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Court of Appeals  
Division I  
State of Washington

COURT OF APPEALS NO. 74220-5-1

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

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STATE OF WASHINGTON,

Respondent,

v.

GERMAN LOPEZ-CASTRO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George F. Appel, Judge,

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

The state initially charged appellant German Lopez-Castro with one count of second degree assault while armed with a deadly weapon, alleging that on July 26, 2015, he threatened to “end it all” and pulled a knife on his estranged wife Stephanie Lopez-Castro.<sup>1</sup> CP 91. The reported incident ended when Lopez-Castro left the apartment and went out to the parking lot. CP 91. Stephanie called police and they arrested Lopez-Castro. CP 90-91.

Following Lopez-Castro’s arrest, Stephanie spoke with Lopez-Castro’s then-girlfriend Tara Larue. CP 91.

Larue told Stephanie that six days earlier, on July 20, 2015, Lopez-Castro brought Larue with him to Stephanie’s apartment, because he reportedly planned to kill her. CP 91. Larue said they waited outside, but Larue knew Stephanie was not at home. CP 80, 91.

Before trial, the state amended the information to include a count of felony harassment while armed with a deadly weapon, occurring on or about July 20 – 26, 2015, and an additional aggravator for both counts that they were committed within the

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<sup>1</sup> To avoid confusion, this brief refers to Stephanie Lopez-Castro by her first name.

sight of Lopez-Castro's minor children. CP 88. It was the state's theory the harassment charge could be based on either (1) the "end it all" threat on July 26<sup>th</sup> or (2) the threat to kill heard by Larue on July 20<sup>th</sup>, which she later relayed to Stephanie. RP 248, 316-318.

At a pre-trial hearing, the state sought to admit allegations by Stephanie and Larue that Lopez-Castro previously abused both women. RP 13, 17. With regard to Stephanie's allegations, the state argued they were relevant to show the reasonableness of Stephanie's fear, an element of harassment. RP 13. With regard to Larue's allegations, the state argued they were relevant to show why Larue did not contact police or Stephanie after the July 20<sup>th</sup> incident. RP 17-18.

In the state's offer of proof, however, Larue testified she did not tell Stephanie about the July 20<sup>th</sup> incident until she saw Stephanie six days later, because Larue had no phone. RP 122. Despite this, the court ruled Larue's allegations of past abuse tended to explain why Larue did not contact police. RP 148-49.

At trial, when the state called Larue to testify, the prosecutor immediately inquired about Lopez-Castro's alleged prior abuse. RP 175. Defense counsel objected any relevance of such accusations had yet to be established, but the court overruled the objection. RP

175. The state thereafter elicited testimony Lopez-Castro committed similar acts of abuse against Larue – one involving a knife – as the state alleged he committed against Stephanie. RP 175-76.

The prosecutor thereafter asked about the morning of July 20<sup>th</sup> and Lopez-Castro's alleged threat to kill Stephanie. RP 177-79. When asked why she did nothing with the information for six days, Larue again said she had no phone. RP 178, 181.

Outside the presence of the jury, the court later noted the lack of any relevant nexus between Larue's allegations of prior abuse and the charges. RP 238. The court lamented that it wished it had ruled otherwise when defense counsel objected to the relevance/foundation for Larue's testimony. RP 239.

The defense moved for a mistrial, but the court resolved to instruct the jury to disregard Larue's prior allegations of abuse. RP 245251-52.

The jury convicted Lopez-Castro of second degree assault while armed with a deadly weapon and found he committed the offense within the sight and sound of his minor children. CP 16-20.

B. ASSIGNMENTS OF ERROR

1. The court erred in admitting prejudicial propensity evidence that did not satisfy the rules of evidence.

2. The court erred in overruling defense counsel's objection to the prejudicial propensity evidence in the absence of a proper foundation.

3. Prosecutorial misconduct deprived Lopez-Castro of his right to a fair trial.

4. Trial irregularity deprived Lopez-Castro of his right to a fair trial.

5. The court erred in denying the motion for mistrial.

Issues Pertaining to Assignments of Error

1. Where the state failed to establish any relevance for Larue's allegations of prior abuse by Lopez-Castro in its offer of proof, did the court err in admitting the allegations under ER 401, 403 and 404(b)?

2. Where the state laid no foundation establishing the relevance of Larue's allegations in her direct testimony, did the court err in overruling defense counsel's relevance objection to testimony about such allegations?

3. Where the state preemptively introduced evidence of Larue's allegations of prior abuse, did prosecutorial misconduct deprive Lopez-Castro of his right to a fair trial?

4. Where the state failed to establish the relevance of Larue's allegations to the current charges and the court ruled the allegations were therefore inadmissible, did the court err in denying the motion for mistrial?

C. STATEMENT OF THE CASE<sup>2</sup>

1. ER 404(b) Hearing

The defense moved to exclude allegations of prior abuse. CP 81-82 (citing ER 401, 403, 404(b)); see also RP 13. As indicated, the state argued the testimony was relevant to show the reasonableness of Stephanie's fear, and to explain why Larue did nothing after the reported July 20<sup>th</sup> threat. RP 13, 17-18. The defense surmised the state could not prove any of the allegations. RP 14.

Nonetheless, the defense agreed Larue was expected to testify that, "on July 20<sup>th</sup>, she believed Mr. Lopez-Castro was going to his wife's house and waiting for her to kill her, that she then went

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<sup>2</sup> Lopez-Castro's jury trial took place in October 2015. The verbatim report of proceedings is referred to as "RP" and contained in six bound volumes, consecutively paginated.

to work and did nothing for the next six days.” RP 19. In that instance, the defense expected to elicit testimony Larue had Stephanie’s number but never contacted her. RP 19.

To clarify, the court asked whether both sides wanted “to get into it?” RP 19. Defense counsel responded, “I think it’s going to come out, just to be perfectly frank with the Court.”<sup>3</sup> RP 19. The court therefore ruled:

Very well. As to what Stephanie will be able to say, Stephanie’s allegations, if I find that they have been proved by a preponderance, are relevant and admissible on Count 2.

Ms. Larue’s allegations – again, if I find that by a preponderance that the allegations are correct – are likewise relevant and admissible in order to explain a subject that both sides want to get into, which is that Ms. Larue did not tell Stephanie nor the police nor take any action whatsoever, apparently, for about five days after an alleged incident in which the defendant said that he was going to kill Stephanie in front of the children.

RP 19-20.

Both Stephanie and Larue testified at the hearing. Because Lopez-Castro does not challenge the admission of Stephanie’s allegations, they will not be recounted here.

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<sup>3</sup> As indicated, the state was relying on either the reported “end it all” threat on July 26 or the conveyed threat-to-kill on July 20 as the basis for the harassment count. CP 88; see e.g. RP 248, 316-18.

Larue testified that around 5:00 a.m. on July 20, 2015, Lopez-Castro brought her with him to Stephanie's house. RP 120. According to Larue, Lopez-Castro said he was going to kill Stephanie. RP 120. They reportedly waited outside for two hours. RP 120, 122. As Larue testified, she didn't tell anyone because: "I had no form of communication. I didn't have a phone." RP 122.

When asked why she went with Lopez-Castro to Stephanie's, Larue claimed: "Because if I didn't, it would have not been a good thing." RP 121. She claimed she was concerned about: "Having to deal with the repercussions of not doing what he said." RP 121. According to Larue, Lopez-Castro had become physical during arguments in the past and had choked her, spit on her, poured beer on her, broke her property and cut up her clothes. RP 122. She claimed he cracked her ribs by grabbing her too tightly. RP 122. According to Larue, Lopez-Castro also held a knife to her throat on one occasion and kidnapped her on another. RP 133. Larue testified she never reported the abuse because she was afraid it could get worse. RP 123.

As defense counsel recounted, Larue said she did not report the July 20<sup>th</sup> incident because she had no phone, not because she was afraid of Lopez-Castro. The prior abuse therefore had no

relevance and should be excluded. RP 142-143. Defense counsel also argued that considering how similar Larue's allegations were to Stephanie's, any probative value was outweighed by its potential for prejudice. RP 143 (citing ER 403); see also RP 14.

The court found the state proved the allegations by a preponderance of the evidence. RP 144. Weighing the potential for prejudice stemming from Larue's allegations, the court noted "there is a good deal of prejudice." RP 147. Yet, the court identified the probative value as follows:

This testimony is being offered for a different purpose [than Stephanie's]. It's not being offered to prove an element of the offense.<sup>[4]</sup> It's being offered to prove, as far as I can tell, two things:

One, that the defendant had some sort of a plan to threaten Ms. Lopez-Castro and had an actual intent to do so because of the thwarted plan or events of July 22<sup>nd</sup> [sic]. The evidence is highly relevant and highly relevant for that purpose.

It also tends to explain why – or some of it tends to explain why Ms. Larue failed to notify the police.

I am advised that both sides wish to get into this, and each side has – has points that may be made from this evidence, because it is true, according to Ms. Larue, that she did not notify the police.

And one might expect that she would if something so remarkable as a believable death threat was made in her presence and even, perhaps, the prelude to a murder. If that's what happened, one

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<sup>4</sup> This is correct with regard to Larue's allegations of past abuse, which ostensibly were being offered to show why she failed to act. However, it is incorrect with regard to her testimony as to what happened the morning of July 20. RP 248.

would expect a reasonable person, even perhaps a reasonable person who occasionally has warrants, to notify the authorities to prevent such a terrible thing from occurring. And that is certainly something the defense is entitled to explore.

But if the defense is going to explore that, then it certainly becomes relevant why she did not notify the police under those circumstances. And her fear of the defendant, if that's what it is, and her reasons for fearing the defendant, if that's what they are, are all relevant to that purpose, because if the jury is going to hear that she did not notify the police, even though a reasonable person ought to have, in which case maybe it isn't true, they should – the jury should also hear a proffer of reasons why she didn't telephone the police.

RP 148-49.

2. Testimony Pre-Mistrial Motion

Apart from the officer who arrested Lopez-Castro, the state called Larue as its first witness. RP 163-73. Larue testified that on July 20, 2015, she was living with Lopez-Castro in Mill Creek. RP 173-74. Right off the bat, the prosecutor inquired asked about the nature of their relationship:

Q. Okay. How was your relationship with Mr. Lopez-Castro?

A. At the beginning, it was great.

Q. I'm sorry?

A. At the beginning, it was great.

Q. And was there a time that that changed?

A. Yeah. Probably four to five months into it after we moved in together.

Q. Okay. And how did it change?

A. Just a lot changed. He – we started arguing a lot. He would get physical with me.

RP 175.

Defense counsel immediately objected, but was overruled:

MS. RIVERA [defense counsel]: Your Honor, I'm going to object at this point as the relevance of this testimony has not yet been established.

THE COURT: Overruled.

MS. YAHYAVI [prosecutor]: Your Honor, may she continue her answer?

THE COURT: Yes.

Overruled means you can go ahead and answer.

RP 175.

Larue continued: "Things just got physical and lots of arguments." RP 175. The prosecutor asked for specifics. RP 176. Larue claimed Lopez-Castro pushed her, spit on her and belittled her. She claimed Lopez-Castro chided her by asking if her children would come to her funeral and by showing her pictures of how she would die. RP 176. Larue claimed that towards the end, Lopez-

Castro abused her nearly every day. RP 176. She testified she did not report the abuse because she feared repercussions. RP 176.

Larue testified that on July 20, 2015, Lopez-Castro told her to get in the car because they were going to Stephanie's. RP 177. According to Larue, Lopez-Castro said he was going to hurt Stephanie when she went to work. RP 177. Larue testified that they waited outside Stephanie's apartment for approximately two hours but she never came outside. RP 177. They also drove by Stephanie's work but didn't see her car. RP 179.

When asked if there was a reason she did not report the incident to police, Larue responded: "No. I – I just did what he told me. He took me back home. I went to work. I haven't had a phone forever. He made sure I had no connection to anybody." RP 178. Larue claimed there was no phone at her work either. RP 178, 181.

Larue testified she told Stephanie about the incident approximately five days later when Stephanie came to her house. RP 180. Although she and Lopez-Castro had roommates, none of them had a phone either. RP 180.

The prosecutor re-visited Larue's allegations of prior abuse and elicited that Lopez-Castro bruised her neck, cracked her ribs

and kidnapped her. RP 182. Larue claimed Lopez-Castro threatened her numerous times with knives. RP 184. Larue claimed that on one occasion, he “ran after me into a stairwell of my friend’s apartment and put the knife on me there.”<sup>5</sup> RP 184.

When asked why she went with Lopez-Castro to Stephanie’s on July 20<sup>th</sup>, Larue testified she was afraid there would be repercussions, such as being choked or spit on. RP 185.

On cross, Larue reiterated she had no phone on July 20<sup>th</sup>. However, she used her roommate’s phone to text with Stephanie July 19<sup>6</sup> and knew Stephanie would not be at home July 20<sup>th</sup>, which Larue said was why she did not want to call 911. RP 189-92. But Larue testified she couldn’t have called 911 anyway, because she had no phone. RP 192.

Stephanie testified she and Lopez-Castro are married and have three children together. RP 211. On July 26, 2015, she and the children were living in a Lynnwood apartment. RP 212. She and Lopez-Castro got into an argument because she didn’t want to lend him her Toyota Camry. RP 212-213. Lopez-Castro owned a red Mustang but said its tires were low. RP 213-14. Stephanie

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<sup>5</sup> On cross, Larue testified Lopez-Castro held the knife to her throat but dropped it and started crying. RP 196. On redirect, Larue said the same thing about Lopez-Castro dropping the knife and crying. RP 209.

testified her children and niece were present during the argument.

RP 213.

During the argument, Lopez-Castro followed her into the bedroom and reportedly said he broke her television, which was in the living room. RP 215. Stephanie slammed her dresser drawer shut and went out to the living room; her television was undamaged. RP 215.

Stephanie testified they went to the front door for some reason and Lopez-Castro spit in her face. RP 216. Stephanie pushed Lopez-Castro and told him to leave. RP 217. According to Stephanie, Lopez-Castro went to the kitchen and took a knife out of the dishwasher. Stephanie told her daughter to call the police. RP 217. According to Stephanie, Lopez-Castro said, "Yeah, call the cops so I can end it all."<sup>7</sup> RP 218. Stephanie claimed Lopez-Castro pushed her against the wall and held the knife up to her neck without touching it. RP 217.

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<sup>6</sup> According to Larue, the roommate was thereafter incarcerated. RP 188.

<sup>7</sup> Stephanie testified she interpreted Lopez-Castro's statement as a threat to kill, because he said similar things in the past. RP 218. She testified that throughout the marriage, they both were sometimes physical with one another but it had become more one-sided. RP 219. And Lopez-Castro had never before threatened Stephanie with a knife. RP 222. She described two incidents during the past year when Lopez-Castro choked her and threatened to jump with her off the balcony. RP 219-222. Stephanie testified she was afraid but did not know if Lopez-Castro would follow through with his threats. RP 221.

Stephanie testified that the children started screaming and Lopez-Castro dropped the knife. RP 223. Their daughter picked it up but Lopez-Castro reclaimed it, put it in his pocket and went outside. Stephanie locked the door. Lopez-Castro did not have a key to get back in. RP 223.

Stephanie testified Lopez-Castro pounded on the door and asked to be let in. When Stephanie refused, Lopez-Castro reportedly sat down and cried. RP 224. He eventually went down to his car. RP 224. Stephanie testified she called 911, because it looked like Lopez-Castro was doing something to her car's tires. RP 224.

Lynnwood police officer William Koonce responded at approximately 5:30 p.m. RP 164-65. According to Koonce, dispatch described a man with a knife associated with a red Mustang in the parking lot. RP 165. Koonce contacted Lopez-Castro and asked, "where is the knife;" Lopez-Castro responded it was inside his car. RP 168.

Officer Wolstad arrived and spoke to Stephanie. RP 169. Stephanie asked if they could get the keys to the Mustang because it would be towed otherwise. RP 230. Wolstad escorted Stephanie to the Mustang. Once there, he asked if a knife lying on the floor

behind the driver's seat was the one Lopez-Castro reportedly had in the house. RP 231, 337. Stephanie confirmed it was. RP 231.

3. Mistrial Motion

Following a break in Stephanie's direct testimony, the court addressed the defense proposed limiting instruction for Larue's allegations of prior abuse; the court had concerns:

Ms. Rivera [defense counsel], the second part, which is entirely consistent with my ruling, instructs the jury that the only purpose for the jurors' consideration of evidence from Larue about all of the things she said that the defendant did to her is only for the question of why she did not report any alleged threats to kill Stephanie Lopez-Castro to any other person, including law enforcement.

Ms. Larue said that she didn't report any of those things to law enforcement because she didn't have a phone. And then on cross-examination, there was some evidence about some warrants.

What does the evidence of things she said the defendant did to her have anything to do with either phone or warrants? Is this jury instruction requiring them to apply evidence to something for which it's not even relevant?

RP 238.

The court continued to believe that in the offer of proof, Larue said she did not contact police because she was afraid of Lopez-Castro. RP 238. But the court now regretted overruling defense counsel's objection when the prosecutor in her direct

immediately launched into the prior abuse, without establishing a connection:

And Ms. Yahyavi [prosecutor], you may recall that you, in this case, began with the litany of episodes instead of using it to explain any fear. There was an objection. Ms. Rivera objected saying it's not been made relevant yet. And in a decision that, by the way, I now regret, I overruled that objection, because I had heard her testimony in the morning, and she said she was afraid.

And so in came all of this stuff in front of the jury. And when you got around to asking her why she didn't call the police, she said she didn't have a phone. And then on cross-examination, Ms. Rivera, I believe, brought out further testimony from her that she also had warrants.

. . . And at no point did the jury ever hear from her that she was afraid of the defendant, because she didn't say that as a reason for not calling the police.

RP 239. The court asked, "now that there isn't any evidence before the jury that she was afraid, where are we?" RP 239.

The prosecutor argued the evidence was still relevant because although Larue said she did not report the incident because she had no phone, she said she went with Lopez-Castro because she feared consequences if she refused. RP 241-42. Therefore, Larue articulated fear of Lopez-Castro. RP 242.

The court recited its notes detailing Larue's repeated testimony she did not contact police because she had no phone. RP 242-44. The prosecutor claimed the abuse evidence was still

relevant on grounds “the reason she didn’t have a phone was because of his dominion and control and abusive behavior towards her.” RP 245. Alternatively, the prosecutor asked the court to merely strike the testimony about the alleged prior abuse. RP 245.

The defense asked for a mistrial. RP 245. Defense counsel reiterated that in the morning following the state’s offer of proof, she pointed out Larue said she did contact anyone because she had no phone. RP 246. Defense counsel also noted she objected during Larue’s direct testimony because “the relevance hadn’t yet been established at the time when she started talking about the prior incidents[.]” RP 246.

As defense counsel explained, the circumstances put her client at an extreme disadvantage:

And we’re in a situation where my client is accused of a domestic violence incident. We have had the alleged victim of that talk about past bad acts, and now we’ve had another witness go into extensive detail about prior abuse.

The defense’s position is it is not relevant and not admissible based on the way the testimony came out that involved an allegation of kidnapping, that involved an allegation of using a knife in the exact same manner in which Ms. Lopez-Castro testified that a knife was pulled and then dropped.

It involved lots of testimony about controlling behavior, destroying her things. It’s the type of testimony that, in light of the fact that the jury has already heard from one other witness alleging that my

client has been abusive in the past, we now have a second witness.

And I think that that is testimony that's so prejudicial it can't be undone by an instruction for them to just disregard that testimony which we've – which may not be relevant. So because of that, I'm asking the Court to declare a mistrial.

RP 246-47.

The state proposed that if the court were considering a mistrial, that as an alternative, it could amend the harassment count and limit it to July 26, "based solely on Ms. Lopez-Castro's testimony."<sup>8</sup> RP 248. The court directed the prosecutor not "to get too far ahead" and respond to the motion for mistrial. RP 248. The prosecutor claimed a limiting instruction would rectify the situation. RP 248.

The court denied the mistrial motion, reasoning although the evidence was inadmissible, there was not a complete "miscarriage of justice" because the evidence could have been admissible under other circumstances, i.e. had Larue testified consistently with the offer of proof (as remembered by the court). RP 248-49.

The court therefore resolved to strike Larue's testimony about her allegations of past abuse:

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<sup>8</sup> At the close of the state's case, the prosecutor did in fact amend the harassment count, limiting it to what happened on July 26. RP 316.

So I think that if I simply told the jurors to disregard all of the testimony that she gave about all the things she said the defendant did to her, I think the defendant would be able to get a fair trial.

RP 252.

The defense objected no limiting instruction could cure the prejudice. RP 254-56. With the understanding defense counsel's objection to the court's remedy was preserved (RP 257-58), the defense provided input as to the instruction ultimately given by the court, which was:

You have heard evidence of unreported and uncorroborated allegations of prior physical contact between the defendant German Lopez-Castro and both Stephanie Lopez-Castro and Tara Larue. You are to disregard all the evidence presented by Ms. Larue concerning allegations of prior physical contact between her and the defendant.

I repeat, you are to disregard utterly all the evidence presented by Ms. Larue concerning allegations of prior physical contact between her and the defendant.

Also, evidence of unreported, uncorroborated allegations of prior physical contact between the defendant and Stephanie Lopez-Castro may not be used to show that Mr. Lopez-Castro acted in conformity with those prior allegations on either July 20<sup>th</sup>, 2015, or July 26, 2015.

The evidence of unreported and uncorroborated allegations of prior physical contact between Stephanie Lopez-Castro and the defendant may only be considered by you for determining whether Stephanie Lopez-Castro had a reasonable fear that she would be killed.

RP 260-61.

4. Testimony Post-Mistrial Motion

On cross, Stephanie confirmed Larue either spoke or texted her using her roommate's phone on July 19 and knew Stephanie would not be home on July 20. RP 267-68. Stephanie confirmed Larue did not have a phone. RP 271.

Stephanie testified that based on Lopez-Castro's statements, she was afraid he might hurt her, but was not sure if he would actually kill her. RP 282. She called 911 because she feared he was planning to slash her tires. RP 282-83.

Stephanie did not tell the 911 operator Lopez-Castro pushed her up against a wall or that he pulled a knife on her. RP 285-86. Rather, she said Lopez-Castro was trying to do something to her car. RP 404-06. In a written statement, she also indicated: "He did not verbally threaten me or actually physically." RP 286. Stephanie later spoke with an immigration officer because she wanted Lopez-Castro deported. RP 284. She could not forgive him for leaving her for another woman. RP 291.

The state called the couple's 12 year-old daughter A.L.-C. to testify. RP 298. A.L.-C. remembered that on July 26, her parents were arguing about her mom's car. RP 301. According to A.L.-C.,

Lopez-Castro pushed her mom up against a wall and held a knife up to her. RP 302. A.L.-C. did not remember what he said. RP 302.

A.L.-C. testified that when everyone started screaming, Lopez-Castro dropped the knife. RP 303. A.L.-C. picked up the knife, but Lopez-Castro took it from her and went outside. RP 305. A.L.-C. denied ever seeing her mom hit or push her dad. RP 308-09.

On cross, A.L.-C. remembered during an interview she said Lopez-Castro held the knife up to the television. RP 307-308. She also remembered she reported her dad saying he was going to deflate her mom's tires. RP 308.

Lopez-Castro testified that on July 26, 2015, he had been staying with Stephanie and their kids at Stephanie's apartment for several days. RP 340. They began arguing because he wanted to borrow Stephanie's car. RP 340. One of the tires on Lopez-Castro's car was leaking. RP 341.

Lopez-Castro said Stephanie began speaking loudly and pushed him. RP 342. He went to get the knife to puncture her tire, so she would know how it felt. RP 342-33. He did not intend to scare her. RP 344. When he went to the door, Stephanie was

blocking his way. RP 344-47. While still holding the knife, Lopez-Castro flailed his arms about to prevent either of them from being hurt as Stephanie reportedly slapped his arms. RP 347.

It was at this point, A.L.-C. came out from watching television. RP 348. Lopez-Castro let the knife drop when A.L.-C. came into the room. RP 349. However, he took it back after A.L.-C. picked it up because of the potential danger to A.L.-C. Lopez-Castro put the knife in his pocket and left. RP 349.

Out in the parking lot, Lopez-Castro decided he did not want to puncture Stephanie's tire and put the knife in his car instead. RP 351. Lopez-Castro denied ever telling Larue he intended to kill his wife. RP 353.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING IRRELEVANT AND PREJUDICIAL PROPENSITY EVIDENCE THAT LOPEZ-CASTRO ABUSED HIS PARAMOUR.

Where the state failed to establish any connection between Larue's allegations of prior abuse and the current allegations in its offer of proof, the court erred in admitting Larue's testimony describing the alleged abuse. ER 404(b) bars admission of [e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity

therewith. Such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

Before admitting ER 404(b) evidence, the trial court must, on the record, (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudice. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). To be relevant, evidence must tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. ER 401.

A trial court's decision to admit ER 404(b) evidence is reviewed for abuse of discretion. Gunderson, 181 Wn.2d at 922. But there is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons, such as the misconstruction of a rule. Id. The court also considers whether a reasonable judge would rule as the trial judge did. Id.

The proposed relevance of Larue's allegations of prior abuse was to explain why she did not report the July 20<sup>th</sup> threat to

Stephanie or anyone else. As the court and parties recognized, jurors – or anyone for that matter – would expect a reasonable person to report something so remarkable as “a believable death threat.” RP 148-49. Therefore, the fact Larue did not report it tended to make the existence of the threat less probable. By that same token, a credible reason for not reporting the threat potentially could counter that conclusion and therefore also be relevant.

Based on the state’s offer of proof, the reason Larue did not report the alleged July 20th threat was because she had no phone (RP 122), not because she was fearful of the defendant due to prior abuse. The court’s reason for admitting Larue’s allegations of prior abuse – to explain why she did not contact police – therefore was based on untenable grounds. RP 148-49.

As the state may point out, Larue testified she went with Lopez-Castro because she feared repercussions from not doing what he wanted. RP 121. However, there was a complete disconnect between why Larue didn’t do anything after-the-fact, i.e. when Lopez-Castro was not around (no phone), and why she went with him, i.e. when he reportedly woke her up at 5:00 a.m. and told her to get in the car because they were going to Stephanie’s (fear).

While the prior abuse allegations may shed light on why Larue went with Castro-Lopez, it did not shed light on the probability of the threat itself – the fact of consequence.

Moreover, to the extent there was some minimal relevance as to why Larue went with Lopez-Castro, the probative value of such evidence was far outweighed by its potential for prejudice. The fact Larue was Lopez-Castro's girlfriend and that he woke her up at 5:00 a.m. and told her to get in the car is evidence enough to explain why she went. The jury did not need to hear it was also because Lopez-Castro previously choked her, spit on her, cracked her ribs, held a knife to her throat and kidnapped her. RP 122-23, 133. No reasonable judge would have so held. The court abused its discretion in admitting what it recognized to be highly prejudicial evidence to explain a fact of no consequence.

State v. Gunderson is analogous. The state charged Daniel Gunderson with felony violation of a no contact order based on an altercation he allegedly had with his ex-girlfriend Christina Moore. Christina's mother Bonnie Moore called police to report that when Gunderson came to pick up his daughter for a visit, he hit Christina and Bonnie. By the time police arrived, Gunderson, Christina and their daughter had already driven away in Gunderson's truck.

Gunderson, 181 Wn.2d at 918. Christina was never asked to give a statement prior to trial. Gunderson, at 920.

Bonnie testified consistently with what she told police. Gunderson, at 919-20. In contrast, Christina testified there was no physical violence and that she willingly climbed into Gunderson's truck and went with him to his house. Id.

In order to impeach Christina's testimony, the state sought to admit evidence of two prior domestic violence episodes involving Christina and Gunderson that resulted in Gunderson's arrest and conviction. Despite Gunderson's objection, the court ruled the evidence was admissible under ER 404(b) to impeach Christina's credibility. Gunderson, at 921.

On appeal, Gunderson argued the court erred in admitting the evidence because its probative value was outweighed by its significant prejudicial effect. Gunderson, 181 Wn.2d at 923; ER 403. The court agreed the fourth prong of the test for admission under ER 404(b) is essentially an ER 403 balancing test.<sup>9</sup>

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<sup>9</sup> Under ER 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Gunderson, 181 Wn.2d at 923. Moreover, the court agreed with

Gunderson on the merits:

Much like cases involving sexual crimes, courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high. See Saltarelli,<sup>[10]</sup> 98 Wash.2d at 363, 655 P.2d 697 (finding that “[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudicial potential of prior acts is at its highest”). To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness’s otherwise inexplicable recantation or conflicting account of events. See Magers,<sup>[11]</sup> 164 Wash.2d at 186, 189 P.3d 126. Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose. See State v. Brown, 113 Wash.2d 520, 531, 782 P.2d 1013 (1989) (Brachtenbach, J., lead opinion). Accordingly, we decline to extend Magers to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements. It was manifestly unreasonable, and therefore an abuse of discretion, for the trial judge to admit evidence of Gunderson’s past domestic violence on the record before us.

Gunderson, 181 Wn.2d at 925 (footnote omitted).

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<sup>10</sup> State v. Saltarelli, 98 Wash.2d 358, 655 P.2d 697 (1982).

<sup>11</sup> State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (evidence that the defendant had been arrested for domestic violence and fighting and that a no contact order had been entered following his arrest was relevant to enable the

Finally, the court also concluded that, “it is reasonably probable that absent the highly prejudicial evidence of Gunderson’s past violence the jury would have reached a different result.” Gunderson, 181 Wn.2d at 926. The court therefore reversed. Id. at 927.

Lopez-Castro maintains Larue’s allegations of prior abuse had no probative value as to the charges against Lopez-Castro, as the allegations did not make the existence of a fact of consequence more or less probable. To the extent this Court disagrees, the allegations should have been excluded under ER 403 for the same reasons cited by the Court in Gunderson. As Gunderson cautioned, the risk of unfair prejudice in admitting prior acts of domestic violence is very high. Therefore, the acts should be admitted only where the state has established their overriding probative value. That did not occur here. The trial court abused its discretion in admitting Larue’s highly prejudicial accusations.

As in Gunderson, this Court should reverse because it is reasonably probable that absent the highly prejudicial evidence of Lopez-Castro’s prior acts of domestic violence against Larue, the

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jury to assess the credibility of the complaining witness, who gave conflicting statements about the defendant’s conduct).

jury would have reached a different result. Lopez-Castro offered an alternative explanation as to what happened. He admitted he had a knife, but testified he planned to slash Stephanie's tires. His daughter overheard him say something about deflating tires. Moreover, Stephanie called 911 because she thought Lopez-Castro was doing something to her tires; she said nothing to the 911 operator about an assault. Lopez-Castro testified he did not assault Stephanie, but that he flailed his arms while holding the knife because she was blocking his way and slapping his arms.

And although A.L.-C testified similarly to Stephanie that Lopez-Castro held the knife up to Stephanie's neck, A.L.-C. previously told an interviewer he held a knife up to the television. A.L.-C. also testified she never saw her mother push Lopez-Castro, despite Stephanie's admission to doing so. Finally, Stephanie had a motive to lie or at least blow the incident out of proportion – she testified she could not forgive Lopez-Castro for leaving her for another woman. For all these reasons, jurors would have had a legitimate reason to doubt the state's case.

But because of the court's ruling, the jury heard evidence Lopez-Castro choked, spit, kidnapped and cracked ribs of Larue. Worse, the jury heard evidence Lopez-Castro held a knife to

Larue's throat in the same manner as the state alleged he did to Stephanie. Absent the similarity in accusations, the jury probably would have reached a different result.

In response, the state likely will argue the court's instruction to disregard Larue's accusations cured the resulting prejudice. Granted, there are cases holding that juries are presumed to follow the court's instructions. See e.g. State v. Cunningham, 51 Wn.2d 502, 505 319 P.2d 847 (1958).

But there are a number of other cases that have held a court's instruction to disregard testimony was – or would be – ineffective to cure the resulting prejudice. See e.g. State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

The court's instruction here could not possibly neutralize the prejudicial effect. That is because Larue's allegations were so similar to Stephanie's. It would have been impossible for a jury to compartmentalize Larue's allegations and ignore them, particularly the allegation Lopez-Castro held a knife to her throat, when that was the very accusation for which Lopez-Castro stood charged.

State v. Escalona is instructive. 49 Wn. App. 251, 742 P.2d 190 (1987). There, in a trial for second degree assault with a

deadly weapon, a witness testified Escalona already has a record and had stabbed someone. Id. at 253. The trial court orally instructed the jury to disregard the statement. Id. This Court held: “despite the court’s admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Id. at 256. The jury undoubtedly used this evidence for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.” Id. A new trial was necessary. Id.

A new trial is necessary in Lopez-Castro’s case as well. This Court should reverse and remand.

2. THE COURT ERRED IN OVERRULING DEFENSE COUNSEL’S RELEVANCE OBJECTION WHERE THE STATE PREEMPTIVELY INTRODUCED THE PRIOR BAD ACTS EVIDENCE.

If this Court finds the court’s ER 404(b) ruling was conditional and therefore not necessarily error, this Court should reverse nevertheless, because the court erred in overruling defense counsel’s objection when the prosecutor *preemptively* elicited Larue’s allegations of prior abuse.

At the pretrial hearing, the court ruled:

And one might expect that she would if something so remarkable as a believable death threat

was made in her presence and even, perhaps, the prelude to a murder. If that's what happened, one would expect a reasonable person, even perhaps a reasonable person who occasionally has warrants, to notify the authorities to prevent such a terrible thing from occurring. And that is certainly something the defense is entitled to explore.

But if the defense is going to explore that, then it certainly becomes relevant why she did not notify the police under those circumstances. And her fear of the defendant, if that's what it is, and her reasons for fearing the defendant, if that's what they are, are all relevant to that purpose, because if the jury is going to hear that she did not notify the police, even though a reasonable person ought to have, in which case maybe it isn't true, they should – the jury should also hear a proffer of reasons why she didn't telephone the police.

RP 148-49 (emphasis added).

The circumstances here are analogous to those in State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2008), where the prosecutor violated the court's ER 404(b) ruling. Fisher was charged with molesting his stepdaughter Melanie approximately six years earlier, when she was twelve. Melanie attributed her delay in reporting to embarrassment and a desire to remain in contact with her younger brother and sister, Brett and Brittany, both of whom she claimed Fisher also physically abused. Fisher, 165 Wn.2d at 733.

At a pretrial hearing to determine the admissibility of evidence Fisher physically abused Brett and Brittany, the court

ruled it would be admissible if Fisher made an issue of Melanie's delay in reporting. Fisher, 165 Wn.2d at 734.

Defense counsel made no mention of Melanie's delay in reporting in opening statement or otherwise. Fisher, 165 Wn.2d at 735. Despite the court's ruling, the prosecutor made statements and elicited testimony concerning Fisher's alleged abuse of Brett and Brittany throughout the proceedings. Fisher, 165 Wn.2d at 735, 738. In closing, the prosecutor argued the evidence of abuse established a pattern. Fisher, at 738.

On review, the Supreme Court held the trial court identified a proper purpose for admitting the evidence of physical abuse to explain why Melanie did not disclose the abuse. Fisher, at 746. However, the prosecutor's use of the evidence for a different purpose constituted misconduct:

Here, the trial court expressly conditioned the admission of evidence of physical abuse on defense counsel's making an issue of Melanie's delayed reporting. The prosecuting attorney, however, first mentioned the physical abuse in his opening statement and introduced the evidence of physical abuse during the direct examination of Melanie, the State's first witness. Defense counsel was not provided the opportunity to decide whether to raise the issue of Melanie's delayed reporting, and defense counsel ultimately never raised Melanie's delay in reporting.

By preemptively introducing the evidence, the prosecuting attorney did not use the evidence for its purported purpose. Instead of using the evidence to rebut a defense argument that Melanie's delay in reporting the sexual abuse means that she is not credible, the prosecuting attorney used the evidence to generate a theme throughout the trial that Fisher's sexual abuse of Melanie was consistent with his physical abuse of all his stepchildren and biological children, an impermissible use of the evidence. In violation of the court's pretrial ruling and in spite of defense counsel's standing objection, the prosecuting attorney directed the jury to consider the evidence of physical abuse to prove Fisher's alleged propensity to commit sexual abuse when he discussed the system failing Tyler, Melanie, Brett, Brittany, Ashland, and Shelby.

The prosecuting attorney further stated Fisher engaged in a repeated pattern of abuse that didn't stop with physical abuse. It spilled right over into sexual abuse. The prosecuting attorney thus contravened the trial court's pretrial ruling by impermissibly using the physical abuse evidence to demonstrate Fisher's propensity to commit the crimes. Using the evidence in such a manner after receiving a specific pretrial ruling regarding the evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct.

Fisher, at 747-49 (footnote and citation to the record omitted, emphasis added).

The court further held the misconduct likely affected the jury's verdict and required a new trial. Fisher, at 747-49. The court noted that, "given the nature of the misconduct and the fact that the prosecuting attorney was well aware of the trial court's

ruling and Fisher's standing objection, we do not believe that any limiting instruction could have neutralized the prejudicial effect." Id. at 748 n.4.

The exact same misconduct occurred here as in Fisher. Assuming the court's ruling was conditional, there was no tenable reason for the court to overrule defense counsel's relevance objection when the prosecutor preemptively introduced the bad acts evidence. First, the defense had not yet made an issue of Larue's delayed reporting. Second, the state did not establish her delay had anything to do with Lopez-Castro's alleged abuse of her. As in Fisher, the state was using the evidence for a purpose other than that identified by the court.

As the court's own comments make clear, the court abused its discretion in overruling defense counsel's objection:

And Ms. Yahyavi [prosecutor], you may recall that you, in this case, began with the litany of episodes instead of using it to explain any fear. There was an objection. Ms. Rivera objected saying it's not been made relevant yet. And in a decision that, by the way, I now regret, I overruled that objection, because I had heard her testimony in the morning, and she said she was afraid.

And so in came all of this stuff in front of the jury. And when you got around to asking her why she didn't call the police, she said she didn't have a phone. And then on cross-examination, Ms. Rivera, I

believe, brought out further testimony from her that she also had warrants.

. . . And at no point did the jury ever hear from her that she was afraid of the defendant, because she didn't say that as a reason for not calling the police.

RP 239.

This Court should reverse Lopez-Castro's conviction. As indicated in the preceding section, the jury probably would have reached a different result in the absence of such highly prejudicial propensity evidence. The court's curative instruction was ineffective to unring the bell under the circumstances of this case.

### 3. PROSECUTORIAL MISCONDUCT DEPRIVED LOPEZ-CASTRO OF HIS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial.

Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Yates, 161 Wash.2d 714, 774, 168 P.3d 359 (2007).

Assuming arguendo the court's ER 404(b) ruling was conditional, the prosecutor committed misconduct by preemptively introducing Larue's allegations of prior abuse. As argued in the preceding section, the defense had not yet made an issue of Larue's delayed reporting. By preemptively introducing the evidence, the state used it for an improper purpose. This was misconduct. Fisher, 165 Wn.2d at 747-49.

There is a substantial likelihood the misconduct affected the jury's verdict. As argued in the first argument section, the jury had many legitimate reasons to doubt the state's case. Lopez-Castro offered an alternative explanation that he intended to slash Stephanie's tires. Stephanie called 911 because she thought Lopez-Castro was doing something to her tires. She never said anything about an assault. A.L.-C. overheard Lopez-Castro say

something about deflating tires. Stephanie had a motive to fabricate or exaggerate what happened – Lopez-Castro left her for another woman. Had the jury not heard Larue’s accusation Lopez-Castro held a knife to her throat in the same manner as Stephanie alleged, the jury probably would have reached a different verdict. This Court should reverse.

4. TRIAL IRREGULARITY DEPRIVED LOPEZ-CASTRO OF HIS RIGHT TO A FAIR TRIAL.

The court erred in denying the motion for a mistrial. When examining a trial irregularity, the question is whether the irregularity so prejudiced the jury that the accused was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. State v. Escalona, 49 Wn. App. at 254. In deciding whether a trial irregularity may have had this impact, the appellate court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. Escalona, 49 Wn. App. at 254.

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion when its decision is

manifestly unreasonable or based upon untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here, the trial irregularity was serious. Either: (1) the trial court abused its discretion in admitting Larue's allegations of prior abuse under ER 401, 404(b) and/or ER 403; (2) the court abused its discretion in overruling defense counsel's objection to the prosecutor's preemptive introduction of the evidence; and/or (3) the prosecutor committed misconduct in preemptively introducing the evidence for a purpose other than that identified by the court. The end result is that the jury heard highly prejudicial evidence that was never connected up to any fact of consequence to the case.

Larue's testimony did not involve cumulative evidence. No other witness testified to the abuse she reportedly suffered at the hands of Lopez-Castro. Indeed, the court ruled the evidence was admissible only to explain why she didn't report the July 20<sup>th</sup> threat – a link that did not exist from the get-go and never did materialize.

Although the court gave a curative instruction, it did not cure the prejudice resulting from Larue's detailed account of Lopez-Castro's prior abuse of her. This is because her allegations were remarkably similar to Stephanie's. Jurors are not robots. It would have been extremely difficult, if not impossible, for jurors to

compartmentalize Larue's allegations from Stephanie's and disregard them. Reversal is the only appropriate remedy.

5. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Lopez-Castro was represented below by appointed counsel. CP 96-98. The trial court found him indigent for purposes of this appeal. CP 1-3. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court made an express finding of indigency, stating: "I'm going to make a finding of indigency, because I don't have any reason to believe that you are going to be earning a significant amount of money when you get out." RP 447. The court imposed only the \$500 VPA and \$100 DNA fee. CP 10; RP 447. The court waived court costs and attorney's fees, although they were requested by the state. RP 447.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review,

*“unless the appellate court directs otherwise in its decision terminating review.”* RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94.

Based on Lopez-Castro’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

D. CONCLUSION

For any of the reasons stated, Lopez-Castro should receive a new trial. Either: (1) the trial court abused its discretion in admitting Larue’s allegations of prior abuse under ER 401, 404(b) and/or ER 403; (2) the court abused its discretion in overruling defense counsel’s objection to the prosecutor’s preemptive

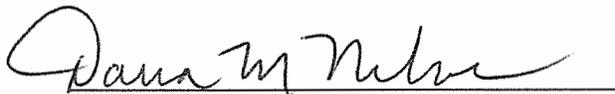
introduction of the evidence; and/or (3) the prosecutor committed misconduct in preemptively introducing the evidence for a purpose other than that identified by the court. The end result is that the jury heard highly prejudicial evidence that was never connected up to any fact of consequence to the case. As a result, Lopez-Castro did not receive a fair trial.

Alternatively, this Court should exercise its discretion and deny costs, if the state is the prevailing party.

Dated this 28<sup>th</sup> day of April, 2016

Respectfully submitted

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Attorneys for Appellant

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

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| STATE OF WASHINGTON  | ) |                   |
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| Respondent,          | ) |                   |
|                      | ) |                   |
| v.                   | ) | COA NO. 74220-5-I |
|                      | ) |                   |
| GERMAN LOPEZ-CASTRO, | ) |                   |
|                      | ) |                   |
| Appellant.           | ) |                   |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF APRIL 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]      GERMAN LOPEZ-CASTRO  
            DOC NO. 386726  
            MONROE CORRECTIONS CENTER  
            P.O. BOX 777  
            MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF APRIL 2016.

X *Patrick Mayovsky*