

67394-7

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COA No. 67394-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VICTOR GOMEZ-RAMIREZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Kimberly Prochnau

REPLY BRIEF

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A. REPLY ARGUMENT

On pages 15 and 17, the Respondent confuses the manifest constitutional error analysis with the harmless error analysis, by arguing that the evidence was “overwhelming” and therefore the error cannot be raised for the first time on appeal. SRB at pp. 15, 17.

In fact, the evidence was highly controverted (the testifying defendant and a defense eyewitness both contradicted the State’s account) and far from overwhelming (requiring reversal, as thoroughly argued in the Opening Brief); but in any event, the test for “manifest constitutional error” under RAP 2.5(a) is different from the question of harmless error. See, e.g., State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2100) (as cited in SRB at p. 18).

Appellant’s briefing commenced by squarely addressing the question of “manifest” constitutional error under RAP 2.5(a), AOB at pp. 7-12, and by noting, as does Respondent, that the Court of Appeals has generally required more than a “passing” reference to an accused’s silence before it will find manifest error. See AOB, at pp. 12, 18.

Without simply re-stating appellant’s arguments already advanced on this point in the Opening Brief, appellant will cite the Supreme Court’s concise statement on the matter:

In State v. Lewis, 130 Wn.2d 700, 706–07, 927 P.2d 235 (1996), this Court distinguished between “**comments**” and “**references**” on silence. Both are improper, but only the former rise to the level of constitutional error. Improper references to silence are not reversible error absent prejudice and are not reviewable for the first time on appeal. State v. Romero, 113 Wn. App. 779, 790–91, 54 P.3d 1255 (2002). A “**comment**” occurs when the State uses a defendant’s silence as substantive evidence of guilt or suggests the silence was an admission of guilt. State v. Gregory, 158 Wn.2d 759, 838, 147 P.3d 1201 (2006)

(Emphasis added.) State v. Burke, 163 Wn.2d 204, 225, 181 P.3d 1 (2008).

In this respect, appellant accurately surveyed pertinent cases in this area, noting in particular the mentioned cases of State v. Romero, 113 Wn. App. 779; and State v. Lewis, 130 Wn.2d 700. AOB, at pp. 11-12, 14-18. Respondent distinguishes none of those cases, which amply demonstrate that the prosecutor’s conduct in this case was manifest error. The parties knew this would be a hotly contested case, with competing testimony by the defendant and the alleged victim. Seeking to tip the balance of persuasion in favor of the State, the prosecutor presented not just the fact of Mr. Gomez-Ramirez’s silence, but also openly contended that his unwillingness to talk to Officer Munoz demonstrated his guilt. 6/1/11RP at 90-91; 6/2/11RP at 238. These comments in trial and

argument were manifest error, without question, in a case where the decisional locus was which testifier the jury should believe.

The prosecutor first recounted Officer Munoz's testimony that the defendant hung up the telephone when the officer wanted to speak with him, and then expressly urged the jury to conclude Mr. Gomez-Ramirez was afraid to give his version of events after the incident:

And then a phone call made by, I believe, Officer Munoz. Two times he calls his [Mr. Gomez-Ramirez's] phone number, he picks up, Hey this is Issaquah PD Officer Munoz. Click. **Second time, Hey this is Officer Munoz with Issaquah PD. Someone answers, click. Interesting how he doesn't want to talk to the police but he's not afraid to tell his rendition of the events up here.**

6/2/11RP at 238.

These questions to a uniformed officer on the stand, and comments in closing making the express argument that silence to the police equaled guilt, were especially capable of persuading the lay jury of the accused's guilt, in this credibility contest. See State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518, review denied, 154 Wn.2d 1009 (2004) (juries find police authoritative in their impermissible assessment of defendant's culpability). This is what the prosecutor plainly intended in the evidence phase, and in closing argument.

The prosecutor's questions and comments carried identifiable, indeed *potent* consequences for the jury's decision on the central issue of which witness to credit, and therefore for the defendant's rights. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). The totality of these circumstances satisfy the required "plausible showing" for manifest error that the error alleged had practical and identifiable consequences in Mr. Gomez-Ramirez's trial. Kirkman, 159 Wn.2d at 935 (explicating RAP 2.5(a)(3)).

This Court should review the prosecutor's disparagement of Mr. Gomez-Ramirez's silence under RAP 2.5(a)(3). This was no passing reference to Mr. Gomez-Ramirez's silence. See also State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). The Crane court noted that a prosecutor's statement will not be considered a comment on a constitutional right to remain silent if standing alone, it was so subtle and so brief that it did not "naturally and necessarily" emphasize the defendant's silence, in which case it would be a mere reference. Crane, 116 Wn2d at 331. Again, the multi-pronged error in the evidence phase and closing argument – where the prosecutor drove home his theory that Gomez-Ramirez's refusal to speak with police meant that the jury should believe the

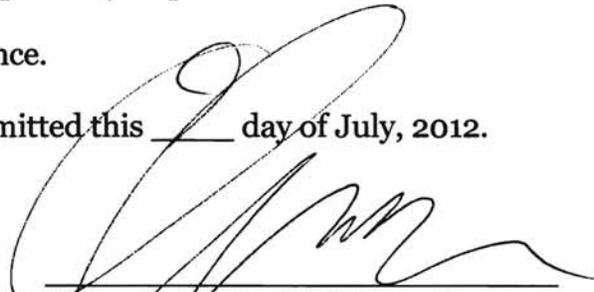
State's witnesses, and not the defendant's testimony – was manifest and reviewable under RAP 2.5(a).

As argued in the Opening Brief, the error was also not “harmless beyond a reasonable doubt.” AOB, at pp. 20-23. This Court should reverse.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Gomez-Ramirez respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this ____ day of July, 2012.



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)	NO. 67394-7-I
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JULY, 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] AMY MECKLING, DPA
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() HAND DELIVERY
() _____

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF JULY, 2012.

X _____ *grv*

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