

NO. 67017-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GILBERTO MARTINEZ-VAZQUEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD D. EADIE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JEFFREY C. DERNBACH  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. SUBSTANTIVE FACTS .....	2
C. <u>ARGUMENT</u> .....	5
1. MARTINEZ-VAZQUEZ HAS FAILED TO DEMONSTRATE ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT ...	5
a. The Prosecutor Did Not Commit Misconduct.....	6
i. The prosecutor did not comment on Martinez-Vazquez’s right to trial .....	7
ii. The prosecutor did not disparage defense counsel .....	12
iii. The prosecutor did not assert a personal opinion about Martinez- Vazquez's guilt .....	14
iv. The prosecutor did not misstate the role of the jury.....	15
b. Martinez-Vazquez Did Not Object And Any Error Was Harmless.....	17
D. <u>CONCLUSION</u> .....	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Whitten, 610 F.3d 168  
(2<sup>nd</sup> Cir. 2010)..... 9

Washington State:

State v. Anderson, 153 Wn. App. 417,  
220 P.2d 1273 (2009)..... 17

State v. Brown, 132 Wn.2d 529,  
940 P.2d 546 (1997)..... 6

State v. Burke, 163 Wn.2d 204,  
181 P.3d 1 (2008)..... 10

State v. Cheatam, 150 Wn.2d 626,  
81 P.3d 830 (2003)..... 6

State v. Evans, 163 Wn. App. 635,  
260 P.3d 934 (2011)..... 17

State v. Fleming, 83 Wn. App. 209,  
921 P.2d 1076 (1996)..... 17

State v. Kirkman, 159 Wn.2d 918,  
155 P.3d 125 (2007)..... 16

State v. Monday, 171 Wn.2d 667,  
257 P.3d 551 (2011)..... 6, 11, 15

State v. Moreno, 132 Wn. App. 663,  
132 P.3d 1137 (2006)..... 9, 11

State v. Negrete, 72 Wn. App. 62,  
863 P.2d 137 (1993)..... 13

<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	6, 18
<u>State v. Romero</u> , 113 Wn. App. 779, 54 P.3d 1255 (2002).....	12
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	10
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	7
<u>State v. Smith</u> , 67 Wn. App. 838, 841 P.2d 76 (1992).....	6, 18
<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	13
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	13
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214 (1995).....	17

#### Constitutional Provisions

##### Federal:

U.S. Const. amend. V .....	12
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#### Other Authorities

WPIC 4.01.....	4, 7, 16
WPIC 4.21.....	16

**A. ISSUES PRESENTED**

1. Alleged misconduct by the prosecutor is waived if there is no objection unless the comments were flagrant and ill-intentioned. Martinez-Vazquez did not object to the prosecutor's closing argument, has failed to demonstrate any misconduct, and has failed to show a substantial likelihood the remarks incurably affected the verdict. Has the defendant failed to show misconduct that prejudiced Martinez-Vazquez requiring reversal?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Gilberto Martinez-Vazquez, was charged with burglary in the second degree. CP 1. The State alleged that Martinez-Vazquez had been previously trespassed from Nordstrom stores, and he returned to shoplift over one thousand dollars worth of merchandise. CP 1-4. At trial, the State added an additional count of theft in the second degree. 1RP 3.<sup>1</sup>

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<sup>1</sup> The verbatim report of proceedings will be referred to as follows: 1RP (2/7/11), 2RP (2/8/11), 3RP (2/9/11), 4RP (4/8/11), and 5RP (2/8/11) (opening and jury selection).

Martinez-Vazquez proceeded to trial. The State called only two witnesses: the Nordstrom employee who had advised Martinez-Vazquez that he was trespassed from the store, and the employee who witnessed Martinez-Vazquez return and shoplift the merchandise. 2RP 3-20, 21-28. Both events were captured on video, and admitted into evidence. 2RP 11, 24. The defense did not give an opening statement, did not cross examine the witnesses,<sup>2</sup> did not object to the admission of the videos, and presented no witnesses. 2RP 11, 20, 24, 27; 5RP 84.

Martinez-Vazquez was convicted of all charges. CP 8-9. The trial court imposed a standard range sentence. CP 32-39.

## **2. SUBSTANTIVE FACTS**

On March 17, 2010, Emily Powell worked at Nordstrom in Seattle as a loss prevention agent. 2RP 3-4. She testified that when a person is caught shoplifting they are trespassed from the store for two years. 2RP 6. On March 17, she trespassed Martinez-Vazquez from the store for two years. 2RP 7. She took

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<sup>2</sup> The defense asked one question during cross examination:

Defense Counsel: So this video represents everything you saw?

A: Yes.

2RP 27.

Martinez-Vazquez to a detention room in the store with video and audio recording equipment. 2RP 9. She read Martinez-Vazquez a form explaining that he was not permitted to return to the store. 2RP 9. The State admitted the video of Martinez-Vazquez in the detention room being advised by Powell and acknowledging that he understood the trespass warning. 2RP 12. He did not express any confusion about the warning. 2RP 12.

On August 26, 2010, Powell was outside Nordstrom and saw Martinez-Vazquez enter the store. 2RP 13. He looked familiar to Powell so she radioed to another loss prevention agent named Brian Edwards to watch Martinez-Vazquez. 2RP 13. Edwards was manning the security cameras at Nordstrom. 2RP 21. He watched as Martinez-Vazquez entered the store, took an entire stack of jeans and concealed them in a bag, then left the store. 2RP 25-26. He then watched as Martinez-Vazquez was detained by two other loss prevention agents. 2RP 25-26.

Powell recovered seven pairs of jeans from Martinez-Vazquez's bag. 2RP 17. Each pair of jeans cost \$202 for a total of \$1,414 worth of merchandise. 2RP 18-19.

At trial, the jury was properly instructed that "[t]he State is the plaintiff and has the burden of proving each element of each

crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements."

CP 15; WPIC 4.01.

During opening statements, the prosecutor noted that every element of the crime was on video. 5RP 82. She explained there would be two witnesses, and they would see a video of Martinez-Vazquez being advised he could not return to the store, and a video of Martinez-Vazquez returning and stealing the merchandise. 5RP 83-84. The prosecutor told the jury, "This is really just a case of the defendant wanting the State to prove the case and that is what I intend to do for you today." 5RP 84.

During closing arguments, the prosecutor indicated that this was a case where "what you see is what you get," and "basically the facts were extremely simple in this case." 3RP 4-5. The State summarized video evidence and concluded:

So again, undisputed facts, simple law, this is not a complex mental task for you. As I said at the outset, this is a situation of the defendant just wanting to make me do my job. And so that's what I'm asking you to do now. I did my job, and now you do your job. I ask that you find Mr. Martinez guilty of these crimes.

3RP 10. Martinez-Vazquez did not object during opening statements or closing arguments. In closing, Martinez-Vazquez

told the jury "I'm not going to tell you not to believe your eyes. You saw the video; pretty clear what happened." 2RP 11. He did not argue that he did not commit the crimes; rather, he argued that the Nordstrom loss prevention agents should have stopped him before he committed the theft. 3RP 11-12. The jury found Martinez-Vazquez guilty of burglary in the second degree and theft in the second degree. CP 8-9.

**C. ARGUMENT**

**1. MARTINEZ-VAZQUEZ HAS FAILED TO DEMONSTRATE ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT.**

Martinez-Vazquez argues that the prosecutor committed misconduct during closing argument by commenting on his right to trial, expressing a personal opinion about the case, and misstating the jury's role. Rather, the prosecutor simply told the jury that this was a simple case, that there was no real defense, and that they should have no difficulty reaching a verdict. The record does not support his allegations of misconduct. Furthermore, he did not object to any of the remarks at trial and cannot establish that the alleged misconduct was flagrant and ill-intentioned such that no curative instruction would have obviated any error. Martinez-

Vazquez has failed to demonstrate any prosecutorial misconduct that requires reversal.

**a. The Prosecutor Did Not Commit Misconduct.**

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The prosecutor's comments are viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Unless a defendant objected to the allegedly improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). A constitutional harmless error standard applies only if race-based arguments are made. State v. Monday, 171 Wn.2d 667, 257 P.3d

551 (2011). Allegedly improper argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

- i. The prosecutor did not comment on Martinez-Vazquez's right to trial.

Martinez-Vazquez alleges that the prosecutor commented on his right to trial. Martinez-Vazquez is incorrect. The prosecutor did not comment on Martinez-Vazquez's right to trial, nor did she suggest the jury should draw any negative inference from Martinez-Vazquez exercising his rights.

The jury was properly instructed that "[t]he State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements." CP 15; WPIC 4.01. Martinez-Vazquez argues the prosecutor's statement that "[t]his is really just a case of the defendant wanting the State to prove the case and that is what I intend to do for you today," and "[t]his is a situation of the defendant just wanting to make me do my job" was misconduct. 3RP 10; 5RP 84. There is

nothing improper about wanting the prosecutor to do her job. It is completely legitimate for the defense to rest upon the burden of proof. It is equally legitimate for the prosecutor to observe that simple fact. The prosecutor's argument was essentially that the defense had provided no basis to question the testimony of the witnesses or that the elements of the crime had been proven.

In the present case, the defense offered no opening statement and no cross examination of the witnesses. When the prosecutor gave closing argument, the only available defense was to hold the State to its burden. The prosecutor's remarks did not disparage defense counsel or suggest any negative inference should be drawn from Martinez-Vazquez going to trial. The prosecutor did not suggest that Martinez-Vazquez should be punished for exercising his right to trial. The prosecutor was only summarizing and addressing the only apparent defense available to Martinez-Vazquez. The prosecutor noted that she had clearly met her burden. This is not misconduct.

Martinez-Vazquez asserts that it is improper for the State to hold the defendant's right to trial against him. He concedes there is no Washington authority holding such. Brief of Appellant at 8. Regardless, the State would acknowledge that it would be

inappropriate to argue adverse inferences from a defendant's choice to proceed to trial. However, in this case, the prosecutor did not do so. This Court should not hold that referencing the State's burden of proof, or indicating that the defense is to hold the State to its burden, is inappropriate.

Martinez-Vazquez analogizes this case to several cases where the prosecutor improperly commented on other rights. In contrast to the present case, in each case cited by Martinez-Vazquez, the prosecutor directly commented on a constitutional right of the defendant.

In United States v. Whitten, 610 F.3d 168 (2<sup>nd</sup> Cir. 2010), the prosecution sought the death penalty. During the penalty phase, the prosecutor argued that "[the defendant] has an absolute right to go to trial, put the government to its burden of proof, to prove he committed these crimes, but he can't have it both ways. He can't do that, then say I accept responsibility." Id. at 194. The prosecutor directly used the defendant's exercise of the right to trial as evidence against the defendant in the penalty phase of the trial. Id.

In State v. Moreno, 132 Wn. App. 663, 132 P.3d 1137 (2006), the State argued that the defendant in a domestic violence case exercising his right to represent himself, was thereby showing

that he was manipulative and controlling. The prosecutor argued "[t]he defendant is a picture perfect example of a domestic violence abuser. He has got to be in control. He is still trying to call the shots. So much so that he *has exercised his constitutional rights to defend himself, because power is that important to him.*" Id. at 672 (emphasis original).

In State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), the prosecution sought the death penalty and offered evidence that the defendant lawfully owned guns unrelated to the crime during the penalty phase. The State argued that defendant's lawful exercise of his constitutional right meant that he deserved the death penalty, and the State attempted to draw adverse inferences from the defendant's mere possession of these weapons. Id. at 707.

In State v. Burke, 163 Wn.2d 204, 221, 181 P.3d 1 (2008), the defendant invoked his right to silence when questioned by police. The State stressed that when offered the opportunity to speak to an attorney, Burke terminated the interview. Id. at 221. The State invited the jury to consider the invocation of the right to counsel to be evidence of guilt, thereby asking the jury to infer guilt because a right was exercised. Id.

In each of these cases, the prosecution drew direct attention to the defendant's constitutional rights and argued adverse inferences from them. In the present case, the prosecutor did not suggest there was anything improper about Martinez-Vazquez holding the State to its burden. The prosecutor simply argued that that the jury should convict because she had met that burden.

Next, Martinez-Vazquez argues that the Court should apply the constitutional harmless error analysis because the prosecutor touched upon his right to trial. Martinez-Vazquez is incorrect. A constitutional harmless error standard applies to prosecutorial misconduct only if race-based arguments are made. State v. Monday, 171 Wn.2d 667, 680-81, 257 P.3d 551 (2011). Washington courts have recognized that the constitutional harmless error analysis is not required for every comment on a defendant's constitutional right. For example, in Moreno, the court held the State directly commented on the defendant's constitutional right to represent himself, however, the Court did not apply the constitutional harmless error analysis. Moreno, 132 Wn. App. at 673. Instead, the court held there was no substantial likelihood the remark

affected the jury's decision because the State presented overwhelming evidence of Moreno's guilt.<sup>3</sup> Id.

If any error occurred in Martinez-Vazquez's case, it was harmless under any standard. Every aspect of the crime was captured on video and shown to the jury. The evidence against Martinez-Vazquez was irrefutable.

- ii. The prosecutor did not disparage defense counsel.

Martinez-Vazquez also argues that the prosecutor's same remarks disparaged defense counsel. This assertion is not supported by the record. As noted above, the prosecutor did not suggest there was anything inappropriate with holding the State to its burden. There was no negative implication for the defendant or his lawyer.

Martinez-Vazquez relies on cases where the prosecutor clearly denigrated the role of the defense attorney. In State v.

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<sup>3</sup> Division Three has held a comment on a defendant's Fifth Amendment does not always require a constitutional harmless error analysis. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Prejudice from a direct comment on the right to silence is reviewed using the constitutional beyond a reasonable doubt standard. Prejudice resulting from an indirect comment is reviewed using the lower, non-constitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome. Id. at 791-92.

Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43, 51 (2011), the prosecutor impugned defense counsel's integrity by referring to his arguments as "bogus" and involving "sleight of hand." In State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008), the prosecutor described the defense argument as "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." In State v. Negrete, 72 Wn. App. 62, 66, 863 P.2d 137 (1993), the prosecutor told the jury the defense lawyer was "being paid to twist the words of the witnesses."

These cases are distinguishable because the prosecutor clearly communicated to the jury that the defense was doing something inappropriate. By contrast, the prosecutor in this case did not suggest or imply that the defense strategy requiring her to prove the case was underhanded. In fact, the comments do not refer to defense counsel at all, they refer to the defendant. 3RP 10; 5RP 84.

- iii. The prosecutor did not assert a personal opinion about Martinez-Vazquez's guilt.

Martinez-Vazquez argues that the prosecutor asserted her opinion about the case during closing arguments and improperly drew comparisons to other cases. The record does not support his assertion. During closing argument, the prosecutor said:

You know, there are a lot of different trials you could get assigned to as jurors, as one juror mentioned, that can take weeks and weeks with very complicated testimony and expert witnesses. This is not one of those cases. There are trials that you can get assigned to where you deliberate for multiple days and agonize over your decision. This should not be one of those cases. This is the simplest of cases when it comes to applying the undisputed facts the law.

3RP 7-8. The prosecutor immediately turned to the elements of the crimes and the evidence. The prosecutor's characterization of the evidence as simple reflected the fact that the entire crime was clearly depicted on videos admitted into evidence. The prosecutor's statements were supported by the evidence. The prosecutor did not express any personal opinion about Martinez-Vazquez's guilt.

The prosecutor also did not assert anything that was beyond the common knowledge of a juror. It is well known there are complex trials that last weeks and rely upon expert witnesses. This

case was not complex. Characterizing Martinez-Vazquez's case as simple was supported by the record given there were only two witnesses and the entire crime was on video. Martinez-Vazquez relies on State v. Monday, 171 Wn. App. 667, 257 P.3d 551 (2011), to argue that the prosecutor was referring to her experience in other cases, but that is not what was said. The prosecutor referred to "different trials you could get assigned to as jurors, as one juror mentioned<sup>4</sup> . . ." 3RP 7 (emphasis added). The remarks referred to cases they *could have been* assigned to, and did not draw any comparison to her own experience or the juror's experience.

The prosecutor's remarks did not express her personal opinion or experiences to the jury. Martinez-Vazquez has failed to demonstrate misconduct.

- iv. The prosecutor did not misstate the role of the jury.

Martinez-Vazquez argues that the prosecutor misstated the jury's role by asking them to do their "job." The prosecutor did not misstate the role of the jury. The prosecutor argued that she met her burden of proof:

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<sup>4</sup> Prospective jurors discussed prior jury experiences during voir dire. 5RP 22-27.

So again, undisputed facts, simple law, this is not a complex case mental task for you. As I said at the outset, this is a situation of the defendant just wanting to make me do my job. And so that's what I'm asking you to do now. I did my job, and now you do your job. I ask that you find Mr. Martinez guilty of these crimes.

3RP 10. The prosecutor argued that she had met her burden of proving Martinez-Vazquez guilty beyond a reasonable doubt.

There is nothing about this argument that suggests it is the jury's "job" to convict even if she failed to meet that burden. The jury was instructed "[t]he State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements." CP 15; WPIC 4.01. The jury is presumed to follow the instructions. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The jury was also instructed that that "[i]f you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty . . ." CP 22, 27; WPIC 4.21. It is not improper to urge the jury to convict, based on the evidence, when the State has met its burden of proof, particularly in a straightforward case such as this.

Martinez-Vazquez cites to several cases where the prosecutor misstates the jury's role, but those cases are inapposite. In State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), and State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), the prosecutor argued that in order to acquit, the jury must believe that the State's witnesses were lying or mistaken. In State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011), and State v. Anderson, 153 Wn. App. 417, 429, 220 P.2d 1273 (2009), the prosecutor improperly argued that the jury's role was to "find the truth." These arguments do not resemble the remarks in the present case. Here, the prosecutor urged the jury to deliberate on the overwhelming evidence and convict. Martinez-Vazquez has failed to demonstrate any misconduct.

**b. Martinez-Vazquez Did Not Object And Any Error Was Harmless.**

Lastly, even if the prosecutor's remarks were improper, Martinez-Vazquez failed to object and has not shown that the prosecutor's argument was flagrant and ill-intentioned. Martinez-Vazquez did not make any objections during closing arguments. Unless a defendant objected to the allegedly improper comments at

trial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. Smith, 67 Wn. App. at 847. As argued above, the prosecutor's remarks were not improper. Even if this Court finds that the State's remarks could be interpreted as improper, had Martinez-Vazquez objected, the trial court could have instructed the jury to disregard them and cured any error.

Finally, any prejudice from the prosecutor's remarks was speculative at best. Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d at 672. The evidence against Martinez-Vazquez was overwhelming. Powell testified that she detained Martinez-Vazquez in March 2010 and advised him not to return to the store. 2RP 7. A video recording was admitted into evidence showing Martinez-Vazquez acknowledging the trespass warning. 2RP 12. Powell saw Martinez-Vazquez enter the store again on August 26, 2010. 2RP 13. Edwards watched on security cameras as Martinez-Vazquez stole \$1,400 worth of merchandise and left the store. 2RP 18-19, 25-26. He recorded the video that was admitted into evidence showing Martinez-Vazquez stealing the

items. 2RP 21. Martinez-Vazquez was detained outside the store and Powell recovered the stolen goods. 2RP 17. Given the irrefutable evidence against Martinez-Vazquez, there is no substantial likelihood the prosecutor's limited remarks that Martinez-Vazquez alleges are misconduct affected the verdict at all much less that such effect could not have been mitigated by a curative instruction. This Court should affirm.

**D. CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm Martinez-Vazquez's convictions.

DATED this 2<sup>nd</sup> day of February, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JEFFREY C. DERNBACH, WSBA #27208  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr & Lindsay Calkins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief Of Respondent, in STATE V. GILBERTO MARTINEZ-VAZQUEZ, Cause No. 67017-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

LeBrame

Name

Done in Seattle, Washington

2/2/12  
Date 2/2/12