

NO. 40218-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO CASTRO GARCIA,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	13
1. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE ON AN ANSWER TO THE SPECIAL VERDICT	13
2. GARCIA WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR COMMITTED NUMEROUS INSTANCES OF MISCONDUCT CONSTITUTING CUMULATIVE ERROR	15
3. GARCIA WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO REQUEST A JURY INSTRUCTION CRITICAL TO HIS DEFENSE	21
D. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Det. of Stout,</u> 159 Wn.2d 357, 150 P.3d 86 (2007)	21
<u>In re Personal Restraint Petition of Lord,</u> 123 Wn.2d 296, 868 P.2d 835 (1994)	18
<u>State v. Allen,</u> 101 Wn.2d 355, 678 P.2d 798 (1984)	22
<u>State v. Anderson,</u> 153 Wn. App. 417, 220 P.3d 1273 (2009)	16
<u>State v. Barrow,</u> 60 Wn. App. 869, 809 P.2d 209, <u>review denied</u> , 118 Wn.2d 1007 (1991)	18
<u>State v. Bashaw,</u> 169 Wn.2d 133, 234 P.3d 195 (2010)	13
<u>State v. Belgarde,</u> 110 Wn.2d 504, 755 P.2d 174 (1988)	15
<u>State v. Castaneda-Perez,</u> 61 Wn. App. 354, 810 P.2d 74 (1991)	17
<u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978)	15
<u>State v. Davenport,</u> 100 Wn.2d 757, 675 P.2d 1213 (1984)	20
<u>State v. Greiff,</u> 141 Wn.2d 910, 10 P.3d 390 (2000)	18

TABLE OF AUTHORITIES

	Page
<u>State v. Henderson</u> , 100 Wn. App. 794, 998 P.2d 907 (2000)	20
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	21
<u>State v. Huson</u> , 73 Wn.2d 660, 440 P.2d 192 (1968), <u>cert. denied</u> , 393 U.S. 1096 (1969)	19
<u>State v. Mangan</u> , 109 Wn. App. 73, 34 P.3d 254 (2001)	22
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	22
<u>State v. Miles</u> , 139 Wn. App. 879, 162 P.3d 1169 (2007)	17
<u>State v. Montgomery</u> , 56 Wn. 443, 105 P. 1035 (1909)	15
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984)	15
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004)	22
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988)	22
<u>State v. Staley</u> , 123 Wn.2d 794, 872 Pd.2d 502 (1994)	22
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214, <u>review denied</u> , 127 Wn.2d 1010, 902 P.2d 163 (1995)	16

TABLE OF AUTHORITIES

	Page
 <u>FEDERAL CASES</u>	
<u>Mak v. Blodgett</u> , 970 F.2d 614 (9 th Cir. 1992)	19
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	21
 <u>RULES, STATUTES, OTHERS</u>	
WPIC 10.02	24
WPIC 10.51	22
U.S. Const. amend. VI	21
Wash. Const. art. I, section 22	21

A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury that it must unanimously agree on an answer to the special verdict.

2. The prosecutor committed numerous instances of misconduct during closing argument.

3. Appellant was denied his constitutional right to effective assistance of counsel.

4. Cumulative error denied appellant his constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

1. Is reversal of the sentence enhancements required where the trial court erred in instructing the jury that it must unanimously agree on an answer to the special verdict and the error was not harmless?

2. Is reversal required where numerous instances of prosecutorial misconduct constituting cumulative error denied appellant his right to a fair trial?

3. Is reversal required where appellant was denied his constitutional right to effective assistance of counsel because defense counsel failed to propose a jury instruction critical to appellant's defense?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On May 18, 2009, the State charged appellant, Alejandro Castro Garcia, as an accomplice, with one count of unlawful sale of a controlled substance on or about April 15, 2009, with an aggravating factor that the offense was a major violation of the Uniform Controlled Substances Act and one count of unlawful sale of a controlled substance on or about May 15, 2009, with an aggravating factor that the offense was a major violation of the Uniform Controlled Substances Act. CP 1-3. The State amended the information on December 23, 2009, charging Garcia as an accomplice with one count of unlawful sale of a controlled substance on or about April 15, 2009, within 1000 feet of a school bus route, with an aggravating factor that the offense was a major violation of the Uniform Controlled Substances Act; one count of unlawful sale of a controlled substance on or about May 15, 2009, within 1000 feet of a school bus route, with the aggravating factor that the offense was a major violation of the Uniform Controlled Substances Act; and one count of unlawful possession of a controlled substance with intent to deliver on or about May 15, 2009, within 1000 feet of a school bus route, with an aggravating factor that the

¹ There are eight volumes of verbatim report of proceedings: 1RP - 12/14/09; 2RP - 12/15/09; 3RP - 12/16/09; 4RP - 12/17/09; 5RP - 12/18/09; 6RP - 12/21/09; 7RP - 12/23/09; 8RP - 01/09/10.

offense was a major violation of the Uniform Controlled Substances Act. CP 84-87.

Following a trial before the Honorable Bryan E. Chushcoff, on December 23, 2009, a jury found Garcia not guilty of unlawful sale of a controlled substance as charged in count one but guilty of unlawful sale of a controlled substance and unlawful possession of a controlled substance with intent to deliver as charged in counts two and three. CP 88-93; 7RP 16-18. On January 8, 2010, the court sentenced Garcia to 116 months in confinement and 9 to 12 months of community custody. CP 102-03

Garcia filed this timely appeal. CP 110.

2. Substantive Facts

a. Trial Testimony.

Detective Matt Renschler, of the Thurston County Narcotics Task Force, learned that Stephen Santella had been booked into the county jail for unlawful possession of cocaine and a firearm. 2RP 7, 25. Renschler visited Santella at the jail and talked to him about working as a confidential informant. Several weeks later, the prosecutor's office negotiated a contract with Santella and he was released from jail. Santella agreed to participate in four drug trafficking or manufacturing cases in exchange for a reduced sentence. In January 2009, Santella fulfilled his contract and received a sentencing benefit. Thereafter, Santella contacted

Renschler and asked if he could continue working as a confidential informant for pay and Renschler agreed. 2RP 25-27.

The first controlled buy occurred on April 8, 2009, when Santella met with Jared Neff and his girlfriend, Rebecca Rycraft, in Lacey. Santella told Renschler that Neff would connect him with a Hispanic male in Tacoma who could provide large quantities of heroin, "he claimed that this connection was a large one, that it was a large network." 2RP 31-33, 39. Santella was searched and hooked up with a body wire before he drove to Neff's house followed by a Washington State Patrol aircraft and detectives in undercover vehicles. 2RP 33-39. Neff and Rycraft got into Santella's car and they drove to Tacoma where they met "the suspects" who drove up in a green Toyota Camry. A passenger in the Toyota made a "hand-to-hand exchange" with Rycraft and the car drove away. Renschler followed Santella's car back to Lacey where Neff and Rycraft were dropped off at a Safeway. 2RP 41-42.

Renschler met with Santella at a private location where Santella provided him with a black tar-like substance which field tested as heroin and he paid Santella \$200 for the operation. Renschler also gave Santella \$150.00 and instructed him to offer the money to Neff in exchange for the phone number for the "source in Tacoma" so that they could deal with the source directly. 2RP 42-44, 46. Neff provided the phone number and

Santella arranged another controlled buy on April 15, 2009. 2RP 46-47. Renschler and Detective Russell met Santella at a predetermined location in Thurston County where they provided him with \$800 of buy money and wired him to record the transaction. 2RP 47. Santella called the number obtained from Neff and spoke with a male who had a thick Hispanic accent. The male instructed Santella to meet him at the intersection of South 64th and Yakima. 2RP 50-51. Detective Strup and Santella drove to designated location followed by Renschler and Russell in an undercover vehicle and a Washington State Patrol aircraft. 2RP 51.

The “suspects” arrived in the same green Toyota Camry but Renschler could not see who was in the car. 2RP 51-52. Renschler drove past the two cars and did not see the transaction. 2RP 53-54. When Strup contacted Renschler and informed him that the “deal was a success,” they all met in parking lot where Santella provided Renschler with 51.4 grams of heroin which he booked into evidence. 2RP 55-59. The operation concluded when the Washington State Patrol aircraft reported that it lost sight of the suspect vehicle. 2RP 56.

A subsequent controlled buy occurred on May 15, 2009, referred to as a “bust buy” because Renschler planned to arrest the suspects after the deal. 3RP 82. Renschler met with Santella, searched and wired him, and provided him with \$1400 in buy money. 3RP 82-83. Santella called the

same number and the Hispanic male instructed him to wait at the intersection of South 84th Street and Pacific Avenue. Russell drove Santella to the location followed by Renschler and a National Guard aircraft. 3RP 90. A silver Saturn arrived shortly thereafter and Russell followed the car to a nearby trailer park where the transaction took place. Renschler did not see the transaction, but when Russell notified him that the exchange occurred, Renschler alerted Tacoma police officers who stopped the suspect vehicle and arrested two Hispanic males, Alejandro Castro Garcia and Garcia Delores. 3RP 92-95.

Officers conducted a search of the men and discovered false Mexican driver's licenses, cell phones, \$717 on Delores, and \$130 on Castro Garcia. 3RP 95-102. Renschler spoke with Delores who said, "I'm a heroin dealer. Can I work with you?" Delores also told him that he had heroin and money secreted in his car, but the discussion "didn't go anywhere." 3RP 178. After obtaining a warrant to search the Saturn, officers recovered 34.8 grams of heroin, \$3854 in U.S. currency, and the \$1400 of pre-recorded buy money in a hidden, "secret compartment" in the center console. Officers also found packaging material on the front passenger side floorboard and documents showing that Garcia Delores owned the car. 3RP 109-116, 147, 179. According to Renschler, Santella

bought 107.8 grams of heroin for the \$1400, which is substantially larger than for personal use. 3RP 157-58.

Stephen Santella, who was 26 years old, admitted that he began using drugs when he was 16 or 17 then started dealing drugs for a living. 4RP 285-91. Santella was arrested in June 2008 and was in jail when Detective Renschler came to talk to him about working as a confidential informant. Thereafter, he entered into a contract with the prosecutor's office to arrange buys working with the Thurston County Narcotics Task Force for a reduced sentence. 4RP 298-99. When Santella completed the contract in January 2009, Renschler offered to pay him to continue working for the task force and he accepted. 4RP 300-01.

The first controlled buy occurred on April 8, 2009, using Jared Neff and his girlfriend. 4RP 301-10. Garcia was not involved in the buy. 5RP 370-71. Santella arranged a second controlled buy on April 15, 2009. After Santella was searched, wired, and provided with buy money, he and another officer drove to Tacoma. 5RP 331-32. They went to a grocery store parking lot where they met two Hispanic males in a green Toyota Camry. 5RP 335-36. Santella got out and started walking toward the Toyota when the passenger jumped out and handed him the heroin and Santella gave him the money, "I told him that I was going to get more next time, and I would be calling him soon." 5RP 337. Santella did not pay

much attention to the driver but saw him just sitting in the driver's seat. 5RP 337-38.

Santella arranged another controlled buy on May 15, 2009 and met the same two young Hispanic males but they were driving a silver Saturn. 5RP 339-43. Santella walked up to the car and the passenger stepped out and told him to get in the passenger seat and hand the money to the driver. Santella got in the car and gave the money to the driver who counted the money. The driver did not say anything to him. Then the passenger provided him with the heroin and they left. 5RP 345-47, 376. According to Santella, Garcia was the driver on April 15th and May 15th. 5RP 353-55. Santella was paid \$400 to \$700 for arranging the controlled buys. 4RP 378.

Alejandro Castro Garcia, who was 25 years old, moved to California from Mexico in 2001 then moved to Washington.² 6RP 7-8. In September 2008, he fled to California because he was afraid of deportation after being charged with a DUI. On April 15, 2009, the day of the alleged buy, Garcia was living in Madera, California working in the blueberry fields. 6RP 14-15, 33. In May 2009, he moved back to Washington because a friend found his wife a better job than the one she had in California. 6RP 15-16.

² Garcia testified through an interpreter. 6RP 6.

Shortly after returning to Washington, Garcia met Delores who helped him obtain a false identification so that he could work. 6RP 26-28. About a week later, on May 15, 2009, Delores came by his house to pick him up to play basketball. Before they went to the basketball court, Delores told him that he was going to meet a man who owed him money. 6RP 18, 26. Garcia assumed that the money was for a painting job because Delores said he was working as a painter. Delores asked him to drive so Garcia agreed to drive his car. 6RP 18, 22, 41-42.

After picking up money from the man, Garcia noticed that a car was following them and Delores said it was the police and he “opened up something in the middle of his car” and put the money in a compartment. Delores told him to tell the police that “the car belongs to you and tell him that the stuff in the car belongs to you.” 6RP 19-20. Garcia did not know that Delores had delivered heroin to the man until the police stopped the car and arrested them. 6RP 19-22.

The parties stipulated that the black tar substance recovered by the police and admitted into evidence was heroin. 5RP 379-08.

b. Sentence Enhancement for Committing Offense within 1000 Feet of a School Bus Route.

Detective Renschler testified that the controlled buy on April 15, 2009 occurred 840 feet from a school bus route. 3RP 128-30, 136-37. He

calculated the distance by using a rolling wheel measuring device and a Google Earth program which he tested for accuracy. 3RP 131-34. Using the rolling wheel measuring device, Renschler also determined that the controlled buy on May 15, 2009 occurred 773 feet from a school bus route. 3RP 137-46. Maude Kelleher, of the Tacoma School District, testified that she was the lead routing specialist in the transportation department. 4RP 271-72. Kelleher was provided with the location of the controlled buy on April 15, 2009. Using a software program, she determined that the location was within 1000 feet of school bus stop. 4RP 273-77. Marcia Hanson, of the Franklin-Pierce School District, testified that she worked as a dispatcher in the transportation department, “[d]oing the routes, assigning the buses, bus stops for the students.” 4RP 229. Hanson was provided with the location of the controlled buy on May 15, 2009. Using a computer program called Versatrans, she determined that the location was 246 yards from a school bus stop. 4RP 230-37.

The trial court instructed the jury that it would be furnished with special verdict forms on whether the crimes were committed within one thousand feet of a school bus route stop:

If you find the defendant guilty of counts I, II, or III, it will then be your duty to determine for that respective count whether the defendant committed the crime within one thousand feet of a school or school bus route stop designated by a school district. You will be furnished with

special verdict forms for this purpose and shall fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, “you must answer “no”.

CP 76, Instruction No. 18.

The jury answered “yes” on the special verdict forms as to counts II and III, finding that Garcia possessed with the intent to deliver a controlled substance and sold a controlled substance within one thousand feet of a school or school bus route stop designated by a school district. CP 89, 92.

c. Closing Argument.

During closing, the prosecutor used a PowerPoint presentation while making his argument. CP 113-18. He told the jury, “It’s your job to look at the evidence to determine what happened and to determine whether the defendant is telling you the truth.” 6RP 66. Defense counsel objected and the court sustained the objection, ordering the prosecutor to “[r]ephrase that.” 6RP 66. The prosecutor continued to repeatedly tell the jury to decide whether the defendant is telling the truth, while presenting a slide which read, “If the defendant is lying to you about being there on April 15, he is guilty across the board.” CP 115. After two objections

from defense counsel, the court excused the jury. 6RP 68-72. The court warned the prosecutor “to be careful” because the slide suggested that perhaps the defendant was lying and that the prosecutor was “getting close” to expressing his opinion about the defendant’s guilt. 6RP 72-73.

Thereafter, the prosecutor argued that in order to conclude that the defendant was not involved in the April 15th buy, the jury had to determine that Steven Santella “obviously is lying or grossly mistaken.” During his argument, the prosecutor presented a slide which read, “Stephen Santella lying or grossly mistaken” and “Detective JD Strup lying or grossly mistaken.” 6RP 75; CP 115. The prosecutor reiterated that the jury should “question what [the defendant] says, to assess what he says because if you don’t believe what he says, there is a very easy and resolute reason for why he’s not telling you the truth. And the answer is because he is involved.” 6RP 92.

At the conclusion of closing arguments, defense counsel moved for a mistrial objecting to the prosecutor’s use of a booking photo of Garcia during his PowerPoint presentation which had not been introduced as evidence during the trial. 6RP 96-97; CP 118. The prosecutor admitted that the photo had not been introduced at trial but argued that it “was cropped to remove any jail garb” and that “the defendant conceded in his testimony that he’s actually been in this jail the whole time.” 6RP 96-97.

The court reviewed the slide and recognized that Garcia was “wearing some kind of gray outfit.” 6RP 97-98. The court concluded, “I don’t think there is prejudice such that we should declare a mistrial,” but interjected, “I don’t think it was the right thing to do either.” 6RP 98.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE ON AN ANSWER TO THE SPECIAL VERDICT.

Reversal of the sentence enhancements is required because the trial court erred in instructing the jury that it must unanimously agree on an answer to the special verdict and the error was not harmless pursuant to the Washington Supreme Court’s recent decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

In Bashaw, the defendant was charged with three counts of delivery of a controlled substance and the State sought a sentence enhancement alleging that the sales took place within 1000 feet of a school bus route stop 169 Wn. 2d at 137. The trial court provided special verdict forms and instructed that the jury, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. The Washington Supreme Court concluded that the jury instruction on the special verdict was an “incorrect statement of the law” because although

“unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding.” *Id.* at 147 (citation omitted). The Court reversed the sentence enhancements, holding that because the jury instruction stated that unanimity was required for either determination, it was erroneous and the error was not harmless. *Id.* at 147-48.

The trial court here provided a jury instruction all but identical to the erroneous instruction given in Bashaw. The court instructed the jury that if it found the defendant guilty, it will be its duty to determine whether the defendant committed the crime within one thousand feet of a school or school bus route stop designated by a school district. In providing the instruction, the court stated:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as this question, you must answer “no”.

CP 76, Instruction No. 18. (Emphasis added.)

As the Supreme Court concluded in Bashaw, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result and it therefore could not say with any confidence what might have occurred had

the jury been properly instructed. 169 Wn.2d at 147-48. Accordingly, the sentence enhancements as to counts two and three must be reversed.

2. GARCIA WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR COMMITTED NUMEROUS INSTANCES OF MISCONDUCT CONSTITUTING CUMULATIVE ERROR.

Reversal is required where the prosecutor committed numerous instances of misconduct during closing argument constituting cumulative error which denied Garcia his constitutional right to a fair trial.

“A prosecuting attorney’s duty is to see that an accused receives a fair trial.” State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), the State Supreme Court noted, “Our view of a prosecutor’s responsibilities is not of recent vintage. As early as 1909, Washington courts were characterizing it as the ‘safeguards which the wisdom of ages has thrown around persons accused of crime.’ ” 102 Wn.2d at 147 (quoting State v. Montgomery, 56 Wn. 443, 447, 105 P. 1035 (1909)). The Court emphasized in State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988), that a public prosecutor is a *quasi-judicial* officer, representing the People of the state, and presumed to act impartially in the interest only of justice:

If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks

to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

110 Wn.2d at 517.

It is improper for a prosecutor to repeatedly ask the jury declare to the truth because the jury's job is not to solve a case but to determine whether the State has proved its allegations against the defendant beyond a reasonable doubt. State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). Directing the jury to decide who is telling the truth or who is lying is misleading and misstates the jury's role which is to determine whether the State has met its burden of proving the case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995)(superseded on other grounds by statute). During closing argument here, the prosecutor improperly told the jury, "It's your job to look at the evidence to determine what happened and to determine whether the defendant is telling you the truth." 6RP 66. The prosecutor reiterated, "It's your job to decide who is being truthful and who is not." 6RP 69. In rebuttal, the prosecutor repeated that the jury should "question" and "assess" what the defendant said. 6RP 92.

A jury does not have to believe a defendant to acquit him, it only has to have a reasonable doubt as to the State's case. It is therefore

misconduct for a prosecutor to tell a jury that it could find the defendant not guilty only if they believed him. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). The prosecutor here improperly suggested, “In my opinion, the quickest way to start deliberations, ask yourself, if the defendant is lying to you about being there April 15th, he’s guilty across the board.” 6RP 68. The prosecutor repeated that the jury had to determine if “the defendant is telling you the truth, then by all means, he is not guilty for April 15th. If you think he’s is telling you the truth.” 6RP 70. He emphasized that “if you don’t believe what he says, there is a very easy and resolute reason for why he’s not telling you the truth. And the answer is because he is involved.” 6RP 92. During his argument, the prosecutor presented a slide which read, “If the defendant is lying to you about being there on April 15, he is guilty across the board.” CP 115.

The prosecutor committed further misconduct by telling the jury that “in order to conclude that this defendant wasn’t involved in the April 15th buy,” the jury had to “determine that Steven Santella is obviously lying or grossly mistaken.” 6RP 75. The prosecutor magnified his argument by presenting a slide which read, “Stephen Santella lying or grossly mistaken” and “Detective JD Strup lying or grossly mistaken.” CP 115. It is misconduct for a prosecutor to argue that in order to acquit a defendant, a jury must find that the State’s witnesses are lying. State v.

Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991); State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991).

The prosecutor concluded his closing argument with a slide of a photograph of Garcia not introduced during the trial, which prompted defense counsel to move for a mistrial:

MR. RYAN: It think it's prejudicial, clearly a booking photo. It was not -- the State chose to play this at the very end. Their triumphant moment. He's guilty and here's a picture of a jail photo, of him in jail. Put him back in jail. That's not proper. It's just not. I have never seen that done.

6RP 96-97.

The court concluded that the photograph was not prejudicial enough to warrant a mistrial but interjected, "I don't think it was the right thing to do either." 6RP 97-98. When defense counsel reiterated that using the photograph was improper, the court agreed, "I don't think it should have been done either." 6RP 98.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The doctrine applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a

fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992).

Irrespective of the jury's verdict finding Garcia not guilty of the charge pertaining to the April 15th buy, the prosecutor committed numerous instances of misconduct during closing argument by: 1) improperly telling the jury that its job was to determine if Garcia was telling the truth; 2) improperly telling the jury that it could find Garcia not guilty only if it believed his testimony; 3) improperly presenting a slide which read, "If the defendant is lying to you about being there on April 15, he is guilty across the board"; 4) improperly telling the jury that in order to find that Garcia was not involved in the April 15th buy, it had to determine that Santella was lying or grossly mistaken; 5) improperly presenting a slide which read, "Stephen Santella lying or grossly mistaken and "Detective JD Strup lying or grossly mistaken," and 6) improperly presenting a slide of a photograph of Garcia in jail garb which had not been introduced at trial.

In State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969), the State Supreme Court emphasized the importance of impartiality and fairness:

[The prosecutor] represents the state, and in the interests of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. . . .

73 Wn.2d at 663.

It is evident from the tenor of the prosecutor's entire closing argument, that his indefensible conduct constitutes an egregious dereliction of the duties of his office.

The ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the defendant's due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). As in State v. Henderson, 100 Wn. App. 794, 804-05, 998 P.2d 907 (2000), where this Court reversed, concluding that the cumulative effect of the incidents of prosecutorial misconduct materially affected the outcome of the trial, reversal is required where the State's case was not overwhelming and the prosecutor committed numerous instances of misconduct thereby violating Garcia's fundamental and constitutional right to a fair trial.

3. GARCIA WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO REQUEST A JURY INSTRUCTION CRITICAL TO HIS DEFENSE.

Garcia was denied his right to effective assistance of counsel where defense counsel failed to request a jury instruction on knowledge, a critical element of accomplice liability. Reversal is required because defense counsel's performance was deficient and Garcia was prejudiced by the deficient performance.

Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. VI; Wash. Const. art. I, section 22.

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687. Counsel's performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86

(2007); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's conduct is not deficient. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

RCW Title 9A defines four levels of culpability applicable to the Washington criminal code: intent, knowledge, recklessness, and criminal negligence. In defining the hierarchy for four levels of culpability, it is apparent that the Legislature gave these culpable mental states technical meanings as opposed to their commonly understood meanings. State v. Allen, 101 Wn.2d 355, 359-60, 678 P.2d 798 (1984). For certain offenses, complicity being one of them, a definitional instruction of "knowledge" is recommended as noted in WPIC 10.51, the instruction on accomplice liability. State v. Scott, 110 Wn.2d 682, 692, 757 P.2d 492 (1988); WPIC 10.51. The key is the defendant's knowledge of the general nature of the crime for which accomplice liability is sought, and that his acts will promote or facilitate that crime. State v. Mangan, 109 Wn. App. 73, 79, 34 P.3d 254 (2001). A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 Pd.2d 502 (1994).

Here, the State charged Garcia with unlawful sale of a controlled substance and unlawful possession of a controlled substance with intent to deliver under accomplice liability.³ CP 84-87. Garcia testified that he recently met Delores playing basketball and did not know that Delores had heroin in the secret compartment of his car until they were arrested. On their way to play basketball, Delores told him that they were going to meet someone who owed him money. Garcia thought Delores was getting the money for a painting job because Delores said he was working as a painter. 6RP 18-22, 26-28. In light of the fact that Garcia's defense rested on his lack of knowledge that Delores was a heroin dealer, a jury instruction on

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A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge, that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

CP 63.

knowledge, an element of accomplice liability, was critical to his defense.

WPIC 10.02 defines knowledge:

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

WPIC 10.02 (Emphasis added.)

It was essential to instruct the jury on knowledge to inform the jury that it was permitted but not required to find that Garcia acted with knowledge even if he had information that would lead a reasonable person in the same situation to believe that a heroin buy was taking place. A reference to the instruction would have been useful in defense counsel's closing where he argued that the State failed to prove knowledge beyond a reasonable doubt. 6RP 89-91.

Furthermore, the record reflects that the jurors were confused about the concept of knowledge. During deliberations, they submitted three questions regarding the element of knowledge in the accomplice

liability instruction.⁴ 7RP 3-4. The trial court discussed the matter with both counsel and asked whether it would be beneficial for the court to instruct the jury on knowledge. The prosecutor suggested providing the instruction but, inexplicably, defense counsel opposed giving the instruction, asserting that it would not be helpful and would further confuse the jury. 7RP 4-12. Based on the discussion, the court responded to the jury questions by only stating, “please review your instructions.” 7RP 12-13; CP 51-54.

It is evident that defense counsel’s performance was deficient for failing to propose the knowledge instruction and then objecting to giving the instruction when the jury had questions about the knowledge component of accomplice liability. As the Court observed in Mangan, the “key” aspect of accomplice liability is the defendant’s knowledge of the crime. 109 Wn. App. at 79. Given the fact that the jury had doubts about the essential element of knowledge, Garcia was prejudiced by counsel’s deficient performance because the instruction informs the jury that it is not required to find that he acted with knowledge. The record substantiates that if the jury were properly instructed, there is a reasonable probability

⁴ The jury asked, “Instruction # 6, must knowledge be prior to a crime or is knowledge during the crime sufficient to constitute aiding?”; “Instruction # 6: Can aiding happen without prior knowledge?”; “Instruction # 6, when does knowledge occur? (must knowledge be prior to crime or can knowledge occur during crime)” CP 51-54; 7RP 3-4.

that the jury would have believed that Garcia did not know about the heroin because he had only recently met Delores and the heroin was hidden in a secret compartment in the console of Delores' car. Importantly, Garcia was not involved in the buy on April 8th and the jury found him not guilty of the charge pertaining to the April 15th buy.

The record reflects that during the discussion, the court stated that it would have provided the knowledge instruction if it had been offered and defense counsel agreed that he would not have objected. 7RP 9. In light of defense counsel's acknowledgment, there is no conceivable tactical reason for failing to propose the instruction and objecting to giving the instruction when he had a subsequent opportunity to have the court instruct the jury. Consequently, defense counsel's performance fell below an objective standard of reasonableness and Garcia was prejudiced because but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different.

Reversal is required because Garcia was denied his constitutional right to effective assistance of counsel. Strickland, 466 U.S. at 687.

D. CONCLUSION

For the reasons stated, this Court should reverse Garcia's convictions because the cumulative effect of the prosecutor's numerous instances of misconduct combined with defense counsel's failure to propose a knowledge instruction essential to Garcia's defense denied Garcia his fundamental and constitutional right to a fair trial. In re Lord, 123 Wn.2d at 332. Should this Court conclude that a reversal is not required, this Court must reverse the sentencing enhancements pursuant to the Supreme Court's holding in Bashaw, 169 Wn.2d at 147-48.

DATED this 20th day of October, 2010.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Alejandro Castro Garcia

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Alejandro Castro Garcia, DOC # 337322, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, Washington 99001-2049.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of October, 2010 in Kent, Washington.


VALERIE MARUSHIGE

Attorney at Law
WSBA No. 25851

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