

No. 64533-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAFAEL ALANIZ LEYVA,

Appellant.

2010 APR 25 AM 4:13

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

The Honorable Gerald A. Knight

BRIEF OF APPELLANT

Susan F. Wilk  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 3

    1. Substantive facts ..... 3

    2. Improper comments on Leyva’s pre-arrest silence..... 5

    3. Prosecutorial misconduct ..... 6

D. ARGUMENT..... 10

    1. THE DETECTIVE’S COMMENTS AND TESTIMONY URGED THE JURY TO INFER GUILT FROM LEYVA’S PRE-ARREST SILENCE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS..... 10

        a. Comments on a defendant’s silence violate the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment due process right to a fair trial ..... 10

        b. The constitutional error was prejudicial..... 15

    2. THE PROSECUTOR’S REPEATED EXHORTATIONS TO THE JURY THAT THEY MUST FIND THE STATE’S WITNESSES WERE LYING IN ORDER TO ACQUIT WERE FLAGRANT MISCONDUCT THAT DENIED LEYVA HIS RIGHT TO A FAIR TRIAL..... 16

        a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions..... 16

        b. The prosecutor’s burden-shifting cross-examination and improper closing argument were misconduct..... 18

c. The prosecutor’s misconduct in closing argument prejudiced Leyva’s due process right to a fair trial, requiring reversal of his conviction.....	20
3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPEATED INSTANCES OF FLAGRANT AND ILL-INTENTIONED MISCONDUCT.....	22
a. It was objectively unreasonable for trial counsel to fail to object to the prosecutor’s improper comments .....	23
b. Defense counsel’s failure to object to the prosecutor’s misconduct prejudiced Leyva .....	25
F. CONCLUSION.....	27

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>In re Brett</u> , 142 Wn.2d 868, 16 P.3d 601 (2001) .....	23
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 154 (1988).....	18
<u>State v. Burke</u> , 163 Wn.2d 204, 217, 181 P.3d 1 (2008) .....	10-16
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978) .....	17
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996) .....	11, 16
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	23
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984) .....	17
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994) .....	18
<u>State v. Smith</u> , 74 Wn.2d 744, 446 P.2d 571 (1968), <u>vacated in part</u> , 408 U.S. 934 (1972).....	24
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	23

### **Washington Court of Appeals Decisions**

<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74, <u>review denied</u> , 118 Wn.2d 1007 (1991).....	18, 25
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993) .....	16
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996)....	19, 20, 21, 22, 25
<u>State v. Neidigh</u> , 78 Wn. App. 71, 895 P.2d 423 (1995).....	21
<u>State v. Saunders</u> , 91 Wn. App. 575, 958 P.2d 364 (1998) .....	24
<u>State v. Soto-Rodriguez</u> , 134 Wn. App. 907, 143 P.3d 838 (2006)	18
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993) .....	18, 21

### **Washington Constitutional Provisions**

Const. art. I, § 3 .....	17
--------------------------	----

### **United States Supreme Court Decisions**

<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1935).....	17
--	----

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	16
<u>Davis v. United States</u> , 512 U.S. 452, 114 S.Ct. 2340, 129 L.Ed.2d 362 (1994).....	14
<u>Doyle v. Ohio</u> , 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) .....	10
<u>Griffin v. California</u> , 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).....	11
<u>Jenkins v. Anderson</u> , 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).....	12
<u>Malloy v. Hogan</u> , 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) .....	10
<u>State v. Radcliffe</u> , 164 Wn.2d 900, 194 P.3d 250 (2008).....	14
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984).....	23, 26
<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).....	24
<u>Williams v. Taylor</u> , 529 U.S. 362, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000).....	23

### **Federal Constitutional Provisions**

U.S. Const. amend. V .....	1, 5, 10, 12, 14, 15
U.S. Const. amend. VI .....	1, 2, 22
U.S. Const. amend. XIV.....	1, 10

### **Rules**

CrR 3.5 .....	3
ER 607.....	13

### **Other Authorities**

<u>People v. De George</u> , 73 N.Y.2d 614, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989).....	13
---	----

A. ASSIGNMENTS OF ERROR

1. In violation of Leyva's Fifth Amendment rights, the State prejudicially urged the jury to draw a negative inference from Leyva's pre-arrest silence.

2. Repeated instances of prosecutorial misconduct denied Leyva his right to a fair trial safeguarded by the Fourteenth Amendment.

3. Defense counsel denied Leyva the effective assistance of counsel guaranteed by the Sixth Amendment when she failed to object to repeated, flagrant instances of prosecutorial misconduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State violates the Fifth Amendment privilege against self-incrimination where it urges jurors to draw a negative inference from an accused person's exercise of his right to silence. This is true even with respect to pre-arrest silence, as an innocent person may have reasons for not cooperating with a police investigation that are not probative of guilt. Did the State urge the jury to draw a negative inference from Leyva's silence, in violation of the Fifth Amendment, when it elicited testimony that Leyva did not respond to the investigating detective's efforts to question him before his

arrest, and implied his failure to speak with her was probative of guilt? (Assignment of Error 1)

2. A prosecutor commits misconduct and shifts the burden of proof, in violation of due process, where she urges the jury to conclude that to acquit, they must conclude the State's witnesses are lying. Did the prosecutor violate Leyva's right to a fair trial where she repeatedly asked him whether the State's witnesses "got it wrong" because his testimony differed from theirs, and relied on this theme in closing argument? (Assignment of Error 2)

3. An attorney's failure to object constitutes ineffective assistance of counsel under the Sixth Amendment where there is no reasonable tactical justification for the omission and the omission prejudices the accused. The State had no independent evidence to support the complainant's allegations and a conviction depended on the jury crediting the complainant's testimony beyond a reasonable doubt, did defense counsel render ineffective assistance of counsel, in violation of the Sixth Amendment, when she failed to object to the prosecutor's misconduct in cross-examining Leyva and in closing argument? (Assignment of Error 3)

### C. STATEMENT OF THE CASE

1. Substantive facts. Appellant Rafael Alaniz Leyva and Tino Resendez are long-time friends. RP 128, 248, 333.<sup>1</sup> On May 18, 2006, Leyva returned to Washington after working in Arizona for a couple of months. RP 292, 334. Resendez picked Leyva up at the airport and brought him back to the Everett home that Resendez shared with his wife, Anna, and children. RP 334. Leyva stayed at Resendez's home on both May 18 and May 19, 2006.

On May 19, Jessica and Megan L.,<sup>2</sup> two young cousins of Anna Resendez, also spent the night at the home. RP 47. Anna Resendez inflated an air mattress and set it up in the living room. RP 262. Leyva was exhausted from traveling and went to sleep early on the mattress. RP 263. When Leyva went to sleep, Jessica and Megan were on the living room couch playing video games. Id.

Leyva woke once in the night briefly and realized Jessica was sleeping on the air mattress beside him. RP 265. He fell back

---

<sup>1</sup> The verbatim report of proceedings consists of four volumes of consecutively paginated transcripts from trial and sentencing proceedings occurring between September 29, 2009, and November 19, 2009. These are referenced herein as "RP" followed by page number. A fifth volume, containing a CrR 3.5 hearing, is not cited.

<sup>2</sup> Jessica and Megan Longfellow are referenced in this brief by their first names to distinguish them from one another. No disrespect is intended.

asleep and did not wake again until morning, when he was awakened by Jessica and Megan. RP 267. He gave them cereal for breakfast, and later that day, they all went to Anna's brother's wedding. RP 267, 269.

Leyva ran into Jessica a few times following the wedding. Once Leyva and Tino Resendez helped Jessica's mother with a move. RP 341. Another time, Leyva, Resendez, and Jessica went to "Hempfest" in Seattle. RP 284, 343. On this excursion, they smoked marijuana together. RP 284. Leyva also saw Jessica at Resendez's home, where they again smoked marijuana together. RP 285, 288.

Several days after the May 19, 2006 sleepover, Jessica reported to a school friend that Leyva had sexually assaulted her. RP 63. Jessica claimed that Megan fell asleep before she or Leyva on the couch, so Leyva decided to share the air mattress with her. RP 47-48. Jessica was uncomfortable about this but wrapped herself in her own blanket on the edge of the air mattress. RP 48. She woke to feel a tickling sensation on her arm but fell back asleep. RP 51.

She next woke up because there was a pillow on her head and Leyva was holding her arms above her head. RP 52. She

tried to wriggle free, but Leyva managed to lower her pajama bottoms and insert his fingers in her vagina. RP 52-53. He was kissing her chest and neck. RP 53. She heard him unzip his pants and felt him “humping” her and trying to put his penis inside her, but Jessica struggled vigorously and Leyva did not succeed. RP 53, 56. He rose and went to the bathroom, and Jessica wrapped herself tightly in her blanket and tried to sleep. RP 59. When Leyva returned to the living room he asked her several times not to tell anyone what happened. RP 59.

Leyva was charged in Snohomish County Superior Court with Rape in the Second Degree and in the alternative with Rape of a Child in the Second Degree and proceeded to a jury trial. CP 25.

2. Improper comments on Leyva’s pre-arrest silence.

Pretrial, Leyva moved to exclude evidence that he did not respond to telephone messages from the investigating detective, arguing that admission of this evidence would cause the jury to draw a negative inference from his pre-arrest silence, contrary to the Fifth Amendment. CP 78-88; RP 18-21. The trial court denied the motion, reasoning that an invocation of Fifth Amendment rights must be unequivocal, and that the evidence was admissible to

show that the detective conducted a thorough investigation of the allegations. RP 21-22.

At trial, however, the prosecutor elicited testimony from the investigating detective that suggested Leyva's silence was indicative of guilt. Detective Kowalchyk explained that she tries to interview suspects "to get everybody's side of the story." RP 175. She stated she attempted to contact Leyva at the very beginning of her investigation and kept trying to make contact with him. RP 181. She implied that she believed Leyva was guilty, explaining that sometimes cases are closed "if there's insufficient or unfounded [sic]. In this particular case I referred over to the prosecutor's office." RP 180. On cross-examination she reiterated that she did not obtain statements from Jessica L. in addition to the statements taken by the initial investigating officer "because I never had an opportunity to talk to the suspect." RP 208.

3. Prosecutorial misconduct. Leyva testified to his version of events at trial. The thematic focus of the prosecutor's cross-examination was to compel Leyva to 'concede' that if his testimony were to be believed, then each of the witnesses called by the State "got it wrong." Because Anna Resendez had testified that Leyva

came over on May 19, but Leyva stated he arrived on the 18<sup>th</sup>, the prosecutor demanded, “so Anna got it wrong?” RP 296.

The prosecutor asked Leyva, “did you hear Anna testify that both you and Tino were playing video games that night?” Leyva responded, “No, I heard her say that, but we weren’t.” The prosecutor rejoined, “So Anna got that wrong too?” RP 301.

With respect to the sleeping arrangements, the prosecutor aggressively demanded, “Did you hear Anna testify that she said she actually told you to sleep on the couch? Did you hear her say that, is my question? But you’re saying that’s wrong now?” Id. When Leyva abided by his testimony, the prosecutor asked, “You’re saying Anna got that wrong? RP 302. The prosecutor noted that Leyva had heard Anna testify about the proposed sleeping arrangements and that Anna had decided the girls would share the air mattress. Id. The prosecutor asked, “And is it your testimony that she did not say that? So she got that wrong too?” Id.

Because Jessica had testified that Leyva got up in the night to go to the bathroom, the prosecutor asked, “Is it your testimony that Jessica got that wrong?” RP 304.

The prosecutor engaged in the same tactics with regard to Kowalchyk’s testimony. Kowalchyk testified she had attempted to

confront Leyva at his home, but he hid in the shower and then fled from her. RP 199-201. The prosecutor asked Leyva, "Did you hear Detective Kowalchuk testify that where she saw you was actually inside the bathroom? . . . And did she get that wrong?" RP 316. The prosecutor challenged Leyva even on the clothes Kowalchuk claimed Leyva was wearing. Because Kowalchuk testified Leyva had been wearing blue shorts, the prosecutor demanded, "did she get that wrong too?" RP 316. Likewise, because Kowalchuk claimed Leyva told her his name was "Juan", the prosecutor asked, "did she get that wrong?" RP 317.

The prosecutor concluded her cross-examination with a dramatic summation of this theme:

Q (by the prosecutor): You sat here and you heard Jessica's testimony, right?

A (by Leyva): Yes.

Q: Okay. But it's your testimony that none of that happened, right?

A: Yes.

Q: Sorry?

A: Yes.

Q: That everything she said about you is made up?

A: Yes.

Q: That everybody else got it wrong?

A: Yes.

Q: All right. I don't have anything further, your honor.

RP 331.

In closing argument, the prosecutor used this theme to attack both Leyva's credibility and character:

Jesse had it wrong. Jesse had it wrong about how Hempfest went. But Tino actually corroborated what Jesse said. Jesse had it wrong about the incident. Completely wrong. It's up to you to determine whose arm got tickled that night.

Detective Kowalchuk got it wrong too. She got it wrong that he gave her the name of Juan when she asked, Who are you in the bathroom? Who are you? Juan. She got that wrong. So I don't know where she got that, but according to him, he never said that. Although he does have a history of giving somebody else's name when he's contact [sic] by the police.

Detective Kowalchuk got it wrong about where she saw him. Police officer of 20 years, she's not sure where she actually saw the defendant. Was it in the bathroom or in the hall?

And then the trooper got it wrong. Everybody got it wrong. Trooper got it wrong.

RP 381.

The jury convicted Leyva of both counts.<sup>3</sup> CP 37-38. Leyva appeals. CP 6-22.

---

<sup>3</sup> Count Two was dismissed at sentencing based on double jeopardy considerations. RP 411.

## D. ARGUMENT

### 1. THE DETECTIVE'S COMMENTS AND TESTIMONY URGED THE JURY TO INFER GUILT FROM LEYVA'S PRE-ARREST SILENCE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

a. Comments on a defendant's silence violate the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment due process right to a fair trial. Both the federal constitution and the Washington Constitution explicitly safeguard an accused person's right to silence and privilege against incrimination. U.S. Const. amend. V;<sup>4,5</sup> Const. art. I, § 9.<sup>6</sup> The right to silence enshrined in the Fifth Amendment prohibits the government from either commenting on the exercise of the right, or urging the jury to draw a negative inference therefrom. Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). The United States Supreme Court and the Washington Supreme Court have repeatedly reversed convictions where the State has

---

<sup>4</sup> In pertinent part, the Fifth Amendment states, no person "shall ... be compelled in any criminal case to be a witness against himself." U.S. Const. amend. 5.

<sup>5</sup> The Fifth Amendment applies to states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 3-4, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

<sup>6</sup> Article I, section 9 states in relevant part: "No person shall be compelled in any criminal case to give evidence against himself."

improperly commented on or urged the jury to draw a negative inference from the exercise of the right to silence. Doyle, supra, Griffin v. California, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Burke, supra; State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

In Burke, the defendant was accused of third-degree rape of a 15-year-old girl. 163 Wn.2d at 206. At trial, Burke's defense was that the complainant had told him she was of legal age and he reasonably believed her. Id. Prior to his arrest, Burke had consented to an interview with law enforcement and made a partial statement, but after police told Burke's father that it was "very possible" Burke would be charged with a crime, Burke's father advised him not to talk to the police until he had consulted with counsel. Id. at 207.

The Supreme Court framed the constitutional question as follows:

The crux of the State's argument is that when given the opportunity to tell his side of the story during the prearrest interview with Detective Richardson, Burke did not mention that J.S. told him she was 16. The State argues that what Burke did say and what he did not say by remaining silent during the interview could be used to imply his guilt. A proper analysis requires careful attention to what was said, what was not said,

the invocation of silence, proper impeachment, and the use of silence itself to imply guilt.

Id. at 218.

Although Burke invoked his right to counsel before he was arrested, before Miranda warnings, and after making a partial statement to law enforcement, the Court held that the prosecutor's arguments impermissibly burdened Burke's right to silence. 163 Wn.2d at 221-22. Far from finding the State used Burke's silence merely to impeach, the Court found the State urged the jury to use his silence as substantive evidence of guilt. Id. at 222 (holding the State "advanced the link between guilt and the termination of the interview," creating an "implication ... that suspects who invoke their right to silence do so because they know they have done something wrong.") Id. at 222.

Burke treated the use of pre-arrest, pre-Miranda silence to impeach trial testimony, which the United States Supreme Court has held will not always violate the Fifth Amendment. Burke, 163 Wn.2d at 220 n. 9; Jenkins v. Anderson, 447 U.S. 231, 235-36, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980). Even so, the Court in Burke cautioned lower courts against authorizing the use of pre-arrest silence as impeachment without limitation, noting, "[a]n accused's

failure to disclose every detail of an event when first contacted by law enforcement is not per se an inconsistency.” Id. at 219 (distinguishing ER 607).

The trial court found that Leyva’s silence was “equivocal”, and consequently gave the State free rein to draw a link between Leyva’s silence and guilty knowledge. But, as the Court in Burke observed, it is precisely the ambiguity inherent in the exercise of the constitutional right to silence that creates the constitutional problem:

Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person’s “awareness that he is under no obligation to speak or the natural caution that arises from his knowledge that anything he says might be later used against him at trial,” a belief that efforts at exoneration would be futile under the circumstances or because of explicit instructions not to speak from an attorney. Moreover, there are individuals who mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because “they are simply fearful of coming into contact with those whom they regard as antagonists.” In most cases it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence.

Burke, 163 Wn.2d at 218-19 (quoting People v. De George, 73 N.Y.2d 614, 618-19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989)).

In finding that the State could introduce evidence of Leyva's failure to respond to Detective Kowalchuk's repeated efforts to contact him, the trial court appears to have confused two distinct bodies of Fifth Amendment jurisprudence. Where a suspect is being interrogated by law enforcement following Miranda warnings, he must make an unequivocal request for counsel or law enforcement is not obligated to cease interrogation. Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2340, 129 L.Ed.2d 362 (1994); State v. Radcliffe, 164 Wn.2d 900, 906-08, 194 P.3d 250 (2008). "[T]he later request must be explicit if the right to counsel has once been waived; an equivocal request will not do." Radcliffe, 164 Wn.2d at 906.

But where the circumstances concern a defendant who has never formally been confronted by police and who has, through his conduct, indicated a desire to assert his constitutional rights, the analysis is different. "[T]he Fifth Amendment right of silence requires no magic words." Burke, 163 Wn.2d at 220-21. "It would be incongruous for the State to tell the jury that Burke exercised his right to silence, to suggest he did so because of guilt, and then for the State to argue that the inference from guilt by silence was

proper because Burke did not invoke his right to remain silent unequivocally.” Id. at 221.

Here, the State told the jury that Leyva did not respond to Kowalchyk’s numerous attempts to contact him. RP 175, 181, 208. Leyva’s right to pre-arrest silence is protected by the Fifth Amendment. Burke, 163 Wn.2d at 218-22. Yet, the jury was invited to conclude from the fact that Leyva did not relate his “side of the story” that he was probably guilty. RP 175. This inference was fortified by Kowalchyk’s testimony—which immediately succeeded and was contextualized by her discussion of Leyva’s failure to respond to her efforts to speak with him—that unlike cases that are supported by insufficient evidence, she decided to refer this complaint to the prosecutor’s office. RP 180. The suggestion that Leyva’s silence was indicative of guilt was especially strong given Kowalchyk’s admission that she had no “hard evidence” or “independent witnesses” to corroborate Jessica’s allegations. RP 182. In sum, the trial court’s ruling penalized Leyva for the exercise of his Fifth Amendment rights.

b. The constitutional error was prejudicial. A constitutional error is presumed prejudicial. Burke, 163 Wn.2d at 222. On appeal, the State bears the burden of proving beyond a

reasonable doubt that the result would have been the same absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Easter, 130 Wn.2d at 242.

As in Burke, the case amounted to a credibility contest between Leyva and Jessica. Burke, 163 Wn.2d at 222-23 (“[t]he trial boiled down to whether the jury believed or disbelieved Burke's story”). In Burke, the Court concluded that “[r]epeated references to Burke's silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury's consideration.” Id. The Court held the error was prejudicial. Id. at 223. Here, likewise, this Court should conclude the trial court's error was prejudicial.

2. THE PROSECUTOR'S REPEATED EXHORTATIONS TO THE JURY THAT THEY MUST FIND THE STATE'S WITNESSES WERE LYING IN ORDER TO ACQUIT WERE FLAGRANT MISCONDUCT THAT DENIED LEYVA HIS RIGHT TO A FAIR TRIAL.

a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the

prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V; XIV; Const. art. I, §§ 3, 22.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

Unless the misconduct infringes on a constitutional right, the defense bears the burden of proving a “substantial likelihood” that prosecutorial misconduct affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The allegedly improper arguments must be reviewed in the context of the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. State

v. Soto-Rodriguez, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006) (citing State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)).

A claim of prosecutorial misconduct in closing argument is waived if defense counsel did not object and curative instructions would have obviated the prejudice from the remarks. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 154 (1988). However, “[a]ppellate review is *not* precluded if the prosecutorial misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” Id. (emphasis in original).

b. The prosecutor’s burden-shifting cross-examination and improper closing argument were misconduct. This Court has repeatedly held that cross-examination or comments which seek to compare the honesty of the defendant with law enforcement officials or which vouch for the veracity of a witness are improper. State v. Stith, 71 Wn. App. 14, 19-20, 856 P.2d 415 (1993); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Such questioning is not only improper because it invades the province of the jury, but because “it is misleading and unfair to make it appear that an

acquittal requires the conclusion that the police officers are lying.” Casteneda-Perez, 61 Wn. App. at 362-63. This kind of argument misstates the law and misrepresents both the role of the jury and the burden of proof: the jury “is *required* to acquit *unless* it ha[s] an abiding belief in the truth of [the victim’s] testimony.” State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (emphasis in original).

In Fleming, this Court noted that the prosecutor engaged in similar misconduct two years after the published opinion in Casteneda-Perez, and for this reason found it flagrant and ill-intentioned, warranting reversal notwithstanding the absence of an objection. But despite the unequivocal warning from this Court that prosecutors who engage in such misconduct jeopardize the convictions they obtain, the prosecutor here peppered her case with improper references and argument of the kind condemned in Casteneda-Perez and Fleming.

In her cross-examination, the prosecutor repeatedly tried to get Leyva to call each State witness “wrong.” RP 296-331. The plain implication of this line of cross-examination was to urge the jury to find that in order to acquit, they had to conclude all of the State’s witnesses being dishonest. This improper objective was

made clear by the prosecutor's outrageous argument in summation. RP 381. But, contrary to the prosecutor's insinuation, the jurors were *required* to acquit *unless* they had an abiding belief in the truth of the State's evidence. Fleming, 83 Wn. App. at 213. The improper argument thus had the added effect of shifting the burden of proof to Leyva.

c. The prosecutor's misconduct in closing argument prejudiced Leyva's due process right to a fair trial, requiring reversal of his conviction. This prosecution boiled down to a credibility contest between the State's complaining witness and the accused. As Kowalchuk aptly noted, there was neither "hard evidence" nor "independent witnesses" to corroborate the substantive allegations. RP 182. Jessica's veracity was compromised by the fact that despite having allegedly been victimized by Leyva, she continued to interact with him socially and even smoke marijuana with him. RP 76, 284-85. Moreover, in the presence of several witnesses, Jessica apologized to Leyva and said she would drop the charges against him. RP 287, 345-46, 358.

Because the evidence supporting the charges was equivocal, the prejudicial effect of the improper cross-examination

and argument was amplified by Kowalchyk's insinuation that Leyva's failure to accede to her efforts to interview him meant he was guilty, and by her self-serving assertion that she determined the case merited referral to the prosecutor's office. RP 175-82. In Stith, this Court found similar comments by law enforcement and prosecutors "tantamount to arguing that guilt had already been determined" because they "indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court." Stith, 71 Wn. App. at 22.

The prosecutor's improper cross-examination and argument attempted to compensate for the deficiencies in the State's case by urging the jurors to conclude that in order to acquit, they had to conclude the State's witnesses were lying. Not even an inexperienced prosecutor would be unaware that urging a testifying defendant to label the State's witnesses as "wrong" – i.e., dishonest – is misconduct.<sup>7</sup> In Fleming, notwithstanding trial counsel's failure to object, this Court concluded that "the misconduct, taken together and by cumulative effect, rose to the level of manifest constitutional error, which we cannot find harmless beyond a reasonable doubt

---

<sup>7</sup> See State v. Neidigh, 78 Wn. App. 71, 76, 895 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct, deputy prosecutor told the appellate court, "because it's always been found to be harmless error").

given the nature of the evidence at trial.” 213 Wn. App. at 216.

Here, similarly, this Court should conclude the prosecutor’s argument was flagrant misconduct and reverse Leyva’s conviction.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPEATED INSTANCES OF FLAGRANT AND ILL-INTENTIONED MISCONDUCT.

In response to Leyva’s allegations of misconduct, the State may claim the issue is waived because defense counsel did not object to the many improper questions and comments. Leyva believes that as in Fleming, the misconduct was flagrant and ill-intentioned, and no curative instruction could have dispelled the taint from the misconduct. To the extent that this Court may find a claim of waiver to have merit, however, Leyva argues in the alternative that his lawyer was ineffective for failing to object to the improper comments.

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amend. VI,<sup>8</sup> Const. art. 1, §§ 3,<sup>9</sup> 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 2d

---

<sup>8</sup> In relevant part, the Sixth Amendment provides that in criminal prosecutions the accused shall “have the Assistance of Counsel for his defence.”

<sup>9</sup> Const. art. 1, § 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To obtain relief based on ineffective assistance of counsel, an appellant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

a. It was objectively unreasonable for trial counsel to fail to object to the prosecutor's improper comments. The Strickland test was adopted in Washington to "ensure a fair and impartial trial." State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing Thomas, 109 Wn.2d at 225). To establish the first prong of the Strickland test, an accused must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 229-30. If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. Id. at 229-30. However, "tactical" or "strategic" decisions by defense counsel must still be reasonable

decisions. Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) that the result of the trial would have differed if the evidence had not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). In Saunders, a prosecution for possession of methamphetamine with an unwitting possession defense, the defense attorney elicited evidence that Saunders had previously been convicted of possessing methamphetamine. Id. On appeal, the court could conceive of no legitimate tactical reason to elicit such prejudicial evidence. Id. The court further found the evidence would have been inadmissible under ER 609. Id. at 579. Finally, the court concluded that the other evidence against Saunders was “not overwhelming”, and consequently, but for counsel’s deficient performance, there was a reasonable probability that the trial’s outcome would have been different.

Here, given that the case hinged upon a credibility contest between Leyva and the complainant, there was no legitimate

tactical reason for defense counsel to fail to object to cross-examination and argument that suggested to the jury they had to believe the State's witnesses were lying in order to acquit. The prosecutor's questions and summation shifted the burden of proof and forced the jury to base their decision on improper considerations. Moreover, in light of Fleming and Castaneda-Perez, the trial court should and would have sustained objections to the prosecutor's questions and argument. Defense counsel's failure to object was deficient performance.

b. Defense counsel's failure to object to the prosecutor's misconduct prejudiced Leyva. In addition to establishing deficient performance, Leyva must show prejudice. Strickland, 466 U.S. at 693. To establish prejudice, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Rather, he need only show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

As demonstrated in arguments 1 and 2, supra, Leyva was prejudiced by counsel's deficient performance. Had counsel

objected, and the court admonished the prosecutor, the jurors would have been informed that they could convict Leyva only if they concluded they believed the State's evidence beyond a reasonable doubt. Additionally, the prosecutor was likely emboldened by defense counsel's lax performance into believing she had a free rein. Had defense counsel mounted a timely and specific objection, and the court issued a curative instruction, the prosecutor would have presumably refrained from engaging in improper argument. As it was, the bell was rung not once, but repeatedly, impacting the jury's verdict. Leyva has shown his counsel's deficient performance prejudiced him, meeting the second prong of the Strickland test.

F. CONCLUSION

For the foregoing reasons, Rafael Leyva respectfully requests this Court to conclude he was denied a fundamentally fair trial, and reverse his conviction.

DATED this 26<sup>th</sup> day of April, 2010.

Respectfully submitted:

  
SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 64533-1-I
	)	
	)	
RAFAEL LEYVA,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |   |                   |                                     |
|-----|---|-------------------|-------------------------------------|
| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | RAFAEL LEYVA<br>334843<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326-0769 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 26<sup>TH</sup> DAY OF APRIL, 2010.

X \_\_\_\_\_ 

2010 APR 26 AM 4:13  
COURT OF APPEALS  
STATE OF WASHINGTON