NO. 47693-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PAUL ALAN GILMORE,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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ORDER FOR SUPPLEMENTAL BRIEFING

During closing in this case the state made the following arguments asking the jury to infer guilt from the defendant's demeanor during a recorded police interview the state had played for the jury during trial:

> His answers to the rest of the questions, I would suggest, are equivocal; again, like the "possibly," ending up, "finally" and "probably." His body language – and this is something we talked about when we're talking about credibility. His body language, if you watched him during the interview, he appears uninterested. He's looking at his hands and kind of cleaning his fingernails while law enforcement is accusing him of molesting his eight-year-old daughter and searching for child pornography. And he seems irritated, uninterested, and is just kind of sitting there like it is any other day.
>
> This is not consistent with a person who has not committed these crimes. A person who has not committed these crimes and is being accused of them by law enforcement is going to be doing something like: I did not do this. I didn't do this. You can search whatever; you can look at my computer. They are going to be vehement. They are not going to be irritated. They are not going to be looking at their fingernails to clean out their fingernails. They are going to be very vocal. Yes, everyone is going to respond differently.
>
> But the defendant's response in law enforcement is absolutely inconsistent with somebody who did not commit these offenses.

RP 607-608.

In the first argument in his Statement of Additional Grounds (SAG) the defendant claimed that under the decision in *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988), this portion of the state's closing "improperly commented on his right to silence and his right to due process." SAG, page 1.

This court has now entered an order "that appellant's counsel and the State submit supplemental briefs addressing this issue." The following is Appellant's supplemental brief as ordered by the court.

ARGUMENT

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT INVITING THE JURY TO INFER GUILT FROM THE DEFENDANT'S DEMEANOR DURING A POLICE INTERVIEW VIOLATED THE DEFENDANT'S RIGHT TO SILENCE AND TO A FAIR TRIAL.

In *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988), the defendant appealed his murder conviction arguing in part that the state had improperly commented on his right to silence and thereby denied him a fair trial during closing argument and during rebuttal when he named all of the officers involved in the defendant's arrest and incarceration and invited the jury to infer guilt based upon the defendant's failure to protest his innocence to these officers. In closing the prosecutor stated:

> Next item. Schmidt - doesn't say anything to Schmidt. Christiensen, the border patrol, doesn't say anything to him. Barriball, again doesn't talk to him except to ask what jail he is going to. This guy who was getting framed, don't you think - I would go, "But wait, I got to tell you guys something." He doesn't say anything. He's getting his chance but wait - Stokes in the area, Huntoon in the area, Kurhenrewther in the area, no talking. I ask you - who is beginning to have some doubts about Gary [Belgarde]?

State v. Belgarde,110 Wn.2d at 510.

The prosecutor repeated these arguments in rebuttal, stating as follows:

> Why doesn't [defense counsel] talk about his client? . . . Oh, yeah, they get a doctor here who heard the story some three weeks ago. If you got a story and you are innocent, you tell the cops. You don't tell some doctor.(Italics ours.)

State v. Belgarde, supra.

In responding to this claim the state argued that under the decision in *Anderson v. Charles*, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), and *State v. Cosden*, 18 Wn.App. 213, 568 P.2d 802 (1977), once a defendant waives this right to silence under United States Constitution, Fifth Amendment, makes a statement to police, and then testifies at trial as did the defendant, the prosecution may use the initial statement to impeach the defendant's inconsistent trial testimony. While recognizing the correctness of this legal principle, the court none the less rejected the state's argument, finding that the prosecutor's closing and rebuttal argument did not fall under this exception. The court held:

> We do not find the prosecutor's comments were proper under *Anderson* and *Cosden*. In both cases, the State was allowed to question the defendant's partial silence at the time he made a statement to police, after having waived the right to remain silent, in order to impeach the defendant's inconsistent trial testimony. In the instant case, the prosecutor focused not on any prior inconsistent statements made by the defendant, but on his failure to make a statement immediately upon arrest. Although the prosecutor commented on Belgarde's prior inconsistent statement in other portions of closing argument, the challenged remarks specifically refer to the officers present when Belgarde was first apprehended. The prosecution's remarks which focused on the defendant's exercise of his right to remain silent falls directly under the Doyle rule which forbids using such silence to imply guilt. We therefore disagree with the Court of Appeals and find that such comments on post-arrest silence violate due process.

State v. Belgarde, 110 Wn. 2d at 512.

The case at bar is different from the facts in *Belgarde* because in this case the defendant did give a complete statement to the police and flatly denied any criminal conduct. However, it is analogous to *Belgarde* because the state's argument in closing in this case was that the defendant was guilty because he did not voice his denial with the words and in the body language the prosecutor thought he should. Thus, in this case, the essence of the state's argument was that the defendant was guilty because he did not speak in the manner the state thought appropriate. Thus, this argument violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, in the same manner as did the closing argument in *Belgarde*.

In addition, under the decision in *State v. Barry*, 183 Wn.2d 297, 352 3d 161 (2015), the state's argument in this case that the jury should consider the defendant's demeanor as evidence of guilt also violated the defendant's right to a fair trial under the Sixth Amendment. In *Barry* the state charged the defendant with child molestation and the matter later went to trial. The defendant did not testify. During deliberation the jury sent out the following question: "Can we use as 'evidence' for deliberations our observations of the defendant's actions-demeanor during the court case?" The judge, prosecutor and defense attorney did not have any idea about what "actions" or "demeanor" the jury was referring to. Over defense objection the court

responded with the written statement that "[e]vidence includes what you witness in the courtroom."

Following conviction the defendant appealed, arguing that this instruction violated both his fifth amendment right to refrain from testifying, as well as his Sixth Amendment right to a fair trial, including the right to have the case decided only on the basis of the evidence admitted during trial. Ultimately the Washington Supreme Court rejected the claims under both the Fifth Amendment as well as under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 3, on the basis that without any evidence in the record concerning the substance of the demeanor evidence the jury wanted to and apparently did consider, the defense could not show prejudice.

By contrast, in the case at bar the record is complete concerning the substance of the demeanor evidence the state argued the jury should consider. In this case the prosecutor specifically referred the jury to the video tape of the defendant's statement to the police and then specifically argued that the jury should infer guilt from the demeanor of the defendant's denial. The video tapes of the interviews were admitted into evidence as trial exhibits 1 and 4, and are included in the record on appeal. The prosecutor's references and arguments concerning demeanor are on the record and quoted above. Justice McCloud's dissent in *Barry* explains the due process error in allowing

such argument. In that case she stated:

> One would hope that an instruction that the jury could consider a defendant's race, gender, religious beliefs, or physical appearance in its deliberations would be constitutionally reprehensible – that we would not tolerate such an instruction to consider irrelevant attributes as "evidence" of guilt. Similarly, the trial court's vague instruction here to consider the defendant's "demeanor" invites that same prejudicial abuse and opens the door for the jury to consider the appearance and demeanor of the defendant instead of focusing on the evidence presented. Such an invitation violates basic notions of due process.

State v. Barry, 183 Wn. 2d at 324 (Gordon McCloud, J. concurring in dissent).

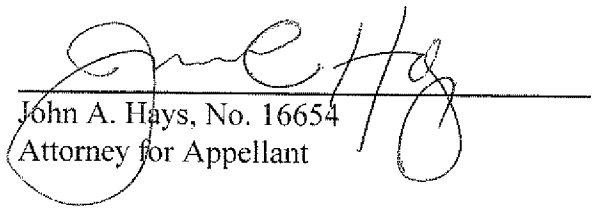
Similarly in the case at bar the state's argument that the jury should convict the defendant because of the demeanor of his denials to the police also denied the defendant due process when it "open[ed] the door for the jury to consider the appearance and demeanor of the defendant instead of focusing on the evidence presented." Thus, in this case, the court should reverse the defendant's conviction based upon the prosecutor's improper closing argument and remand for a new trial.

CONCLUSION

The state's argument inviting the jury to infer guilt from the demanor of the defendant's denial to the police violated the defendant's rights under both the Fifth and Sixth Amendments, as well as under Washington Constitution, Article 1, § 3, and Washington Constitution, Article 1, § 9. As a result, this court should reverse the defendant's conviction and remand for a new trial.

DATED this 2nd day of September, 2016.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **PAUL A. GILMORE,** **Appellant.**	**NO. 47963-2-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 2nd day of September, 2016, at Longview, WA.

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2nd Supplemental Brief of Appellant

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