

No. 46107-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Toribio Amaro-Sotelo,**

Appellant.

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Cowlitz County Superior Court Cause No. 12-1-01402-4

The Honorable Judge James Stonier

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE OFFICER’S TESTIMONY THAT MR. AMARO-SOTELO “SMIRKED” AND SAID THE STATE WOULD HAVE TO PROVE THE CHARGES AGAINST HIM WAS AN IMPERMISSIBLE COMMENT ON THE EXERCISE OF HIS CONSTITUTIONAL RIGHTS.**

A direct comment on the accused’s exercise of his constitutional rights during police interrogation is always inadmissible. *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004); *State v. Pinson*, 44259-1-II, 2014 WL 4358461, --- Wn. App. ---, 333 P.3d 528 (Sept. 3, 2014) (*citing State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)). Here, a police witness testified that Mr. Amaro-Sotelo “smirked” before saying that the state was going to have to prove the charges against him.<sup>1</sup> RP 334. This was after Mr. Amaro-Sotelo had been *Mirandized*. RP 76.

Testimony constituting a comment on post-*Miranda* silence violates the constitution regardless of whether the accused validly invoked *Miranda* in order to require the questioning to stop. *See e.g. Holmes*, 122 Wn. App. at 445. In *Holmes*, for example, the court reversed based on a comment that the accused had not proclaimed his innocence when he was arrested. *Holmes*, 122 Wn. App. at 445. Simple failure to deny a charge is

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<sup>1</sup> The state attempts to characterize this statement as a simple denial of the charges, rather than an exercise of Mr. Amaro-Sotelo’s right to remain silent, to due process, and to a jury trial. Brief of Respondent, p. 3. But Mr. Amaro-Sotelo’s statement was neither an admission nor a denial. It was a statement regarding his plan to exercise his constitutional right to require the state to prove the charges against him beyond a reasonable doubt.

far from sufficient to actually invoke the privilege against self-incrimination and require the officers to stop questioning. Nonetheless, the information is not admissible because of the risk that the jury will improperly infer guilt based on the exercise of a constitutional right. *Id.* at 443.

Still, Respondent's argument relies exclusively on the fact that Mr. Amaro-Sotelo did not unequivocally invoke *Miranda*. Brief of Respondent, pp. 2-3. But Mr. Amaro-Sotelo does not argue that the officer was required to stop the interrogation. Rather, the state was prohibited from encouraging the jury to infer guilt based on the exercise of his rights, whether he made an unequivocal invocation or not. *Holmes*, 122 Wn. App. at 445.

An inference of guilt resting on exercise of a constitutional right "always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial." *State v. Silva*, 119 Wn. App. 422, 429, 81 P.3d 889 (2003). Such an error requires reversal unless the state can prove that the comment was harmless beyond a reasonable doubt. *Id.* at 446.

Here, the state argues that the evidence against Mr. Amaro-Sotelo was overwhelming because the informant conducted five controlled buys, three detectives were involved in the buys, and portions of the audio

recordings were “consistent with drug transactions.” Brief of Respondent, pp. 4-6.

But the informant’s contract with the police was later terminated for misconduct during controlled buys. RP 93, 340. None of the three detectives actually saw any drugs, guns, or money exchange hands. *See* RP *generally*. Mr. Amaro-Sotelo regularly bought and sold car parts from the informant. RP 127-29, 428-30. The majority of the audio recordings were also “consistent” with a transaction of that nature. RP 168-92, 264-67, 324-29. The evidence of Mr. Amaro-Sotelo’s guilt was far from overwhelming.

The state cannot prove that the officer’s improper comment was harmless beyond a reasonable doubt. *Silva*, 119 Wn. App. at 446. The officer’s comment that Mr. Amaro-Sotelo “smirked” invited the jury to conclude that Mr. Amaro-Sotelo’s invocation of his rights was actually an admission of guilt. Mr. Amaro-Sotelo was prejudiced by the officer’s improper comment on his rights to remain silent, to a jury trial, and to due process. *Id.*

The officer’s improper comment violated Mr. Amaro-Sotelo’s rights to remain silent, to a jury trial, and to due process. *Silva*, 119 Wn. App. at 428-29; *Holmes*, 122 Wn. App. at 445. Mr. Amaro-Sotelo’s convictions must be reversed. *Id.*

**II. THE COURT’S ADMISSION OF A CERTIFICATION – CREATED FOR THE PURPOSE OF CRIMINAL PROSECUTION – ATTESTING TO THE EXISTENCE OF A PRIOR MISDEMEANOR ASSAULT CONVICTION VIOLATED MR. AMARO-SOTELO’S RIGHT TO CONFRONT ADVERSE WITNESSES.**

Testimony is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A statement is testimonial if it is “created for use in a criminal proceeding.” *State v. Jasper*, 174 Wn.2d 96, 115, 271 P.3d 876 (2012) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)). Certifications attesting to the existence or nonexistence of essential facts are also testimonial. *Jasper*, 174 Wn.2d at 114-15; *Melendez-Diaz*, 557 U.S. at 2532.

Here, the court admitted a printout, created by a non-testifying witness, attesting that Mr. Amaro-Sotelo had a prior conviction for fourth-degree assault domestic violence. Ex. 12; RP 313-14. The printout was made eleven years after the conviction to which it attests and a few months after the controlled buys. Ex. 12. The document is testimonial because it was created for use in criminal prosecution. *Jasper*, 174 Wn.2d at 115.

The printout was also testimonial because its creator certified the existence of a prior conviction. *See Jasper*, 174 Wn.2d at 114-15. The

printout, itself, had no legal effect. Ex 12. Rather, it simply purported to summarize and attest to the content of other records. Ex 12.

Nonetheless, the state argues that the document did not violate Mr. Amaro-Sotelo's confrontation rights because it falls within the hearsay exception for certified court records. Brief of Respondent, pp. 6-8 (*citing State v. Cross*, 156 Wn. App. 568, 588, 234 P.3d 288 (2010)).

Respondent's argument is incorrect for two reasons.

First, admission of testimonial statements without an opportunity for cross-examination violates the confrontation clause regardless of whether the statement falls within an exception to the hearsay rule. *Crawford*, 541 U.S. 36. The printout admitted against Mr. Amaro-Sotelo was testimonial because it was created for litigation and attested to the existence of critical facts. *Jasper*, 174 Wn.2d at 114-15; *Melendez-Diaz*, 557 U.S. at 2532. Accordingly, its admission violated Mr. Amaro-Sotelo's right to confront adverse witnesses regardless of the analysis of the hearsay rule. *Crawford*, 541 U.S. 36.

Second, the state's reliance on *Cross* is misplaced. *Cross* merely held that a printout similar to that in Mr. Amaro-Sotelo's case was sufficient to meet the state's burden of proving prior convictions by a preponderance of the evidence at sentencing. *Cross*, 156 Wn. App. at 587-88. *Crawford* does not apply at sentencing. The court also noted in

*Cross* that “evidentiary rules are relaxed during sentencing hearings.”  
*Cross*, 156 Wn. App. at 587. Accordingly, the court did not consider whether the printout was testimonial or whether it was admissible under the rules of evidence. *Id.* *Cross* is inapposite to Mr. Amaro-Sotelo’s case.

The court violated the right to confront adverse witnesses by admitting a testimonial certification when Mr. Amaro-Sotelo never had an opportunity to cross-examine the document’s creator. *Jasper*, 174 Wn.2d at 114-15. Mr. Amaro-Sotelo’s unlawful possession of a firearm conviction must be reversed. *Id.* at 120.

**III. THE COURT ERRED BY ADMITTING HEARSAY IN THE ABSENCE OF AN ADEQUATE FACTUAL FOUNDATION.**

Mr. Amaro-Sotelo relies on the argument set forth above and in his Opening Brief.

**IV. MR. AMARO-SOTELO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Amaro-Sotelo relies on the argument set forth above and in his Opening Brief.

**V. THE COURT VIOLATED MR. AMARO-SOTELO'S CONSTITUTIONAL RIGHTS BY INSTRUCTING THE JURY IN A MANNER PERMITTING CONSIDERATION OF HIS ELEVEN YEAR OLD CONVICTION FOR MISDEMEANOR ASSAULT IN DETERMINING HIS CREDIBILITY.**

Evidence of Mr. Amaro-Sotelo's eleven year old conviction for misdemeanor assault was not admissible to impeach his credibility. ER 609. Still, the court instructed the jury that it could consider *any* witness's prior conviction for *any* offense in determining the weight or credibility to lend to his/her testimony. CP 31. The court's instruction violated Mr. Amaro-Sotelo's presumption of innocence and right to present a defense by permitting the jury to infer that he was not credible based on improper factors. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007); *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

The state explains at length that the court's instruction constituted a correct statement of the law in regards to the police informant's prior convictions for crimes of dishonesty. Brief of Respondent, pp. 11-12. But the language of the instruction does not limit itself in that manner. The instruction left the jury with the plain impression that any prior conviction for any witness – including Mr. Amaro-Sotelo's misdemeanor assault conviction – was to be considered in determining credibility. CP 31.

The court instructed the jury that it could only consider the *exhibits* related to Mr. Amaro-Sotelo's misdemeanor conviction in determining his guilt for the unlawful possession of a firearm charge. CP 32. But a police witness also testified to the existence of the misdemeanor conviction. RP 313. The court's instructions did not limit the jury's consideration of that testimony in any way. CP 32. Accordingly, the court's instruction about exhibits 12, 14, and 15 does not cure the error.

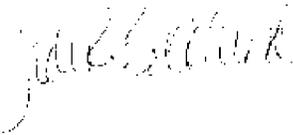
The court's instructions violated Mr. Amaro-Sotelo's presumption of innocence and right to present a defense. ER 609; *Evans*, 163 Wn. App. at 643; *Holmes*, 547 U.S. at 324. Mr. Amaro-Sotelo's convictions must be reversed. *Id.*

### **CONCLUSION**

For the reasons set forth above and in Mr. Amaro-Sotelo's Opening Brief, his convictions must be reversed.

Respectfully submitted on February 4, 2015,

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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Toribio Amaro-Sotelo, DOC #373295  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

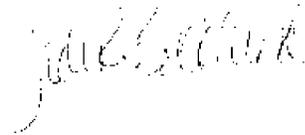
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 4, 2015.



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## BACKLUND & MISTRY

February 04, 2015 - 1:00 PM

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