

No. 67016-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GILBERTO MARTINEZ-VAZQUEZ

Appellant.

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

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT.....1

1. WASHINGTON CASELAW, INCLUDING THE AUTHORITY CITED BY RESPONDENT, SHOWS THAT THE PROSECUTOR IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO MR. MARTINEZ-VAZQUEZ.....3

    a. The “no shred of evidence” comments were not in the permissible realm of response to an explicit defense theory of the case; instead, they implied that Mr. Martinez-Vazquez was obligated to present evidence of his innocence.....4

    b. The prosecutor further infringed on the presumption of innocence by implying that the jury should not expect better evidence and by stating that the defense counsel “admitted” that Mr. Martinez-Vazquez had contacted Ms. Gomez.....10

2. BY DIRECTLY IMPLYING THAT MR. MARTINEZ-VAZQUEZ SHOULD HAVE TAKEN THE STAND TO PROVE HIS INNOCENCE, THE PROSECUTOR IMPERMISSIBLY COMMENTED ON MR. MARTINEZ-VAZQUEZ’S CONSTITUTIONAL RIGHT TO REMAIN SILENT.....15

3. MR. MARTINEZ-VAZQUEZ DID NOT WAIVE HIS VALID CHALLENGE TO THE DENIAL OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.....18

4. THE JURORS SEATED ON THE PANEL DEMONSTRATED ACTUAL BIAS, GOING TO THE HEART OF THE ISSUES IN THE CASE.....21

5. MR. MARTINEZ-VAZQUEZ WAS DENIED A FAIR TRIAL, AND HIS CONVICTION MUST BE REVERSED.....	25
B. CONCLUSION.....	25

TABLE OF AUTHORITIES

**Washington Supreme Court Cases**

State v. Ashby, 77 Wn.2d 33, 459 P.2d 403 (1969)..... 16

State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006)..... 16, 17

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995)..... 16, 17

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)..... 14

State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001)..... 19

State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001)..... 19, 20

State v. Gresham, \_\_\_\_ P.3d \_\_\_\_, 2012 WL 19664  
(Jan. 5, 2012)..... 24

State v. Murphy, 9 Wash 204, 37 P. 420 (1894)..... 3

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008)..... 4, 5

**Washington Court of Appeals Cases**

State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324  
(1995)..... 11, 12

State v. Babiker, 126 Wn. App. 664, 110 P.3d 770 (2005)..... 8

State v. Barrow, 60 Wn. App. 869, 809 P.2d 209 (1991)..... 8

State v. Casteneda-Perez, 61 Wn. App. 354, 810 P.2d 74  
(1991)..... 13

State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114 (1990),  
rev. denied, 115 Wn.2d 1014, 797 P.2d 514 (1990)..... 8

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996)..... 13

State v. Cruz, 77 Wn. App. 811, 894 P.2d 573 (1995)..... 11, 12

<u>State v. David</u> , 118 Wn. App. 61, 74 P.3d 686 (2003).....	19, 20
<u>State v. David</u> , 130 Wn. App. 232, 122 P.3d 764 (2005).....	20
<u>State v. Dixon</u> , 150 Wn. App. 46, 207 P.3d 459 (2009).....	9
<u>State v. Evans</u> , 163 Wn. App. 635, 260 P.3d 934 (2011).....	2, 3, 4, 13, 15
<u>State v. Fiallo-Lopez</u> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	4, 17, 18
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	10
<u>State v. Gonzalez</u> , 111 Wn. App. 276, 45 P.3d 205 (2002), <u>rev. denied</u> , 148 Wn.2d 1012 (2003).....	21
<u>State v. Hartzell</u> , 156 Wn. App. 918, 237 P.3d 928 (2010).....	3
<u>State v. Jackson</u> , 150 Wn. App. 877, 209 P.3d 553 (2009).....	7, 8
<u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 936 (2010), <u>rev. denied</u> , 171 Wn.2d 1013, 249 P.3d 1029 (2011).....	5, 6
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	10
<u>State v. Morris</u> , 150 Wn. App. 927, 210 P.3d 1025 (2009).....	16, 17
<u>State v. Ramirez</u> , 49 Wn. App. 332, 742 P.2d 726 (1987).....	17
<u>State v. Toth</u> , 152 Wn. App. 610, 217 P.3d 377 (2009).....	3
<u>State v. Traweek</u> , 43 Wn. App. 99, 715 P.2d 1148 (1986), <u>rev. denied</u> , 106 Wn.2d 1007 (1986), <u>overruled on other</u> <u>grounds by State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	6, 7, 9
<u>State v. Venegas</u> , 155 Wn. App. 507, 228 P.3d 813 (2010), <u>rev. denied</u> , 170 Wn.2d 1003, 245 P.3d 226 (2010).....	2, 5, 6, 15, 25

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011).....5, 7, 14  
State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006).....7,8  
State v. Witherspoon, 82 Wn. App. 634, 919 P.2d 99 (1996).....22

**United States Supreme Court Cases**

United States v. Martinez-Salazar, 528 U.S. 304,  
120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).....19, 20

**Court Rules**

ER 404(b).....23

## A. ARGUMENT

In this case, absent any physical evidence, the State's case rested on the credibility of two witnesses. The first, alleged victim Margaret Gomez, testified that Gilberto Martinez-Vazquez had contacted her three separate times on May 12, 2010—once by approaching her in the parking lot in the early evening, between 5 and 7 p.m.; next by knocking at her door, again between 5 and 7 p.m.; and finally by possibly throwing something at her window, when it was dark outside. 3RP 53–55.

On direct examination, Ms. Gomez testified that there was a five-hour separation from the first incident to the last. 3RP 57. Minutes later, on cross-examination, she testified that all of the incidents occurred between 5 and 8 or 8:30 p.m. 3RP 61. Two days before the trial, Ms. Gomez stated in an interview that she had no contact whatsoever with Mr. Martinez-Vazquez until after 8 p.m. on May 12. 3RP 72–73. Defense counsel presented audio impeachment to the jury in which Ms. Gomez stated, “No, I didn’t see him that day, that afternoon or anything.” 3RP 73. The only other witness, responding officer Anna Green, testified based on her 25-minute conversation with Ms. Gomez. See 3RP 20–32.

In light of this scant evidence, a prosecutor's misconduct is heavily scrutinized for prejudice. See, e.g., State v. Venegas, 155 Wn. App. 507, 526–27, 228 P.3d 813 (2010), rev. denied, 170 Wn.2d 1003, 245 P.3d 226 (2010). Here, the prosecutor argued twice in closing that “There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez on May 12th.” 4RP 19. He also elicited improper testimony from Officer Green indicating that the jury should not expect more evidence in a violation of a court order case. 3RP 15–19; see State v. Evans, 163 Wn. App. 635, 644–45, 260 P.3d 934 (2011). Finally, the prosecutor stated, “[Defense] [c]ounsel talks a lot about the 8:00 p.m. contact . . . They already admitted themselves there was 8:00 p.m. contact. There was 8:00 p.m. contact.” 4RP 26. Each of these instances drew objections from defense counsel; none was sustained. 3RP 16–18; 4RP 19, 26.

Watching this unfold were three jurors who expressed during *voir dire* that they believed that, given evidence that a defendant had violated a no-contact order twice before, they would have difficulty believing that he would not do it again. 1RP 49–55. The judge denied defense counsel's challenges of these jurors for cause. 1RP 94.

The jury convicted Mr. Martinez-Vazquez. CP 236. But there can be no question that a biased jury and prosecutorial misconduct directly contributed to the verdict in this case. Mr. Martinez-Vazquez's trial was unfair, and he is entitled to a new trial. See, e.g., State v. Murphy, 9 Wash 204, 217, 37 P. 420 (1894) (finding *per se* reversible error when court overrules challenge of juror for established bias); Evans, 163 Wn. App. 648.

1. WASHINGTON CASELAW, INCLUDING THE AUTHORITY CITED BY RESPONDENT, SHOWS THAT THE PROSECUTOR IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO MR. MARTINEZ-VAZQUEZ

In the Opening Brief, Appellant argued that the prosecutor shifted and diluted the burden of proof, and also commented on Mr. Martinez-Vazquez's right to remain silent. AOB 22–24.

Respondent conflates these two arguments, using caselaw on the right to remain silent to contend that the prosecutor's comments were neither commentary on this constitutional right *nor* burden shifting. SRB 13–14. While the occasional case addresses the two issues together, the majority of cases indicate that the two infractions must be reviewed under different analyses. E.g., State v. Hartzell, 156 Wn. App. 918, 942–43, 237 P.3d 928 (2010) (analyzing claim of burden shifting against a missing witness

argument); State v. Toth, 152 Wn. App. 610, 614–15, 217 P.3d 377 (2009) (argument that the defendant had not provided any evidence to corroborate his testimony was burden shifting); compare State v. Fiallo-Lopez, 78 Wn. App. 717, 728–29, 899 P.2d 1294 (1995) (argument that “there was absolutely no evidence to explain why Fiallo-Lopez was present at [the scenes]” was both burden shifting and an impermissible comment on the defendant’s right to remain silent) (alteration added and internal quotation marks omitted).

This separation between tests for a comment on the right to silence and improper burden shifting more accurately reflects the two doctrines, which are grounded in separate constitutional rights.

a. The “no shred of evidence” comments were not in the permissible realm of response to an explicit defense theory of the case; instead, they implied that Mr. Martinez-Vazquez was obligated to present evidence of his innocence. The burden-shifting prohibition is rooted in the constitutional due process requirement that the State prove every element of a crime beyond a reasonable doubt. See State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). Any implication that lowers that standard or that shifts the burden to the defendant is improper; it infringes on “the presumption of innocence[,] the bedrock upon which the criminal

justice system stands.” Id.; see Evans, 163 Wn. App. at 643–44 (“[T]he prosecutor’s comment invited the jury to disregard the presumption [of innocence] once it began deliberating, a concept that seriously dilutes the State’s burden of proof.”).

In the caselaw, there are two manners of improperly misstating the burden of proof. The first occurs when a prosecutor simply misrepresents the proper standard, without overt reference to the defendant’s case (or lack thereof). For example, in Warren, the Supreme Court explained that the following argument was “clearly improper”: “But reasonable doubt does not mean beyond all doubt and it doesn’t mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.” 165 Wn.2d at 25. In Venegas, this Court held that the prosecutor’s argument that the presumption of innocence erodes with every bit of evidence of the defendant’s guilt was flagrant misconduct. 155 Wn. App. at 525.

Another method of misstating the burden of proof is implying that a defendant has an obligation to present exculpatory evidence. Examples of this include the improper “fill-in-the-blank” argument: prosecutors in several recent trial cases have argued that in order to find the defendant not guilty, the jury had to “fill in the blank” with a reason. See, e.g., State v. Walker, 164 Wn. App. 724, 265 P.3d

191, 195–96 (2011); State v. Johnson, 158 Wn. App. 677, 684–85, 243 P.3d 936 (2010), rev. denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011); Venegas, 155 Wn. App. at 523. This Court explained that the fill-in-the-blank argument was improper because it implied that “the defendant bore the burden of providing a reason for the jury not to convict him.” Johnson, 158 Wn. App. at 684.

Along the same lines, it is also improper burden shifting for a prosecutor to argue that the defendant presented no evidence whatsoever. See State v. Traweck, 43 Wn. App. 99, 106–07, 715 P.2d 1148 (1986), rev. denied, 106 Wn.2d 1007 (1986), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). For example, in Traweck, the prosecutor argued:

Mr. Traweck doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hadn't it be [sic] presented if there are explanations, which there aren't?"

Id. at 106. Explaining that this type of argument was not permitted, this Court wrote: “[A] defendant has no duty to present any evidence . . . The prosecutor’s statement suggested that the defendant was obliged to call witnesses and thus to prove his innocence. There was no such a duty.” Id. at 107.

The prosecutor's comments in this case were no different. By arguing twice that there was "[n]ot one shred of evidence to show that the defendant did not have contact with Ms. Gomez," the prosecutor directly implied that Mr. Martinez-Vazquez had an affirmative obligation to provide evidence of his innocence. 4RP 19. Like the fill-in-the-blank arguments and the argument in Traweek, these comments are not permitted. E.g., Walker, 164 Wn. App. at 195–96; Traweek, 43 Wn. App. at 107.

It is important to briefly note that the "no shred of evidence" comments do not fall within the narrow category of permissible commentary on a defense case. When a defendant does present evidence supporting his theory of innocence, it is proper to question that evidence and to tell the jury that that evidence is inadequate or wanting. E.g., State v. Jackson, 150 Wn. App. 877, 885–86, 209 P.3d 553 (2009); State v. Whitaker, 133 Wn. App. 199, 235–36, 135 P.3d 923 (2006). For instance, in Jackson, the prosecutor stated that there was no evidence to corroborate the testimony of the defense's witness, and then further attacked her credibility; in Whitaker, the prosecutor noted that the defendant's testimony was contradicted. Jackson, 150 Wn. App. at 885; Whitaker, 133 Wn. App. at 235. In both cases the court held that the comments were

not improper. Jackson, 150 Wn. App. at 885–86; Whitaker, 133 Wn. App. at 235–36. As this Court wrote in State v. Contreras, “When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.” 57 Wn. App. 471, 476, 788 P.2d 1114 (1990), rev. denied, 115 Wn.2d 1014, 797 P.2d 514 (1990); see also State v. Babiker, 126 Wn. App. 664, 668–69, 110 P.3d 770 (2005) (proper to argue about lack of evidence to corroborate alternative theory offered by defendant); State v. Barrow, 60 Wn. App. 869, 871–83, 809 P.2d 209 (1991) (allowing argument about absence of a witness who defendant had testified could support his story).<sup>1</sup>

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<sup>1</sup> Respondent attempts to distinguish State v. Fleming and State v. Cleveland, both cases offered in Appellant’s Opening Brief as examples of burden shifting, by stating that in those cases “the prosecutor directly criticized the defendant for failing to present any evidence.” SRB 14 n. 3. But that distinction is not recognized in the caselaw, and Respondent does not offer any explanation of why it would be meaningful. See id. In fact, the Barrow court cited Cleveland to highlight the actual distinction between proper commentary and improper burden shifting: whether or not the prosecutor was directly responding to a defense theory of the case; in Cleveland, he was not. See Barrow, 60 Wn. App. at 872. Furthermore, the only party who would have offered evidence that Mr. Martinez-Vazquez did not contact Ms. Gomez was Mr. Martinez-Vazquez; the prosecutor’s “no shred of evidence” remark directly criticized his failure to present exculpatory evidence.

But that is not the case here. Mr. Martinez-Vazquez did not present any witnesses. See 3RP 5–82. In argument, the defense counsel did not provide a theory as to where Mr. Martinez-Vazquez had been on May 12; he instead argued that the State had not met its burden of proof to show that beyond a reasonable doubt, Mr. Martinez-Vazquez had been at Ms. Gomez's apartment. 4RP 21–25. The proper rebuttal, then, was to point to the evidence that the State did have: the testimony (albeit inconsistent) of one witness. Instead, the prosecutor “went beyond what was necessary” and implied that the defense should have presented a case. State v. Dixon, 150 Wn. App. 46, 56–57, 207 P.3d 459 (2009). The prosecutor’s “no shred of evidence” comments were not, and could not, be in response to a defense theory of the case. Instead, they instructed the jury that Mr. Martinez-Vazquez needed to show them that he was not at Ms. Gomez’s apartment. “It is not proper for the State to comment on a failure of the defense to do what it has no duty to do.” Traweek, 43 Wn. App. at 107.

b. The prosecutor further infringed on the presumption of innocence by implying that the jury should not expect better evidence and by stating that the defense counsel “admitted” that Mr. Martinez-Vazquez had contacted Ms. Gomez. As Respondent accurately notes, the prejudicial effect of a prosecutor’s improper comments are not examined in isolation but rather in the context of the broader argument, the evidence, and the instructions given to the jury. SRB 11 (citing State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). In this case the prosecutor’s improper comments were not ameliorated by the broader context, but rather were compounded by his attempts throughout the case to lower the State’s burden of proof.<sup>2</sup>

During direct examination of Officer Green, the prosecutor questioned her about investigations of no-contact order violations, asking “[H]ow many times did you show up on the scene with the suspect present?” 3RP 16. He then asked, “[Y]ou just take a

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<sup>2</sup> In support of the argument that the prosecutor did not engage in burden shifting, Respondent asserts: “the prosecutor repeatedly and accurately reminded the jury of the burden of proof . . . A review of the entire record belies the notion that the prosecutor sought to undermine or shift the burden of proof.” SRB 14. Courts look to context to determine prejudice, not impropriety. See, e.g., McKenzie, 157 Wn.2d at 57. Thus isolated comments may be improper but not merit reversal due to their context, or vice versa; an improper comment will not be deemed proper merely because the prosecutor made proper comments elsewhere in the trial. See, e.g., State v. Fleming, 83 Wn. App. 209, 216, 921

statement from an aggrieved party at that point? . . . Is there any other evidence that you usually gather . . . ?” 3RP 17. Defense counsel objected: “I think what the State’s getting at is the lack of evidence is not—that the jury should excuse the State if there’s lack of evidence.” 3RP 18. The judge stated, “If that’s what you’re saying then I would sustain the objection.” Id. The prosecutor responded, “I’m just generally speaking right now about how. . . .” Id. The judge stated, “Right, so you’re just trying to educate the jury as to how these types of cases are typically investigated?” The prosecutor responded “Absolutely.” Id. He then went on to ask, “So no forensic evidence, no DNA, nothing like that taken?” 3RP 19. Ms. Green replied, “No.” Id.<sup>3</sup>

Respondent asserts that this solicitation was appropriate, stating, “the appellate courts have recognized that similar background testimony from police officers may be admitted. Here, the testimony provided relevant background [information].” SRB 12. In support of this contention, Respondent cites State v. Avendano-

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P.2d 1076 (1996).

<sup>3</sup> Appellant argued that the solicitation of this testimony was misconduct. AOB 15–16. In addition, contrary to Respondent’s assertion that there was no assignment of error to the trial court’s evidentiary ruling, Appellant assigned error to the trial court’s overruling of defense counsel’s objections to improper conduct by the prosecutor. AOB 1; SRB 12.

Lopez, 79 Wn. App. 706, 709–11, 904 P.2d 324 (1995) and State v. Cruz, 77 Wn. App. 811, 815, 894 P.2d 573 (1995). Both of those cases involved trafficking in heroin. In those cases, background information about drug dealing—about the manner in which drugs were typically transferred and the appearance of the drugs—was critical in assisting the jury understand the testimony of the arresting officers, who otherwise would have been recounting seemingly nonsensical actions that they had witnessed by the defendants. See Avendano-Lopez, 79 Wn. App. at 709–11; Cruz, 77 Wn. App. at 812–14. In Avendano-Lopez, for example, officers testified that the defendant had removed something from his mouth and given it to an accomplice; permissible background testimony in that case included the fact that drug dealers often keep drugs in their mouths. 79 Wn. App. at 709–11. In Cruz, the defendant was observed pulling a brown bag out of a plant in a public area and handing it off to another person; background testimony was allowed that included explanations of why drug transactions typically take place in public places, and the reason that drugs are often hidden outside. 77 Wn. App. at 812–14.

Here, the fact that no forensic or DNA evidence is typically gathered in VNCO cases—a fact elicited by the prosecutor after

being warned by the court that eliciting testimony to excuse the lack of State's evidence would not be allowed—is not a fact that would help the jury understand the evidence in the case. It would, however, encourage a juror to be satisfied with what little evidence the State presented; it would give a juror some piece of mind that the evidence here (no suspect at the scene, no physical evidence) would be sufficient in other VNCO cases, so it should be enough in this case. See AOB 15–16. This is not proper. See Evans, 163 Wn. App. at 645.

Respondent next states, “Contrary to Martinez-Vazquez’s claim that this testimony amounted to burden shifting, the prosecutor never argued or suggested that the jurors should excuse any deficiencies in the police investigation.” SRB12. The argument seems to be that a prosecutor may not commit misconduct solely by eliciting improper testimony. See id. This is not the law. Examination alone may be misconduct if it is designed to elicit inadmissible or improper testimony. See, e.g., State v. Copeland, 130 Wn.2d 244, 285, 922 P.2d 1304 (1996); State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991).

Finally, in addition to eliciting testimony to encourage the jurors to forgive the State’s lack of evidence and implying that Mr.

Martinez-Vazquez had a duty to present exculpatory evidence, the prosecutor in this case told the jury, “[The defense attorneys] admitted themselves there was 8:00 p.m. contact. There’s 8:00 p.m. contact.” 4RP 26. Respondent concedes that this statement was inaccurate. SRB 15. But then Respondent goes on to assert, “A prosecutor’s misstatement of the law or facts does not automatically justify reversal of a conviction . . . Martinez-Vazquez must show that there is a substantial likelihood that this single comment affected the jury’s verdict.” *Id.* That is not the argument here. Several instances of improper conduct, considered cumulatively, may justify reversal. *E.g., State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); *Walker*, 265 P.3d at 199.

Respondent’s treatment of the remark is also problematic. The assertion that the statement was “simply an inaccurate characterization of the defense closing argument” appears to cast off the assertion as an innocent error. SRB 15. To be clear: Mr. Martinez-Vazquez could be convicted if the jury found that just one of the State’s three alleged contacts took place. CP 27. The prosecutor told the jury that defense counsel “admitted” to the 8:00

p.m. contact. 4RP 26.<sup>4</sup>

This is more than merely a misstatement of the facts. It is more than an “inaccurate characterization.” SRB 15. It is not a characterization at all. It is nothing short of telling the jury that the defendant had admitted the entire case. And as noted in Appellant’s Opening Brief, the trial court’s response to the defense objection—that the “jury would have to use their collective memory about what the evidence was during the trial”—invited the jury to consider that the prosecutor’s fabrication could have been true. AOB 21; 4RP 27. No prosecutor could have believed honestly that defense counsel had admitted their entire case in open court. To tell the jury that this was so was flagrantly misleading. Once again, the prosecutor lowered the burden of proof for the State, making it easier for the jury to convict Mr. Martinez-Vazquez.

The prosecutor in Mr. Martinez-Vazquez’s case seriously diluted and shifted the burden of proof throughout the trial. See Evans, 163 Wn. App. at 644. This misconduct was highly prejudicial, and this Court should reverse Mr. Martinez-Vazquez’s conviction. Id. at 647–48; Venegas, 155 Wn. App. at 507.

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<sup>4</sup> After defense counsel’s objection, the prosecutor went on to argue: “Just got to pick the time and the date—well, the date we know is the 12th. Just

2. BY DIRECTLY IMPLYING THAT MR. MARTINEZ-VAZQUEZ SHOULD HAVE TAKEN THE STAND TO PROVE HIS INNOCENCE, THE PROSECUTOR IMPERMISSIBLY COMMENTED ON MR. MARTINEZ-VAZQUEZ'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.

Appellant has also argued that the prosecutor's "no shred of evidence" remarks were an improper comment on Mr. Martinez-Vazquez's right to remain silent. AOB 22–24. Respondent asserts, "A prosecutor may state that certain testimony is undenied or may comment that evidence is undisputed without reference to who could have denied it . . . [A] prosecuting attorney may comment on a lack of defense evidence so long as the prosecuting attorney does not directly refer to the defendant's decision not to testify." SRB13 (citing State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995), State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006), and State v. Morris, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009)).

The critical part of this rule is that a prosecutor must not refer explicitly to who should have testified, and particularly cannot refer directly to the defendant's declining to testify. This is highlighted by the following statement in Brett: "Prosecutors may also comment on

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got to pick a time. 8:00 p.m." 4RP 27.

the defendant's failure to present evidence on a particular issue if persons other than the accused could have testified as to that issue.” 126 Wn.2d at 176 (citing State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969)). In Brett, the prosecutor told the jury that there was no evidence to support the defense theories that a gun had accidentally fired and that the defendant used a needle to inject himself with insulin, and not as part of a plan to kill. Brett, 126 Wn.2d at 177. The Court specifically stated that there were at least two other witnesses—other than the defendant—who could have offered corroborating testimony for these theories. Id. at 177–78. Thus, the Court held that the prosecutor’s argument was not improper commentary on Brett’s right to remain silent. Id.<sup>5</sup>

This case is much closer to Fiallo-Lopez. In that case, the Court held that the prosecutor impermissibly commented on a defendant’s right to remain silent by arguing that the defendant had not offered any evidence to explain his presence at crime scenes. 78 Wn. App. at 728. The Court explained that a prosecutor must not “make a statement of such character that the jury would

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<sup>5</sup> Neither Morris nor Borboa offer enough relevant facts to analyze their rulings on comments on the right to silence. The Borboa opinion does not contain the prosecutor’s exact words; Morris does not indicate if the defense advanced a theory of the case or put on other witnesses. See 150 Wn. App. at 931; 157

naturally and necessarily accept it as a comment on the defendant's failure to testify." Id. (quoting State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987)) (internal quotation marks omitted). The Court went on: "Despite the prosecutor's passing reference to the fact that the defense had no burden to explain Fiallo-Lopez's actions, the State's argument highlighted the defendant's silence. In this case, no one other than Fiallo-Lopez himself could have offered the explanation that the State demanded." Fiallo-Lopez, 78 Wn. App. at 729.

Such is the case here: by stating that there was not "one shred of evidence to show that the defendant did not have contact with Ms. Gomez" that night, the State directly implicated Mr. Martinez-Vazquez's right to silence because no one else could have stated that Mr. Martinez-Vazquez did not have any of the three alleged contacts with Ms. Gomez. See 4RP 19–20 (accusing Mr. Martinez-Vazquez of three separate instances of contact on May 12). Mr. Martinez-Vazquez was the only person who could have "offered the explanation that the State demanded." Fiallo-Lopez, 78 Wn. App. at 729. This was an impermissible comment on

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Wn.2d at 123.

Mr. Martinez-Vazquez's decision not to testify, and was not harmless beyond a reasonable doubt. Id.; AOB 23–24.

3. MR. MARTINEZ-VAZQUEZ DID NOT WAIVE HIS VALID CHALLENGE TO THE DENIAL OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY

Both Appellant and Respondent agree that longstanding Washington precedent precluded appealing a denied challenge for cause when trial counsel failed to exhaust peremptory strikes. AOB 25; SRB 21–22. The parties disagree over the effect of State v. Fire on this rule. 145 Wn.2d 152, 34 P.3d 1218 (2001); AOB 26–27; SRB 22–23. Fire post-dated State v. Clark, the last Supreme Court case to squarely address the issue, and which case Respondent cited for the contention that Washington law still forbids challenging biased jurors on appeal when peremptories were not exhausted at trial. 143 Wn.2d 731, 24 P.3d 1006 (2001); SRB 21–22.

Respondent is correct that the Fire Court's holding did not address the failure to exhaust peremptories. 145 Wn.2d at 165; SRB 22. But elsewhere in the opinion the Court did indicate that it was permissible to withhold a peremptory strike from a juror challenged for cause and still to raise the issue on appeal:

If a defendant believes that a juror should have been excused for cause and the trial court refused

his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

Fire, 145 Wn.2d at 158. In enunciating the rule, the Fire Court cited directly to United States v. Martinez-Salazar, whose reasoning and holding the Fire Court used to expressly overturn previous Washington precedent. Fire, 145 Wn.2d at 158 (citing United States v. Martinez-Salazar, 528 U.S. 304, 315, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (“After objecting to the District Court’s denial of his for-cause challenge, Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal.”)).

Respondent argues that the language in Fire was in *dicta*, and therefore earlier precedent should not be overruled “*sub silentio*.” SRB 23. But the Court clearly enunciated the rule, citing to a case in which the rule was clearly enunciated by the United States Supreme Court. Fire, 145 Wn.2d at 158 (citing Martinez-Salazar, 528 U.S. at 315). Thus the law is not changing “*sub silentio*.”

There is simply no difference between choosing not to use a peremptory on a biased juror and using it elsewhere, and choosing

not to use a peremptory challenge altogether. See AOB 27. After Fire, two Court of Appeals opinions have recognized the Fire rule as applying to the latter scenario. In State v. David, this Court wrote:

[T]he State argues that because David failed to use all of his peremptory challenges, he waived his right to challenge the impartiality of the jury . . . Our Supreme Court rejected that argument in State v. Fire: [I]f a defendant believes that a juror should have been excused for cause . . . he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal . . .

Thus, a defendant need not use all of his peremptory challenges before he can show prejudice arising from the selection and retention of a particular juror. In fact, the opposite is true, if a defendant exhausts his peremptory challenges to remove a juror . . . the defendant cannot then argue on appeal that he was prejudiced by the denial of the for-cause challenge, because the juror was not seated.

118 Wn. App. 61, 68, 74 P.3d 686 (2003) (opinion withdrawn in part and modified on other grounds by State v. David, 130 Wn. App. 232, 122 P.3d 764 (2005)) (internal citations omitted). In addition, as noted in Appellant's Opening Brief, this Court has reviewed a denial of a challenge for cause after stating that defense counsel had failed to use one of his peremptory strikes. State v. Gonzalez, 111 Wn. App. 276, 280, 45 P.3d 205 (2002), rev. denied, 148 Wn.2d 1012 (2003); AOB 26. The Gonzalez Court also cited the

Fire rule allowing an appellate challenge to a biased juror in spite of counsel's not using a peremptory strike on that juror.

4. THE JURORS SEATED ON THE PANEL  
DEMONSTRATED ACTUAL BIAS,  
GOING TO THE HEART OF THE ISSUES  
IN THE CASE.

Jurors 3, 16, and 24 expressed actual bias with regard to Mr. Martinez-Vazquez's two previous convictions. AOB 29–30. Asked whether they would believe that it was more likely that Mr. Martinez-Vazquez had committed this violation since he had two previous convictions for violating court orders, Juror 3 stated, "Yeah, my gut instinct is that if you do it twice you're more likely to do it a third time." 1RP 53. Asked if he would change his mind if told that it was wrong to feel this way, he stated, "No, but if you showed me evidence to the contrary." 1RP 54. Jurors 24 and 16 expressed that they felt the same way. 1RP 54–55.

As Appellant explains in the Opening Brief, these statements are akin to those held to demonstrate actual bias in Gonzalez, Fire, and State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996); AOB 28–30. Inability to maintain the presumption of innocence when confronted with recidivism was precisely the issue in the case: the jury was exposed to evidence of Mr. Martinez-

Vazquez's prior convictions throughout. 2RP 30; 1RP 14, 49–57. Jurors 3, 16, and 24 stated that with that evidence, they would believe that it was more likely that Mr. Martinez-Vazquez was guilty. 1RP 53–55. This is actual bias, and the jurors' presence on the panel violated Mr. Martinez-Vazquez's 6th Amendment right to an impartial jury. AOB 29–30; see Witherspoon, 82 Wn. App. at 638.

Appellant argued that the meager attempts at rehabilitating the biased jurors were inadequate. AOB 30–31. Respondent makes no attempt to respond to this point. Instead, and while citing no caselaw, Respondent states:

A non-lawyer . . . could reasonably believe that evidence of prior similar behavior is relevant. There is an entire body of law surrounding ER 404(b) allowing such evidence under certain circumstances. The legislature recently enacted . . . RCW 10.58.090, based upon the theory that a person's commission of a prior sex offense is relevant when he is charged with a new sex offense.

SRB 25–26.

There are considerable flaws in this reasoning. The greatest is the implication that it was appropriate for jurors to feel that prior bad acts led to a propensity to commit another bad act. That is exactly the opposite of the law. ER 404(b) is a limiting rule, not an enabling one. It permits evidence of prior bad acts in extremely limited circumstances. None of those circumstances were present

here. Mr. Martinez-Vazquez's convictions were admitted only to prove an element of the crime. 2RP 30; 2RP 19–20; CP 26. They were not and could not be admitted to show Mr. Martinez-Vazquez's propensity to re-offend; yet this is precisely what Jurors 3, 16, and 24 took them for. 1RP 53–55; see ER 404(b).

Second, after Respondent's brief was filed, the Supreme Court ruled that RCW 10.58.090 was unconstitutional because it violated the separation of powers doctrine by attempting to abrogate ER 404(b)'s preclusion on propensity evidence. State v. Gresham, \_\_\_ P.3d \_\_\_, 2012 WL 19664 at \*9–11. (Jan. 5, 2012). In short, the Supreme Court condemned the statute for precisely the reason that Respondent extols it. Jurors 3, 16, and 24 expressed an inability to presume Mr. Martinez-Vazquez innocent due to his prior convictions. 1RP 53–55. They should have been struck for cause.

5. MR. MARTINEZ-VAZQUEZ WAS DENIED  
A FAIR TRIAL, AND HIS CONVICTION  
MUST BE REVERSED.

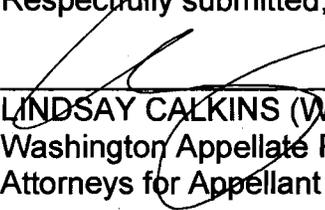
Mr. Martinez-Vazquez was convicted by a panel that included three biased jurors. Supra Part A.4. He was convicted after the prosecutor impermissibly commented on his right to remain silent and repeatedly diluted and shifted the burden of proof. Supra Part A.1–A.2. He is entitled to a new trial due to the prejudicial effect of each infraction, and to the cumulative prejudicial effect of the errors. See Venegas, 155 Wn. App. at 526–27.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in his Opening Brief, Mr. Martinez-Vazquez respectfully requests that this Court reverse his conviction for felony violation of a court order.

DATED this <sup>GM</sup> 0  day of FEBRUARY, 2012.

Respectfully submitted,

  
LINDSAY CALKINS (WSBA No. 44127)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67016-6-I
v.	)	
	)	
GILBERTO MARTINEZ-VAZQUEZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **REPLY 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] BRIAN MCDONALD, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GILBERTO MARTINEZ-VAZQUEZ 811463 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON  
2012 FEB -8 PM 4:29**

**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2012.

X \_\_\_\_\_  
*[Signature]*

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