SUPREME COURT NO. 94927-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KYLE BRYCELAND,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

Court of Appeals No. 76738-1-I
Kitsap County No. 16-1-00059-1

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, KYLE BRYCELAND, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Bryceland seeks review of the July 31, 2017, unpublished decision of Division One of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. After his arrest Bryceland was advised of his constitutional rights. Although he agreed to speak, he chose not to answer some of the detective's questions. The detective testified at trial that Bryceland was talking in circles and it was clear he did not want to cooperate. Does this comment on Bryceland's exercise of his constitutional right to silence require reversal?

2. At trial the State presented, over defense objection, a recording of a phone conversation Bryceland had while in jail, in which the person he spoke to told him he had to prove his innocence by answering questions about the State's evidence. Did the State's use of this recorded statement constitute an indirect comment on Bryceland's right to silence?

3. Where the recorded statement had no probative value and served only to create an inference that Bryceland's exercise of his constitutional rights was consistent with guilt, did the trial court err in denying the defense motion to exclude the recording?

D. STATEMENT OF THE CASE

Kyle Bryceland was convicted of first degree robbery following a jury trial in Kitsap County Superior Court. CP 70. The court imposed a standard range sentence, and Bryceland appealed. CP 80-81, 90.

On the evening of January 12, 2016, Hunter Trerise made plans with his friend Devan Kluge to smoke methamphetamine with Chris Jones, and he contacted Kyle Bryceland for a ride to Jones's place. 2RP[1] 129, 187. Bryceland and Jones headed to Trerise's house, with Bryceland driving Jones's car. On the way, they picked up Angelo Lundy. 2RP 248-49. Bryceland dropped Jones off in an alley near Trerise's house and then picked up Trerise and Kluge. 2RP 250. Once they were in the car, Bryceland pulled back into the alley and stopped the car so that Lundy could move his backpack to the trunk to make room in the backseat for other passengers. 2RP 132, 252-53. Bryceland got out of the car and opened the trunk for Lundy. 2RP 134, 253.

[1] The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—4-4-16; 4-5-16; 2RP—4-6-16; 3RP—4-7-16; 4RP—4-8-16; 5RP—4-29-16.

While Bryceland and Lundy were out of the car, a man wearing a bandana over his face approached and pointed a gun at Trerise through the open passenger window. 2RP 135, 137. Trerise later identified the man as Jones. 2RP 152. Jones told Trerise to give him everything he had, and Trerise took off a watch and bracelet and threw them to the floor of the car. 2RP 136, 171. He and Kluge then ran back to Trerise's house and called 911. 2RP 138-39.

Acting on information from Trerise, police located Jones's car at a convenience store. 2RP 221. Trerise was brought to the scene to identify his belongings in the car and to identify Jones, Bryceland, and Lundy. 2RP 149-51. Chaiss Pry was with them as well, and all four were arrested. 2RP 151, 279.

In a search of Jones's car, police found a BB gun replica of a .45 caliber pistol under the driver's seat. 3RP 330-31. Trerise's watch, bracelet, and cell phone were found in the front passenger area, as well as a black bandana and two hats. 3RP 335-36. In the trunk police found Lundy's backpack, which contained numerous credit cards and gift cards, a social security card, a checkbook, a blank check, and passports in various names, some of which had been reported stolen. 3RP 349-51. A large amount of methamphetamine and heroin was found in the backseat area, along with baggies, a pocket knife, and a scale. 3RP 338-40.

During a police interview that night, Bryceland said he had been on the west side of Bremerton and drove to the east side with Jones and Lundy. 2RP 282-83. When asked if he thought Jones intended for anyone to get hurt, Bryceland said he did not think so, but he did not really know what was going on in Jones's mind. 2RP 285. Bryceland said he dropped Jones off, he did not know what Jones did, and then Jones was back in the car. He said he was on the west side doing what Jones wanted him to do, but he did not say what that was. 2RP 285. He said he didn't know anything about a gun. 2RP 286-87.

In phone calls he made from the jail over the next few weeks, Bryceland referred to Jones as the person who committed the crime, saying he was out of the vehicle when it happened. He also said that Pry had snitched on him. Exhibit 35.

Defense counsel argued in closing that Bryceland knew there was going to be a drug deal that night, but he did not know there was going to be a robbery, and he did not know there would be a replica firearm used in the crime. 3RP 457. Bryceland was not the mastermind, but he was the driver for the drug deal. He was told to drop Jones off in the alley so he could get methamphetamine to sell to Trerise and Kluge. 3RP 459-60. Although Bryceland clearly knew there had been a robbery by the time he

made the recorded jail phone calls, that did not mean he knew beforehand that the robbery would happen. 3RP 463.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS' HOLDING THAT THERE WAS NO COMMENT ON BRYCELAND'S EXERCISE OF HIS RIGHT TO REMAIN SILENT CONFLICTS WITH OTHER DECISIONS OF THE COURT OF APPEALS AND INVOLVES A SIGNIFICANT CONSTITUTIONAL QUESTION. RAP 13.4(b)(2), (3).

Impermissible comments on Bryceland's exercise of his right to remain silent violated due process and denied him a fair trial. The Fifth Amendment to the United States Constitution guarantees that a criminal defendant shall not be compelled to be a witness against himself. U.S. Const. amend V. Nor may the State comment on a defendant's exercise of that right. *Griffin v. California*, 380 U.S. 609, 613-15, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). The Washington Constitution guarantees the same protections. Wash. Const., art. I, § 9; *State v. Earls*, 116 Wn.2d 364, 374-74, 805 P.2d 211 (1991) (federal and state protections coextensive).

"The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citations omitted). Thus, it is constitutional error for the State to elicit testimony or

make closing argument as to the defendant's silence to infer guilt. *Easter*, 130 Wn.2d at 236. Further, it is well settled that comments on the defendant's post-arrest silence violate due process, because the Miranda warnings constitute an assurance that the defendant's silence will carry no penalty. *Easter*, 130 Wn.2d at 236; *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979). "A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

In *Romero*, the court established a framework for analyzing whether a comment on the defendant's silence is constitutional error. *See Romero*, 113 Wn. App. at 790-91. If the comment on the defendant's silence is direct, constitutional error exists. When a comment from a state agent is indirect, three questions are considered to determine whether there was constitutional error. First, could the comment reasonably be considered purposeful? Second, could the comment be unresponsive but either given in an attempt to prejudice the defense or resulting in likely prejudice to the defense? And third, was the comment exploited by the State during the course of trial? If any of these questions is answered in

the affirmative, the indirect comment is constitutional error. *Romero*, 113 Wn. App. at 790-91.

Both direct and indirect comments on Bryceland's silence were admitted at trial, and both errors require reversal.

a. **The detective who interviewed Bryceland after his arrest directly commented on Bryceland's silence.**

Bryceland was interviewed at the police station after being advised of his rights. 1RP 29. Although he said he was willing to talk, he did not give the detective specific answers. 1RP 30-32. At trial, Detective Thuring testified that Bryceland and the other suspects were tired when they were interviewed, and they were not very cooperative. 2RP 281. Bryceland appeared to nod off at times, mumbled his responses, and talked in circles. 2RP 281-82. Thuring said that Bryceland knew they were talking about a robbery, but his answers were not very clear. 2RP 285. Bryceland told Thuring that he was doing what Jones wanted him to do, but he would not say what that was. 2RP 285. Thuring testified that he lost patience with Bryceland and ended the interview early, because Bryceland was talking in circles and his answers were indefinite, and "[i]t was clear ... that he was not really wanting to cooperate." 2RP 286.

Any direct police testimony as to the defendant's refusal to answer questions is a violation of the right to silence. *Romero*, 113 Wn. App. at 792 (citing *Easter*, 130 Wn.2d at 241). In *Romero*, a law enforcement officer testified that after the defendant was arrested and placed in a holding cell, he was somewhat uncooperative, chose not to waive his rights, and would not talk. *Romero*, 113 Wn. App. at 785. This was a direct comment on the defendant's choice of silence in response to questioning and thus constitutional error. *Id.* at 792.

Here, as in *Romero*, the detective directly commented on Bryceland's decision not to answer questions after he was advised of his right to remain silent. The detective characterized Bryceland as uncooperative and said that although he agreed to talk he did not respond to the detective's questions. The only purpose this comment served was to infer that Bryceland's lack of cooperation was more consistent with guilt than with innocence. This direct comment on Bryceland's refusal to answer questions violates his right to silence.

Defense counsel did not object to this testimony. Instead, he attempted to clarify the circumstances on cross examination, establishing that the interview occurred around 4:30 a.m. and Bryceland had been in the interview room since about 1:00 a.m. 3RP 309. A comment on exercise of the right to remain silent is manifest constitutional error which

may be raised for the first time on appeal, however. *Romero*, 113 Wn. App. at 790-91. Counsel's failure to object does not preclude review of this error.

b. The State's presentation of portions of recorded phone calls constituted an indirect comment on Bryceland's right to remain silent.

At trial, a corrections officer with the Kitsap County Sheriff's Office testified that he maintains the inmate telephone system at the Kitsap County Jail. He reviewed calls from Bryceland's account and prepared a recording for the prosecution. He identified the recording at trial. 3RP 393-96. The prosecution investigator testified that she prepared a transcript of the recorded calls, which was admitted and presented to the jury. The investigator identified the calls as the recording was played in court. 3RP 399-412.

Included in the recording was a conversation Bryceland had with a woman in which she said,

> So, they're gonna say, Kyle, why did you drive said car to the destination to take a bag out and put it in the trunk? Why are ...Why did the owner of this car happen to be in a place that you...you know...supposedly dropped him? How...how did this all...you...you gotta understand. They're gonna try to paint the picture. How did all these events happen? Why? How? Where? And who? And they're gonna try to back evidence and they're gonna do all of this stuff to prove you guilty.

Exhibit 35, at 9. Bryceland responded. "Yah." Next, the woman said,

> Well...you know...you just gotta really think like what is gonna prove your innocence. How...how you gonna prove this to people who are gonna sit there and interrogate you? Why were you here? You have to come up with...with like an answer.

Exhibit 35, at 9. Bryceland responded, "Ah well, I came up with all that already (inaudible)." *Id.*

Defense counsel objected to this portion of the recording, arguing that the woman's statements constituted an impermissible comment on the presumption of innocence and the right to silence, a misstatement of law, and an implication that Bryceland needed to testify about what happened, when he had a right not to. 1RP 47-48, 50. The State argued that the conversation demonstrated a consciousness of guilt because Bryceland did not deny participation or knowledge and said he already came up with a story. 1RP 49. The court denied the motion to exclude the statements. 1RP 52.

It is impermissible to invite the inference of guilt from the exercise of constitutional rights. *State v. Nemitz*, 105 Wn. App. 205, 215, 19 P.3d 480 (2001). In *Nemitz*, an officer testified that when arrested the defendant presented an attorney's business card which contained an explanation of rights if stopped by police. It was error for the court to deny a motion in limine to exclude information about the card, because it had no probative value and served only to create an inference of guilt from

the exercise of constitutional rights. *Id.* Similarly, here, the States use of this portion of the recorded telephone call served no purpose other than to create the inference of guilt from Bryceland's exercise of constitutional rights.

A criminal defendant has the right not to testify, and exercise of that right may not be used to imply guilt. *State v. Mendes*, 180 Wn.2d 188, 194-95, 322 P.3d 791 (2014), *cert. denied*, 135 S. Ct. 1718, 191 L. Ed. 2d 688 (2015). Furthermore, the State has the burden to prove every element of the crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). "A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

The statements made during this portion of the telephone call were clearly contrary to constitutional principles regarding the right to silence, the presumption of innocence, and the State's burden of proof. There was no probative value to erroneous statements that Bryceland had to prove his innocence by answering questions. The State's use of this portion of the phone call created the prejudicial impression that Bryceland's exercise of his constitutional right to silence was more consistent with guilt than with innocence.

Although the erroneous statements were not made by a police officer or State agent, they were presented to the jury by the prosecutor through the testimony of two State agents. Moreover, the introduction of this evidence cannot be considered anything but purposeful. It was a recorded statement which the State had transcribed and chose to use. There was no doubt as to what the statement would be and no legitimate purpose for putting it before the jury. Under Romero, the State's use of these statements constitutes an indirect comment on Bryceland's constitutional right to silence and is constitutional error. *Romero*, 113 Wn. App. at 790-91 (indirect comment rises to constitutional proportions when it "could reasonably be considered purposeful, meaning responsive to the State's questioning with even slight inferable prejudice to the defendant's claim of silence[.]"). The Court of Appeals' conclusion that the State's use of this evidence was not an impermissible comment on Bryceland's exercise of his constitutional right conflicts with the decisions in *Nemitz* and *Romero*. Opinion, at 5-6.

2. THE COURT OF APPEALS' HOLDING THAT THE TRIAL COURT DID NOT ERR IN ADMITTING THE RECORDED STATEMENT PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(b)(4).

Even if the recorded statement was not an indirect comment on Bryceland's exercise of his constitutional rights, the court abused its discretion in admitting the statement over defense objection. *See Nemitz*, 105 Wn. App. at 215 (court erred in denying motion in limine to exclude business card listing constitutional rights which had no probative value and served only to create prejudicial inference of guilt). The Court of Appeals agreed with the State that the recorded statement was properly admitted as an adopted admission relevant to show Bryceland's consciousness of guilt. Opinion, at 6-7. But the recording did not contain an incriminating statement which Bryceland would deny if not true. Instead, it was a misstatement of law, and there was no legitimate basis for admitting it.

The other speaker's misstatement of the law was wholly lacking in probative value and could serve only to confuse the jury and prejudice the defense. The evidence should have been excluded under ER 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence."), ER 402 ("Evidence which is not relevant is not admissible."), and ER 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....").

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the evidence as a whole." *Id.* Given the lack of evidence that Bryceland knew Jones was planning a robbery rather than a drug transaction, it is likely the jury's verdict rested on the impression created by the recorded statement, together with the detective's improper testimony, that Bryceland would have explained the State's evidence if he were innocent. There is a reasonable probability the erroneous admission of this evidence affected the verdict, and Bryceland's conviction must be reversed. The Court of Appeals' holding to the contrary must be reversed.

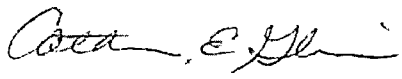
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Bryceland's conviction and sentence.

DATED this 30th day of August, 2017.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



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Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Kyle Bryceland,* Court of Appeals Cause No. 76738-1-I, as follows:

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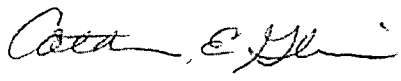

Catherine E. Glinski
Done in Manchester, WA
August 30, 2017

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KYLE S. BRYCELAND, Appellant.	)	No. 76738-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 31, 2017

SPEARMAN, J. — In a criminal trial, the State cannot comment on the defendant's exercise of the right to silence. Here, because appellant, Kyle Bryceland, did not exercise his right to silence prior to trial, any reference to his pretrial discussions does not implicate that right. In addition, the admission of statements from a recorded jail call was not an error because they were relevant as adopted statements indicating consciousness of guilt and not unfairly prejudicial. Nor did the statements impermissibly comment on the right to silence or shift the burden of proof. We affirm.

FACTS

On the evening on November 12, 2016, Kyle Bryceland was driving Chris Jones and Angelo Lundy to pick up Hunter Trerise and Devon Klug at Trerise's house. Jones got out of the car just shy of Trerise's house. Trerise and Klug joined Bryceland and Lundy in the car. Then Bryceland unexpectedly pulled into the alleyway behind Trerise's house. He and Lundy got out of the car to move a

backpack from the back seat to the trunk. A man walked down the alleyway toward the car. Wearing a bandana over his face, he approached Trerise's open car window, stuck a gun through it, and demanded that Trerise give him everything he had. Trerise gave the man his bracelet and watch, and he and Klug got out of the car. Trerise ran back to his house and called the police.

Bryceland and Lundy observed the robbery from outside of the car. They did not run away. Afterwards, Bryceland and Lundy took off in the car with Jones, who had rejoined them. The three drove to a nearby convenience store, where they were arrested by police. Trerise identified Jones as the gunman.

That night, Detective Matthew Thuring interviewed Bryceland about the incident. The detective read Bryceland his rights pursuant to Miranda v. Arizona.[1] Bryceland agreed to waive those rights and speak to the detective. He did not assert his Fifth Amendment right to silence. Bryceland was charged with first degree robbery and second degree driving with license suspended. He pleaded guilty to the charge of driving with license suspended.

While in jail pending trial, Bryceland made multiple phone calls that were recorded. One of the phone calls was with an unidentified woman who advised Bryceland to think about how he was going to prove his innocence. Bryceland replied that he "came up with all that already." Exhibit 35 at 9.

At a pretrial hearing for the robbery charge, Bryceland argued that portions of the jail call should be excluded as an impermissible comment on the

[1] 384 U.S. 436, 88 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

right to silence, and because they were irrelevant. The court rejected these arguments and admitted portions of the call.

At trial, Detective Thuring testified that during his interview, Bryceland was tired and fidgety, and that he talked in circles. Defense counsel did not object to this testimony. Bryceland was convicted of first degree robbery. He appeals.

DISCUSSION

Testimony about Police Interview

Bryceland argues for the first time on appeal that Detective Thuring's description of his behavior during interrogation was an impermissible comment on his right to silence. The State contends that Bryceland did not preserve this issue because he did not object to the testimony at trial.

Generally, we do not consider arguments raised for the first time on appeal. RAP 2.5(a). But a defendant may appeal a manifest error affecting a constitutional right even if the issue was not raised before the trial court. RAP 2.5(a)(3). The defendant must identify a constitutional error and show that it resulted in actual prejudice, which means that it had practical and identifiable consequences in the proceeding. State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000).

Bryceland does not meet the first prong of this test. He does not raise an issue affecting a constitutional right, because he does not contend that he invoked his constitutional right to remain silent. State v. Seeley, 43 Wn. App. 711, 714, 719 P.2d 168 (1986) (citing Anderson v. Charles, 447 U.S. 404, 408, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980)) ("a defendant who voluntarily speaks after

receiving Miranda warnings has not been induced to remain silent."); State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) ("When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say.") (citing State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)). It is undisputed that Bryceland received Miranda warnings, waived his constitutional right to silence and agreed to speak to the detective. Because Bryceland did not assert his right to silence, and was not silent, he cannot show that Detective Thuring's testimony implicated his constitutional right to silence. We decline to review this issue under RAP 2.5(a)(3).

Admission of Jail Call

Bryceland argues that the trial court erred by admitting certain statements made during a jail phone call about defense strategy. He contends the statements were an improper comment on his right to not testify and improperly shifted the burden of proof from the State to him. In the alternative he argues that the statements were not relevant and unfairly prejudicial, so the trial court abused its discretion in admitting them. The State argues that the statements were not a comment on Bryceland's decision to not testify, and that they were properly admitted as adoptive admissions demonstrating consciousness of guilt.

A criminal defendant has the right to not testify, and exercise of that right may not be used to imply guilt. State v. Mendes, 180 Wn.2d 188, 194-95, 322 P.3d 791 (2014). Courts consider two factors to determine whether a statement impermissibly comments on a defendant's silence: (1) whether the prosecutor manifestly intended the remarks to be a comment on the defendant's exercise of

his right not to testify and (2) whether the jury would naturally and necessarily interpret the statement as a comment on the defendant's silence. State v. Barry, 183 Wn.2d 297, 307, 352 P.3d 161 (2015) (citing State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

In the jail call, Bryceland and a woman discussed his defense:

> Female voice: So, they're gonna say, Kyle, why did you drive said car to the destination to take a bag out and put it in the trunk? Why are...Why did the owner of this car happen to be in a place that you...you know...supposedly dropped him? How...how did this all...you...you gotta understand. They're gonna try to paint the picture. How did all these events happen? Why? How? Where? And who? And they're gonna try to back evidence and they're gonna do all this stuff to prove you guilty.
> Male voice: Yah.
> [Break in recording]
> Female voice: Well ... you know ... you just gotta really think like what is gonna prove your innocence. How... how you gonna prove this to people who are gonna sit there and interrogate you? Why were you here? You have to come up with ... with like an answer.
> Male voice: Ah well. I came up with all that already (inaudible)

Exhibit 35 at 9.

Bryceland argues that the statements are an implied comment on his right to silence and shift the burden of proof. We disagree. The first part of the statement discusses how Bryceland might defend himself, but never mentions silence. It is not an impermissible comment on Bryceland's silence. And while the statement mentions things that the State will do to prove Bryceland's guilt, it does not suggest that Bryceland bears the burden of proving his innocence.

The second part of the statement does not appear to discuss Bryceland's exercise of his right to silence at trial. Rather, it discusses interrogation, which is commonly understood to take place with police officers before trial. And because

Bryceland did not assert his pre-trial right to silence, the second statement is not a comment on the exercise of that right. In addition, while there is mention of Bryceland proving his innocence, viewed in context the statement does not shift the burden of proof to Bryceland. First, as discussed, the statement appears to refer to a police interrogation and not a trial. The burden of proof is not at issue in that context. And second, the statement occurs during a general discussion about how to prepare a defense with a friend who does not appear to be a lawyer.

Under these circumstances, a jury would not naturally and necessarily consider the statement a comment on silence or conclude that Bryceland bore the burden of proving his innocence. This is especially so in light of the trial court's instructions on these issues. The jury was instructed to not infer guilt from the fact that the defendant has not testified. The jury was also instructed that the State solely bore the burden of proving each element of the crime and that Bryceland bore no burden to prove his innocence. We presume the jury follows the court's instructions. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

Bryceland also argues that the statements were irrelevant and prejudicial and that the trial court abused its discretion by admitting them. The State contends the statements were adopted by Bryceland and were relevant to show consciousness of guilt. We agree with the State. When an incriminating statement is made in the presence of the accused, and the accused does not deny, contradict, or object to it, the statement and the failure to deny are

admissible as evidence of acquiescence in its truth. State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725, (1988) (citing State v. Redwine, 23 Wn.2d 467, 470, 161 P.2d 205 (1945)), overruled on other grounds, State v. Robinson, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). Here, Bryceland appeared to acquiesce to the idea that he needed to come up with an explanation for his presence at the scene of the robbery and indicated that he had already done so. The exchange is relevant as evidence of potential fabrication by Bryceland when talking with police or preparing his defense.

We also reject Bryceland's argument that the evidence should have been excluded as unfairly prejudicial. Unfair prejudice requires more than testimony which is simply adverse to the opposing party. State v. Gould, 58 Wn. App. 175, 180, 791 P.2d 569 (1990). Bryceland argues that the statements are unfairly prejudicial because they show guilt absent direct evidence that he had prior knowledge of the robbery. But simply because the evidence is probative of guilt does not make it unfairly prejudicial. The relevance of the statements is not substantially outweighed by unfair prejudice. The trial court did not abuse its discretion when it admitted them.

Fees on Appeal

Because the State indicates that it will not seek fees in this case, we do not address Bryceland's argument that fees not be awarded.

Affirmed.

Specman, J.

WE CONCUR:

Appelwick, J.

Becker, J.