

NO. 72419-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR CONTRERAS,

Appellant.

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

The Honorable Theresa B. Doyle, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural Facts</u> .....	3
2. <u>Substantive Facts</u> .....	4
a. <u>Eyewitness Accounts</u> .....	4
b. <u>Arrest and Interview</u> .....	6
c. <u>Forensic Evidence</u> .....	7
d. <u>Prior Shooting Incidents</u> .....	9
e. <u>Closing Arguments and Verdicts</u> .....	9
C. <u>ARGUMENT</u> .....	11
1. DUE PROCESS WAS VIOLATED WHEN THE STATE COMMENTED ON CONTRERAS’ FIFTH AMENDMENT RIGHT TO SILENCE. ....	11
a. <u>The State Commented on Post-Miranda Silence When the Detective Testified that, Instead of Protesting about Guilt or Innocence, Contreras “Just Sat There.”</u> .....	12
b. <u>The Fifth Amendment Also Protects Partial Silence.</u> .....	15
c. <u>The Violation of Contreras’ Due Process Rights Is Manifest Constitutional Error that Warrants Reversal Even When Raised for the First Time on Appeal.</u> .....	17

**TABLE OF CONTENTS (CONT'D)**

Page

d. <u>The State Cannot Rebut the Presumption of Prejudice from the Use of Contreras' Constitutionally Protected Silence as Evidence of Guilt.</u> .....	20
2. THE DETECTIVE’S TESTIMONY THAT CONTRERAS FAILED TO PROTEST AND JUST SAT THERE WAS AN IMPERMISSIBLE OPINION ON GUILT THAT INVADED THE PROVINCE OF THE JURY.....	22
3. ALTERNATIVELY, COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE VIOLATION OF CONTRERAS’ DUE PROCESS AND FIFTH AMENDMENT RIGHTS. ....	26
4. THE TRIAL COURT FAILED TO ENSURE JURY UNANIMITY AS TO THE FACTUAL BASIS FOR EACH COUNT OF FIRST-DEGREE ASSAULT.....	28
a. <u>An Election or Unanimity Instruction Was Required Because the State Presented Evidence of Multiple Shootings for Each Victim But Only Charged One Count of Assault Per Victim.</u> .....	29
b. <u>Different Shootings Separated by Time and Place Do Not Fall Under the Exceptions for Alternative Means Cases or a Continuous Course of Conduct.</u> .....	32
c. <u>The Failure to Ensure Jury Unanimity Is Presumed Prejudicial and Requires Reversal of the Assault Convictions.</u> .....	36
5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT VIOLATED CONTRERAS’ RIGHT TO A FAIR TRIAL.....	38
a. <u>The Prosecutor Improperly Vouched for West’s Credibility.</u> .....	40

**TABLE OF CONTENTS (CONT'D)**

	Page
b. <u>The Prosecutor Improperly Disparaged Defense Counsel</u> .....	44
6. CUMULATIVE ERROR DENIED CONTRERAS A FAIR TRIAL.....	46
7. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CRR 3.5.....	47
D. <u>CONCLUSION</u> .....	49

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Ferree v. Doric Co.</u> 62 Wn.2d 561, 383 P.2d 900 (1963) .....	48
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012) .....	39, 40
<u>Slattery v. City of Seattle</u> 169 Wn. 144, 13 P.2d 464 (1932) .....	40
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999) .....	27
<u>State v. Alexander</u> 64 Wn. App. 147, 822 P.2d 1250 (1992) .....	46
<u>State v. Allen</u> 150 Wn. App. 300, 207 P.3d 483 (2009) .....	28
<u>State v. Boyd</u> 160 Wn.2d 424, 158 P.3d 54 (2007) .....	39
<u>State v. Burke</u> 163 Wn.2d 204, 181 P.3d 1 (2008) .....	11, 19
<u>State v. Buttry</u> 199 Wn. 228, 90 P.2d 1026 (1939) .....	40
<u>State v. Carothers</u> 84 Wn.2d 256, 525 P.2d 731 (1974) .....	36
<u>State v. Clark</u> 143 Wn.2d 731, 24 P.3d 1006 .....	16
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984) .....	46

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Coleman</u> 159 Wn.2d 509, 150 P.3d 1126 (2007).....	29, 36, 38
<u>State v. Crane</u> 116 Wn.2d 315, 804 P.2d 10 (1991).....	34
<u>State v. Craven</u> 69 Wn. App. 581, 849 P.2d 681 (1993).....	35
<u>State v. Crawford</u> 159 Wn.2d 86, 147 P.3d 1288 (2006).....	27
<u>State v. Dailey</u> 93 Wn.2d 454, 610 P.2d 357 (1980) .....	48
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	39
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	23
<u>State v. Doogan</u> 82 Wn. App. 185, 917 P.2d 155 (1996).....	36
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1285 (1996).....	17
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	39, 40
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	27
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	38
<u>State v. Fuller</u> 169 Wn. App. 797, 282 P.3d 126 (2012).....	15, 16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Green</u> 150 Wn.2d 740, 82 P.3d 239 (2004).....	32
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	19
<u>State v. Guloy</u> 104 Wn.2d 412, 705 P.2d 1182 (1985).....	26
<u>State v. Haga</u> 8 Wn. App. 481, 507 P.2d 159 (1973).....	25
<u>State v. Handran</u> 113 Wn.2d 11, 775 P.2d 453 (1989).....	35
<u>State v. Head</u> 136 Wn.2d 619, 964 P.2d 1187 (1998).....	48
<u>State v. Hescock</u> 98 Wn. App. 600, 989 P.2d 1251 (1999).....	48
<u>State v. Holmes</u> 122 Wn. App. 438, 93 P.3d 212 (2004).....	13, 14, 22, 25
<u>State v. Huson</u> 73 Wn.2d 660, 440 P.2d 192 (1968).....	38
<u>State v. Ish</u> 170 Wn.2d 189, 241 P.3d 389 (2010).....	40
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936 (2010).....	45
<u>State v. King</u> 75 Wn. App. 899, 878 P.2d 466 (1994).....	3, 33, 34
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	24

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	29, 36
<u>State v. Knapp</u> 148 Wn. App. 414, 199 P.3d 505 (2009).....	12, 22
<u>State v. Lamar</u> 180 Wn.2d 576, 327 P.3d 46 (2014).....	19, 21
<u>State v. Lewis</u> 130 Wn.2d 700, 927 P.2d 235 (1996).....	17
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	44
<u>State v. Lynch</u> 178 Wn.2d 487, 309 P.3d 482 (2013).....	21
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	38, 40
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	23, 24
<u>State v. Neslund</u> 50 Wn. App. 531, 749 P.2d 725 (1988).....	45
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007).....	27
<u>State v. Perez-Mejia</u> 134 Wn. App. 907, 143 P.3d 838 (2006).....	46
<u>State v. Petrich</u> 101 Wn.2d 566, 683 P.2d 173 (1984).....	29, 32, 36
<u>State v. Pierce</u> 169 Wn. App. 533, 280 P.3d 1158 (2012).....	39

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Pinson</u> 183 Wn. App. 411, 333 P.3d 528 (2014).....	13, 14
<u>State v. Quaale</u> ___ Wn.2d ___, 340 P.3d 213 (2014).....	22, 26
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	42, 45
<u>State v. Reed</u> 168 Wn. App. 553, 278 P.3d 203 (2012).....	42, 43
<u>State v. Romero</u> 113 Wn. App. 779, 54 P.3d 1255 (2002).....	17, 18, 21
<u>State v. Rose</u> 62 Wn.2d 309, 382 P.2d 513 (1963).....	40
<u>State v. Silva</u> 119 Wn. App. 422, 81 P.3d 889 (2003).....	16, 20
<u>State v. Smith</u> 68 Wn. App. 201, 842 P. 2d 494 (1992).....	48
<u>State v. Spencer</u> 128 Wn. App. 132, 114 P.3d 1222 (2005).....	32
<u>State v. Terry</u> 181 Wn. App. 880, 328 P.3d 932 (2014).....	11, 17, 19
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	27
<u>State v. VanderHouwen</u> 163 Wn.2d 25, 177 P.3d 393 (2008).....	36
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	45

## TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Workman</u> 66 Wash. 292, 119 P. 751 (1911) .....	32
 <u>FEDERAL CASES</u>	
<u>Bruno v. Rushen</u> 721 F.2d 1193 (9th Cir. 1983) .....	39, 45
<u>Chapman v. California</u> 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	21
<u>Doyle v. Ohio</u> 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).....	1, 12
<u>Griffin v. California</u> 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).....	15
<u>Hurd v. Terhune</u> 619 F.3d 1080 (9th Cir. 2010) .....	15
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	11, 12, 15, 20
<u>Salinas v. Texas</u> ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013).....	15
<u>State v. Weatherspoon</u> 410 F.3d 1142 (9th Cir. 2005) .....	44
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	27
<u>United States v. Brooks</u> 508 F.3d 1205 (9th Cir. 2007) .....	40
<u>United States v. Edwards</u> 154 F.3d 915 (9th Cir. 1998) .....	41

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>United States v. Kerr</u> 981 F.2d 1050 (9th Cir. 1992) .....	42
<u>United States v. McKoy</u> 771 F.2d 1207 (9th Cir. 1985) .....	44
<u>United States v. Prantil</u> 764 F.2d 548 (9th Cir. 1985) .....	41
<u>United States v. Vargas</u> 583 F.2d 380 (7th Cir. 1978) .....	42
<u>United States v. Velarde-Gomez</u> 269 F.3d 1023 (9th Cir. 2001) .....	13, 14

**OTHER JURISDICTIONS**

<u>People v. Johnson</u> 149 Ill. App. 3d 465, 102 Ill. Dec. 835, 500 N.E.2d 728 (1986) .....	43
<u>State v. Mayhorn</u> 720 N.W.2d 776 (Minn. 2006) .....	43
<u>State v. Spencer</u> 81 Conn. App. 320, 840 A.2d 7 (Conn. Ct. App. 2004) <u>reversed in part on other grounds</u> , 275 Conn. 171, 881 A.2d 209 (Conn. 2005) .....	32, 43

**RULES, STATUTES AND OTHER AUTHORITIES**

CrR 3.5 .....	1, 3, 47, 48
CrR 3.6 .....	48
ER 701 .....	23
ER 704 .....	23

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RAP 2.5.....	26
RCW 9A.36.011 .....	32
U.S. Const. amemd. V .....	12, 14, 15, 20, 22
U. S. Const. amend. VI .....	29, 46
Const. art. I, § 9.....	12
Const. art. I, § 22.....	29, 46

A. ASSIGNMENTS OF ERROR

1. Appellant's constitutional right to remain silent and his right to due process were violated when the detective commented on his silence.

2. Improper opinion testimony by the detective violated appellant's constitutional right to a fair trial by an impartial jury.

3. Appellant's constitutional right to effective assistance of counsel was violated when his attorney failed to object to the detective's comment on appellant's silence and opinion on guilt.

4. Appellant's constitutional right to jury unanimity was violated when the State failed to elect which shooting to rely on and the court failed to give a unanimity instruction.

5. Prosecutorial misconduct violated appellant's constitutional right to a fair trial.

6. Cumulative error deprived appellant of a fair trial.

7. The court erred in entering judgment against appellant.

8. The trial court failed to enter written findings of fact and conclusions of law after the hearing under CrR 3.5.

Issues Pertaining to Assignments of Error

1. The detective testified arrested persons normally make some protestation about guilt or innocence, but appellant was indifferent

and just sat there. Was this testimony an impermissible comment on appellant's exercise of his right to silence in violation of due process?

2. Did the detective's testimony contrasting normal protestations of innocence with appellant's indifference and silence invade the province of the jury by offering an implied opinion on guilt in violation of appellant's constitutional right to a fair trial?

3. Was counsel ineffective in failing to object to the detective's testimony as a comment on silence or opinion on guilt?

4. The evidence showed the three victims were shot at on two separate occasions, once at the intersection of Spokane Street and Beacon Avenue and then multiple times after they fled their car near the intersection of 22<sup>nd</sup> and Lucile. The State charged one count of first-degree assault per victim. The State did not elect one location to rely on and the court did not instruct the jury it must be unanimous as to which incident formed the basis for its verdicts. Does the record fail to establish jury unanimity as to which incident of shooting was proved?

5. During closing argument, the prosecutor told the jury "we" "know for certain" appellant and his co-defendant were two of the shooters. During rebuttal, he told the jury the defense attorneys were trying to "explain away" every piece of the State's evidence, and their efforts were becoming "nonsensical." Did these arguments constitute

prejudicial misconduct by vouching for the credibility of the State's eyewitness, disparaging defense counsel, and minimizing the burden of proof beyond a reasonable doubt?

6. Did the accumulated effect of the trial errors render appellant's trial unfair?

7. CrR 3.5 (c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. No findings or conclusions were filed in this case. Should this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Victor Contreras with three counts of first-degree assault and one count of first-degree unlawful possession of a firearm. CP 13-15. The State also alleged each of the assaults was committed while armed with a firearm. CP 13-15. The jury found Contreras guilty and found he was armed with a firearm. CP 34-43. The court imposed consecutive standard range sentences for the assaults and three consecutive firearm sentencing enhancements for a total of 527 months. CP 51. The court also imposed a concurrent standard range sentence for the unlawful possession charge and 36 months of community custody. CP 51-52. Notice of appeal was timely filed. CP 58.

## 2. Substantive Facts

This case involves a series of gunshots fired in Seattle's Beacon Hill neighborhood the evening of July 22, 2012. Afterwards, the window of one home had been shattered, and there were bullet holes in the side of a house, two parked cars, a fence, and a railing. 6RP 46-47, 52, 55-56, 76-78, 103-04, 106-08. Based on the locations of the casings, bullet strikes, and bullet fragments, the detective opined there were at least two shooters. 9RP 138-39. Both began firing in the intersection of 22<sup>nd</sup> and Lucile. 9RP 138-39. One shooter with a .45 moved north along 22<sup>nd</sup> and shot eastward towards the interior of the block. 9RP 139. Meanwhile, someone shooting a .40 caliber weapon moved east from the intersection along Lucile and shot northward down a driveway toward the interior of the block. 9RP 140. One casing was also found in the intersection of Spokane Street and Beacon Avenue, approximately 20 blocks away. 6RP 115.

### a. Eyewitness Accounts

One of the shooting victims, Lawrence West, identified his assailants as Douglas Ho and Victor Contreras, members of the Insane Boyz gang. 8RP 27-31. West claimed the motive for the shooting was a longstanding "beef" between his gang, the Tiny Raskal Gangsters, and the Insane Boyz. 8RP 12-14, 17. He claimed others had specifically warned him to be on the

lookout for Contreras, Ho, and a tan/silver<sup>1</sup> Honda with a primer black hood driven by Contreras. 8RP 12-14 25-27.

According to West, he and Trung Ngo were passengers in a car driven by William Ngeth. 8RP 24. Their car was stopped at a red light at the intersection of Spokane Street and Beacon Avenue when West saw the distinctive Honda pull up next to him. 8RP 25-27. Inside were Contreras, Ho, and a third person he could not identify. 8RP 30-31. He claimed Contreras was driving, while Ho stood up out of the sunroof and fired one shoot at their car before Ngeth was able to drive away. 8RP 27-29, 31. West testified the Honda chased them at high speeds for approximately 20 blocks. 6RP 67. After failing to negotiate a turn, he and his compatriots, all members of the Tiny Raskal Gangsters, left their car and fled on foot between the houses in the neighborhood. 8RP 33-35. As he climbed over a fence, West sustained two gunshot wounds when a bullet went through the side of his back and lodged in his arm near the elbow. 8RP 42-43, 48; 10RP 21. He also heard numerous shots strike the area around him as he ran and hid. 8RP 41-43.

Trung Ngo corroborated the fact of the gunshots and the car chase. 10RP 29, 30, 33-34. However, according to him, the shot at the intersection of Spokane and Beacon was fired through the driver's window, either by the

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<sup>1</sup> Witnesses described the car as looking tan or gold in some lights and silver or grey in others. 7RP 50-51, 136-38; 9RP 74-75.

driver or by a passenger leaning over the driver's seat. 10RP 43-44. He could not identify anyone in the car that chased them. 10RP 30, 40. He also testified the Tiny Raskal Gangsters had contentious relationships with many other local gangs and he had never been warned about Ho or Contreras in particular. 10RP 45-49.

Testimony by local residents also corroborated the car chase and the numerous gunshots. 6RP 20-21, 32; 7RP 83-84, 94-96; 9RP 158; 10RP 133-34, 143. But testimony about the identity of the shooters was scant. One witness claimed she saw the driver of the pursuing car fire out the driver's side window. 7RP 84. Another could only describe the shooter as Asian and wearing a white t-shirt. 7RP 101. Other local residents heard gunfire but could not see the shooters. 6RP 60; 7RP 9-10; 9RP 158; 10RP 162.

After the shooting stopped, a witness who lived at the corner of 22<sup>nd</sup> and Lucile saw a gold or tan early 1990s Honda drive away. 6RP 34. Shortly thereafter, officers arrived and briefly detained West, Ngeth, and Ngo before determining none of them was armed and West had been shot. 6RP 95-96; 7RP 110.

b. Arrest and Interview

After taking West's statement, Seattle police arrested Contreras and Ho at a barbecue in Seward Park two days later. 7RP 136-38, 143. At the station, Detective Sevaetasi separated Ho and Contreras, read them their

rights, and interviewed them briefly. 9RP 97. He testified, “I told them that they were there for investigation of a shooting.” 9RP 97. Ho and Contreras both “denied any knowledge of it.” 9RP 97. When asked about their whereabouts on the night in question, Sevaaetasi testified, “They couldn’t account for where they were.” 9RP 97-98. Sevaaetasi described their attitude as “nonchalant” and “indifferent.” 9RP 97. When the prosecutor asked what he meant by that, Sevaaetasi testified:

Well, you know, normally you would arrest someone, put them in handcuffs, and take them to the police station. They would – some protestation about guilt or innocence or whatever or why they’re there. There was no such attitude from them. They were – really were kind of indifferent, just sat there.

9RP 98. Sevaaetasi they repeated that they could not account for their whereabouts at the time of the shooting. 9RP 98.

c. Forensic Evidence

Police also executed a search warrant for Contreras’ mother’s tan/silver Honda with the primer black hood. 7RP 50-52, 56-57. Under the driver’s seat was a .45 caliber Glock semi-automatic pistol, and in the glove box was a .40 Taurus pistol. 9RP 108-09. Also at the barbecue was Jason Lee, who officers identified as also belonging to the Insane Boyz gang. 7RP 51; 9RP 99-100. In the trunk of his girlfriend’s car, police found a .45 Kimber pistol. 9RP 101. Lee’s girlfriend denied all knowledge of the gun

and testified Lee and his friends frequently used her car. 11RP 6-8, 15. According to a forensic scientist from the Washington State Patrol Crime Lab, the shell casing found at the intersection of Spokane and Beacon and all 20 casings found near 22<sup>nd</sup> and Lucile were fired from these three firearms. 7RP 34-35, 39-40, 174-77.

Fingerprints matching Ho were found on a magazine for the .45 Kimber. 9RP 51-54. No fingerprints linked Contreras to any of the weapons. 9RP 47-48, 50. A mixed sample of DNA was found on the Glock, and Contreras was a possible contributor, along with one out of every two people taken at random. 12RP 19-20. Therefore, the results were virtually meaningless. 12RP 30. DNA on the Taurus clearly matched a single unidentified male; both Ho and Contreras were excluded. 12RP 18.

The State also presented evidence that Ho and Contreras' cell phones hit off the towers near Othello station in South Seattle earlier in the evening, then hit off the tower at Jefferson Golf Course on Beacon Hill around the time of the shooting. 11RP 53, 55-58. Then, shortly afterwards, their phones hit off towers near the I-5 corridor just to the south. 11RP 54, 58-59. The range of a cell phone tower is approximately two miles, and while phones normally use the nearest tower, they may instead use one further away if a nearby tower is blocked or overloaded. 11RP 64-68.

d. Prior Shooting Incidents

Gang unit detectives also testified about a series of seven shooting incidents approximately 3 months earlier in April and May 2012. 10RP 65. On April 7, 2012, there was a drive-by shooting at Ho's home. 10RP 91-92. A week later, another drive-by occurred at the home of the elderly couple who lived next door to Ho. 10RP 92. Three days later, two Tiny Raskal Gangsters were shot in a drive-by. 10RP 93. Then, four shootings occurred in a matter of hours in the wee hours of the morning of May 27, 2014: the first at approximately 1 a.m. at the home of the founders of the Insane Boyz, the next at Ho's home, the next at the home another Tiny Raskal Gangster, then next at the home of another Insane Boyz member. 10RP 95-96. No one was charged, or even arrested for any of these incidents. 10RP 98. No evidence linked any of these prior shootings to any member of the allegedly opposing gang. 10RP 114-16. However, based on the pattern of which gang was targeted, the detective concluded the motive for the current shooting was West, Ngeth, and Ngo's gang affiliation. 10RP 96.

e. Closing Arguments and Verdicts

The State argued there were three criminal actors in this case and "we only know for certain two of the individuals that were shooting that night. That was Mr. Contreras and Mr. Ho." 13RP 15-16. The State argued it appeared from the evidence that Ho was firing the Kimber, Contreras was

firing the Glock, and an unknown third person was firing the Taurus. 13RP 25-26. However, because the State charged Ho and Contreras both as principals and as accomplices, the State argued it need not definitively prove who was firing which gun or which person actually injured West. 13RP 26, 35-36.

Similarly, regarding the intent to inflict great bodily harm element of first-degree assault, the State argued it need not prove all the shooters had that intent, or which had that intent; so long as one of the shooters had the requisite intent, the others were accomplices. 13RP 14-15. The State argued the car chase after the first shot and the quantity and location of the subsequent bullet strikes showed an intent to inflict great bodily harm. 13RP 11-14.

The defense argued West's identification of Ho and Contreras was motivated by gang rivalry and, even if Ho and Contreras were responsible, they should be convicted only of second-degree assault based on the recklessness of the shooting. 13RP 49-50, 67, 75, 79. In rebuttal, the prosecutor argued, "Defense counsel, both of them, have gone through in their closing and tried to explain away or dismiss every single piece of the State's evidence. But it gets to a point where you lose – where it becomes nonsensical." 13RP 87. Ho's objection to improper argument was overruled. 13RP 87.

After the jury returned guilty verdicts on all counts and special verdicts finding the defendants were armed with a firearm for the assault charges, the jury heard additional testimony and found the offenses were committed with intent to benefit a criminal street gang. 14RP 5-12; 15RP 3-4. However, the State did not seek, nor did the court impose, an exceptional sentence. 16RP 9, 39, 41.

C. ARGUMENT

1. DUE PROCESS WAS VIOLATED WHEN THE STATE COMMENTED ON CONTRERAS' FIFTH AMENDMENT RIGHT TO SILENCE.

The State may not suggest a person is guilty because he or she was silent after being given Miranda<sup>2</sup> warnings. “For the government to comment on *post-Miranda* silence is to ‘[break] its promises given in the *Miranda* warnings and violate[ ] due process of law.’” State v. Terry, 181 Wn. App. 880, 889, 328 P.3d 932 (2014) (quoting State v. Burke, 163 Wn.2d 204, 213, 181 P.3d 1 (2008)). The State broke its promise here when Detective Sevaaetasi told the jury that, “normally,” arrested persons make “some protestation about guilt or innocence” whereas Contreras and Ho “really were kind of indifferent, just sat there.” 9RP 98. This comment on Contreras’ *post-Miranda* silence violated his right to due process and requires reversal of his convictions.

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 458, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Both the United States and Washington Constitutions guarantee accused persons the right to be free from self-incrimination, including the right to silence; the two provisions are interpreted similarly. U.S. Const. amend. V; Const. art. I, § 9. The privilege against self-incrimination is liberally construed. State v. Knapp, 148 Wn. App. 414, 420, 199 P.3d 505 (2009).

To protect the Fifth Amendment privilege against coerced self-incrimination, Miranda requires that arrested persons be warned that they have the right to remain silent, that anything they say may be used against them at trial, and that they have the right to counsel before any interrogation. Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 2244, 49 L. Ed. 2d 91 (1976). “Silence in the wake of these warnings may be nothing more than the arrestee’s exercise of these Miranda rights.” Id. at 618. In light of the warnings, it is “fundamentally unfair and a deprivation of due process” to use a person’s silence to suggest guilt or impeach a defendant at trial. Id.

- a. The State Commented on Post-Miranda Silence When the Detective Testified that, Instead of Protesting about Guilt or Innocence, Contreras “Just Sat There.”

The State comments on silence and violates due process when it contrasts the defendant’s demeanor with that of an innocent person. This Court found reversible error on strikingly similar facts in State v. Holmes,

122 Wn. App. 438, 93 P.3d 212 (2004). In that case, the detective testified, that, upon being confronted with the allegations, Holmes “didn’t appear surprised. When he was advised what the charge was, there wasn’t any kind of denial or something that I would normally expect to see.” Id. at 442. The court found this testimony was an “observation on his failure to proclaim his innocence, and it provided a basis for an inference of guilt.” Id. at 445. The court declared it “fundamentally unfair.” Id.

More recently, in State v. Pinson, 183 Wn. App. 411, 415, 333 P.3d 528, 531 (2014), this Court considered a prosecutor’s comment that the defendant remained silent in answer to a question about whether a fight became physical. The prosecutor told the jury, “[I]f you’re innocent, you’re going to have a wholly different response.” Id. The court held this comment violated Pinson’s privilege against self-incrimination. Id.

The Ninth Circuit refused to distinguish “demeanor evidence” from silence and came to the same conclusion in United States v. Velarde-Gomez, 269 F.3d 1023, 1026, 1028 (9th Cir. 2001). In Velarde-Gomez, the disputed testimony was as follows:

Q: Okay. And what was his response when you told him there was marijuana found in the vehicle?

A: There was no response. He didn’t look surprised or upset or whatever.

Q: So he just sat there?

A: Yes.

Q: Did he say anything?

A: No.

Q: Did he deny knowledge?

A: No.

Velarde-Gomez, 269 F.3d at 1027. The court concluded that the “evidence of a lack of physical or emotional reaction was tantamount to evidence of silence,” and its admission violated Velarde’s Fifth Amendment privilege against self-incrimination. In so holding, the court focused on the detective’s testimony that Velarde “just sat there.” 269 F.3d at 1031. The court concluded that the “non reaction” the State sought to introduce was nothing more than a failure to speak. 269 F.3d at 1031.

The detective’s testimony here directly parallels Holmes, Pinson, and Velarde-Gomez. The detective’s focus on Contreras’ “indifference” and “non-chalance” when confronted with the allegations is no different than the testimony in Holmes that the defendant was not surprised. 9RP 98; Holmes, 122 Wn. App. at 442. The detective’s testimony that Contreras did not make any protestation about guilt or innocence, as people normally do is akin to the detective in Holmes testifying there was no denial as he would have expected to see and the prosecutor in Pinson arguing an innocent person would have a different response. 9RP 98; Pinson, 183 Wn. App. at 415; Holmes, 122 Wn. App. at 442. The detective in Velarde used exactly the same phrase as Detective Sevaaetasi: the defendant, “just sat there.” 9RP 98; Velarde-Gomez, 269 F.3d at

1031. Sevaaetasi's testimony was an impermissible comment on silence because it strongly suggested Contreras was guilty because he did not protest like an innocent person would.

b. The Fifth Amendment Also Protects Partial Silence.

A person may exercise the right to silence at any time after arrest and may do so selectively in response to individual questions. State v. Fuller, 169 Wn. App. 797, 814-15, 282 P.3d 126 (2012) (citing Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010)). Once a person is in custody and advised of Miranda rights, the right to silence is self-executing. Salinas v. Texas, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2174, 2179-80, 186 L. Ed. 2d 376 (2013) (discussing Griffin v. California, 380 U.S. 609, 613-615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) and Miranda, 384 U.S. at 467-68). A person need not expressly invoke the Fifth Amendment. Id.

Therefore, even when an arrested person makes a knowing, intelligent, and voluntary waiver of Miranda rights and chooses to answer some questions, the State may not use partial silence as substantive evidence of guilt. Fuller, 169 Wn. App. at 815-16. For example, in Fuller, the defendant answered some of the detective's questions, but did not expressly deny the allegations or deny that he would be seen on the surveillance video. Id. at 816. The court held it was reversible error for the prosecutor to exploit this partial silence in closing argument. 169 Wn.

App. at 819-20; see also State v. Silva, 119 Wn. App. 422, 424, 81 P.3d 889, 891 (2003) (due process violation where detective testified defendant answered innocuous questions and then was silent after being confronted with incriminating facts).

An exception to the ban on partial silence may exist if the partial silence directly impeaches the defense theory or the defendant's later testimony at trial. See, e.g., State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (no comment on silence where Clark spoke with police twice before arrest and developed conflicting accounts). But in this case, Contreras did not testify. The only defense theory was to cast reasonable doubts on the State's case. There was no concrete defense theory of the case to contradict or impeach.

This is precisely what occurred in Fuller. In that case, the State sought to use partial silence to impeach the defense, but the court noted Fuller did not testify and the only defense theory of the case was that the State failed to prove beyond a reasonable doubt that he committed the murder. Fuller, 169 Wn. App. at 818. The court concluded, "This is not a defense theory the State may attack by using the defendant's constitutionally protected silence." Id. As in Fuller, the exception for use of partial silence to impeach testimony or a specific defense theory of the case does not apply here.

c. The Violation of Contreras' Due Process Rights Is Manifest Constitutional Error that Warrants Reversal Even When Raised for the First Time on Appeal.

A direct comment on silence as evidence of guilt is “automatic constitutional error.” State v. Terry, 181 Wn. App. 880, 891, 328 P.3d 932 (2014) (discussing State v. Romero, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002)). A direct comment occurs whenever a witness “effectively stated or expressed an opinion that the defendant’s silence was evidence of guilt.” Terry, 181 Wn. App. at 891 (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). “[A]ny direct police testimony as to the defendant’s refusal to answer questions is a violation of the defendant’s right to silence.” Romero, 113 Wn. App. at 792 (citing State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996); Lewis, 130 Wn.2d at 706). The detective effectively stated Contreras’ silence was evidence of guilt when he described “protestation about guilt or innocence” as “normal,” and then directly contrasted the normal protests with Contreras, who was “indifferent” and “just sat there.” 9RP 98.

But even if this court finds the comment indirect, it is still manifest constitutional error. For indirect comments, courts follow the Romero analysis and ask three questions. Terry, 181 Wn. App. at 890-91 (discussing Romero, 113 Wn. App. at 790-91). If the answer to any one of

them is “yes,” then the comment is constitutional error that must be addressed even without objection below. Id.

First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Third, was the indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant?

Romero, 113 Wn. App. at 790-91. In this case, the answer to the first and third questions may be “No.” The prosecutor’s questions about indifference may have been aimed at permissible description of physical demeanor rather than an intentional attempt to elicit an opinion about guilt. The prosecutor quickly moved on to a different area after the detective’s answer and did not mention this testimony in closing argument. 9RP 98; 13RP 4-40, 82-92. But the answer to the second question is “Yes.”

Under Romero’s second question, constitutional error occurs when a volunteered answer either attempted to or had the likely effect of prejudicing the defense. Romero, 113 Wn. App. at 790-91. Only moments before this comment, Sevaaetasi testified he read Contreras his

rights and Contreras denied all knowledge of the shooting, but could not recall where he was at the time. 9RP 97. But all the force and influence was sucked out of Contreras' denial by the subsequent comment that "normally" people make "some protestation about guilt or innocence," while Contreras "just sat there." 9RP 98. The detective attempted to prejudice the defense by negating Contreras' denial, and indeed that was the likely effect on the jury.

Other cases find manifest constitutional error when there is a comment on silence as opposed to merely a reference to silence. Burke, 163 Wn.2d at 216. The distinction between the two is the purpose of the comment. Id.; Terry, 181 Wn. App. at 891. An impermissible comment occurs whenever the State "suggests the silence was an admission of guilt." Terry, 181 Wn. App. at 891 (citing State v. Gregory, 158 Wn.2d 759, 838, 147 P.3d 1201 (2006)). Detective Sevaaetasi's comment was manifest constitutional error because it suggested Contreras' silence was an admission of guilt.

More generally speaking, manifest constitutional error requires actual prejudice, defined as "practical and identifiable consequences." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Here, the practical and identifiable consequence was to negate the efficacy of

Contreras' denial, to effectively remove it as a meaningful part of the jury's deliberations.

In considering whether there are "practical and identifiable consequences," courts also look at whether the error would have been identifiable on the facts known to the trial court at the time. Id. This requirement serves a gatekeeping function to ensure errors are only reviewed when the record is sufficient and there is a fairly strong likelihood serious constitutional error has occurred. Id. The improper comment here is manifest on the record. It is apparent from the testimony that the detective commented on Contreras' silence and failure to protest after he had been read his Miranda rights. 9RP 97-98. Nothing more is needed to show the strong likelihood of a serious violation of Contreras' Fifth Amendment rights. This Court should review the error despite the lack of objection below.

d. The State Cannot Rebut the Presumption of Prejudice from the Use of Contreras' Constitutionally Protected Silence as Evidence of Guilt.

Division Three of this Court has held that comments on the right to silence are always unfairly prejudicial because the inference of guilt from silence always adds weight to the State's case. State v. Silva, 119 Wn. App. 422, 429, 81 P.3d 889, 893 (2003). In general, constitutional errors

are presumed prejudicial. Lamar, 180 Wn.2d at 588 (citing State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); Romero, 113 Wn. App. at 794-95. The State can rebut this presumption only if the untainted evidence is so overwhelming that the court is convinced beyond a reasonable doubt that the verdict would have been the same without the error. Id. That is not the case here.

First, there were many reasons a rational juror could have had a reasonable doubt as to both West's identification of Ho and Contreras as the shooters and as to intent to inflict great bodily harm. Thus, the detective's opinion may have tipped the scales in favor of a guilty verdict.

West's eyewitness testimony could indeed have been motivated by animus toward a rival gang. Ballistics evidence linking the gun found in Contreras' car two days later to the casings found at the scene does not necessarily prove he was the shooter or even that he was present. No DNA or fingerprint evidence could establish he even touched any of the guns. 9RP 47-50; 12RP 19-20. Contreras' only statement was to deny any knowledge of the shooting. 9RP 97. Under these circumstances, the detective's opinion linking Contreras' silence to guilt was powerful and added greatly to the State's case.

It is difficult to be certain the jury would come to the same result when the defendant's denial of the charges was "tainted" by a comment on silence: "The lingering suggestion was powerful: Holmes knew he was guilty, and for that reason was not surprised." Holmes, 122 Wn. App. at 447. Here, the powerful lingering suggestion was to discount Contreras' denial because a normal, i.e. innocent, person would have protested. 9RP 98. The jury was left with the impression Contreras must be guilty because he was "indifferent" and "just sat there." 9RP 98. With only one eyewitness conclusively linking Contreras to the shootings, the evidence is far from overwhelming and there is a reasonable possibility the detective's testimony played a role in the jury's verdict. See, e.g., State v. Knapp, 148 Wn. App. 414, 419-20, 199 P.3d 505 (2009) (comment on silence required reversal despite two eyewitnesses). Contreras' convictions must be reversed because the State violated his Fifth Amendment Right to silence and constitutional due process.

2. THE DETECTIVE'S TESTIMONY THAT CONTRERAS FAILED TO PROTEST AND JUST SAT THERE WAS AN IMPERMISSIBLE OPINION ON GUILT THAT INVADED THE PROVINCE OF THE JURY.

Even by mere inference, witness opinions as to the defendant's guilt, violate the right to a jury trial by intruding on the jury's role. State v. Quaaale, \_\_\_ Wn.2d \_\_\_, 340 P.3d 213, 217 (2014); State v. Montgomery,

163 Wn.2d 577, 590, 183 P.3d 267 (2008). Courts consider five factors in determining whether opinion testimony improperly invades the province of the jury: (1) the type of witness involved, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Witnesses may express opinions that are rationally based on their perceptions and are helpful to the jury. ER 701. Such opinions are not necessarily objectionable solely because they encompass an ultimate issue of fact. ER 704. But expressions of personal belief as to the guilt of the defendant are “clearly inappropriate.” Montgomery, 163 Wn.2d at 591 (citing, *inter alia*, Demery, 144 Wn.2d at 759).

Testimony by police officers, such as the detective in this case, carries with it an “aura of reliability” and is particularly likely to unfairly influence the jury. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). A jury might assume the police believe a person is guilty, but that does not excuse admitting opinion testimony. See Montgomery, 163 Wn.2d at 595 (“The State argues the officers’ opinions added nothing new because the jury already knows the defendant was arrested because the officers believed he was guilty. We believe this unavoidable state of affairs does not justify allowing explicit opinions on intent.”).

Improper opinion testimony is manifest constitutional error that may be raised for the first time on appeal when the opinion is explicit or nearly so and has practical and identifiable consequences for the trial. Montgomery, 163 Wn. App. at 595; State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Here, the detective's testimony amounted to a nearly explicit opinion that, despite his denial of any knowledge of the shooting, Contreras was guilty because he did not sufficiently protest and was indifferent or nonchalant. 9RP 98. This nearly explicit opinion on guilt is manifest constitutional error.

In determining the existence of manifest constitutional error, courts have also considered the possibility that proper jury instructions could have prevented actual prejudice. In Montgomery, witnesses opined regarding facts that led them to believe pseudoephedrine was possessed with intent to manufacture methamphetamine. Montgomery, 163 Wn.2d at 588. The court declined to find actual prejudice in part because the court presumed the jury would have followed instructions that it is the sole judge of credibility and is not bound by witness opinions. Montgomery, 163 Wn. 2d at 595-96. The jury was instructed in nearly identical terms here. CP 76, 86. But the Montgomery court warned it would not hesitate to find prejudice from improper opinion if there were any sign the jury had been influenced. 163 Wn.2d at 596 n.9. Unlike the comments regarding intent in Montgomery,

comments on silence as evidence of guilt are particularly likely to influence the jury regardless of instruction. When the opinion involved is a comment on silence, “the bell is hard to unring.” Holmes, 122 Wn. App. at 446.

The circumstances at Contreras’ trial are reminiscent of what occurred in State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159 (1973). Haga was convicted of murdering his wife and infant daughter. Id. at 482. During trial, an ambulance driver testified Haga had not displayed any grief and that he (the driver) had significant experience dealing with individuals experiencing grief over the death of a loved one. Id. at 490. The prosecutor then asked whether Haga’s response to the death of his wife was unusual, and the driver responded the defendant had been unusually “calm and cool.” Id. On appeal, this Court reversed, concluding the driver’s testimony improperly implied his opinion that the defendant was guilty and the error could not be deemed harmless. Id. at 492.

Like the witness in Haga, Detective Sevaaetasi testified as to his experience, in this case with arrests. 9RP 98. He then contrasted Contreras’ demeanor -- “indifferent,” “nonchalant,” “just sat there,” -- with the normal “protestations of guilt or innocence.” 9RP 98. Like the driver in Haga, the detective’s comments directly suggested his opinion that Contreras was guilty because of his unusual reaction. 9RP 98.

Because it is a constitutional error, the improper opinion on Contreras' guilt is presumed prejudicial, and the State bears the burden of demonstrating it was harmless beyond a reasonable doubt. Quaale, \_\_\_ Wn.2d at \_\_\_, 340 P.3d at 218; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State cannot meet that burden here. The evidence was far from overwhelming, the detective's opinion based on Contreras' silence was particularly likely to influence the jury, and the improper opinion had the likely effect of causing the jury to disregard Contreras' denial. Under these circumstances, the error cannot be dismissed as harmless.

3. ALTERNATIVELY, COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE VIOLATION OF CONTRERAS' DUE PROCESS AND FIFTH AMENDMENT RIGHTS.

As argued above, the detective's testimony was both an impermissible comment on silence and an impermissible opinion on guilt. Both were manifest error that violated Contreras' constitutional rights to silence, due process, and a fair trial by an impartial jury. The errors may, therefore, be reviewed despite the lack of objection below under RAP 2.5. However, in the event this Court should find the issue unpreserved, the Court should nonetheless reverse Contreras' convictions because his attorney was ineffective in failing to object to the unconstitutional use of Contreras' silence as evidence of his guilt and the unconstitutional opinion that invaded

the province of the jury. “A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney’s performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Under the second prong, the court must reverse if it finds a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 694). Reversal is required when the attorney’s error undermines confidence in the outcome. Id.

Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207

P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing). Reasonably competent counsel would have objected to the blatant comment on Contreras' constitutional right to silence after arrest and the obvious witness opinion on guilt.

It is reasonably probable the outcome would have been different had counsel objected. Given the seriousness of these errors, as discussed above, the court would likely have granted a motion for mistrial or, at a minimum, attempted to give a curative instruction to the jury to disregard. But without any action by defense counsel, the detective's testimony essentially erased Contreras' denial and replaced it with the opinion that he was guilty because he did not sufficiently protest his innocence. Confidence in the outcome is undermined when the State transformed Contreras' denial into evidence of guilt by penalizing the exercise of his constitutional rights. Contreras' convictions should also be reversed for ineffective assistance of counsel.

4. THE TRIAL COURT FAILED TO ENSURE JURY UNANIMITY AS TO THE FACTUAL BASIS FOR EACH COUNT OF FIRST-DEGREE ASSAULT.

Contreras was charged with one count of first-degree assault for each of the three victims, West, Ngeth, and Ngo, but the State presented evidence of two discrete shooting events for each victim. CP 13-15. Contreras' constitutional right to a unanimous jury verdict was violated because the

State did not elect which incident it relied on, and the court did not instruct the jury it must be unanimous as to which incident formed the basis for its verdict.

a. An Election or Unanimity Instruction Was Required Because the State Presented Evidence of Multiple Shootings for Each Victim But Only Charged One Count of Assault Per Victim.

Our State and federal constitutions both require criminal convictions be based solely on the verdict of a unanimous jury. Const. art. 1, § 22; U. S. Const. amend. 6; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the evidence shows multiple incidents of the offense but the State charges only one count, there are two constitutionally permissible ways to ensure the verdict is unanimous as to the underlying criminal conduct. Either the State may elect one act to rely on, or the court may instruct the jury it must unanimously agree which (if any) act supports its verdict. The failure to follow one of these courses of action is constitutional error. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Petrich, 101 Wn.2d at 572.

In Petrich, the court reversed convictions for indecent liberties and statutory rape because the State presented evidence of multiple instances of each offense at different times and places. Petrich, 101 Wn.2d at 568. The court rejected the State's argument that the acts constituted one continuous

course of conduct because each act occurred in a separate identifying place and time. Id. at 571. The court reasoned it had no way to conclude the jury agreed on a single underlying act for each of the two convictions, and the error was not harmless. Id. at 573.

The same error occurred here. The State presented evidence of multiple acts, any one of which could support the charge of first-degree assault against each victim: the shooting at Spokane and Beacon and the shootings at 22<sup>nd</sup> and Lucile.

Assault was defined for the jury as either (1) “an intentional shooting of another person” that was offensive or harmful regardless of injury, (2) an act, “done with intent to inflict bodily injury upon another, tending but failing to accomplish it,” or (3) an act which intends to and actually does “create in another apprehension and fear of bodily injury.” CP 88. Additionally, to prove assault in the first-degree, the jury was instructed the State had to prove the assault was committed a firearm and with the intent to inflict great bodily harm. CP 96-98.

There were two separate shooting incidents for each victim, each of which could have been found to constitute first-degree assault. For example, count one alleged first-degree assault of Lawrence West. CP 96. The State presented evidence that Ho, with Contreras as accomplice, fired into the car West was riding in at the intersection of Spokane and Beacon. 8RP 25-30.

This shot could satisfy either the second or the third definition of assault as well as the remaining elements of intent to inflict great bodily harm and that a firearm was used. Then, after the car chase, near the intersection of 22<sup>nd</sup> and Lucile, one or several of the inhabitants of the car shot at West again, numerous times, hitting him once. 8RP 41-43. This second shooting incident could satisfy all three definitions of assault as well as the additional elements required for first-degree. The same two separate incidents could also support convictions for first-degree assault of Ngeth and Ngo as charged in counts two and three.<sup>3</sup>

The two incidents were separated by both time and location; the series of shootings at 22<sup>nd</sup> and Lucile occurred roughly 20 blocks and at least several minutes from the initial shooting at Spokane and Beacon. In closing, the prosecutor did not elect which of these two incidents it relied upon for each count of first-degree assault. Nor was the jury instructed it must be unanimous as to which incident supported its verdict. Under these circumstances, the court cannot be certain the jury was unanimous as to which incident, the shooting at Spokane and Beacon, or the shootings at 22<sup>nd</sup> and Lucile, served as the basis for its verdicts on first-degree assault.

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<sup>3</sup> The only distinction would be that only the second and third definitions of assault could apply because none of the shots actually hit Ngeth or Ngo.

b. Different Shootings Separated by Time and Place Do Not Fall Under the Exceptions for Alternative Means Cases or a Continuous Course of Conduct.

Two exceptions to the general rule do not apply here. When underlying conduct could satisfy two different statutory alternative means of committing the crime, unanimity is not necessary as to which alternative was committed. Petrich, 101 Wn.2d at 569-70. But this is not an alternative means case. While there are alternative means of committing first-degree assault, in this case the jury was only instructed on one of them. RCW 9A.36.011; CP 96-98. This is a multiple acts case, because “the evidence tends to show two separate commissions of the crime.” Petrich, 101 Wn.2d at 570 (quoting State v. Workman, 66 Wash. 292, 119 P. 751 (1911)).

The second exception to the requirement of instruction or election occurs when the offense is a continuous course of conduct. Petrich, 101 Wn.2d at 571. “[T]he doctrine of continuing offenses should be employed sparingly, and only when the legislature expressly states the offense is a continuing offense, or when the nature of the offense leads to a reasonable conclusion that the legislature so intended.” State v. Spencer, 128 Wn. App. 132, 137, 114 P.3d 1222 (2005) (quoting State v. Green, 150 Wn.2d 740, 742-743, 82 P.3d 239 (2004)). The defendant’s conduct must be evaluated in a “commonsense manner” to determine whether it forms one continuing offense. Petrich, 101 Wn.2d at 571. Factors in this determination include

whether the acts occurred in a “separate time frame” or “identifying place.” Id. The nature of the charged offense as well as the particular facts of the case must be considered. Id.

This was not a continuous course of conduct. The nature of the offense is an assault, which was defined for the jury as, among other things, a “shooting.” CP 88. For each count (i.e. each victim), there were numerous discrete incidents of shooting, and the shooting at Spokane and Beacon was separated by both time and place from the shootings at 22<sup>nd</sup> and Lucile.

Even an offense that is usually described as ongoing or continuous, such as possession of a narcotic, may, nonetheless, involve discrete acts that require proof of unanimity. See State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994). In King, the court reversed for failure to give a unanimity instruction for possession of cocaine. Id. at 900. The court held an instruction or election was required to ensure unanimity because the jury could have found King guilty based on either the cocaine found in a Tylenol bottle on the floor of his car when he was arrested or the cocaine found in his fanny pack when he was searched after arriving at the police station. Id. at 903. The court rejected the idea that the possession of cocaine was a continuous offense because the cocaine was found in two separate containers at two different times, and in two different places. Id. at 903. The court also noted that the State’s case with regard to the cocaine in the Tylenol bottle

rested on constructive possession, while King's possession of the cocaine in the fanny pack was actual possession. Id. at 903.

In this case, as in King, there were two discrete incidents, separated by time and place and supported by different theories of liability. At Spokane and Beacon, there was evidence of only one shot fired by Ho; thus, any liability for Contreras in that instance necessarily rested on a theory of accomplice liability. 8RP 25-30. Then, 20 blocks away and several minutes later, there were multiple shots fired and some evidence that the driver, i.e. Contreras, actually fired some of them. 7RP 83-84. Thus, the jury could have found Contreras guilty as a principal as to the later shootings at 22<sup>nd</sup> and Lucile.

The continuing course of conduct exception has generally been applied to assaults only under fairly specific facts. For example, in State v. Crane, 116 Wn.2d 315, 317-21, 804 P.2d 10 (1991), the defendant was charged with causing the death of his three-year old nephew, based on an assault that occurred sometime within a two-hour period. There was no evidence as to specific acts, but medical experts testified that the injury that resulted in the child's death was inflicted within that time frame, and there was testimony as to the type of actions that could have caused the injury. Id. The Supreme Court held the jury did not have to be unanimous as to which specific act resulted in the fatal injury. Id. at 330. It only had to agree that

the defendant caused the injury. Id. Thus, the continuing course of conduct exception applied. Id.

Similarly, in State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (1993), the defendant was charged with assaulting her boyfriend's 16-month-old son. The evidence showed she was the child's only caregiver during the three-week charging period and that the child had been subjected to continuing assaults during that time. Id. at 582-84. This Court held that the continuing course of conduct exception applied to the systematic pattern of abuse established in that case. Id. at 588. The court explained that this exception was particularly appropriate given that the victim was preverbal, the abusive conduct occurred outside the presence of other witnesses, and no one could testify as to any single act of abuse. Id. at 589, n.7.

Courts have also found assaults to be a continuous course of conduct when individual assaults are aimed at achieving a specific and common goal. For example, in State v. Handran, 113 Wn.2d 11, 17-18, 775 P.2d 453 (1989), two assaultive acts of kissing and then hitting Handran's wife were both deemed part of a continuous course of conduct aimed at forcing her to submit to sexual activity.

Here, by contrast, the evidence did not show a systematic pattern of abuse or multiple attempts to achieve a common goal. Instead, the State presented evidence of two distinct incidents, each of which met the

definition of assault. Individual incidents did not have to be inferred from the circumstances; multiple witnesses attested to the fact of the shootings in each location.

This case does not fit with the specialized facts upon which multiple assaults have been found to be a continuous course of conduct. This case is more analogous to Petrich, where different acts occurred at different times and places, with the only commonality being the victim. 101 Wn.2d 566, 571. The Petrich court thus concluded there were multiple acts requiring either an election or a jury instruction to ensure unanimity. Id. at 572. This Court should do likewise.

c. The Failure to Ensure Jury Unanimity Is Presumed Prejudicial and Requires Reversal of the Assault Convictions.

Lack of jury unanimity is constitutional error that may be raised for the first time on appeal. State v. Doogan, 82 Wn. App. 185, 191, 917 P.2d 155 (1996) (citing State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974)). It is presumed prejudicial and requires reversal unless the prosecution proves the error harmless beyond a reasonable doubt. State v. VanderHouwen, 163 Wn.2d 25, 38-39, 177 P.3d 393 (2008); Coleman, 159 Wn.2d at 510, 512. The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Coleman, 159 Wn.2d at 512 (citing Kitchen, 110 Wn.2d at 411-12).

A rational juror could have distinguished between the incidents based on the supporting evidence and found reasonable doubt. There were many reasons to doubt West's identification of Ho and Contreras during the incident at Spokane and Beacon. He was a member of a rival gang who may have been motivated by animus based on gang rivalry. 8RP 12-14. His testimony conflicted with that of his co-gang member Ngo, who testified the shot was fired through the driver's window, not the sunroof. 10RP 43-44. There was also reason to doubt the element of intent to inflict great bodily harm. At Spokane and Beacon, only one shot was fired. The fact that it was fired at essentially point blank range but failed to hit anyone tends to indicate intent to frighten, rather than cause injury.

There were also reasons to doubt that Ho and Contreras were responsible for the subsequent shootings at 22<sup>nd</sup> and Lucile. During that portion of the evening's events, no one identified Ho or Contreras as being there. West assumed it was them. 8RP 79. Ngo could not see who was shooting at him. 10RP 40. Local residents could not identify the shooters. 6RP 60; 7RP 9-10, 101; 9RP 158; 10RP 162.

This Court cannot be confident the jury was unanimous. Some jurors may have relied on the Spokane and Beacon incident, while others may have relied on the subsequent events at 22<sup>nd</sup> and Lucile. Because a rational juror could find reasonable doubt as to both incidents, the presumption of

prejudice stands, and Contreras' convictions for first-degree assault must be reversed. Coleman, 159 Wn.2d at 512.

5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT VIOLATED CONTRERAS' RIGHT TO A FAIR TRIAL.

During closing argument, the prosecutor improperly vouched for West's credibility as a witness by opining to the jury, "We only know for certain two of the individuals that were shooting that night. That was Mr. Contreras and Mr. Ho." 13RP 15-16. He committed additional misconduct during rebuttal by disparaging the role of defense counsel when he argued, "Defense counsel, both of them, have gone through in their closing and tried to explain away or dismiss every single piece of the State's evidence. But it gets to a point . . . where it becomes nonsensical." 13RP 87.

A prosecutor is a quasi-judicial officer who shares in the court's duty to ensure that every accused person receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A fair trial is one where the verdict is based on the evidence, the law, and reason. Fisher, 165 Wn.2d at 746-47. Therefore, prosecutors must refrain from using the prestige of their elected office to sway the jury. Monday, 171 Wn.2d at 677. A fair trial is one in which the accused person benefits from the effective assistance of counsel for his or her defense. State

v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). Therefore, prosecutors must also refrain from attacking defense counsel's vital and constitutionally mandated role in the proceedings. Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983).

A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts consider the context of the entire trial. Id. at 704. Prosecutorial misconduct requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Id. at 703-04.

Prosecutorial misconduct is a serious irregularity because it may violate the defendant's constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is on whether the effect of the argument could be cured. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) (citing State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012)).

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial

as a whole. Glasmann, 175 Wn.2d at 704. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

“The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks.” State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)).

a. The Prosecutor Improperly Vouched for West’s Credibility.

Like witnesses, prosecutors must not offer personal opinions on the guilt of the defendant or the credibility of witnesses. Monday, 171 Wn.2d at 677. Improper vouching occurs when the prosecutor places the prestige of the government behind the witness or expresses a personal belief as to the witness’ truthfulness. Id.; State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007)).

Although it is permissible to reason that the evidence showed a witness is truthful, it is misconduct to declare the witness truthful based on something other than the evidence. Opinions by a prosecutor are improper when “the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.” Ish, 170 Wn.2d at 197 (quoting Roberts, 618 F.2d 530).

“Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating.” United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998). Both rules are “designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the ‘fundamental distinctions’ between advocates and witnesses.” Id. at 922 (citing United States v. Prantil, 764 F.2d 548, 554 (9th Cir. 1985)). Vouching is inappropriate because it invites the jury to assume the State’s witnesses bear a special seal of trustworthiness.

The prosecutor improperly vouched for West’s credibility and Contreras’s guilt when he told the jury “we only know for certain two of the individuals that were shooting that night. That was Mr. Contreras and Mr. Ho.” 13RP 15-16. The prosecutor’s remark was improper vouching

because it suggested he was personally “certain” West’s identification of Ho and Contreras was true and correct rather than mistaken or fabricated. In United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992), the Ninth Circuit held, “A prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign’s representative, the jury may be misled into thinking his conclusions have been validated by the government’s investigatory apparatus.” See also, United States v. Vargas, 583 F.2d 380, 387 n.7 (7th Cir. 1978) (recognizing a prosecutor’s statement carries an implicit stamp of authenticity and credibility as it is endorsed by the government). The prosecutor committed misconduct by presenting the jury with his assurance of certainty that Contreras was one of the shooters.

It is also misconduct for the prosecutor to make comments “calculated to align the jury with the prosecutor and against the [accused].” State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). This alignment may occur in an obvious manner. See id. (prosecutor argued defendant’s counsel and expert witnesses were outsiders driving expensive cars). Or it may occur by subtler, but no less effective, means.

For example, it is improper for a prosecutor to align herself with jurors by making continuous references to “we” and “us” as though jurors and the prosecutor were one and the same or on the same side. State v.

Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006); State v. Spencer, 81 Conn. App. 320, 329, 329 n.6, 840 A.2d 7 (Conn. Ct. App. 2004), reversed in part on other grounds, 275 Conn. 171, 881 A.2d 209 (Conn. 2005); People v. Johnson, 149 Ill. App. 3d 465, 468, 102 Ill. Dec. 835, 500 N.E.2d 728 (1986) (prosecutor unfairly aligned himself with jury by referring to “our job” to find the facts). Because a prosecutor is not a member of the jury, a prosecutor’s use of pronouns like “we” and “us” is inappropriate and may be an effort to appeal to the jury’s passions. Mayhorn, 720 N.W.2d at 790; Spencer, 81 Conn. App. at 329, 329 n.6. Such alignment also blurs the proper roles of neutral factfinder and zealous advocate in the adversary process.

In addition to vouching for West, the prosecutor’s use of the expression, “we only know for certain,” drew the jury into that certainty and suggested an improper alliance between the prosecutor and the jury against Contreras. Until deliberations, the jury was required to keep an open mind on all points, including West’s credibility and Contreras’ guilt. See, e.g., State v. Reed, 168 Wn. App. 553, 578, 278 P.3d 203 (2012) (presumption of innocence continues throughout entire trial). The prosecutor’s comment undermined the presumption of innocence by inviting jurors to be on the side of the prosecution, which was already “certain.”

When the evidence is disputed, the jury “may be inclined to give weight to the prosecutor’s opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.” State v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005) (quoting United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985)). The prosecutor’s comments here unfairly aligned the jury with the State and placed the prosecutor’s personal opinion like a thumb upon the scales of justice. Reversal is required because the effect of the prosecutor’s certainty was unlikely to be curable merely by instructing the jury.

b. The Prosecutor Improperly Disparaged Defense Counsel.

In closing argument, the prosecutor disparaged defense counsel’s strategy as attempts to “explain away” the State’s evidence and called it “nonsensical.” 13RP 87. This argument was improper in two respects: by being derogatory toward defense counsel and by making light of the concept of reasonable doubt.

Maligning counsel is prosecutorial misconduct. State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). Comments by the prosecutor that permit the jury to nurture suspicions about defense counsel’s integrity violate the rights to a fair trial and to effective assistance of counsel. Bruno

v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983); State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988). It is therefore blatant misconduct for the prosecutor to disparage defense counsel or defense counsel's role. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); Bruno, 721 F.2d at 1195. Such improper argument severely damages the defendant's opportunity to present his case before the jury. Bruno, 721 F.2d at 1195. Additionally, it is well-established that prosecutors may not trivialize the jury's role or the burden of proof. State v. Walker, 164 Wn. App. 724, 732, 265 P.3d 191 (2011) (prosecutor's comments improper where they minimized burden of proof by comparing reasonable doubt to everyday decision-making); State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010).

The prosecutor described defense counsel's attempts to "explain away" all the State's evidence as "nonsensical." 13RP 87. But the essence of reasonable doubt is alternative explanations of the evidence that are inconsistent with guilt. If, indeed, defense counsel were able to "explain away" or provide a reasonable alternative explanation for every piece of the State's evidence, then that strategy would not be nonsensical. On the contrary, under the law it should be successful. The jury would have to find reasonable doubt and acquit. Thus, by denigrating defense counsel's strategy, the prosecutor simultaneously disparaged defense counsel and

minimized the burden of proof beyond a reasonable doubt. By calling this strategy nonsensical, the prosecutor encouraged the jury to ignore reasons to doubt the State's case.

By overruling counsel's objection to improper argument, the court appeared to place its imprimatur on the State's argument, suggesting to the jury that the State's view of the law and the argument was correct, or at least, permissible. State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). Counsel's objection preserved the error for review and the court's reaction exacerbated the prejudice, making it substantially likely that the improper argument affected the jury's evaluation of the evidence. Contreras' convictions should be reversed for prosecutorial misconduct.

6. CUMULATIVE ERROR DENIED CONTRERAS A FAIR TRIAL.

Even if this Court concludes the above errors do not individually require reversal, their combined effect does. Every accused person has the right to a fair trial. U.S. Const. amend. VI; Const. art. 1, § 22. Cumulative error may violate this right. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Even unpreserved errors can contribute to a finding that cumulative error denied the appellant a fair trial. State v. Alexander, 64 Wn. App. 147, 150, 822 P.2d 1250 (1992). Contreras' trial was rendered unfair when the detective offered an improper opinion on guilt based on Contreras'

constitutional right to silence. The scales were further unbalanced by prosecutorial argument that undercut the burden of proof beyond a reasonable doubt, denigrated defense counsel, and vouched for the credibility of the State's witness.

7. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CRR 3.5.

Before trial, the court held a hearing under CrR 3.5 to determine admissibility of Contreras' and Ho's statements to Detective Sevaetasi. 2RP 20-37; 3RP 50-77, 109-11. The court, however, failed to enter written findings or conclusions as required by CrR 3.5. That court rule provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision, but failed to enter the required written findings and conclusions.

The oral decision is "no more than a verbal expression of [the court's] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely

abandoned.” Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court’s decision is not binding “unless it is formally incorporated into findings of fact, conclusions of law, and judgment.” State v. Hescocock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 (“[T]he State’s obligation is similar under both CrR 3.5 and CrR 3.6). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id.

D. CONCLUSION

Contreras did not receive a fair trial. His constitutional rights were violated by comment on his right to silence, improper opinion on guilt, failure to ensure jury unanimity, and prosecutorial misconduct during closing argument. He therefore asks this Court to reverse his convictions.

DATED this 25<sup>th</sup> day of February, 2015.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72419-3-I
	)	
VICTOR CONTRERAS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

- [X] VICTOR CONTRERAS  
DOC NO. 377031  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362
  
- [X] KING COUNTY PROSECUTOR'S OFFICE  
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FEB 25 10 11 AM  
CLERK OF COURT

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF FEBRUARY 2015.

X *Patrick Mayovsky*