

NO. 67016-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GILBERTO MARTINEZ-VAZQUEZ

Appellant.

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COURT OF APPEALS
DIVISION ONE
CLERK

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING CO.

The Honorable Mariane Spearman

APPELLANT'S OPENING BRIEF

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Rule 9

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed reversible misconduct during trial by shifting the burden of proof onto Mr. Martinez-Vazquez.

2. The prosecutor committed reversible error by commenting on Mr. Martinez-Vazquez's constitutional right to remain silent.

3. The trial court erred by overruling or ignoring defense counsel's objections to the prosecutor's improper comments.

4. The trial court erred by denying defense counsel's for-cause challenges to Jurors 3, 16, and 24.

5. The trial court denied Mr. Martinez-Vazquez's constitutional right to an impartial jury by seating Jurors 3, 16, and 24 on the panel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. In order to show prosecutorial misconduct, a defendant who has preserved the issue through objection must demonstrate that there was improper commentary and that the improper comments were prejudicial. In this case, the prosecutor elicited testimony to support the contention that the State did not need to present very much evidence; stated during closing argument that Mr. Martinez-Vazquez had not shown any evidence of his innocence; and falsely stated that defense counsel had admitted

that Mr. Martinez-Vazquez had contacted the alleged victim, Ms. Gomez. Were the prosecutor's comments improper?

2. Improper comments are prejudicial when there is a "substantial likelihood" that they affected the jury. Here, there was weak evidence to support the jury's finding of guilt. The only evidence presented was the testimony of Ms. Gomez, who was impeached on the stand, and the testimony of the investigating officer who took Ms. Gomez's statement and did not present any independent evidence. Were the prosecutor's comments prejudicial?

3. It is a violation of a defendant's Fifth Amendment right to remain silent for the government to comment on his exercise of that right, or to encourage the jury to use a defendant's silence against him. Here, the prosecutor argued that the jury should find the defendant guilty in part because there was no defense evidence that he had not committed the crime. Did the prosecutor commit reversible error?

4. The Sixth Amendment to the United States Constitution and Article 1, § 22 of the Washington Constitution guarantee a defendant the right to a fair and impartial jury. When a juror expresses actual bias during voir dire, the trial court must excuse

the juror. Here, defense counsel challenged for cause Jurors 3, 16, and 24 because they had expressed an inability to maintain the presumption of innocence. Did the trial court err by denying the challenges and seating the jurors on the panel?

C. STATEMENT OF THE CASE

1. Events Leading Up to Trial.

Margaret Ann Gomez lives in Seattle and has taken methadone for five years to treat pain and addiction. 3RP 45–46.¹ She also has prescriptions for Paxil and Tylenol with Codeine No. 4. 3RP 49, 76. Ms. Gomez, who suffers from bipolar disorder, takes the three medications at the same time. 3RP 48, 77.

When Ms. Gomez met Gilberto Martinez-Vazquez for the first time, he asked her out. 3RP 44. They had a romantic relationship together. 3RP 44. By May 2010, the relationship had ended. 3RP 44. Ms. Gomez asked for a temporary protection order against Mr. Martinez-Vazquez on May 10. 3RP 22, 50.

¹ The transcripts in this case are separated into 5 volumes and are paginated individually. They are referred to herein as:

1RP	February 15, 2011 (Voir Dire)
2RP	February 15, 2011
3RP	February 16, 2011
4RP	February 17, 2011
5RP	April 8, 2011

Ms. Gomez testified that on May 12, Mr. Martinez-Vazquez approached her in the parking lot of her building sometime in the early evening and asked if they could talk. 3RP 52. 3RP 50. Ms. Gomez did not call the police at that time. 3RP 60. She testified that within two hours of that incident, Mr. Martinez-Vazquez knocked on her door and asked if they could try to work it out. 3RP 54. Ms. Gomez stated that she then called the police. 3RP 54. She stated specifically that Mr. Martinez-Vazquez did not touch her, and did not harm her. 3RP 56. After she called the police, Ms. Gomez said, she heard a knock at her sixth-floor window and looked out to see Mr. Martinez-Vazquez standing across the street. 3RP 55. Ms. Gomez said that she initially thought the tap at her window was a seagull she had seen there before, but then believed that Mr. Martinez-Vazquez had thrown a rock in order to reach the height of her window. 3RP 56, 62.

Officer Anna Green responded to Ms. Gomez's call and arrived at her apartment around 5:30 p.m. 3RP 28. Green spoke with Ms. Gomez for around 25 minutes. 3RP 26. Both Green and another officer did an "area check" for Mr. Martinez-Vazquez, using the description of him that Ms. Gomez had given, but did not find anyone. 3RP 30–31.

Mr. Martinez-Vazquez was arrested more than three months later, in August of 2010. CP 4. He was charged with Domestic Violence Felony Violation of a Court Order, under RCW 26.50.110(1), (5). CP 1–2.

2. Voir Dire.

During voir dire, the judge read aloud to the venire the Information. 1RP 14. The Information included the allegation that Mr. Martinez-Vazquez “at the time of the violation had at least two prior convictions for violating the provisions of a court order.” 1RP 14.

Defense counsel opened her inquiry with, “Does knowing that [Mr. Martinez had two convictions for violating no contact orders] and knowing that he’s charged now with a felony violation of a no contact order does that give you some concern? Does that make you think that, ‘Well, he’s been already convicted,’ lead to some conclusion.” 1RP 49 (sic). The jurors began to respond, many in the affirmative. One juror stated that “based on logic, [y]ou know, a guy steals a car twice, he might steal a car a third time. That’s just logic.” 1RP 50. Another juror stated, “the fact that []he did not obey the first two, petitions or whatever, makes me think that he’s more—I believe a more possibility that he will do it again.” 1RP 52.

Defense counsel then asked if it would change their minds if defense counsel or the prosecutor told them that it was wrong to think that way, or that they should not think that way. 1RP 52–53. One juror said, “Probably not. Based on my personal experience, no.” Defense counsel asked if anyone shared the same feelings. Several jurors raised their hands, including Juror No. 3.

Juror 3 stated:

A(3): It depends. First, how do you feel?
You feel like he might have. Yeah, my
gut instinct is that if you do it twice you’re
more likely to do it a third time. Do I believe?
I don’t know if I have a belief.

Q: Ok. Is that how you feel?

A(3): That’s how I feel.

Q: And anything that I—if I say that’s wrong
for you to feel that way, is that going to
change your mind?

A(3): No, but if you showed me evidence
to the contrary.

1RP 53–54. Defense counsel then went on to ask more jurors if they felt the same way. Juror 16 responded, “Yes.” 1RP 54. Juror 24 also responded “Yes.” 1RP 55.

Questioning continued. At 4 p.m., the judge stated to defense counsel:

Ct: [I]t's 4:00. So sorry to rush things along, but we have got to get to the peremptories because we're trying not to keep you here for the rest of the evening.

Def: Your honor, can we have a quick sidebar.

Ct: Trying to avoid that.

Def: Are you adjourning now, Your Honor?

Ct: No. We're going to do peremptories.

Def: Okay. I did want to address some for-cause challenges before we get there.

1RP 86–87. Defense counsel proposed five for-cause challenges, and the court granted three of them. 1RP 87–89. Defense co-counsel then said she had additional for-cause challenges, listing 10 additional jurors, including jurors 3, 16, and 24.² 1RP 90. She stated:

Def: These were jurors that when I asked about the prior convictions and with the defendant being charged with a third conviction, they said they had strong feelings about that.

Ct: That isn't the standard, though, counsel.

Def: But that they would not change their mind just because they were told that it was wrong for them to have these strong feelings

² In the transcription, defense co-counsel's requests do not show juror 24, but rather show juror 4 twice. 1RP 90. The court clarified, "thirty seven and what?" And co-counsel stated, "Twenty four and sixteen." 1RP 91. Both Juror 4 and Juror 24 were subsequently questioned by the judge. 1RP 92, 94.

about his likelihood of committing this third offense because of the two prior convictions. And I would further elaborate at a sidebar, Your Honor.

Ct: We're not going to have a sidebar. Can you read off the numbers again?

1RP 90. Defense counsel did so, and after hearing from the parties, the court instructed the venire that "the standard here is not that he more likely than not committed the third offense. The standard is did the State prove beyond a reasonable doubt that he committed this offense. The State also has to prove that he has committed two prior offenses. Keeping those things in mind . . . would you be able to follow the law regarding presumption of innocence and the burden of proof?" 1RP 91–92.

The judge went down the line, asking each challenged juror two questions: first, whether he could "follow the law," and second, whether there was "any doubt" in his mind. 1RP 92–94. Each juror gave essentially a one-word answer to each question: "yes" to whether they could follow the law, and "no" to whether there was any doubt. 1RP 92–94. Juror 3 responded "yes" and "no." 1RP 92. The court denied the challenge to Juror 3. 1RP 92. Juror 16 answered "yes" and "no." 1RP 93. Juror 24 simply answered "yes." 1RP 94.

The judge stated, “Did we miss anybody? Defense challenges to those jurors for cause are denied.” 1RP 94. Defense counsel used four of their seven peremptories. 1RP 5, 94–97. Jurors 3, 16, and 24 were seated. 1RP 96.

3. The Prosecutor’s Conduct at Trial.

At trial, the only evidence presented was the testimony of the alleged victim, Ms. Gomez, and the testimony of the investigating officer, Anna Green. 3RP 15–31, 43–80. Defense counsel also stipulated to Mr. Martinez-Vazquez’s two previous convictions. 3RP 81. The only evidence of Mr. Martinez’s actual conduct on May 12 was the testimony of Ms. Gomez, which defense counsel impeached with her prior statement that she had only seen Mr. Martinez-Vazquez once that night. See 3RP 71–73.

During the State’s examination of Officer Green, the following exchange occurred:

Q: Approximately how many no-contact order violation cases have you investigated in your 16 years—or 12 years, excuse me, with the force?

A: Oh, quite a few. I don’t have a hard number but I’d say at least over a hundred.

...

Q: Of those a hundred investigations that you investigated for no-contact order violation

how many times did you show up on the scene with the suspect present?

...

A: Investigated a violation where the suspect is still present?

Q: Yeah.

A: Not very many. A slim number . . . Probably, oh, say 10 out of 100. Not very many.

Q: So 10 out of 100 where the suspect is actually there?

A: Yes.

Q: What about the 90 other ones?

A: Generally we show up to take a report from the victim and we're reporting on what the reporting party or the victim is telling us.

...

Q: Is there any other—so you show up to a scene, so 90 percent of the case, and you just take a statement from the aggrieved party at this point?

A: Correct.

Q: Ok. Is there any other evidence that you usually gather or how do you investigate these types of crimes?

A: There is generally not any other evidence for a simple reporting of a violation—

...

Q: Ok. And is that pretty much all you do as a line officer, kind of responding to

those kind of calls when it comes to these kind of cases?

A: That's correct. I don't do any follow-up most of the time.

Q: So no forensic evidence, no DNA, nothing like that taken?

A: No.

3RP 15–19. Defense counsel objected four times during this line of questioning, on the grounds of relevance, prejudice, and improper burden-shifting. 3RP 16–18. The court overruled. 3RP 16–18.

During closing argument, the prosecutor stated, “Any way you look at it there was contact. There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez on May 12th.” 4RP 19. Defense counsel objected. The court stated, “Your objection is noted.” 4RP 19. The prosecutor went on, “There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez any way you look at it.” 4RP 19.

Later in the closing, the State argued, “Counsel talks a lot about the 8:00 p.m. contact, the 8:00 p.m. contact. They already admitted themselves there was 8:00 p.m. contact. There's 8:00 p.m. contact.” 4RP 26. Defense counsel objected to

mischaracterization of their argument. 4RP 26.³ The court stated, “The jury will have to use their collective memory about what the evidence was during trial.” 4RP 27.

A jury found Mr. Martinez-Vazquez guilty on February 17, 2011. CP 236. He was sentenced to 60 months in prison. CP 237.⁴ Mr. Martinez-Vazquez appeals. CP 245.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED REVERSIBLE ERROR THROUGHOUT THE TRIAL BY SHIFTING THE BURDEN OF PROOF TO MR. MARTINEZ-VAZQUEZ.

A prosecutor’s conduct in the courtroom may deprive a defendant of a fair trial. State v. Evans, ____ P.3d ____, 2011 WL 4036102 at *3 (Div. 2 Sept. 13, 2011). A defendant making such a claim must show both improper comments and that there was actual prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d

³ Defense counsel had argued,
And we know from an interview of Ms. Gomez just a few days ago that she said unequivocally, not once but twice, that she did not have any contact with Mr. Martinez-Vazquez before 8:00 p.m. that day. And it wasn’t that there was any confusion in the questioning. In fact she was specific about it and said that she knew it was after 8:00 p.m. because that was around bedtime.

4RP 22.

⁴ The sentencing in this case was consolidated with another matter for Mr. Martinez-Vazquez, No. 10-1-08976-1 SEA. See 5RP 2. An appeal is pending in the second matter, COA No. 67017-4.

221 (2006). Where there is no objection by defense counsel to improper commentary, the defendant must show that the misconduct was so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction to the jury; with an objection, a defendant need only demonstrate improper commentary and prejudice. See State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); e.g., State v. Allen, 161 Wn. App. 727, 747, 255 P.3d 784 (2011).

In this case, there were three instances of improper commentary: first, the prosecutor's eliciting of testimony from the investigating officer that there was usually minimal evidence in violation of a protection order cases (3RP 15–19); second, the prosecutor's argument during closing that there was not any evidence to prove that Mr. Martinez-Vazquez did not have contact with Ms. Gomez (4RP 19); and third, the prosecutor's statement during closing that defense counsel had admitted that there was contact at 8:00 p.m. (4RP 26). Defense counsel objected to each instance of improper commentary. 3RP 3RP 16–18; 4RP 19; 4RP 26. This conduct shifted the burden of proof from the State to Mr. Martinez, and was highly prejudicial.

a. It is improper for a prosecutor to shift the burden of proof from the State to the defendant. The presumption of innocence is the foundation of the criminal justice system in the United States, and in Washington. State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). To overcome the presumption, the State must prove every element of the charged offense beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 315–16, 165 P.3d 1241 (2007); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

A prosecutor must neither dilute nor shift this heavy burden of proof. State v. Jones, ____ Wn. App. ____, 259 P.3d 351, ¶29 (Div. 2 Aug. 30, 2011). It is a prosecutor's duty to act impartially and to ensure that a defendant receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664–65, 585 P.2d 142 (1978). When a prosecutor, a quasi-judicial officer, misstates or mischaracterizes the burden of proof it deprives the defendant of a fair trial. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). The jury knows that the prosecutor is an officer of the State, and any standard he suggests below the beyond-a-reasonable-doubt standard is error. See id.

i. The prosecutor relieved the State of its burden of proof by implying that the State's lack of evidence could be forgiven. In this case, the prosecutor diluted and shifted the State's burden of proof in three ways. First, the prosecutor elicited testimony from Officer Green that violations of no-contact orders did not typically have a lot of evidence in support. See 3RP 15–19. He asked whether the defendant was typically present, to which the officer responded in the negative, and then asked whether there was normally any DNA or forensic evidence, and the officer replied “No.” 3RP 16, 19. It is improper for a prosecutor to suggest that the jury overlook weaknesses in the State's evidence. Evans, 2011 WL 4036102 at *5. In Evans, for example, the prosecutor instructed the jury not to “wish” for more evidence. Id. at *5. The court explained that the attorney had “miscast the jurors' role as one of determining what happened and not whether the State had met its burden of proof.” Id. at *5. Similarly, in Mr. Martinez-Vazquez's case, the prosecutor converted the jury's role from determining whether there was proof beyond a reasonable doubt, to determining whether there was enough proof in light of the general lack of evidence in the typical VNCO case. This was improper. See State v. Barrow, 60 Wn. App. 869, 875–76 & n. 6, 809 P.2d 209 (1991) (noting that

prosecutor's argument misstating the burden of proof was improper).

ii. The prosecutor told the jury that Mr. Martinez-Vazquez had not presented any evidence. In a criminal case, the defendant has no duty to present evidence. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). It is well-settled in Washington that it is error to "suggest otherwise." State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

For example, in Fleming, the prosecutor argued, "It's true that the burden is on the State. But you would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]. And several things, they never explained." 83 Wn. App. at 214. In State v. Cleveland, the prosecutor argued, "Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you." 58 Wn. App. 634, 647, 794 P.2d 546 (1990). In both cases, this Court stated that the comments were improper. Fleming, 83 Wn. App. at 214–15; Cleveland, 58 Wn. App. at 648.

In this case, the prosecutor stated in closing argument that there was not “one shred of evidence to show that the defendant did not have contact with Ms. Gomez on May 12,” and that “There [was] not one shred of evidence to show that the defendant did not have contact with Ms. Gomez any way you look at it.” 4RP 19. These assertions, like those in Fleming and Cleveland, impermissibly shifted the burden of proof from the State to Mr. Martinez-Vazquez by stating that he needed to present exculpatory evidence in order to win the case. See State v. Dixon, 150 Wash.App. 46, 58–59, 207 P.3d 459 (2009). This was patently improper. Montgomery, 163 Wn.2d at 597; State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

iii. The prosecutor mischaracterized defense arguments. Finally, during closing argument, the prosecutor stated that the defense attorneys “admitted themselves that there was 8:00 p.m. contact” between Mr. Martinez-Vazquez and Ms. Gomez. 4RP 26. This was a misstatement of the defense’s argument, which was that Ms. Gomez had previously stated that she did not have any contact with Mr. Martinez-Vazquez before 8:00 p.m. 4RP 22. This false characterization was especially harmful because Mr. Martinez-Vazquez could be convicted if the jury agreed

unanimously that Mr. Martinez-Vazquez had committed one of the three contacts that Ms. Gomez alleged. CP 27. By openly stating that the defense had agreed with the witness's testimony, the prosecutor improperly bolstered his case and further lowered his burden of proof. It is improper to argue facts not on the record, and there was no support for the assertion that the defense admitted to the 8:00 p.m. contact. See State v. Belgarde, 110 Wn.2d 504, 516–17, 755 P.2d 174 (1988).

Thus, there were three instances of improper conduct by the prosecutor in Mr. Martinez-Vazquez's case. The first part of the two-part test for reversible misconduct is satisfied. McKenzie, 157 Wn.2d at 52.

b. This misconduct was highly prejudicial. The second question is whether conduct was prejudicial. Id. Comments are prejudicial if there is a "substantial likelihood" that they affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). While there is no clear test for "substantial likelihood," case law reflects that courts are more likely to find prejudice when there was weak evidence—removed from the persuasive commentary—to support the jury's verdict. For example, in Reed, the Washington Supreme Court explained that there was "not overwhelming"

evidence that the defendant had acted with sufficient premeditation to constitute first-degree murder: he had been intoxicated, and testimony supported the theory that he suffered from borderline personality disorder. 102 Wn.2d at 147. Thus, there was a “substantial likelihood” that the prosecutor’s statements about the credibility of the witnesses, calling the defendant a liar, and stating that defense counsel did not have a case had affected the jury’s verdict. Id. at 147–48.

In Evans, the prosecutor told the jury that the presumption of innocence “kind of stops once you start deliberating,” and had told the jury that they should have a specific reason if they had a doubt as to guilt. 2011 WL 4036102 at *4–5. The court stated that the comments were prejudicial because the case against the defendants was not particularly strong; witnesses offered inconsistent testimony and had admitted to using drugs at the time of the incident. Id.; see also State v. Johnson, 158 Wn. App. 677, 686, 243 P.3d 936 (2010), rev. denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011) (explaining that a prosecutor’s instructing the jury to “fill in the blank” with a reason for doubt was prejudicial where conflicting testimony was presented at trial); State v. Venegas, 155 Wn. App. 507, 526–27 & n. 20, 228 P.3d 813 (2010) (finding

prejudicial a “fill in the blank” argument when the case was supported primarily by witness testimony, rather than physical evidence); compare State v. Emery, 161 Wn. App. 172, 195–96, 253 P.3d 413 (2011) (explaining that improper comments were not prejudicial when there was substantial physical evidence, including DNA evidence, underpinning the State’s case); State v. Anderson, 153 Wn. App. 417, 431–32 & n. 8, 220 P.3d 1273 (2009) (rejecting a claim of prejudice for improper “fill in the blank” argument when the “untainted evidence against [the defendant] was overwhelming,” in the form of multiple eyewitnesses and a surveillance video).

Against that standard, the case against Mr. Martinez-Vazquez was extremely weak. It was based only on the testimony of Ms. Gomez, who had admitted to being on multiple prescription medications at the time of the incident, and whose testimony was impeached by defense counsel. See 3RP 45, 48, 62, 71, 73. While the testimony of Officer Green lent additional support, it presented no independent evidence of Mr. Martinez-Vazquez’s violating the no-contact order on May 12. See 3RP 15–31.

In light of this small amount of evidence, there is a “substantial likelihood” that the prosecuting attorney’s improper

comments affected the verdict. See Reed, 102 Wn.2d at 145. First, the prosecutor lowered the State's burden of proof by implying to the jury that there was not typically physical evidence gathered in a violation of a no-contact order case. See 3RP 15–19. Second, the prosecutor implied that the defendant had a burden to present exculpatory evidence. 4RP 19. The judge's response to defense counsel's objection—"your objection is noted"—did not mitigate the error, but rather compounded it, as the State's attorney followed the statement by again asserting that there was no evidence to prove the defendant's innocence. See 4RP 19. Finally, the prosecutor's assertion that defense counsel had conceded to one of the contacts between Mr. Martinez-Vazquez and Ms. Gomez lent additional, unfounded—indeed, false—support to the State's theory of the case. See 4RP 26. Again, the judge's confusing response that the "jury would have to use their collective memory about what the evidence was during the trial," did not correct the prosecutor's misstatement, but rather exacerbated its prejudicial effect by implying that the false statement could have been true—that the jury would have to decide for themselves whether it was or not. See 4RP 27.

The prosecutor's behavior at trial was improper, and there was a substantial likelihood that it affected the jury. Mr. Martinez-Vazquez's conviction must be reversed. See Evans, 2011 WL 4036102 at *6; Venegas, 155 Wn. App. 507, 527.

2. THE PROSECUTOR COMMITTED REVERSIBLE ERROR BY COMMENTING ON MR. MARTINEZ-VAZQUEZ'S RIGHT TO REMAIN SILENT.

a. By arguing that Mr. Martinez-Vazquez had not presented evidence of his innocence, the prosecutor violated Mr. Martinez-Vazquez's Fifth Amendment privilege against self-incrimination and his right to due process under the Fourteenth Amendment. Both the United States and the Washington Constitutions protect the right to remain silent and the privilege against self-incrimination. U.S. Const amend. V.; Const. art. I, § 9. The Fifth Amendment applies to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 3–4, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The Fifth Amendment right to silence prevents the government from commenting on or encouraging the jury to draw a negative inference from its invocation. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); Doyle v. Ohio, 426 U.S. 610, 618, 96 S. Ct. 2240 49 L. Ed. 2d 91 (1976).

In Dixon, the State conceded that the prosecutor improperly commented on a defendant's right to remain silent when he said, "Did [Dixon] make any statement that '[Dixon's passenger] put that in [her] purse'? No. We didn't hear any of that testimony." 150 Wn. App. at 61 (Hunt, J., dissenting and concurring). Likewise, in this case, the prosecutor commented on Mr. Martinez-Vazquez's right to remain silent and privilege against self-incrimination by implying that Mr. Martinez-Vazquez had a duty to present exculpatory evidence. See 4RP 19.

b. The error was not harmless beyond a reasonable doubt. When the State impermissibly comments on a defendant's right to silence, a reviewing court applies the constitutional harmless error standard. Burke, 163 Wash.2d at 222. The error is only harmless if the reviewing court is convinced beyond a reasonable doubt that the jury would have reached the same conclusion absent the improper comment, and where the evidence is so overwhelming that it must lead to a finding of guilt. Id; State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

As explained above, the evidence presented in this case was weak. It was based primarily on the impeached testimony of one witness. See 3RP 43–80. No physical evidence was presented

to corroborate the testimony. See 3RP. 5–80. Given the slight amount of evidence, it is possible that the jury could have reached a different outcome had the prosecutor not commented on Mr. Martinez-Vazquez’s silence. See, e.g., State v. Romero, 113 Wn. App. 779, 794–95, 54 P.3d 1255 (2002) (noting that the State’s evidence was “not overwhelming,” with the verdict turning on the testimony of one witness, and thus declining to find a comment on the defendant’s right to silence harmless beyond a reasonable doubt). A mere possibility of a different verdict is all the test requires. See, e.g., State v. Jones, 168 Wn.2d 713, 724–25, 230 P.3d 576 (2010) (explaining that “a reasonable jury . . . may have been inclined to see the [matter] in a different light.”).

3. MR. MARTINEZ-VAZQUEZ WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL JURY WHEN JURORS 3, 16, AND 24, WHO HAD EXPRESSED THEIR INABILITY TO APPLY THE PRESUMPTION OF INNOCENCE, WERE SEATED ON THE PANEL

a. The Constitution guarantees a fair and impartial jury. Both the Washington Constitution and the United States Constitution guarantee a defendant the right to a fair trial before an impartial jury. Const. art. 1 §§ 3, 21, 22; U.S. Const. amends. 6, 14; State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). As the Washington Supreme Court stated in Davis, “More important than

speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.” 141 Wn.2d at 824–25 (internal quotation marks omitted).

Accordingly, a defendant’s challenge for cause must be challenged where there is a doubt of a juror’s ability to decide the case impartially and free from bias. Morgan v. Illinois, 504 U.S. 717, 723, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). A juror may not sit if she has an opinion or a state of mind that could prevent her from fairly trying the case. RCW 4.44.170, .190; State v. Moser, 37 Wn.2d 911, 916–17, 226 P.2d 867 (1951).

b. The guarantee to a fair and impartial jury exists whether or not defense counsel exhausted their peremptory challenges. Past Washington courts have stated that a defendant cannot claim prejudice from a biased juror if the defendant did not use all of his peremptory challenges. State v. Robinson, 5 Wn.2d 230, 231–32, 450 P.2d 180 (1969); State v. Reid, 40 Wn. App. 319, 322, 698 P.2d 588 (1985). The reason for this rule, though not often articulated, was that a defendant had effectively waived his challenge by not reasserting it through use of a peremptory. See State v. Jahns, 61 Wn. 636, 638, 112 P. 747 (1911).

But serious errors of constitutional magnitude cannot be waived. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). A fair, impartial jury is a fundamental constitutional guarantee. Const. art. 1, § 22; State v. Lormor, 172 Wn.2d 85, 91, 257 P.3d 624 (2011). Perhaps in recognition of this principle, this Court recently reversed a conviction where a biased juror sat on the panel and the defendant had not exhausted his peremptory challenges. State v. Gonzalez, 111 Wn. App. 276, 280, 45 P.3d 205 (2002), rev. denied, 148 Wn.2d 1012 (2003) (“Gonzalez later challenged Juror 11 for cause. The court denied the challenge without comment. Defense counsel then used all but one of his peremptory challenges to remove other potential jurors. Juror 11 was seated on the jury and went on to deliberate.”). The biased juror had expressed a belief that police officers typically told the truth, and had said that he would have trouble applying the presumption of innocence contrary to an officer’s testimony. Id. at 278–79. After noting that the juror had shown actual bias and had not been adequately rehabilitated, the Court stated,

When a defendant is denied his or her constitutional right to a fair and impartial jury, the remedy is reversal. Our Supreme Court . . . recently described a defendant’s options as follows: [I]f 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.

Id. at 282 (citing State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001) and United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)) (alteration in original).

This language addresses the failure to use a peremptory on a challenged juror, not the failure to exhaust peremptories altogether. But the situations are essentially the same: in either case, the defense counsel elected not to use a peremptory on a juror that was challenged for cause. Moreover, the Gonzalez Court used this reasoning to justify reversal where a defendant had not used all of his peremptories. Gonzalez, 111 Wn. App. at 282.

In this case, defense counsel challenged jurors 3, 16, and 24 for cause. 1RP 90. The court denied the challenges. 1RP 92, 94. Afterward, defense counsel did not use peremptories to challenge jurors 3, 16, and 24, and also did not exhaust their peremptory strikes. This was precisely the case in Gonzalez, and Mr. Martinez-Vazquez should not be precluded from challenging on appeal the

inclusion of the jurors, who demonstrated actual bias. 111 Wn. App. at 280.

c. Jurors 3, 16, and 24 showed strong bias and expressed that they were unlikely to respect the presumption of innocence. In order to protect a defendant's right to a fair and impartial jury, a juror must be excused for cause if his views or beliefs would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). Under Washington statute, this means that a juror must be excused for either "actual" or "implied" bias. RCW 4.44.170; Kuhn v. Schnall, 155 Wn. App. 560, 228 P.3d 828 (2010). Actual bias is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2).

In Gonzalez, where the juror had expressed a belief that police officers always tell the truth, the prosecutor asked, "So, in your mind, does [the defendant] still have a presumption of

innocence regardless of the fact that it is an officer that has taken the stand to testify?” 111 Wn. App. at 279. The juror replied, “I don’t know.” Id. The court held that the juror had demonstrated actual bias. Id. at 282. In State v. Witherspoon, a juror stated that he was a “little bit prejudiced” against African Americans who dealt drugs. 82 Wn. App. 634, 637, 919 P.2d 99 (1996). Granting a new trial, the court explained that the bias went to the very heart of the case: the jury was being asked to find whether the defendant, an African-American man, had possessed drugs. Id. at 638. In Fire, a child molestation case, a juror stated that he was “very opinionated” about child sex cases and that convicted defendants in such cases should be “severely punished.” 145 Wn.2d at 155. The court held that the juror had demonstrated actual bias. Id. at 156–57.

This case is like Witherspoon and Fire: the very matter with which the defendant was charged—recidivist Felony Violation of a No Contact Order—was the matter about which Jurors 3, 16, and 24 expressed strong opinions. All three indicated that when confronted with recidivism, they would believe that it was more likely than not that a defendant would commit the same crime again. 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. The defense

attorney asked if she explained that it was wrong to feel that way, whether it would change the juror's mind. 1RP 54. He replied "No, but if you showed me evidence to the contrary." 1RP 54. The defense attorney asked more jurors if they felt the same way. Juror 16 responded, "Yes." 1RP 54. Juror 24 also responded "Yes." 1RP 55. These statements indicate not only that the jurors were not able to maintain the presumption of innocence, but also that they would not be able to follow the instruction that Mr. Martinez-Vazquez's two prior convictions were not evidence of a third violation. Jurors 3, 16, and 24 showed actual bias, and should have been excused for cause.

d. Jurors 3, 16, and 24 were not adequately rehabilitated, and their presence on the panel constituted reversible error. After defense counsel raised challenges for cause against Jurors 3, 16, 24, and others, the trial judge attempted to rehabilitate the jurors. 1RP 91–94. The judge asked each juror whether he could "follow the law" and whether there was "any doubt" in his mind. 1RP 92–94. Jurors 3 and 16 responded simply "yes" and "no." 1RP 92, 93. Juror 24 only stated "yes." 1RP 94.

In Fire, this Court explained that one-word responses to leading questions were insufficient evidence of rehabilitation for

jurors who had demonstrated bias. State v. Fire, 100 Wn. App. 722, 728–29, 998 P.2d 362 (2000), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001). The court stated, “We find nothing in the potential juror’s one-word affirmative responses to the series of rehabilitative questions that indicates he had come to understand that he must lay his preconceived notions aside, in order to serve as a fair and impartial juror.” Id; see also Witherspoon, 82 Wn. App. at 638 (“There were attempts to rehabilitate Juror No. 3, and he ultimately agreed that he would presume Mr. Witherspoon was innocent. That, however, does not go far enough to mitigate a categorical statement by a juror that he is prejudiced against African Americans because of what he has seen and read.”). That is precisely the case here: Jurors 3, 16, and 24 gave no indication other than their one-word responses that they adequately understood the presumption of innocence, or that the fact of two prior convictions was not evidence of a third offense. See 1RP 92–94. The judge’s leading questions were insufficient rehabilitation for the jurors’ demonstrated bias.

When a juror who should have been dismissed for cause is seated on the panel, the conviction must be reversed. Fire, 145 Wn.2d at 158; Martinez-Salazar, 528 U.S. at 316. In this case,

three jurors were seated who should have been struck for cause.

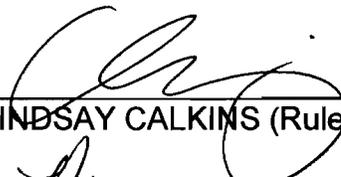
Mr. Martinez-Vazquez's conviction must be reversed.

E. CONCLUSION

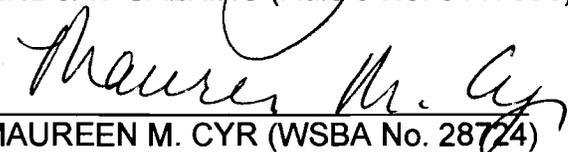
For the foregoing reasons, Mr. Martinez-Vazquez respectfully requests that this Court reverse his conviction for Felony Violation of a Court Order.

DATED this 17th day of October 2011.

Respectfully submitted,



LINDSAY CALKINS (Rule 9 No. 9117856)



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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 GILBERTO MARTINEZ-VAZQUEZ,)
)
 Appellant.)

NO. 67016-6-I

2011 OCT 17 PM 4:59
COURT OF APPEALS - DIVISION ONE
STATE OF WASHINGTON

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF OCTOBER, 2011, 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:

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