SUPREME COURT NO. 98919-2

NO. 78036-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AUSTIN PARKS,

Petitioner.

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

The Honorable Ellen Fair, Judge
The Honorable Richard Okrent, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Austin John Parks, the appellant below, seeks review of the Court of Appeals opinion, State v. Parks, noted at __ Wn. App. 2d __, 2020 WL 4049728, No. 78036-1-I (Jul. 20, 2020).

B. ISSUES PRESENTED FOR REVIEW

1. The state emphasized in opening statement and elicited the testimony of two police officers that Parks had not responded to multiple law enforcement contacts which they said resulted in Parks being the focus of a criminal investigation and in the referral of charges. Under Washington law, were these improper comments on Parks's prearrest silence?

2. Does article I, section 9 provide greater protection than the Fifth Amendment in the context of prearrest silence under Gunwall[1]?

3. Did the prosecutor's misstatements of the self-defense standard constitute constitutional error and/or qualify as reversible under the flagrant and ill-intentioned standard?

4. Should Parks's ineffective assistance of counsel claims related to the foregoing three issues also be reviewed?

C. STATEMENT OF THE CASE

This case arose out of a dispute over a parking space. Lisa Driscoll was waiting for her son George Miller to exit a smoke shop and blocked a

[1] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

parking spot in front of the shop. 2RP[2] 59-61, 258. This prompted Tonya Morgan,[3] Parks's wife, to honk the horn in Parks's car. 2RP 258.

According to Morgan, Driscoll flipped Parks and Morgan off and began screaming profanities. 2RP 259-60. Driscoll exited her car, approached Parks's car, and continued yelling. 2RP 260-61. Driscoll's son Miller exited the store and joined in the yelling and profanity use; he also started coming toward Parks and Morgan in an aggressive manner. 2RP 262-64, 284. Parks opened his door, grabbed a can of pepper spray, and pressed the button down for just a second, pointing the spray at Miller. 2RP 267-68. At that point, Driscoll began assaulting Parks, reaching around his neck, grabbing hold of the hooded part of Parks's sweatshirt from behind, and ripping the hood completely off the sweatshirt. 2RP 269-70. Parks discharged the pepper spray over his left shoulder toward Driscoll but most of the pepper spray actually came back into Parks's face. 2RP 270.

According to Driscoll, Morgan approached her window, saying "get the F out of the way, something that that effect. You're blocking the parking spot." 2RP 64-65. Driscoll told Morgan and Parks that she could not move because they were blocking her in and that she was waiting for her son;

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[2] Parks refers to the verbatim reports of proceedings as follows: 1RP—January 12, 2017; 2RP—consecutively paginated transcripts dated June 12, 13, and 14, 2017; 3RP—June 15, 2017; 4RP—July 27, 2018; 5RP—February 6, 2018.

[3] To clearly distinguish between Parks and his wife, Parks refers to Tonya Parks as Tonya Morgan in this brief.

Parks got out of the car and there were "a lot of cuss words." 2RP 67-68, 121. Miller exited the smoke shop and started stating, "you don't want any problems with my mom." 2RP 71, 123. Driscoll told Miller to get in the car so they could leave because she did not want Miller to create more of an issue. 2RP 72, 119. Driscoll said Parks stated something like, "I'll show you a problem," reached into his car, and started spraying pepper spray toward Miller and then toward Driscoll. 2RP 71, 74-75, 127. Driscoll stated Parks was close to her and remembered pushing Parks. 1RP 77, 128.

Amy Ebert also witnessed the altercation and testified she heard lots of swearwords, such as "I'll kick your fucking ass," exchanged between Miller and Parks. 2RP 155, 177. Driscoll repeatedly told Miller to "get in the car, we're leaving." 2RP 158. Ebert said she saw Parks duck into the car and then spray Driscoll with pepper spray at close range. 2RP 159. Ebert stated that Driscoll got sprayed for 10 to 15 seconds and then Miller came around to the other side of the car and also got sprayed. 2RP 162-63. Ebert did not recall seeing any physical contact between the parties. 2RP 180.

The state charged Parks with two counts of third degree assault, one against Driscoll and the other against Miller. CP 107-08.

The state sought to introduce the fact that Parks had left the scene and not returned the calls of police officers after the incident to show consciousness of guilt. According to the state, Parks's refusal to report his

self-defense claim to law enforcement showed he was guilty and was relevant to demonstrate law enforcement's investigation. 2RP 40-41. Defense counsel objected to such evidence, asserting in part that it was an improper comment on Parks's prearrest silence. 2RP 42-43.

The trial court did not meaningfully address the defense's concern about the potential comment on Parks's prearrest silence. 2RP 42-43. Instead, the trial court addressed the evidence on a relevancy standard, indicating it was appropriate for the state to elicit evidence that shows the steps taken by law enforcement to identify Parks as the focus of its investigation. 2RP 43-44. The state, defense, and court agreed that, insofar as evidence of Parks's flight from the scene was concerned, the state would present its evidence and then ask the court prior to closing whether the pertinent standards for addressing the admissibility of flight evidence were met.[4] 2RP 45-46.

Despite not addressing the legal permissibility of using prearrest silence as substantive evidence of guilt in the State's case, the state brought up Parks's prearrest silence during its opening statement: "Mr. Parks was not there at the time [when Officer Gerfin attempted to contact him]. He wasn't able to contact Mr. Parks and the investigation was turned over to Detective Jones who is here in the courtroom." 2RP 458. The state proceeded, "Jones

[4] Thus, the parties seemingly agreed to admit this "flight" evidence before any ruling was made on whether such evidence was even admissible.

also contacted Mr. Parks' mother, and he was unable to reach Mr. Parks, and the case was referred to the prosecutor's office." 2RP 459.

During Officer Gerfin's testimony, the following exchange occurred:

> Q. Did you make any efforts to contact that person [Parks] by phone?
> A. I did.
> Q. And tell us about that. What efforts did you make?
> A. I called multiple times to the phone number hoping to make contact and I wasn't able to.
> Q. And was there a voicemail at all?
> A. There was not. There was not voicemail set up.
> Q. How many times do you think you called that phone number?
> A. At a very minimum, three or four.

2RP 216-17. Gerfin also stated he went to Parks's residence, contacted Parks's mother, but still was not able to contact Parks. 2RP 218-19. Gerfin left his card with Parks's mother and took no further action. 2RP 220. Based on what he "had learned through [his] investigation," Gerfin testified, "I was focusing on one person, yes. That would be Mr. Parks." 2RP 220.

The state presented testimony of Detective Christopher Jones, who stated,

> A. Eventually I contacted Mr. Parks' mother.
> Q. Okay. And what was your reason for contacting Mr. Parks' mother?
> A. To see if she could get in touch with him.
> Q. And up until this point, had you been able to -- had law enforcement been able to contact Mr. Parks?
> A. No.
> Q. Now, when you contacted Mr. Parks' mother, were you able to get any information in order to contact him?

> A. No.
> Q. Now, after you contacted Mr. Parks' mother, what other investigative actions did you take in this case, if any?
> A. At that point you go with the information you have. You always want to try to get every side of the story, but at some point you just go with what you have. At that point I forwarded the case to the prosecutor's office.

2RP 245-46.

During the testimony of Tonya Morgan, defense counsel elicited that Morgan was aware officers had stopped by Parks's mother's home on the night of the incident. 2RP 274-75. On cross, Morgan said she had not received any phone calls from law enforcement on the evening of the incident or anytime thereafter. 2RP 276, 279. The prosecutor asked, "you didn't feel it was important enough to stay around and talk to law enforcement?" 2RP 281. Morgan testified, "They told me that they would contact me by phone" and "I never spoke to a police officer." 2RP 281.

Prior to closing argument, the state again requested to use Parks's prearrest silence, characterizing it as evidence of flight. 2RP 303-04. However, the prosecutor wished to point out numerous failed police contacts to argue that Parks's failure to respond to "those efforts by law enforcement would not be consistent with what one would expect someone to do in a self-defense situation." 2RP 306; see also 2RP 307 ("One would expect them to stick around to be contacted by law enforcement" if claiming self-defense). The trial court permitted the State to make its arguments given that it was

subject to counterargument that simply going about one's business was not inconsistent with acting in self-defense. 2RP 308. However, the court stated, "I simply would caution that it's just inconsistent with a self-defense claim, leave it at that," and, "I'm again cautioning you on the argument about the phone calls. Don't elaborate as much as perhaps you would like to." 2RP 308.

Although the state did not explicitly state that Parks failed to respond to police despite their multiple attempts to contact him, the state argued that Parks's use of pepper spray "wasn't lawful based on the evidence that's been presented here. There was absolutely no reason, given the evidence that you have been presented, for him to have done that act." 2RP 320.

In its rebuttal argument, the state argued that Parks did not act in self-defense because he did not act reasonably prior to the need to use force arose:

> Was it necessary? There is no duty to retreat. And you may not consider it as a reasonable alternative. But a reasonable alternative, how about when you get there, just park in another space? What about when you get there, not escalate the situation. Getting in an argument. Excuse me, ma'am, we'd like to park in this space. Would you mind moving your car? Screw you. But we'd like to park in this space. Screw you. Did it require an escalation if that's really what happened? Were there reasonable alternatives here? Absolutely.

2RP 338.

The jury found Parks guilty of both third degree assaults. CP 52-53; 3RP 4-7. Parks was sentenced to 50 months. CP 13-14, 115-16; 4RP 15-16.

Parks appealed. CP 8. Among other things, he asserted that the state impermissibly commented on his prearrest silence by commenting on its failed attempts to contact him and the resultant focus on Parks as the guilty party and subsequent referral of the case to the prosecutor's office. Br. of Appellant, 19-60. Parks also provided a full analysis of article I, section 9 pursuant to Gunwall, contending that the state constitutional provision was more protective than the Fifth Amendment in light of Salinas v. Texas, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), in which the U.S. Supreme Court approved of comments on prearrest silence. Br. of Appellant, 34-49. Beginning at page 60 of his brief, Parks also contended the state's misstatements self-defense standards were reversible misconduct.

As for the comment on prearrest silence issue, the court of appeals declined to reach Parks's Gunwall analysis of article I, section 9 and instead conclude, ed that multiple officers' and the prosecutor's statements did not constitute a comment on prearrest silence at all. Slip op., 11. The court of appeals agreed with Parks that the prosecutor misstated the law of self-defense but determined that Parks waived his challenge by failing to object. Slip op., 13-14. The court also rejected Parks's related ineffective assistance of counsel claims. Slip op., 14-16.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **The court of appeals decision misapplies and conflicts with the prearrest silence cases, meriting review under RAP 13.4(b)(1)–(3)**

Under Washington law, prearrest silence in answer to inquiries of law enforcement may not be used in the prosecution's case in chief as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). Silence is ambiguous because innocent persons may have many reasons for not speaking to law enforcement, including instructions from an attorney, a mistrust of law enforcement officials, or a mistrust in the integrity of criminal process. Id. at 218-19; accord State v. Easter, 130 Wn.2d 228, 239, 922 P.2d 1285 (1996) (prearrest silence is "insolubly ambiguous").

The court of appeals resolved this issue by holding that no comment on prearrest silence occurred, likening this case to State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996). Slip. op., 11. In Lewis, the defendant was accused of demanding sex in exchange for drug drugs. 130 Wn.2d at 702. An officer called Lewis and Lewis admitted that women had been in his apartment but that nothing had happened. Id. at 702-03. The officer testified, "my only other conversation was that if was innocent he should just come in and talk to me about it." Id. at 703. This was not a comment on silence because the officer did not say Lewis refused to talk to him, did not

imply silence meant guilt, and did not reveal that Lewis failed to keep his appointments to speak to the officer. Id. at 706.

In Easter, by contrast, the state violated the right to silence when the officer said he questioned Easter at the scene of a traffic stop and Easter did not answer and looked away without speaking. 130 Wn.2d at 241. The officer also called Easter a "smart drunk" based on his silence and behavior. Id. at 241-42. This was an improper comment on silence because it embodied the officer's opinion that Easter's silence meant guilt. Id. at 242.

State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), is also instructive. The court of appeals reversed when the detective stated Keene did not contact her after being warned she would turn the case over to the prosecutor's office if she did not hear from him, which violated Keene's right to silence. Id. at 594.

Postarrest silence cases are also informative.[5] In State v. Romero, 113 Wn. App. 779, 793, 54 P.3d 1255 (2002), an officer stated he read arrest warnings and Romero "chose not to waive, would not talk to me," which constituted a "direct comment about Mr. Romero's election to remain silent." Id. In State v. Curtis, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002), an officer testified that Curtis refused to talk and wanted an attorney when read

[5] Washington courts have analyzed comments on prearrest silence by looking to postarrest silence cases by analogy. See, e.g., Burke, 163 Wn.2d at 216 n.7, 217; State v. Knapp, 148 Wn. App. 414, 421-22, 199 P.3d 505 (2009).

Miranda[6] warnings. Even though the state did not "harp" on the officer's testimony, reversal was required because the officer's testimony was "injected into the trial for no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer." Curtis, 110 Wn. App. at 13-14. Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), has also been cited with approval in Washington. See Romero, 113 Wn. App. at 789; Curtis, 110 Wn. App. at 14. In Douglas, the officer arrested Douglas and testified Douglas made no statements, after which the prosecutor ended direct examination. 578 F.2d at 267. The court determined this was an improper comment on silence, especially given the placement of the problematic question at the end of state's examination, giving it undue prominence as part of the testimony. Id.

Under this case law, the state impermissibly commented on Parks's prearrest silence. The state emphasized in opening statements that two officers attempted to contact Parks but could not, and stating that because one of them could not reach him the case was referred for prosecution. 2RP 458-59. Gerfin said he had spoken to several witnesses at the scene, but had not spoken to Parks despite "call[ing] multiple times," at a "very minimum" three or four times. 2RP 216-17. Gerfin stated that his investigation—

[6] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

speaking to Driscoll, Miller, and Ebert but not Parks—led him to "focus[]" on Parks as the suspect. 2RP 220-22.

Jones also recounted multiple failed attempts to contact Parks. 2RP 245-46. Jones said he always wanted to "get every side of the story" but because Parks had not returned calls, "you just go with what you have. At that point I forwarded the case to the prosecutor's office."[7] 2RP 246.

Contrary to the court of appeals decision, Parks's trial was infected by improper comments on his silence. The state told jurors at the outset of trial that the case was referred for prosecution after police had not been able to speak with Parks. 2RP 458-59. One officer said he contacted Parks at minimum four times but received no response, juxtaposing this silence against Driscoll's, Miller's, and Ebert's cooperation. Compare 2RP 216-20 with 2RP 212-16. The other officer said he would have liked to get every side of the story, meaning Parks's side, and forwarded the case for prosecution because he had not received Parks's side. 2RP 245-46. This violated Parks's right to prearrest silence.

[7] The court of appeals decision claims Parks misconstrues Jones testimony about why he referred the case to the prosecutor. Slip op., 11 n.9. But Jones specifically said when he didn't hear from Parks to get "every side of the story," "you just go with what you have. At that point I forwarded the case to the prosecutor's office," which the court of appeals declined to acknowledge. 2RP 246. As Parks argued, the testimony establishes that Jones forwarded the case for prosecution because he had not gotten Parks's side of the story and therefore he just went with what he had. Jones directly tied referring the case for prosecution to Parks's declining to share his side of the story. This was an improper comment.

This case is not like Lewis as the court of appeals claimed. Slip op., 11. Unlike Lewis, two officers rather than one testified about multiple failed attempts to contact Parks. Both officers said, due to Parks's silence, Parks was either the focus of the investigation or the case was referred to prosecution. And the prosecutor emphasized Parks's silence in his opening statement, stating that was the reason the case was referred for prosecution. These were repeated, direct comments on Parks's prearrest silence. The court of appeals decision conflicts with Burke, Easter, Keene, Romero, and Curtis on an important constitutional issue, meriting RAP 13.4(b)(1), (2), and (3) review.

2. **This case presents the important constitutional and public issue whether the state constitution prohibits comments on prearrest silence even considering changes in Fifth Amendment law**

By misapplying the law, the court of appeals avoided the important constitutional question that has yet to be decided by Washington's highest court: does the robust prohibition against the use of prearrest silence present in Washington jurisprudence survive Salinas v. Texas under the state constitutional provision, article I, section 9? Although no Washington court has yet concluded that article I, section 9 provides greater protection, each situation must be adjudged on its own facts, case-by-case. State v. Russell,

125 Wn.2d 24, 57-58, 882 P.2d 747 (1994). Review should be granted under RAP 13.4(b)(3) and (4) to answer Parks's question.

a. Textual differences in the context of prearrest silence

The Fifth Amendment states no person "shall be compelled . . . to be a witness against himself." By contrast, article I, section 9 states no person "shall be compelled . . . to give evidence against himself." These textual differences merit broader protection under the state provision in the context of prearrest silence.

Parks acknowledges that, in State v. Moore, 79 Wn.2d 51, 57, 483 P.2d 630 (1971), this court rejected the textual distinction Moore drew between compelled giving of physical evidence and compelled testimonial evidence. The Moore court held, "The protection of both constitutional provisions extends [only] to testimonial or communicative evidence." Id.

Even with this limitation, however, the text of article I, section 9 commands broader protection in this context. Prearrest silence is surely communicative if the state can later claim it as substantive evidence of guilt. Though Parks was not a testimonial witness in the traditional sense, his failure or refusal to speak to police nonetheless compelled him to give communicative evidence against himself in the form of comments on his silence and lack of communication. Under the first two Gunwall factors, the differences between the texts of the federal and state provisions support a

more protective interpretation under the state provision in the context of prearrest silence.

b. Preexisting law supports a more protective state interpretation

As discussed, Washington law is clear that the refusal to speak to law enforcement for any reason is not admissible as substantive evidence of guilt. E.g., Burke, 163 Wn.2d at 217-18; Easter, 130 Wn.2d at 241-42; Keene, 86 Wn. App. at 594. This significant body of preexisting state law compels a more protective interpretation of article I, section 9 under Gunwall's fourth factor.

In Salinas v. Texas, Salinas agreed to be interviewed by police and then declined to answer one question by looking at the floor and remaining silent, which was used by the prosecution as substantive evidence of guilt. 570 U.S. at 182. Because Salinas did not expressly invoke his right to silence, the Court concluded Salinas could not rely on the Fifth Amendment privilege against self-incrimination. Id. at 183-85.

Salinas cannot control in a case like this or like Easter in which the defendant never speaks to police and does not testify. Parks did not voluntarily speak to law enforcement and then refuse to answer one or more questions; he remained silent which, under Washington law, is "not admissible because of its low probative value and high potential for undue

prejudice." Burke, 163 Wn.2d at 214 (citing Easter, 130 Wn.2d at 235 n.5). Salinas should not control.

Also, the Salinas Court wrongly assumed that silence should be affirmatively considered as evidence of guilt, in contrast to what the Washington Supreme Court has said on the subject. See Burke, 163 Wn.2d at 218-19 (noting many reasons someone might not speak to law enforcement and therefore prearrest silence as evidence of guilt is improper); Easter, 130 Wn.2d at 239 (silence is "insolubly ambiguous" and therefore not probative); State v. McKenzie, 184 Wash. 32, 49 P.2d 1115 (1935) ("silence or failure to deny, of itself, unaccompanied by the statement in the face of which the accused remained silent or which he failed to deny, cannot well be testified to so as to convey meaning"). Preexisting Washington law is correct and the Salinas Court's choice to allow baseless prosecutorial speculation to become substantive evidence of guilt should be disavowed.

And even Salinas recognized that "where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence . . . . [A] witness need not expressly invoke the privileges where some form of official compulsion denied him" the free choice to admit, deny, or refuse to answer. 570 U.S. at 185. If the state is permitted to use prearrest silence as evidence of guilt, then the mere existence of the privilege not to speak to police would itself incriminate.

Indeed, Parks said nothing to law enforcement through this entire case and this was used against him as evidence of guilt. Parks did not truly have a free choice to admit, deny, or refuse to answer. He was instead punished by having his noncommunication used as substantive evidence of his guilt.

Washington should employ article I, section 9 to maintain its commonsense, correct rule that silence is so ambiguous that it is not probative of questions or guilt or innocence. Preexisting state law supports giving article I, section 9 a broader and more protective application than the Fifth Amendment.

c. This is a matter of particular state and local concern

The record in this case establishes that prearrest silence is a matter of state and local concern under the sixth Gunwall factor. Notwithstanding Salinas, the prosecutor acknowledged the need to "be careful" and make "sure that I'm not making an argument or comment that Mr. Parks had some obligation in his failure to contact law enforcement in his exercise of his right . . . ." 2RP 42-43. The state also asserted that prearrest silence could be used only for impeachment in the event Parks's testified. 2RP 44-45. At the close of evidence, the state sought clarification of what it could argue, stating it did could not argue prearrest silence. 2RP 304-06. The trial court cautioned the prosecutor not to comment on prearrest silence, attempting to limit such an argument to the impeachment of the self-defense claim. 2RP

308. The concerns repeatedly expressed by the state and the trial court show that the issue of prearrest silence is of particular concern in Washington courts. The sixth Gunwall factor supports Parks's request for greater protection under the state provision. Washington should part ways with federal courts that wrongly permit a defendant's prearrest silence to be used as substantive evidence of guilt. RAP 13.4(b)(3) and (4) review is merited.

3. Because misconduct eased its burden of proof, the prosecutor's remarks should be reviewed under a constitutional error standard and in any event require reversal

The court of appeals correctly agreed with Parks that the state's comments '"misrepresented the point at which Parks needed to consider reasonable alternatives' to the use of force.'" Slip op. 12-13. However, it incorrectly concluded that, without Parks's objection, a curative instruction could have alleviated any prejudice from these remarks.

The court of appeals decision conflicts with cases about the standard of review. When misconduct directly violates constitutional rights, such as shifting or weakening the burden of proof, as here, the state must establish harmlessness beyond a reasonable doubt. State v. Emery, 175 Wn.2d 742, 758, 278 P.3d 653 (2012); State v. Fuller, 169 Wn. App. 797, 813, 828 P.3d 126 (2012). The state bears the burden of proving the absence of self-defense beyond a reasonable doubt and its misstatement of the law on

reasonable alternatives violated Parks's due process rights. State v. Lile, 188 Wn.2d 766, 802, 398 P.3d 1052 (2017). Parks argued the constitutional standard, Br. of Appellant, 62-63, but the court of appeals did not acknowledge as much, conflicting with Emery and Fuller and thereby meriting review. RAP 13.4(b)(1)–(3).

Also, there was no cure for the state's nullification argument. It was emotionally appealing, exhorting jurors to problem-solve by examining Parks's actions leading up to the assaultive conduct. See In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012) (reversal required when misconduct is so flagrant and ill-intentioned that no instruction could cure prejudice). The state attacked the self-defense standard itself. This came in rebuttal, which is particularly prejudicial. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014). The court of appeals decision that the misconduct could have been cured applies the wrong standard and is incorrect. Review is warranted. RAP 13.4(b)(1), (3).

4. **Parks's related ineffective assistance claims also merit review**

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017).

Parks asserted his attorney's objection to improper opinion but acquiescence to the same evidence being used as flight evidence (without any analysis of flight evidence) constituted ineffective assistance of counsel. Br. of Appellant, 51-53. He asserted ineffective assistance also for his counsel's failure to object to the prosecutor's closing argument that misstated the law of self-defense. Br. of Appellant, 65-66. These claims, related to those discussed above, should be reviewed as significant constitutional issues pursuant to RAP 13.4(b)(3).

E. CONCLUSION

Because all RAP 13.4(b) criteria are met, review should be granted.

DATED this 19th day of August, 2020.

Respectfully submitted,

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. PARKS, AUSTIN JOHN, DOB: 10/19/1988, Appellant.	)	No. 78036-1-I UNPUBLISHED OPINION

BOWMAN, J. — Austin John Parks appeals his jury convictions of two counts of third degree assault. Parks contends that (1) the trial court abused its discretion by denying his motion for new counsel, (2) the State improperly commented on his prearrest silence, (3) the prosecutor engaged in misconduct by misstating the law of self-defense, (4) he received ineffective assistance of counsel at trial, (5) cumulative error deprived him of a fair trial, and (6) we should strike certain legal financial obligations from his judgment and sentence. We affirm the convictions but remand to the trial court to strike the criminal filing fee, DNA[1] collection fee, and nonrestitution interest from his judgment and sentence.

[1] Deoxyribonucleic acid.

FACTS

On the evening of December 17, 2015, Lisa Driscoll and her adult son George Miller drove to the Marysville Papa John's to pick up a pizza. While waiting for their order, Miller walked to a neighboring smoke shop. After picking up their food, Driscoll left Papa John's and drove partway into the "only parking spot available" in front of the smoke shop to wait for Miller. She did not "pull all the way into" the parking spot.

Parks and his girlfriend Tonya Morgan[2] drove into the crowded lot looking for a parking space. They stopped behind Driscoll's car and Morgan reached over from the passenger seat to honk the horn. Driscoll saw the car "immediately behind me" and Morgan standing outside of Parks' car. She heard Morgan "screaming" at her. Driscoll conveyed[3] that she was not ready to leave the parking space. The two women "briefly" argued and Morgan went back to the passenger side of Parks' car.

Driscoll "couldn't pull forward because of the island" and "couldn't back up because of [Parks'] car," so she started to get out of her car to "see how close they were to the bumper" of her car. Parks got out of his car "angry and yelling" at Driscoll to move her car. The two began to argue near the rear of Driscoll's car. While Driscoll and Parks were arguing, Miller returned from the smoke shop. He stood at the passenger door of Driscoll's car and started to argue with Parks while Driscoll "immediately went to the driver's side" of her car to leave.

[2] Tonya Morgan and Parks later married. We refer to Morgan by her maiden name for clarity and intend no disrespect by doing so.

[3] Driscoll claims she told Morgan, "You can't have it right now." Morgan testified that Driscoll "started screaming profanities" and "flipped me off."

Amy Ebert, a customer in the smoke shop who was in the checkout line behind Miller, walked out of the store "a minute or less" after Miller. She saw the argument. According to Ebert, Driscoll "was not out of her car" at that time and Parks "has the [driver's side] door open and is outside [his] car." Ebert testified that while Miller was "standing at the passenger side of [Driscoll's] car," she heard "elevated voices" and saw Driscoll then get "out of her vehicle as well[,] asking what I presume is her son to get back into the car because they're leaving." Ebert testified that she heard a "lot of swear words . . . from both sides. You know, do you want to go? I'll kick your ass. Things of that nature going back and forth between [Parks and Miller]." Ebert testified that the verbal argument escalated but she did not see any physical touching.[4] She said that everyone stayed "in the same spot"—Parks stood just outside his open driver's side door, Miller remained at the passenger side of Driscoll's car, and Driscoll stood "outside of her car on the driver's side" telling Miller that "we're leaving."

Ebert then saw Parks "duck into his car" and pull out a can of pepper spray "very quickly." Ebert testified that Parks "instantly" sprayed Driscoll for several seconds "at a very close range" from her head to her knees. Miller started to move around the back of Driscoll's car and Parks sprayed him as well. Ebert watched as Parks immediately "gets in his car, backs up, and pulls out of the parking lot."

All of the witnesses described the entire incident as "quick." Ebert testified that the "whole thing lasted probably less than 25 seconds all together." On

[4] Ebert testified, "There — you know, there was banter going on back and forth between the two males, but physical, like touching or anything, no."

cross-examination, Ebert clarified that the time from Parks and Miller arguing to when Parks pepper sprayed Driscoll was "a little bit longer than 25 seconds, but I think the whole incident was under three minutes."

Driscoll had her cell phone in her hand during the entire altercation and "was already on the phone with [911]." She gave the police the license plate number of the car Parks was driving. Parks also called 911. Parks reported that "he had sprayed somebody with pepper spray" but hung up before giving any details.

Morgan testified that Parks acted in self-defense and pepper sprayed Miller first. She claimed Miller "kept coming towards" Parks in an aggressive manner, "hollering" and "screaming," prompting Parks to reach for the pepper spray. She said that Parks warned Miller to stop before Parks sprayed him in the eyes for "[j]ust a second." She testified that Parks then sprayed Driscoll because she assaulted Parks as he sprayed Miller. According to Morgan, Parks "kept telling her to get off me" before he pepper sprayed Driscoll.

Morgan testified that because Parks got some of the pepper spray in his eyes, she "got [him] into the back seat" and drove away. Morgan said she called 911 from Parks' phone using the "speaker phone" function so that they were both on the call with the 911 dispatcher. Morgan did not remember ending the 911 call. It was her "understanding [that] a police officer was supposed to contact us by phone."

Police later tried to contact Parks as part of their investigation. They left messages at the phone number Parks used to call 911 and with Parks' mother.

Parks did not respond. After several unsuccessful attempts to reach Parks, the police referred the case to the prosecutor's office.

The State charged Parks with one count of assault of Driscoll in the third degree and one count of assault of Miller in the third degree. Before trial, Parks made a motion to discharge his court-appointed attorney. The court denied his motion.

A jury convicted Parks of both charges. The court sentenced Parks within the standard range and imposed restitution, a $200 criminal filing fee, a $500 victim assessment, and a $100 DNA collection fee. Parks appeals.

ANALYSIS

Motion To Discharge Counsel

Parks argues that the court abused its discretion by denying his motion to discharge his court-appointed attorney before trial. We disagree.

We review a trial court's decision not to appoint new counsel for abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

A defendant "has no constitutional right to his choice of appointed counsel." State v. Stenson, 132 Wn.2d 668, 765-66, 940 P.2d 1239 (1997). To warrant substitution of counsel, the defendant must show " 'good cause,' " such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. State v. Davis, 3 Wn. App. 2d 763, 790, 418 P.3d 199 (2018)

(quoting State v. Thompson, 169 Wn. App. 436, 457, 290 P.3d 996 (2012)). The court should grant a motion to discharge only where conflicts between appointed counsel and the defendant are so significant that they would prevent an adequate defense. Stenson, 132 Wn.2d at 734. A trial court considering a motion to discharge appointed counsel must " 'inquire thoroughly into the factual basis of the defendant's dissatisfaction' sufficient to reach an informed decision." Davis, 3 Wn. App. 2d at 790[5] (quoting Thompson, 169 Wn. App. at 462).

Parks claims that the trial court abused its discretion in denying his motion to discharge counsel because it failed to engage in "any inquiry of any kind" as to the basis of Parks' dissatisfaction with his attorney. He contends that the court failed to inform itself of the facts on which to exercise its discretion as required by State v. Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995).

In Lopez, the defendant told the court that he wanted " 'a different attorney because this one isn't helping me at all.' " Lopez, 79 Wn. App. at 764. The court responded, " 'I'm not going to appoint you another attorney.' " Lopez, 79 Wn. App. at 764. Division Three of our court determined that such a summary denial of a request to discharge counsel without inquiring into any of the reasons for the defendant's dissatisfaction with his attorney is an abuse of the court's discretion. Lopez, 79 Wn. App. at 767.

But here, Parks clearly expressed the reasons that he wanted to discharge his attorney. During the hearing on Parks' motion for new counsel, his

[5] Internal quotation marks omitted.

attorney read the court a letter Parks wrote detailing his complaints. The letter states, in pertinent part:

> "I voiced my frustrations to [defense counsel] regarding her lack of communication with me. At that time she told me to come to court an hour early so that her and I could meet before court started.
>
> "On January 6th, 2016, I did exactly that. I arrived at court at 9:30 a.m. to meet with [defense counsel]. She was not able to meet with me until 10:15 a.m. It was a very brief meeting. . . .
>
> " . . . [She] had an extremely poor attitude and was very rude . . . . Her behavior was very unprofessional.
>
> "I . . . also feel that [defense counsel] is not representing me fairly. For instance, on January 6th, 2017, . . . she asked me a few specific questions regarding my case. When I answered her questions truthfully and honestly, she called me a liar and repeatedly stated that she knew I was lying, that I needed to tell her the truth.
>
> "I strongly feel that I can no longer work with [defense counsel] to resolve these legal matters."

The court gathered more information before issuing its ruling. The court asked the prosecutor and Parks' attorney to respond and gave Parks a second chance to address the court:

> THE COURT: Okay. And is the State taking any position?
>
> [PROSECUTOR]: I'm skeptical of some of the alleged facts written into those letters and I'm also somewhat unsympathetic that he had to allegedly wait some time for [defense counsel] to talk to him given his tardiness at court this morning.
>
> And, also, it doesn't appear that he's met the standard in regards to asking for new counsel. He certainly is entitled to counsel but not to counsel of his choosing. So the State is eager to move these cases forward and asks the Court to deny that motion at this time.
>
> THE COURT: Alright. And do you have any response?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> . . . .
>
> . . . .
>
> . . . I don't know if Mr. Parks has anything further he'd like to add for the Court.
>
> THE DEFENDANT: No.

> THE COURT: Okay. So it sounds like, in kind of cutting through all of this, there was a missed appointment. Then there was some problem, again, connecting, leading to some frustration.
>
> I think I would agree; I don't think that what I have heard meets the standard for assigning new counsel. So I am going to deny the request.

Parks clearly expressed his reasons for requesting a new attorney and the court did not abuse its discretion in denying his motion to discharge counsel.

Prearrest Silence

Parks argues that we should reverse his convictions because the State impermissibly commented on his prearrest silence in violation of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution. We disagree.

We first note that Parks cites State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996), in support of his argument. He acknowledges that Salinas v. Texas, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013), and State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016),[6] have specifically abrogated Easter and its progeny.[7] But Parks claims that the self-incrimination provision in article I, section 9 of the state constitution is more protective than the provision in the Fifth Amendment. And he contends that the court in Magana reached its

[6] Abrogated on other grounds by State v. Johnson, 4 Wn. App. 2d 352, 421 P.3d 969, review denied, 192 Wn.2d 1003, 304 P.3d 260 (2018).

[7] In Salinas, the United States Supreme Court determined that absent an express invocation of the right to silence, the Fifth Amendment is not an obstacle to the State's introduction of a suspect's prearrest silence as evidence of guilt. Salinas, 570 U.S. at 191. "Legally, this is not an area where our state's constitution affords greater protection than the federal constitution." Magana, 197 Wn. App. at 195. As a result, "the Fifth Amendment analysis set forth in Easter, [State v.]Lewis[, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)], and their progeny is no longer good law." Magana, 197 Wn. App. at 195.

conclusion without engaging in a Gunwall[8] analysis, so he urges this court to conduct such an analysis here. Because we conclude that the State did not improperly comment on Parks' prearrest silence, we need not conduct a Gunwall analysis.

A comment on a defendant's silence occurs when the State uses a defendant's constitutionally protected silence to its advantage, "either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 707. For example, in Easter, our Supreme Court determined that an officer's characterization of Easter's prearrest silence as evidence that he was " 'trying to hide or cloak' " his guilt was an impermissible comment. Easter, 130 Wn.2d at 233, 241. Similarly, in State v. Keene, 86 Wn. App. 589, 592, 594, 938 P.2d 839 (1997), a detective's testimony that she warned Keene that she would turn his case over to prosecutors if he did not contact her, coupled with the prosecutor's argument to the jury highlighting Keene's failures to contact the detective and asking the jury if these were " 'the actions of a person who did not commit these acts,' " rose to impermissible comments.

In contrast, our Supreme Court determined in Lewis that a detective's testimony that he called Lewis and told him " 'if he was innocent he should just come in and talk to me about it' " was not a comment on the defendant's prearrest silence. Lewis, 130 Wn.2d at 703, 705-06. The court emphasized that "[t]he detective did not say that Lewis refused to talk to him, nor did he reveal the

[8] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

fact that Lewis failed to keep appointments." Lewis, 130 Wn.2d at 706. Also, "[t]here was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police," nor was there "any statement that silence should imply guilt." Lewis, 130 Wn.2d at 706.

Here, Marysville Police Officer Bryant Gerfin testified about his efforts to reach Parks as follows:

> Q. Did you make any efforts to contact that person [who called 911 and reported they had pepper sprayed someone] by phone?
> A. I did.
> Q. And tell us about that. What efforts did you make?
> A. I called multiple times to the phone number hoping to make contact and I wasn't able to.
> Q. And was there a voicemail at all?
> A. There was not. There was no voicemail set up.
> Q. How many times do you think you called that phone number?
> A. At a very minimum, three or four.
> . . . .
> Q. When you went to the address that you believed was associated with that license plate, was Mr. Parks at that address?
> A. He was not.
> Q. Were you able to speak with him at that time?
> A. I was not.

And Detective Christopher Jones testified:

> Q. . . . [W]hat else did you do in this case?
> A. Eventually I contacted Mr. Parks' mother.
> Q. Okay. And what was your reason for contacting Mr. Parks' mother?
> A. To see if she could get in touch with him.
> Q. And up until this point, had you been able to — had law enforcement been able to contact Mr. Parks?
> A. No.
> Q. Now, when you contacted Mr. Parks' mother, were you able to get any information in order to contact him?
> A. No.

Q. So after calling her, at any point in the investigation were you able to speak with him about what happened?
A. No.

This case is like Lewis. The officers did not testify that Parks failed to attend appointments or that he refused to speak with the police. Nor did the prosecutor elicit any testimony that Parks purposefully refused to contact the police. Indeed, Parks himself elicited the only testimony that he was at all aware of the efforts of law enforcement to reach him. Defense counsel asked Morgan:

Q. . . . So at some point during this period while were you in California, did you speak with [Parks'] mother?
A. Yes.
Q. And from that conversation you learned that police officers had contacted her?
A. Yes.

Further, the prosecutor did not try to use the testimony about law enforcement's efforts to contact Parks to the State's advantage.[9] The State did not argue that Parks' failure to contact the police was substantive evidence of guilt or suggest to the jury that it was an admission of guilt. The officers' testimony did not amount to an improper comment on Parks' prearrest silence.

Prosecutorial Misconduct

Parks argues that the prosecutor "grossly misstated the law of self-defense" and impermissibly shifted the burden of proof to the defense. We conclude that the prosecutor's remarks were improper but that Parks waived his

[9] Parks claims that the State used his silence to its advantage because the officers testified that they "referred the case to the prosecutor's office precisely because Parks did not return their calls and provide his 'side of the story.' " But this misconstrues Detective Jones' testimony about why he referred the case to the prosecutor after failing to reach Parks. He explained that "[y]ou always want to try to get every side of the story, but at some point you just go with what you have."

claim of prosecutorial misconduct.

To show prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). When a defendant fails to object to prosecutorial misconduct at trial, he is deemed to have waived any error unless the prosecutor's conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under this heightened standard, the defendant must show that " 'no curative instruction would have obviated any prejudicial effect on the jury' " and that the misconduct resulted in prejudice that " 'had a substantial likelihood of affecting the jury verdict.' " Emery, 174 Wn.2d at 761 (quoting Thorgerson, 172 Wn.2d at 455). We review alleged improper statements by the State in the context of the argument as a whole, the issues involved in the case, the evidence referenced in the statement, and the trial court's jury instructions. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

RCW 9A.16.020 provides:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> . . . .
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

"Necessary" means "that no reasonably effective alternative to the use of force

appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended." RCW 9A.16.010(1).

Parks contends that the prosecutor "misrepresented the point at which Parks needed to consider reasonable alternatives" to the use of force. The prosecutor argued in rebuttal:

> There wasn't self-defense here based on the evidence. When you look at lawful force, it has to be necessary. . . .
> . . . .
> Was it necessary? There is no duty to retreat. And you may not consider it as a reasonable alternative. But a reasonable alternative, how about when you get there, just park in another space? What about when you get there, not escalate the situation. Getting in an argument. Excuse me, ma'am, we'd like to park in this space. Would you mind moving your car? Screw you. But we'd like to park in this space. Screw you. Did it require an escalation if that's really what happened? Were there reasonable alternatives here? Absolutely.

We agree with Parks that the prosecutor's remarks were a misstatement of the law. "The justification of self-defense must be evaluated from the defendant's point of view as conditions appeared to [him] at the time of the act." State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984); RCW 9A.16.020(3). Here, according to Morgan's testimony, "the time of the act" was when Miller "started coming towards [Parks]" in an aggressive manner. Not while Parks was looking for a parking spot nor when Morgan asked Driscoll to move her car.

But a curative instruction could have alleviated any prejudice from the prosecutor's remarks. Before closing argument, the trial court properly instructed the jury that the use of force is lawful "when the force is not more than is necessary" and that "[n]ecessary means that, under the circumstances as they reasonably appeared to the actor at the time, . . . no reasonably effective

alternative to the use of force appeared to exist." Had Parks objected to the prosecutor's remarks, the trial court could have reiterated the proper instructions, which would have eliminated any possible confusion and cured any potential prejudice. Parks waived his claim of prosecutorial misconduct.

Ineffective Assistance of Counsel

Parks claims that his attorney was ineffective because she did not object to testimony about his prearrest silence or to the prosecutor's improper comments in closing argument.

To establish ineffective assistance of counsel, a defendant must show that the attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Strickland, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland, 466 U.S. at 697.

To establish prejudice resulting from ineffective assistance of counsel, a defendant must show that there is a " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d

816 (1987)[10] (quoting Strickland, 466 U.S. at 694). It is not enough for the defendant to show that the errors "had some conceivable effect" on the outcome of the proceeding. Strickland, 466 U.S. at 693.

Parks first argues that his attorney's failure to object to law enforcement testimony about his prearrest silence was deficient. Parks' argument fails because the testimony was not an improper comment on his prearrest silence.

Parks next argues that his attorney was ineffective because she failed to object to the prosecutor's improper remarks in closing argument. Parks contends that the prosecutor "encouraged the jury to nullify the law and convict Parks because his actions leading up to the imminent need to use force" were "unreasonable." He claims that it is "all too likely that the jury did as the State asked, declining to find Parks' actions justified because of his behavior beforehand." We disagree.

The inordinate focus of this case was not on whether Parks should have left the scene as a reasonable alternative to self-defense. Rather, the parties devoted nearly all of their closing remarks to whether Parks faced a credible threat worthy of self-defense at all.

Morgan testified that Parks was standing at the driver's door of his car when Miller moved toward him aggressively. She claimed that Parks warned Miller to stop, but Miller continued toward him, forcing Parks to pepper spray Miller. And Morgan testified that Driscoll forced Parks to pepper spray her because Driscoll attacked him while he was defending himself against Miller.

[10] Emphasis omitted.

Defense counsel argued during closing that Morgan's testimony was credible and that the actions of Miller and Driscoll justified Parks' use of pepper spray to defend himself.

Driscoll and smoke shop customer Ebert both contradicted Morgan's testimony that Parks acted in self-defense. They testified that Driscoll was standing by the driver's side door of her car when Parks pepper sprayed her first. They both testified that Miller was standing at the passenger side door of Driscoll's car until the moment Parks sprayed Driscoll. Ebert also testified that Miller was trying to come to Driscoll's aid and had just started to move around the back of Driscoll's car when Parks pepper sprayed him. The State argued that Driscoll and Ebert's testimony was more credible and that Parks overreacted when he sprayed Driscoll and Miller. The prosecutor told the jury that such "force" was "[n]ot necessary. Not needed. Not required."

Additionally, as discussed earlier, the court properly instructed the jury on the law of self-defense. We presume that jurors follow the court's instructions absent evidence to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Parks has not shown a reasonable probability that the outcome of his trial would have been different had his attorney objected to the prosecutor's improper remarks.

Cumulative Error

Parks argues for reversal under the cumulative error doctrine. Applying the cumulative error doctrine is "limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but

when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply when errors have "little or no effect" on a trial's outcome. Greiff, 141 Wn.2d 910 at 929.

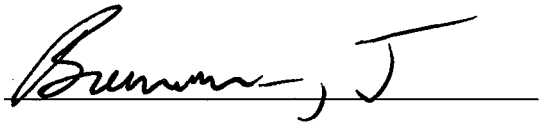
Parks fails to establish several trial errors. The cumulative error doctrine does not apply here.

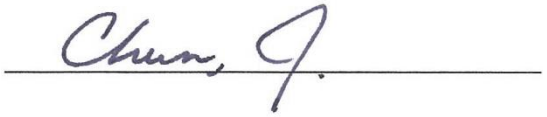
Legal Financial Obligations

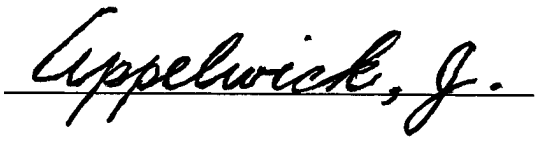
Parks argues that we should strike the criminal filing fee, DNA collection fee, and nonrestitution interest from his judgment and sentence under ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1783, 65th Legislature, Regular Session (Wash. 2018), and State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). The State concedes that legislative action has eliminated the trial court's authority to impose these legal financial obligations. We agree.

We affirm Parks' convictions for third degree assault but remand to strike the criminal filing fee, DNA collection fee, and nonrestitution interest from his judgment and sentence.

WE CONCUR:







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