NO. 47693-2

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL ALAN GILMORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-01222-3

SUPPLEMENTAL BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3equitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 12, 2016, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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CASES

I. SUPPLEMENTAL COUNTERSTATEMENT OF THE ISSUES

1. Whether the prosecutor's remarks about Gilmore's post-*Miranda* statements while he was questioned by police violated his right to remain silent.

A. SUPPLEMENTAL FACTS

During trial, Detective Baker testified to his contact with Gilmore. RP, 5/13/15, 444. He and another detective interviewed Gilmore. Id. This occurred at the Naval Criminal investigation Services (NCIS) office at subbase Banger (where Gilmore was stationed). Id. at 445. This interview was video recorded. Id. (the video was admitted as state's exhibit 4, which is in the record). The video was published to the jury. Id. at 448-49.

The other detective, Blankenship, testified, at the CrR 3.5 hearing that Gilmore was read *Miranda* warnings. RP, 5/5/15, 135. Gilmore said he understood and agreed to the interview. Id. A transcript of exhibit 4, the video, was admitted as exhibit 4A, which is in the record. The giving of *Miranda* warnings can be seen at exhibit 4A page 1.

Gilmore testified. RP, 5/14/15, 509 *et seq.* He said that during the police interview he was tired and "[s]o I didn't know what I was saying." RP, 5/14/15, 531. The remarks by the prosecution with regard to

Gilmore's interview with the police are as follow:

> When he's interviewed by law enforcement the -- when asked about child pornography, whether or not he accesses child pornography, what he volunteers -- the statement he volunteers is: I might have searched "Daddy's little girl." That's something that he came up with and had not yet been suggested by anyone in the interview. And when asked: Well, could it have been "Daddy's little girl giving a blow job?" He said: "Possibly." And then they said: "Possibly?" And he said: "Probably."
>
> He agreed that neither Mackenzie nor his wife would have searched those terms. Although he, on the stand seems to imply -- not seems to imply, implies that Mackenzie would be the one to search those terms.
>
> 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, 5/18/15, 606-08.

II. ARGUMENT

A. THE ISSUE WAS NOT PRESERVED AND THE PROSECUTOR'S REMARKS ABOUT THE STATEMENTS GILMORE DID MAKE WERE NOT A COMMENT ON HIS SILENCE.

Gilmore argues that the prosecutor's closing argument contained an improper comment on his silence. This claim was not preserved by objection below and the remarks are not so ill-intentioned or flagrant as to allow for review without an objection. This claim is also without merit because Gilmore did not in fact remain silent, agreeing to an interview with police post-*Miranda*, because his statements in the police interview were inconsistent with his trial testimony, and because the jury actually saw the interview on video and the prosecutor was simply remarking about what they saw.

Gilmore's reliance on *State v. Belgarde,* 110 Wn.2d 504, 755 P.2d 174 (1988), is misplaced as that case is clearly distinguishable from the present case.[1] The obvious and dispositive difference between the cases is that in *Belgarde* the defendant had actually remained silent. And, there the prosecution argued essentially that he should have said something during his multiple contacts with multiple law enforcement officers. This was held to be a clear and improper comment on a defendant's silence.

[1] Also, the *Belgarde* Court had already reversed the conviction for the prosecutor's inflammatory remarks about the American Indian Movement and the section relied on by

Gilmore concedes this difference in his Supplemental Brief. Brief at 5.

Gilmore did not remain silent. He was read his constitutional warnings, waived them, and proceeded to answer the investigators' questions. The distinguishing point is seen where the *Belgarde* Court distinguished other cases, saying "[i]n the instant case, the prosecutor focused not on any prior inconsistent statements made by the defendant, but on the failure to make a statement immediately upon arrest." 110 Wn.2d at 512. In our case, Gilmore gave a rather lengthy statement to police and testified denying the allegations at trial. These two case, then, are rather completely un-alike except that they both involve arguments about a defendant in a closing argument.

This case falls under the rule that was not applied to silence in *Belgarde*: "once a defendant waives the right to remain silent and makes a statement to police, the prosecution may use such a statement to impeach the defendant's inconsistent trial testimony." Id. at 511. Further, "the State may question a defendant's failure to incorporate the events related at trial into the statement given to police or may challenge inconsistent assertions." Id. Gilmore would have it that the prosecution should ignore, or at least make no comment about, his lengthy statement to the police; a statement viewed by the jury on video. The jury not only heard the words

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Gilmore is unnecessary and as such arguably non-precedential dictum.

of the statement, it also saw Gilmore make the statement and the circumstances he was in when he did.

Moreover, Gilmore does not even address the law relating to the preservation of alleged misconduct in a prosecution closing argument. The well-worn rule is that

> [a] prosecutor's argument warrants review despite his failure to object because the statement was so flagrant and ill-intentioned that a curative instruction from the court could not have obviated the resulting prejudice.

State v. Klok, 99 Wn.App. 81, 82, 992 P.2d 1039 (2000), *citing State v. Belgarde, supra.* In *Klock,* it was held that the above rule remains the proper approach on a determination of the reviewability of a prosecutor's argument. Id. at 83. Further,

> One of the reasons for placing the burden on the defense to object in the course of argument is that the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor's remarks. The absence of an objection in this case indicates that the comment, at the time it was made, did not strike Klok or his attorney as being unfair or untrue.

Id. at 85 (citation omitted). Gilmore did not object and the absence of objection should be viewed as an indication that neither Gilmore nor his attorney found the prosecutor's remarks as unfair or untrue. In any event, Gilmore's position, in not addressing these rules, seems to be that this Court should simply presume prejudice and reverse. In fact, to avoid waiver, Gilmore must show that "(1) no curative instruction would have

obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Emery,* 174 Wn.2d 741, 761, 278 P.3d 653 (2012). Gilmore has failed to persuasively argue that the exception for flagrant and ill-intentioned conduct applies in this case.

Moreover, such a finding is unlikely even if Gilmore preserved the issue. A prosecutor has wide latitude in arguing the evidence adduced at trial and reasonable inferences from the evidence. *See State v. Thorgerson,* 172 Wn.2d 438, 448, 258 P.3d 43 (2011). As noted above, when the defendant does not in fact remain silent, the prosecutor may essentially go after his words and point out the inconsistencies in his various statements. This includes that the defendant may be assailed for "failure to incorporate the events related at trial into the statement given to police." *Belgarde, supra.* Further, "Courts have almost unanimously held that the Fifth Amendment does not protect evidence of a defendant's actions or demeanor (hereinafter, demeanor evidence), a conclusion consistent with Fifth Amendment jurisprudence and the plain meaning of "demeanor."" *State v. Barry,* 183 Wn.2d 297, 305, 352 P.3d 161 (2015) (footnote omitted).

The prosecutor's remarks herein are primarily a discussion of the demeanor that the jury saw and a highlighting of the inconsistency of

Gilmore's various remarks. This is not a case were a police officer is relating demeanor of the defendant and the prosecutor is expanding on that testimony. The prosecutor was remarking on the evidence seen by the jury, that is, Gilmore's demeanor. Even if this issue was preserved, it fails.

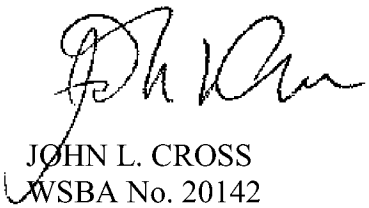
III. CONCLUSION

For the foregoing reasons, Gilmore's conviction and sentence should be affirmed.

DATED September 12, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR

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