides by the prosecutor during closing argument may constitute misconduct.

A prosecutor's use of multimedia slides during closing argument may constitute misconduct. Glasmann, 175 Wn.2d at 699; Walker, 182 Wn.2d at 468. In Glasmann, the prosecutor presented slides with a booking photo (a "mug shot") of the defendant along with captions or superimposed text. Glasmann, 175 Wn.2d at 701-02. One slide displayed the booking photo with a caption below stating, "DO YOU BELIEVE HIM?" Id. at 701. Another placed a caption above the photo, stating, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Id. at 702. In three more slides, the photo appeared with the word or words "GUILTY" superimposed across the defendant's face. Id. at 703.¹ Recounting the rule that the jury should only receive admitted evidence, our Supreme Court reasoned that these slides were improper, in

¹ The captioned photos appear in the second set of slides in appendix G of the State's Response to the Personal Restraint Petition. Available at: <https://www.courts.wa.gov/content/Briefs/A08/844755%20response%20to%20prp.pdf>. (last accessed August 23, 2016).

The photos with the superimposed captions appear in the Personal Restraint Petition. Available at: <https://www.courts.wa.gov/content/Briefs/A08/844755%20prp.pdf> (last accessed August 23, 2016).

part because “the prosecutor’s modification of photographs by adding captions was the equivalent of unadmitted evidence.” Id. at 705-06. The court noted that images can be especially powerful in evoking emotional reactions and that such reactions may inflame the jury rather than focus them on the evidence and the law. Id. at 708-09 & 709 n.4. Despite no objection, the court reversed all of the defendant’s convictions. Id. at 714.

Our Supreme Court refused prosecutors’ invitation to disavow Glasmann. Walker, 182 Wn.2d at 475. In Walker, the prosecutor presented a PowerPoint presentation with superimposed text over the defendant’s booking photo proclaiming the defendant’s guilt. Id. at 472. Additionally, the prosecutor used a series of slides to suggest that the defendant was guilty of murder and robbery because he greedily and callously spent the stolen proceeds on video games and lobster dinner. Id. at 472, 478. The prosecutor also juxtaposed photos of the decedent with photos of the defendant and his family, implicitly emphasizing the defendant’s race. Id. at 478 & n.4. Citing Glasmann, the court reasoned that prosecutors do not have “the right to present altered versions of admitted evidence to support the State’s theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant’s guilt.” Id. at 478 (footnote omitted). Given the serious misconduct, the court reversed despite no objection. Id. at 478-79.

c. The prosecutor’s slideshow, which contained unadmitted evidence, modified exhibits, and juxtaposed images calculated to evoke an emotional response, was improper.

Similar to Walker, which juxtaposed the defendant with the decedent, the prosecutor juxtaposed Mr. Salas and the decedent in her slides. In the first slide, the prosecutor presented an unflattering and grim picture of Mr. Salas (not unlike a mugshot) with the caption “5’11”, Football player, fighter, outdoorsman.” In the same slide, the prosecutor contrasted this image with a photo of a smiling Mr. Lopez at a theme park with three park employees dressed as Smurfs² with the caption “5’5.5,” Band leader, saxophone player, customer service representative”:



² See https://en.wikipedia.org/wiki/The_Smurfs (last accessed September 6, 2016).

Ex. 464, Slide 1. Similarly, the second slide presented captioned photos, one of Mr. Salas trying on a ring and another of a cheerful Mr. Lopez with Mr. Salas in the background:



Ex. 464, Slide 2.

When the prosecutor displayed the slides, Mr. Salas objected. RP 1376. Out of the jury's presence, Mr. Salas argued that, as in Walker, it was misconduct to juxtapose these pictures with the captioned text. RP 1377-83. In particular, he argued slide 1 was analogous to the slides in Walker which used inflammatory captions and superimposed text along with juxtaposed photos designed to derogate the defendant. RP 1380.

The prosecutor argued there was no problem because the photos were admitted exhibits, the captions were based on testimony, and that the presentation was “really just to assist in efficiency of what would happen

anyway” without slides. RP 1377, 1381. Although the captions were not a part of the exhibits and the paired photos were not part of the same exhibit, she maintained there was no alteration. RP 1382.

After reviewing the other slides, some of which also contained captioned photos, the court overruled the objection:

THE COURT: I don't read the case [Walker] the same way as you, Mr. Thompson. I don't think that the State's [sic] precluded from using these types of slides. What they're precluded from doing is what it says in [headnote] 12, and that is that they can't present altered versions of admitted evidence.

As I review the photographs, they are not altered in any fashion, the photographs themselves. There's additional writing that's contained on there. The writing in there is not any expression of opinion, it is the alleged testimony of the witnesses. It doesn't have derogatory depictions of the defendant, and it doesn't express personal opinions on the defendant's guilt. I don't find that these slides are prosecutorial misconduct based on my reading of State v. Walker, so I'll allow them to be used.

RP 1383-84.

When the jury returned, the prosecutor continued her argument, using the rest of her slideshow. This consisted of many graphic photos, some of them captioned with quotes or the prosecutor's summary of testimony:



Antonia: I heard a noise, I came out and found the defendant trying to pull my son out to the balcony. My son had his left hand on the wall



Ex. 464, slide 5.

Antonia: I grabbed by son around his torso and pulled him to the kitchen and left him leaning on the kitchen counter. Meanwhile, the defendant went to the front door and I went after him.



Ex. 464, slide 6.

At the front door I close and lock the door and ask EJ "aren't you going to help me? Are you just going to leave me with this? I hear my son fall and say "mom, help me I'm dying"



Ex. 464, slide 7.

	<p>Antonia: he went to the door, he was wearing short sleeves, I didn't see him bleeding. He put on his shoes and backpack (no coat). I shut/locked the door, I said aren't you going to help? He took his shoes off, got something out of his backpack and ran back (32.5 feet) to my son.</p>
<p>Defendant: I went to the door, my arm was already sliced (which Dr. Selove said would have bled profusely), I'd already been on top of Jesus on the kitchen floor, I was covered in Jesus blood, I put on my coat and backpack, but not my shoes, and went straight to the balcony instead of out the front door.</p>	

Ex. 464, slide 8.

After showing other photos of Mr. Lopez's bloody body at the scene and autopsy photos,³ the prosecutor ended her argument with a

³ Ex. 464, slides 14, 17-21.

picture of Mr. Lopez smiling and embracing Cristal Salas at the “Great Wheel,” a Ferris wheel on the Seattle waterfront.



Ex. 464, slide 22; Ex. 52; RP 451. To maximize the emotional appeal, the prosecutor displayed the image for at least a minute (about three pages of transcripts) while completing her argument. RP 1397-1400, 1402.

d. The slideshow constituted misconduct.

Unlike Glasmann and Walker, the prosecutor’s slides do not contain superimposed text proclaiming the defendant’s guilt. However, these cases stand for much more. These opinions hold that modifying photos with captioned text may be equivalent to presenting the jury with unadmitted evidence. Glasmann, 175 Wn.2d at 705-06 (“the prosecutor’s modification of photographs by adding captions was the equivalent of unadmitted evidence.”); Walker, 182 Wn.2d at 478 (“[the slide show]

included multiple exhibits that were altered with inflammatory captions”). They looked at the presentation as a whole and held that the juxtaposition of photos may impermissibly invoke an emotional response and invite the jury to convict on something other than evidence of guilt beyond a reasonable doubt. Glasmann, 175 Wn.2d at 706 (“the multiple photographs here may well have affected the jurors’ feelings about the need to strictly observe legal principles”).

There was no admitted photo stating Mr. Salas was a “football player,” a “fighter,” or an “outdoorsman.” There was no photo stating Mr. Lopez’s height, that he was a “band leader,” “saxophone player,” or “customer service representative.” Even the photo of Mr. Salas was not admitted into evidence, contrary to the prosecutor’s representation. This photo appears on Mr. Salas’s driver’s license. See Ex. 374, 375. However, what was admitted were two pictures of law enforcement holding Mr. Salas’s license:



Ex. 374, 375.

In contrast, the photo of Mr. Salas in slide 1 is much clearer than the admitted photographs, and appears to have been obtained from a different source, such as a government database. Compare Ex. 464 (slide 1) with Ex. 374, 375. Photos used in slides should be based on the actual admitted evidence. See Walker, 182 Wn.2d 489-90 (McCloud, J.,

concurring) (explaining that booking photo was improper because it was not actually admitted; photo was excised from part of montage, which was admitted). As in Glasmann and Walker, the prosecutor placed unadmitted and altered evidence before the jury.

The prosecutor's PowerPoint presentation was also designed to place Mr. Lopez, an older, outgoing man who (according to the testimony) made unwanted sexual advances on Mr. Salas, in the best possible light while placing Mr. Salas, a younger and less outgoing man, in the worst light. It portrayed Mr. Lopez as a "nice guy" who enjoyed theme parks and Ferris wheels. In contrast, Mr. Salas was made to appear unsocial, threatening, and dangerous. In essence, it invited the jury to convict based on the State's skewed characterizations of Mr. Lopez and Mr. Salas. As in Walker, the juxtapositioning of the defendant and decedent was improperly designed to inflame the passions and prejudice of the jury.

The State will protest that the pictures and captions in the slideshow were based on admitted evidence. However, the pictures in Glasmann and Walker were also premised on admitted evidence. Glasmann, 175 Wn.2d at 705; Walker, 182 Wn.2d at 473. What matters is their substance and how they are used. See Walker, 182 Wn.2d at 473 (explaining there was "nothing new about the idea that purported visual aids can cross the line into unadmitted evidence."). As in Glasmann and

Walker, it was improper for the prosecutor to present unadmitted evidence and to alter evidence by captioning them with her summary of purportedly related testimony and evidence.

The trial court erred in overruling Mr. Salas's objection. Following Glasmann and Walker, this Court should hold that the prosecutor's PowerPoint presentation was improper.

e. The prosecutor committed other misconduct by arguing facts outside the evidence and giving her personal opinion.

It is improper for a prosecutor to argue facts outside the record or unsupported by the admitted evidence. Belgarde, 110 Wn.2d at 508; State v. Case, 49 Wn.2d 66, 70, 298 P.2d 500 (1956). Similarly, it is improper for a prosecutor to express her personal opinion. Id. Here, the prosecutor violated these prohibitions at least four times.

First, the prosecutor represented (incorrectly) that Mr. Lopez received 15 stab wounds, that some of these were potentially deadly alone, and that the autopsy doctor had said this. RP 1389. Mr. Salas objected to the prosecutor's misrepresentations, but the court overruled the objection:

And again, the defendant doesn't throw the knife over the balcony, to end this. He stabs him 15 times, after he gets that knife back. Many of those stab wounds alone could have been fatal, you heard Dr. Selove say that.

MR. THOMPSON: Your Honor, I'm going to object. Facts not in evidence.

THE COURT: I'll let the jurors determine what the facts were, as established by the witnesses. Overruled.

RP 1389 (emphasis added).

Dr. Solove actually testified that there were six stab wounds and nine cuts from the knife. RP 1042. Moreover, he testified that no one wound would have immobilized Mr. Lopez and that no one wound would have actually killed him. RP 1096. Rather, it was the combination of several wounds. RP 1096. The prosecutor's inaccurate representation improperly bolstered the State's contention that Mr. Salas intended to kill Mr. Lopez, an essential element of first and second-degree murder on which the State bore the burden of proof. RCW 9A.32.030(1)(a), .050(1)(a). The court erred in overruling Mr. Salas's objection.

Second, at the very outset of the prosecutor's rebuttal, she informed the jury of her personal opinion that Mr. Salas committed murder, that the evidence was "clear," and that it would be a "cop-out" for the jury to return of verdict of manslaughter:

THE COURT: Rebuttal.

MS. LARSEN: First of all, I did go over Instruction 16. You have all the instructions, I went over most of them. Not the Manslaughter I, not the Manslaughter II because based on the evidence in this case, that would be a cop-out. This is a murder. The evidence is clear.

RP 1413 (emphasis added).⁴

The prosecutor’s personal opinion on Mr. Salas’s guilt and her opinion on the evidence was improper. See Case, 49 Wn.2d at 68 (prosecutor improperly opined that defendant raped his daughter). Her opinion that it would be a “cop-out” was especially improper. For example, in a prosecution for murder, the Illinois Court of Appeals held that “[t]he prosecutor’s suggestions to the jury that involuntary manslaughter was inapplicable and a ‘cop-out’ were highly improper.” People v. Howard, 232 Ill. App. 3d 386, 390, 597 N.E.2d 703 (Ill. App. Ct. 1992). There, the prosecutor had argued, “involuntary manslaughter does not apply; it is a cop-out and I don’t want to insult anyone but it is a cop-out in this case. The evidence is clear and we ask you to find him guilty of murder.” Id. (emphasis added). Based on this improper argument, the court reversed. Id. at 392-93. Similarly, a Florida appellate court reversed where the prosecutor argued during opening that the issue for the jury was whether the defendant’s insanity defense was a “cop-out.” Taylor v. State, 640 So. 2d 1127, 1133-34 (Fla. Dist. Ct. App. 1994).

⁴ Instruction 16 is the self-defense instruction. CP 53. While the prosecutor briefly discussed this instruction, RP 1373-74, the prosecutor conspicuously omitted the most important part of the instruction—that the State bore the burden of proving beyond a reasonable doubt that the homicide was not justifiable. RP 1373-74; CP 53.

Third, the prosecutor gave her personal opinion that not all wounds on a person's limbs are "defensive." RP 1414. Earlier, Mr. Salas's counsel had correctly represented, based on the testimony, that wounds on a limb between oneself and a weapon are classified as "defensive." RP 1109, 1400-01. Thus, Mr. Salas's sliced arm was a defensive wound. RP 1400-01. The court properly sustained Mr. Salas's objection to the prosecutor's contrary opinion:

Now, the defense says any wound on your limbs is defensive. You all know that's not true. It's common sense.

MR. THOMPSON: Your Honor, I'm going to object. I believe the State is testifying at this point. These are facts not in evidence.

THE COURT: Sustained.

RP 1414.

Fourth, the prosecutor improperly argued that not much of Mr. Salas's blood was found at the entryway of the apartment and that one would have expected to find his blood there if he had been bleeding profusely. RP 1415-16. But there was blood by the entryway. Ex. 461 (Entryway.pdf). Further, the forensic scientist, who had only examined two blood samples, testified that blood on the entryway door contained DNA matching Mr. Salas. RP 1130-33, 1219. Thus, the court sustained Mr. Salas's objection to the prosecutor's misrepresentation:

During all of that struggle that the defense talked about the defendant wasn't hurt. By his own statement, that happened. That was the very first thing. Never hurt again. But by the evidence, the evidence that there is not a gushing amount of the defendant's blood in a place, where he was the person standing –

MR. THOMPSON: Objection, Your Honor.

MS. LARSEN: -- for a long time.

MR. THOMPSON: That's not in evidence.

THE COURT: Sustained. The jury will disregard the last statement.

RP 1415.

f. Viewing the misconduct cumulatively, Mr. Salas was deprived of a fair trial.

Two standards of review apply to claims of prosecutorial misconduct. State v. Allen, 182 Wn.2d 364, 375, 341 P.3d 268 (2015). If the defendant objected, the issue is whether there was a substantial likelihood that the misconduct affected the jury's verdict. Id. If there was no objection, the error is forfeited unless the misconduct was "so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Id. (quotation omitted). In analyzing prejudice, the misconduct should be viewed cumulatively rather than in isolation. Glasmann, 175 Wn.2d at 707. The focus is on the impact of the misconduct, not on the otherwise properly admitted evidence. Walker,

182 Wn.2d at 479. Comments made during rebuttal are more likely to be prejudicial. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014).

Mr. Salas objected to the misconduct as related to the PowerPoint presentation. And excluding the misconduct regarding the prosecutor's personal opinion that Mr. Salas was guilty and that a verdict of manslaughter would be a "cop-out," Mr. Salas objected to the other three instances of misconduct recounted above.

A key issue for the jury was whether the State disproved Mr. Salas's claim of self-defense beyond a reasonable doubt. CP 53. Assuming yes, a second key issue was Mr. Salas's state of mind. First-degree murder requires proof of a premeditated intent to kill; second-degree murder proof of intent to kill; first-degree manslaughter proof of a reckless killing; and second-degree manslaughter proof of a criminally negligent killing. RCW 9A.32.030(1)(a), .050(1)(a), .060(1)(a), .070(1); CP 43, 46, 48, 51. The jury was unable to reach a verdict as to first-degree murder and found Mr. Salas guilty of second-degree murder.

There is a substantial likelihood that the misconduct affected this outcome. As discussed previously, the prosecutor's improper slideshow alone likely inflamed the jury against Mr. Salas. The State essentially invited the jury to convict Mr. Salas based on emotion rather than reason. The improper slideshow "may well have affected the jurors' feelings about

the need to strictly observe legal principles and the care it must take in determining [the defendant's] guilt.” Glasmann, 175 Wn.2d at 706.

The prosecutor's improper comments exacerbated the risk of unfair prejudice. The comments misrepresenting the evidence on the severity of Mr. Lopez's wounds tended to support a determination that Mr. Salas intended to kill Mr. Lopez. The prosecutor's personal opinion that Mr. Salas was guilty of murder and that a verdict of manslaughter would be a “cop-out” was also very improper. While not objected to, this comment came during rebuttal and struck at the contentious issue of the defendant's state of mind. This comment was so flagrant and ill-intentioned that a curative instruction would have been ineffective.

The inaccurate claims about whether Mr. Salas suffered a defensive wound and on the amount of his blood found by the entryway also contributed to the prejudice. While the court sustained objections to the prosecutor's erroneous comments, the court did not provide a curative instruction as to the comment on defensive wounds. Viewed with the other misconduct, it is unlikely that a curative instruction would have cured the prejudice. Similarly, given the flagrancy and pervasive misconduct, it is unlikely that the court's vague curative instruction in response to the comment on the defendant's blood was effective.

The evidence also presented a close case for the jury. Mr. Lopez was intoxicated. There was evidence that he was aggressive and attacked Mr. Salas. While Ms. Lopez referred to Mr. Salas making cutting motions, she did not claim to see him use a knife and was not positive on what she saw. The issue of self-defense largely came down to credibility determinations, which could have been resolved differently. Even setting aside the issue of self-defense, the jury might have also rationally concluded that the killing was reckless or negligent rather than intentional, resulting in a conviction for manslaughter rather than murder.

There is a substantial chance that absent the prosecutorial misconduct, the jury would have rationally concluded that the State did not disprove self-defense, or at the least, that the State did not prove that Mr. Salas intended to kill Mr. Lopez. This Court should reverse and remand for a new trial.

2. In violation of *Miranda*, the trial court erred in admitting statements elicited from Mr. Salas by state agents after Mr. Salas invoked his right to an attorney.

a. Persons in custody who invoke their right to an attorney under *Miranda* may not be interrogated by “law enforcement,” including any “state agent.”

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these constitutional rights, the police must advise suspects in custody of their

right to remain silent and the presence of an attorney before questioning. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008).

Once an accused person in custody has invoked their right to counsel, that person “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Once the request for a counsel has been made, the accused has expressed that he or she is “unable to deal with the pressures of custodial interrogation without legal assistance.” Arizona v. Roberson, 486 U.S. 675, 683, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988). This is a “bright-line rule.” Id. at 681. The presumption that the accused is unable to deal with the coercive pressures of custodial interrogation without a lawyer is continuing and, unless there has been a two-week break from custody, invalidates waivers obtained by the State. Maryland v. Shatzer, 559 U.S. 98, 104, 110, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010).

b. Refusing to put Mr. Salas in contact with an attorney after he requested counsel, law enforcement transported Mr. Salas to a hospital, where medical personal asked him about how he was injured.

Law enforcement arrested Mr. Salas shortly after 2:10 p.m. on October 25, 2014. CP 186 (FF 1 (c), (A)(m)).⁵ After being read his Miranda rights, Mr. Salas asked to speak to an attorney. CP 187-88 (FF 1 (B)(r)); 9/3/15RP 24-25, 29. When a person in custody “desires a lawyer,” the State must “provide[] access” to counsel immediately, “at the earliest opportunity,” including telephone contact. CrR 3.1(c)(2). Here, the officers knew an on-call public defender was available, yet they chose not to put Mr. Salas in contact with any attorney. 9/3/15RP 27, 33, 36-37.

Because Mr. Salas was injured, law enforcement requested Mr. Salas be examined. CP 188 (FF 1(B)(v)); RP 25. The paramedics determined that Mr. Salas had a deep laceration on his arm and advised that he would need to be transported to the hospital for further treatment. 9/3/15RP 34, 39; CP 189 (FF 1(C)(dd)). Law enforcement then made the decision to take him to the hospital. 9/3/15RP 34, 39. Contrary to court’s finding, there was no testimony that the “paramedics said that the defendant would be taken to the hospital for treatment prior to being booked into jail.” CP 189 (FF 1(C)(dd)).

⁵ The court’s findings and conclusions from the CrR 3.5 hearing are attached in the appendix.

Deputy Humphreys took Mr. Salas to Providence Hospital in Everett, arriving at 3:18 p.m. CP 189 (FF 1(C)(ee-gg)); RP 39. Deputy Humphreys told hospital staff that he needed a “clear to book,” meaning a “medical clearance” so that Mr. Salas “could be booked into jail.” 9/3/15RP 40; CP 189 (FF 1(C)(gg)). This “clear to book” was “a regular process” for suspects who are injured. 9/3/15RP 40.

Hospital staff placed Mr. Salas and Deputy Humphreys in a room together. 9/3/15RP 40; CP 189 (FF 1(C)(hh)). The Deputy handcuffed Mr. Salas’s left arm to the hospital bed. 9/3/15RP 42; CP 189 (FF 1(C)(hh)). Deputy Humphreys remained in the room because Mr. Salas was in custody and to maintain security. 9/3/15RP 41; CP 189 (FF 1(C)(hh)).

A nurse examined Mr. Salas. 9/3/15RP 40; CP 189 (FF 1(C)(ii)). She asked Mr. Salas about the origin of the laceration on his arm. 9/3/15RP 41; CP 189 (FF 1(C)(jj)). Mr. Salas responded “I don’t know, from barbed wire or a tree.” 9/3/15RP 41 CP 189 (FF 1(C)(jj)). Dr. Bigelow later examined Mr. Salas, around 3:40 p.m. 9/3/15RP 42; CP 189 (FF 1(C)(ll)). She asked Mr. Salas how he injured his arm, specifically asking if it was from an assault. 9/3/15RP 43 CP 190 (FF 1(C)(mm)). According to Deputy Humphreys, Mr. Salas “kind of gave a chuckle and then said: I killed someone.” 9/3/15RP 43.

Neither the nurse nor the doctor testified. 9/3/15RP 7-58. The court only heard testimony from law enforcement. 9/3/15RP 7-58. Mr. Salas argued that his statements should be excluded under Miranda because the questions were not necessary for treatment and the medical professionals were acting as state agents. CP 203-05; 9/3/15RP 61. The State argued the statements were admissible because they were not obtained from interrogation by a state agent. CP 200; 9/3/15RP 60-61. Agreeing with the State, the court admitted the statements, reasoning that the statements “were not the result of interrogation by a State agent.” CP 190 (FF 1 (C)(ss)).

c. The court improperly admitted statements elicited by a nurse and doctor, who saw Mr. Salas during his custody and after he invoked his right to an attorney.

Constitutional protections may apply even when private parties are involved. See, e.g., Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (“Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.”). Hence, the protections of Miranda against custodial interrogation apply not only against law-enforcement, but any “agent of the State.” Estelle v. Smith, 451 U.S. 454, 467, 101 S. Ct. 1866,

68 L. Ed. 2d 359 (1981); State v. Heritage, 152 Wn.2d 210, 216, 95 P.3d 345 (2004). In Estelle, the United States Supreme Court determined that a court-appointed psychiatrist who conducted a competency examination qualified as a state agent and that admission of the defendant's statements to this doctor violated the Fifth Amendment. Estelle, 451 U.S. at 467-68. Similarly, the court earlier applied Miranda where an internal revenue agent questioned a prisoner about his taxes. Mathis v. United States, 391 U.S. 1, 4, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968); accord State v. Willis, 64 Wn. App. 634, 639-40, 825 P.2d 357 (1992) (Miranda applied to corrections officer's questioning of jailed defendant even though officer was not acting at the request of the prosecution or the court).

Our Supreme Court subsequently determined that park security officers were state agents for purposes of Miranda. Heritage, 152 Wn.2d at 214. In so holding, the court reasoned that a reasonable person in the place of the defendant would view the officers as "law enforcement officers" because of their gear and the way they "authoritatively asked questions." Id. at 217. The court also noted that the security officers' duties included investigating or reporting crimes, and that the information elicited by the officers was used to prosecute the defendant. Id.

There does not appear to be a decision from Washington addressing the issue of whether medical personal, acting at the behest of

law enforcement and treating a suspect who has invoked his right to counsel, are state agents for purposes of Miranda. To answer this question, the inquiry is one of agency, though not necessarily in the strict legal sense:

Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere. The test is not whether the members of the executive committee are the representatives of the state in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.

Nixon v. Condon, 286 U.S. 73, 88-89, 52 S. Ct. 484, 76 L. Ed. 984 (1932).

Still, use of common law agency principles is appropriate. United States v. Ackerman, No. 14-3265, 2016 WL 4158217, at *6 (10th Cir. Aug. 5, 2016) (using agency principles in determining that Fourth Amendment applied). In analyzing the question of agency for purposes of the Fifth Amendment, the “totality of the circumstances” should be considered, including four nonexclusive factors:

Applying a totality of the circumstances approach, courts can consider a variety of factors bearing on the question of agency: (1) the extent of the government’s knowledge of, and participation in, the alleged agent’s conduct; (2) the alleged agent’s motivations; (3) the presence or absence of coercion as viewed from the suspect’s perspective; and (4) other traditional indicia of agency, such as the parties’

mutual manifestation of consent, either express or implied, to have the private party act on behalf of the government and the extent of control exercised by the government over the private party's actions.

United States v. Alexander, 447 F.3d 1290, 1294-95 (10th Cir. 2006).

Here, Deputy Humphreys was aware that the nurse and doctor were going to treat Mr. Salas. He brought Mr. Salas to the hospital for that very purpose, telling medical staff that he needed a "clear to book," meaning a medical clearance. The medical staff were aware that Mr. Salas was in custody and that he would be going to jail. Hence, the doctor and nurse were assisting law enforcement.

As for coercion, Mr. Salas was handcuffed, he had a significant injury requiring treatment, and law enforcement was present. Given these circumstances, a reasonable person in Mr. Salas's position would feel coercion. Moreover, Mr. Salas had asked for a lawyer, but had not spoken to one. This signaled that any questioning would be too coercive for Mr. Salas without a lawyer. Roberson, 486 U.S. at 683.

In treating Mr. Salas, the medical staff were acting at the behest of law enforcement. They were treating him so that he could be booked into jail. They impliedly agreed to treat Mr. Salas knowing that the purpose was not simply to treat Mr. Salas, but so that the State could continue the process of detaining him. Hence, there was implied consent on the part of

hospital and staff to act on behalf of the State. Moreover, the hospital and its staff were serving an essential government function. Without a medical clearance, Snohomish County Jail would not accept arrestees with a significant injury or medical condition. CP 191 (FF 1(D)(yy)).

Under the totality of the circumstances, the doctor and nurse were acting as state agents, triggering the protections of article I, § 9 and the Fifth Amendment. Cf. People v. Sanchez, 148 Cal. App. 3d 62, 69-70, 195 Cal. Rptr. 558, 562 (Cal. Ct. App. 1983) (holding that “a doctor interviewing a defendant to secure evidence on the behalf of the prosecution is an agent of law enforcement.”).

As for the question of “custodial interrogation,” Mr. Salas was in custody. The trial court concluded that neither the doctor nor the nurse interrogated Mr. Salas. This was error. Under Miranda, the term “interrogation” refers to “any words or actions” that a person “should know are reasonably likely to elicit an incriminating response from the suspect.” Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The focus is on “the perceptions of the suspect,” not the person eliciting the response. Id.; In re Pers. Restraint of Cross, 180 Wn.2d 664, 685, 327 P.3d 660 (2014). Here, both the doctor and the nurse knew that Mr. Salas was in custody. Their express questioning as to the origin of the laceration were likely to elicit an incriminating response.

The questioning from the doctor, who asked if the laceration was from an assault, was particularly likely to elicit an incriminating response.

This Court should conclude that Mr. Salas was subjected to custodial interrogation in violation of Miranda.

d. The State cannot meet its burden proving the error harmless beyond a reasonable doubt.

The admission of statements obtained in violation of Miranda are subject to the constitutional harmless error test. Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

Prejudice is presumed and the State bears the burden of proving the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

The State recounted Mr. Mr. Salas's statements to medical personal during its opening summation. RP 342. Deputy Humphreys testified about Mr. Salas's statements at trial. RP 849-50. While there was no issue as to whether Mr. Salas caused Mr. Lopez's death, the characterization of him "chuckling" likely did not endear him to the jury and supported an inference that the death was intentional. RP 342 ("defendant chuckled and said, I killed someone."); 850 ("he chuckled, and said . . . no, I killed somebody."). As for the barbed wire and tree

branches statement, this statement came in as substantive evidence and tended to undermine the self-defense claim. The jury may have concluded that the laceration came from barbed wire rather than the knife.

Further, the State did not have a strong case. The prosecution did not prove Mr. Salas acted with premeditation in killing Mr. Lopez, as the State insisted. Given Mr. Salas's injury and the drunkenness of Mr. Lopez, the jury may have believed Mr. Salas acted in self-defense but for these improperly elicited comments. At the least, the jury might have entertained a reasonable doubt on intent and convicted Mr. Salas of manslaughter instead of second-degree murder.

The error cannot be proven harmless beyond a reasonable doubt. This Court should reverse.

3. By asking questions about whether the decedent had been a “social person” or was “flirty,” the State opened the door to inquiry on whether the decedent was aggressive when drinking.

a. The court's erroneous ruling.

Before trial, the State moved to preclude testimony about Mr. Lopez's sexual behavior with others while drunk. CP 178. In particular, the State did not want the jury hearing about Mr. Lopez's behavior with brothers Brandon and David Hefton. CP 178. The Heftons' said that Mr. Lopez would get very “flirtatious” when drunk. CP 174. For example,

although he told Mr. Lopez to stop, Brandon said that Mr. Lopez kept trying reach into his shorts and touch his genitals. CP 174. David said that when he refused Mr. Lopez's invitation to go to bed and "snuggle," Mr. Lopez bit him on the shoulder. CP 174. The court granted the State's motion, subject to reconsideration outside the presence of the jury. RP 9.

At trial, the State called Mr. Frescas to testify. RP 935. Mr. Frescas was a friend of Mr. Lopez's. RP 937. Brandon Hefton was Mr. Frescas's sexual partner around the summer 2014. RP 937. Mr. Frescas had also had sexual interactions with Mr. Lopez twice around August or September 2014. RP 943-44.

On direct, the State asked Mr. Frescas to describe Mr. Lopez socially:

Q. How would you describe him socially? Was he a social person?

A. He was a social person.

Q. Can you –

A. Friendly, supportive. Just liked to have a good time.

RP 941. The prosecutor also inquired whether Mr. Frescas considered Mr. Lopez, in the words of the prosecutor, to be "flirty." RP 942-43. Mr. Frescas said, "yes." RP 943. Mr. Frescas was also "flirty," having sent nude pictures of himself in the shower to Mr. Lopez. RP 944.

After the State completed its direct examination, Mr. Salas's attorney requested a hearing outside the presence of the jury. RP 950. He argued that the door had been opened to cross-examination on prior incidents where Mr. Lopez had become sexually aggressive after drinking and as to what "flirty" meant. RP 950-51, 955-56. He argued that the jury had been left with the impression that Mr. Lopez was a "good guy" and that the inquiry into how Mr. Lopez acted socially opened the door to testimony on how he acted when intoxicated. RP 958. The court reserved ruling on the matter. RP 958. When considering the matter later, the court ruled the matter inadmissible even though the purpose was to rebut Mr. Frescas's testimony:

THE COURT: Actually, there was the one other one. That's in relation to whether or not the door was opened. So, Mr. Thompson, tell me again, you believe the door was opened, in relation to the testimony that he was flirty, and that is sufficient for you to believe – you believe to question, in relation to the incident that happened with the Heftons?

MR. THOMPSON: That, coupled with his other testimony. And, I apologize, I don't have it up, but essentially, I think he said that he was a nice guy, that he was giving, something of that nature. That, coupled with the fact that he was flirty, I do think that opened the door to rebuttal testimony that there was, essentially, more to it, that when he drinks, he gets aggressive.

THE COURT: Is this information that you're claiming that your client was or was not aware of, Mr. Thompson?

MR. THOMPSON: I am not claiming that he was aware of it. It is strictly to rebut Ralph's testimony.

THE COURT: Okay. For that purpose, I'm going to find even if it were relevant that the probative value would be outweighed by the prejudice. If it was information the defendant was aware of, certainly, that would be admissible, from the standpoint of his claim for self-defense.

Frankly, I don't think the door was opened in relation to that testimony, but even if it was, I'd find that it's more prejudicial than probative, so I'll deny that request.

1270-71.

b. The court erred in ruling that the door had not been opened and in excluding this highly probative evidence.

Interpretation of an evidentiary rule is reviewed *de novo*. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the trial court properly interpreted the rule, the court's decision on whether to admit the evidence is reviewed for an abuse of discretion. Id. A court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. Id.

As explained by our Supreme Court about half a century ago, subjects inquired into on direct examination are fair game in cross-examination, otherwise the jury is left with “half-truths”:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). “The *Gefeller* rule’s purpose is to prevent a party from mischaracterizing evidence by only revealing advantageous details of a particular subject.” City of Seattle v. Pearson, 192 Wn. App. 802, 819, 369 P.3d 194 (2016).

The State inquired into how Mr. Lopez acted socially. RP 941. Mr. Frescas answered that Mr. Lopez was a “social person,” that he was “friendly,” and “[j]ust liked to have a good time.” RP 941. Similarly, the State asked if Mr. Lopez was “flirty,” to which Mr. Frescas answered affirmatively. RP 942-43.

Contrary to the court's ruling, the State opened the door to inquiry on how Mr. Lopez acted socially, especially with people he had sexual relationships with, like Mr. Frescas. As argued below, Mr. Frescas's testimony left the jury with the false impression that Mr. Lopez was just a "nice guy." But the truth was that when Mr. Lopez drank, he tended to become aggressive. This was relevant to the jury in evaluating how Mr. Lopez acted the night of his death, where he drank and interacted with Mr. Salas. The jury later heard that Mr. Lopez's blood alcohol level was at .24 when he died, which is about three times the legal limit for driving. RP 1091.

Concerning the court's determination that the danger of unfair prejudice outweighed the probative value of the evidence, the court misapplied ER 403. This rule permits the trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403 (emphasis added). The court did not find that the danger of unfair prejudice was substantial. Further, unless the evidence was admitted, the jury was left with the false impression that Mr. Lopez did not have a history of being aggressive when drinking. This was very probative as to Mr. Salas's self-defense claim.

The Court should hold that the trial court erred in ruling that the door had not been opened and in excluding highly probative evidence.

c. The error was prejudicial.

An evidentiary error is prejudicial if there is a reasonable probability that it materially affected the outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). The excluded evidence was highly probative. The exclusion left the jury with a false impression as to how Mr. Lopez acted. If the jury credited Mr. Frescas's testimony, the jury may have discredited Mr. Salas's testimony that Mr. Lopez attacked him, resulting in the rejection of his self-defense claim. Accordingly, there is a reasonable probability that the error was prejudicial, requiring reversal.

4. Cumulative error deprived Mr. Salas of a fair trial.

An accumulation of non-reversible errors may deny a defendant a fair trial.” State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997) (citing State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). The appellate court considers errors committed by the trial court as well as instances of misconduct by others, including the prosecutor. See State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). “In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.” United States v. Lloyd, 807 F.3d 1128, 1168 (9th Cir. 2015).

Viewing any combination of the errors (including prosecutorial misconduct) together, this Court cannot be confident that Mr. Salas received a fair trial. The prosecutorial misconduct invited the jury to convict on emotion rather than reason. The errors in admitting and excluding evidence likely affected how the jury evaluated the claim of self-defense, and on what mental state Mr. Salas acted with. The accumulation of errors deprived Mr. Salas of fair trial, requiring reversal.

5. No costs should be awarded to the State for this appeal.

If Mr. Salas does not prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1); RAP 14.2. This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means “making an individualized inquiry.” Sinclair, 192 Wn. App. at 391 (citing State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015)). A person’s ability to pay is an important factor. Id. at 389.

Here, Mr. Salas was found to be indigent. Supp. CP __ (sub. no. 92); RP 1448. This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. The trial court further recognized this indigency by declining to impose discretionary legal financial obligations upon Mr. Salas. CP 9; RP 1448-49. While

relatively young, Mr. Salas was sentenced to 244 months. CP 6. Given this record, the Court should exercise its discretion and rule that no costs will be awarded. Cf. Sinclair, 192 Wn. App. at 392-93 (declining State's request for costs in light of defendant's indigency and lack of evidence or findings showing that defendant's financial situation would improve).

F. CONCLUSION

The prosecutor's misconduct deprived Mr. Salas of a fair trial. The court improperly admitted statements in violation of Miranda. And the court erred by precluding cross-examination which would have shown that the decedent was aggressive when drinking. Mr. Salas's conviction should be reversed and the case remanded for a new trial.

DATED this 8th day of September, 2016.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

Appendix

FILED

2015 SEP 23 PM 3: 32

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

Plaintiff,

14-1-02282-9

vs.

CERTIFICATE PURSUANT TO
Cr 3.5 OF THE CRIMINAL RULES
FOR SUPERIOR COURT

SALAS IV, ENCARNACION

Defendant.

The undersigned Judge of the above court hereby certifies that a hearing has been held in the absence of the jury pursuant to Rule 3.5 of the Criminal Rules for Superior Court and now sets forth:

1. The Undisputed Facts

a. On October 25, 2014 the Snohomish County Sheriff's Office was investigating a homicide that had occurred on October 24, 2014 in an apartment in Lynnwood, Washington.

b. The defendant, Encarnacion Salas, was a suspect in the Murder investigation and had been at large since the night before.

c. At approximately 2:10 pm Deputies responded to a call that the defendant may have returned to his apartment, which was located in the same complex as the apartment where the homicide had occurred.

d. Detective Emmons knocked on the apartment door and a female answered and said the defendant was inside, he had a knife, and something to the effect of "he's not well".

e. At this time there were several deputies present at the doorway.

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1 f. Deputies could see two other civilians inside the apartment and were concerned for
2 the safety of those people and the public due to the violent nature of the homicide and the
3 statements made by the female at the door.

4 g. Deputies entered the apartment and were told the defendant was in a bedroom with
5 double doors on it.

6 **1(A). Statements Made Prior to arrest**

7 h. Detective Emmons began ordering the defendant to show himself and eventually the
8 defendant stepped from the closet area of the room.

9 i. Detective Emmons ordered the defendant to get on the ground, but the defendant
10 would not comply.

11 j. Instead of complying with the Deputies commands, the defendant asked questions,
12 such as "What's going on?" "What do you want?" "What is this about?"

13 k. The defendant was tazed by deputies twice, with little to no effect.

14 l. Deputy Koster told the defendant he was under arrest and to comply. The defendant
15 said "What for? Tell me what for and I'll comply."

16 m. Deputy Koster told the defendant he was under arrest for homicide and the
17 defendant eventually complied.

18 n. The statements made by the defendant during the time the deputies were attempting
19 to get him into custody were not made in response to any questions by the deputies, or any
20 statements designed or likely to elicit an incriminating response. The commands the deputies
21 made were those attendant to arrest and not a form of interrogation.

22 o. The statements the defendant made while deputies were attempting to get him into
23 custody were voluntary and spontaneous.

24 **1(B) Statements Attendant to Arrest.**

25 p. Once the defendant was in custody, Deputy Koster advised the defendant of his
26 Constitutional rights as required by law.

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1 q. The defendant indicated he understood each of those rights and said he wanted to
2 talk to a representative.

3 r. Deputy Koster asked the defendant what he meant by representative and the
4 defendant said he wanted to talk to an attorney.

5 s. At this time, the apartment was not secure. Deputies had concerns for their safety
6 and for the integrity of the scene.

7 t. Deputy Koster then began to frisk the defendant for weapons. When Deputy Koster
8 touched the defendant's arm, the defendant winced.

9 u. Deputy Koster asked the defendant if he was injured and the defendant told Deputy
10 Koster what his injuries were.

11 v. Medics were called to the scene to treat the defendant and the defendant was taken
12 out of the apartment and into the parking lot.

13 w. The question Deputy Koster asked the defendant about his injuries was made
14 attendant to arrest and custody and was not a question that was designed to or was likely to
15 elicit an incriminating response. It was not "interrogation".

16 x. The defendant's answer to Deputy Koster's question regarding his injuries was
17 voluntary.

18 y. While the defendant was being treated by medics at the scene, the lead detective in
19 the case, Detective Walvatne, introduced himself to the defendant and told the defendant he
20 understood the defendant had asked for an attorney and advised the defendant he was under
21 arrest for Murder.

22 z. The defendant told Detective Walvatne that he thought he was just a suspect.

23 aa. Detective Walvatne did not ask the defendant any questions during this encounter.

24 bb. The Detectives statements to the defendant were statements made attendant to
25 arrest and were not designed or likely to elicit an incriminating response. The Detective's
26 statements were not a form of interrogation.

cc. The defendant's statement to Detective Walvatne was voluntary and spontaneous.

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1 **1(C) Statements to Medical Personell**

2 dd. The aid crew at the scene determined that the defendant had a severe laceration to
3 his right arm that they could not treat at the scene. The paramedics said that the defendant
4 would be taken to the hospital for treatment prior to being booked into jail.

5 ee. Deputy Humphreys was tasked with transporting the defendant to Providence
6 Hospital in Everett, Washington.

7 ff. Deputy Humphreys left the scene with the defendant at 1456 hours and arrived at the
8 hospital at 1518 hours.

9 gg. When Deputy Humphreys arrived at the hospital, he told the staff that he needed to
10 have the defendant cleared to book into jail. He did not tell anyone what the defendant was
11 alleged to have done nor did he have more conversation with staff about the defendant's
12 situation.

13 hh. The defendant was assigned to a room for treatment and Deputy Humphreys
14 accompanied the defendant, for safety and security reasons, during the entire time the
15 defendant was in the hospital. The defendant was handcuffed to the bed on which he was
16 seated.

17 ii. Initially, a nurse came to examine the defendant. Deputy Humphreys does not recall
18 the name of the nurse or what type of nurse she was. Deputy Humphrey had no prior personal
19 or working relationship with the nurse and did not talk to the nurse about the defendant prior to
20 the examination.

21 jj. When the nurse looked at the laceration on the defendant's arm, she asked him how
22 he got it. The defendant responded, "I don't know, from barbed wire or a tree."

23 kk. The nurse's question was not prompted by law enforcement in any way.

24 ll. At approximately 1540 hours Dr. Bigelow came into the room to examine the
25 defendant. Deputy Humphreys does not know Dr. Bigelow and has no personal or working
26 relationship with Dr. Bigelow. Deputy Humphreys did not speak to Dr. Bigelow about the
defendant's situation prior to the examination.

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1 mm. During Dr. Bigelow's examination, she asked the defendant how he got the
2 laceration on his arm and asked if it was from an assault. The defendant chuckled and said, "I
3 killed someone."

4 nn. Dr. Bigelow's question was not prompted by law enforcement in any way.

5 oo. Providence Hospital is not run by the State or any local government. It is a privately
6 run not-for-profit hospital. The hospital staff does not work for or directly with the Snohomish
7 County Sheriff's Office or other political entity.

8 pp. Neither the nurse treating the defendant nor Dr. Bigelow was a State agent on
9 October 25, 2014. Nor were they acting as State agents or on behalf of any State agent.

10 qq. Neither the nurse nor Dr. Bigelow had been told by law enforcement, about the case
11 the defendant was involved in.

12 rr. The questions the nurse and doctor asked the defendant, even if not necessary for
13 treatment, were attendant to treating the defendant and were not designed to or likely to elicit an
14 incriminating response.

15 ss. The statements the defendant made to the nurse and Dr. Bigelow were made
16 voluntarily and were not the result of interrogation by a State agent.

17 **1(D) Right to an attorney**

18 tt. After Dr. Bigelow's initial examination, Detective Tedd Betts arrived to serve a search
19 warrant on the defendant.

20 uu. Detective Betts and Deputy Humphries photographed the defendant and collected
21 swabs pursuant to the search warrant.

22 vv. Dr. Bigelow then returned and sutured the laceration on the defendant's arm and
23 cleared the defendant for booking.

24 ww. Deputy Humphreys then transported the defendant to the Snohomish County jail for
25 booking.

26 xx. There are telephones in the booking area of the Snohomish County Jail and inmates
are allowed to use the phones once they are booked into the jail.

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1 yy. An individual who has been arrested and has a significant injury or medical condition
2 must be medically cleared for booking before the Snohomish County Jail will accept them into
3 their facility.

4 zz. Each of the Deputies that testified was aware that there is a 24 hour per day on-call
5 public defender and Detective Walvatne had the phone number for that service.

6 aaa. However, the Deputies' primary concern was getting the defendant the medical
7 treatment he needed. The Deputies were also concerned about securing the scene and
8 ensuring the safety of themselves and the public. The Deputies also needed to serve a signed
9 search warrant on the defendant's person to take photographs and collect DNA.

10 **1(E) General Findings of Fact**

11 bbb. At no time did anyone threaten, coerce, or make promises to the defendant to get
12 him to make statements or speak.

13 ccc. At all times, the defendant was coherent and lucid and understood his rights and the
14 statements he was making. Each of the statements was made voluntarily and without threats,
15 promises or coercion.

16 **2. The Disputed Facts**

17 There were no disputed facts.

18 **3. Court's Conclusions as to Disputed Facts**

19 N/A

20 **4. Court's Conclusions as to Confessions Voluntary and Admissible or
21 Involuntary and Inadmissible With Reasons in Either Case**

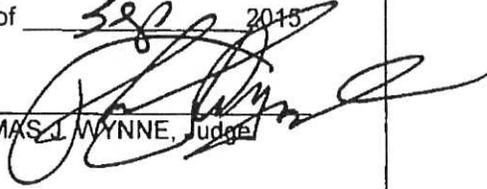
22 a. Under the circumstances in this case, the Deputies were not required to immediately
23 put the defendant in touch with an attorney. They were not required to delay the
24 needed medical treatment or the service of the search warrant for that purpose. Nor
25 were they required to interrupt their pre-booking and booking procedures to put the
26 defendant in touch with an attorney.

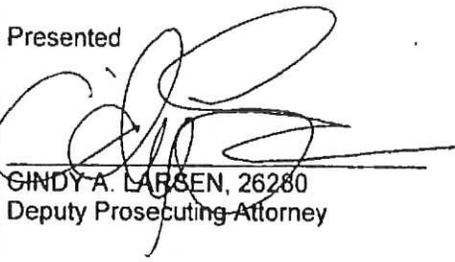
b. All of the defendant's statements in this case are admissible at trial

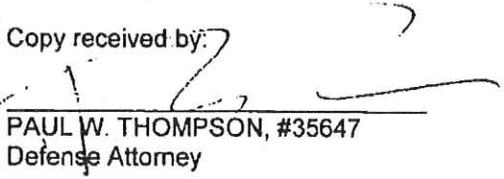
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DONE IN OPEN COURT this 18th day of SEP 2015


THOMAS J. WYNNE, Judge

Presented

CINDY A. LARSEN, 26280
Deputy Prosecuting Attorney

Copy received by:

PAUL W. THOMPSON, #35647
Defense Attorney

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74209-4-I
)	
ENCARNACION SALAS IV,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
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WALLA WALLA, WA 99362 | (X)
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SIGNED IN SEATTLE, WASHINGTON, THIS 8TH DAY OF SEPTEMBER, 2016.



X _____

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