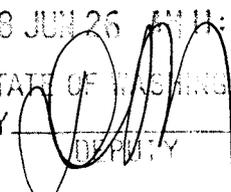


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DIVISION II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

ANTONIO PADILLA-TAPIA,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richard D. Hicks, Judge
Cause No. 07-1-00953-5

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
PATRICIA A. PETHICK, WSBA 21324
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing testimony that improperly commented on Padilla-Tapia's constitutional right to remain silent.
02. The trial court erred in permitting Padilla-Tapia to be represented by counsel who provided ineffective assistance by failing to properly object to testimony that improperly commented on Padilla-Tapia's constitutional right to remain silent.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in allowing testimony that improperly commented on Padilla-Tapia's constitutional right to remain silent? [Assignment of Error No.1].
02. Whether Padilla-Tapia was prejudiced as a result of his counsel's failure to properly object to testimony that improperly commented on his constitutional right to remain silent? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Antonio Padilla-Tapia (Padilla-Tapia) was charged by information filed in Thurston County Superior Court on May 30, 2007, with murder in the second degree while armed with a deadly weapon, to-wit: a knife, contrary to RCWs 9A.32.050(1)(a), 9.94A.602 and 9.94A.533(4). [CP 5].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 11]. Trial to a jury commenced on December 3, the Honorable Richard D. Hicks presiding. No objections nor exceptions were taken to the jury instructions. [RP 663].

The jury returned a verdict of guilty as charged, Padilla-Tapia was sentenced within his standard range, including enhancement, and timely notice of this appeal followed. [CP 64-65, 67-77].

02. Substantive Facts

In the early morning of May 27, 2007, Isidro Chavelas (Isidro) was at his trailer 4A located in a mobile home park in Thurston County. He was drinking beer with a group of approximately nine people, which included his cousin, Salome Hernandez Chavelas (Salome), his brother, Lucas Chavelas (Lucas), and Padilla-Tapia. When Isidro went to bed around 3:00 a.m., some of the people remained in the trailer, though he didn't see either Padilla-Tapia, who also resided at the trailer, or Salome, who lived in another trailer in the park. Everything was calm. [RP 203-10, 214, 218-20, 228-229, 308-11, 478, 562].

At approximately 5:00 a.m., Sergeant Ray Brady arrived at the trailer park to find the deceased body of Salome lying in the grass within 15 feet of trailer 19, the victim of multiple stab wounds. [RP 82-93, 294, 516, 565].

Lucas testified that at some unspecified time before May 27

Padilla-Tapia had said:

he felt like killing someone, and I'm not sure if he said that to me to make me feel afraid, but he had said that three times, so I don't know whether he just wanted to scare me with that or that's a saying that he has.

[RP 226].

Lucas did not take this seriously: "I thought it was like a saying."

[RP 230]. "I didn't think it was very important." [RP 231].

Padilla-Tapia was arrested in Lewis County before noon the same day. He was seized near a 1992 GEO that had been reported missing from the area of the incident. A key to the car was in his pocket. [RP 346-67, 397-404, 454, 475-76, 480, 521-27, 574, 595]. There were no bruises nor visible injuries on his hands. [RP 536-37].

Clothing removed from Padilla-Tapia exhibited airborne blood stains (shoes) and contact and saturation blood stains (shirt). [RP 47, 49, 61, 64, 68, 171-72, 180, 198, 526]. The origin of the airborne stains was placed in the vicinity of zero to six feet. [RP 63, 69]. A DNA match placed Salome's blood on Padilla-Tapia's jeans [RP 353-56], which had both airborne and contact stains, mostly from the knee and below. [RP 498-503, 512]. "(T)he wearer of the jeans was in close proximity to the incident involving Mr. Hernandez Chavelas." [RP 506].

20-year-old Padilla-Tapia, who immigrated to the United States approximately six months before the incident, had attended a dance in Lewis County the previous evening before returning “about eleven or twelve” to trailer 4A, where he and several others, including Salome, were talking and drinking. [RP 607-10]. Everybody was drunk. [RP 619]. At some point, he went across the street to a party for about half an hour before returning to his trailer “about three o’clock.” [RP 612]. Later, “Salome left, and after that I left, but I don’t know when he left.” [RP 613]. While on his way to another trailer, Padilla-Tapia heard a noise and “saw Salome lying down.” [RP 615].

I saw him. I wanted to help him, and I went to grab him, but I got stained and I panicked. I didn’t know what to do, and I’ve just been here for half a year.

[RP 615].

I was quite drunk and I panicked.

[RP 617].

I just grabbed him. I lifted him up a bit, and then I panicked. I thought I would probably be blamed for this. I wanted to get out of there.

[RP 643].

Padilla-Tapia further explained that he was on the ground with Salome for three to five minutes and had touched him and got blood on his hands and clothes, but was intoxicated at the time and couldn’t remember

exactly where he had touched him. [RP 616-17, 640-41]. After briefly returning to his trailer, he left the trailer park in the GEO.

I left felling afraid, and I left driving a car because I almost always drive the car and almost always have the keys on me.

[RP 618].

Padilla-Tapia denied killing Salome. [RP 619].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY THAT IMPROPERLY COMMENTED ON PADILLA-TAPIA'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.

The privilege against self-incrimination, or the right to remain silent, is based upon the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). In Washington, a defendant's constitutional right to silence applies in both pre- and post-arrest situations. State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). If the State does comment on the defendant's right to remain silent, this court must reverse unless the State meets its burden of overcoming the presumption that the error is prejudicial, Id. at 242, which requires proof that the untainted evidence overwhelmingly supports a

finding of guilt beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The scope of this protection extends to comments that may be used to infer guilt from a defendant's silence, see State v. Lewis, 130 Wn2d 700, 705, 927 P.2d 235 (1996), and it is constitutional error for the State to purposefully elicit testimony as to a defendant's silence. State v. Curtis, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002). Even without an explicit reference to Miranda, a prosecutor may be deemed to have purposely elicited the fact of silence in the face of arrest. In the Ninth Circuit case of Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), the court held the following exchange between the prosecutor and the arresting officer was the sort of inquiry forbidden by the Supreme Court in Miranda and Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

- Q. Who arrested Mr. Douglas?
A. I did.
Q. Did he make any statements to you?
A. No.

State v. Curtis, 110 Wn. App. at 14 (quoting Douglas v. Cupp, at 267.

During the cross-examination of Padilla-Tapia, his counsel's objection to the following was sustained.

- Q. And when you were arrested, once the police caught up with you, you immediately told them this story (Padilla-Tapia's version of events), correct?

(Defense): Objection, your Honor.

THE COURT: Sustained.

[RP 649].

The State then reintroduced the same impermissible inference¹ through the backdoor.

Q. (prosecutor): Have you ever told anyone this story?

(Defense): Objection, your Honor.

THE COURT: Overruled. He can answer yes or no.

A. No.

[RP 649].

The State emphasized this testimony in its closing argument, asking the jury:

We've proven that he was arrested wearing the clothes with Salome's blood all over it and that he's never told anyone this story until now. Does that make sense to you?

[RP 715].

¹ Not allowed to ask if Padilla-Tapia told the police his version, but okay to ask if he told anyone, which, of course, would include the police who arrested him. Now, while "Did you tell anyone else?" may have worked, this wasn't done, with the result that the impact of the initial question, which was sustained, remains, and to claim it does not is to assert that the effect is somehow diminished by the increasing number of people told. This doesn't work.

The State was allowed to deliberately present evidence from which the jury could infer guilt from Padilla-Tapia's silence in not explaining his story when he was arrested, even though evidence had been presented that Padilla-Tapia had been advised of his Miranda rights. [RP 449-451]. More fundamental, the prosecutor plainly urged the jury during argument to consider this failure as evidence of Padilla-Tapia's guilt. And whether viewed as a direct or indirect reference to Padilla-Tapia's right to remain silent, it constitutes a constitutional infringement upon this right. See State v. Romero, 113 Wn. App. 779, 790-91 54 P.3d 1255 (2002). The prosecutor elicited the testimony, Padilla-Tapia's answer was responsive to the questioning, and it was all intended to denigrate Padilla-Tapia and undermine his only defense: His version of the events. And there can only be agreement that the State exploited this during closing argument.

The effect of all of this had a high potential for prejudice, and represents a serious irregularity. This court should be unwilling to assume that the jury missed the State's message. In the end, this case essentially turned on whom the jury was going to believe. Padilla-Tapia denied that he was responsible for the killing. His credibility was central to the case; it was his only defense. And while parts of his story may be questionable, the untainted evidence was insufficient for a finding of guilt.

//

02. PADILLA-TAPIA WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO PROPERLY OBJECT TO TESTMONY THAT IMPROPERLY COMMENTED ON HIS CONSTITUTIONAL RIGH TO REMAIN SILENT.²

A criminal defendant claiming ineffective

assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

² While it has been argued in the preceding section of this brief that the issues of the testimony regarding Padilla-Tapia's constitutional right to remain silent constituted constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

Should this court determine that counsel waived the issue by failing to properly object by fully explaining his objection to the testimony relating to Padilla-Tapai's constitutional right to remain silent, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to so object to this testimony for the reasons previously argued herein. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

Counsel's performance thus was deficient because he failed to properly object to the testimony here at issue for the reasons previously argued herein, which was highly prejudicial to Padilla-Tapia, with the result that he was deprived of his constitutional right to effective

assistance of counsel, and is entitled to reversal of his conviction for murder in the second degree.

E. CONCLUSION

Based on the above, Padilla-Tapia respectfully requests this court to reverse and dismiss his conviction consistent with the arguments presented herein.

DATED this 25th day of June 2008.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne	Antonio Padilla-Tapia #313621
Deputy Pros Atty	W.S.P.
2000 Lakeridge Drive S.W.	1313 North 13 th Avenue
Olympia, WA 98502	Walla Walla, WA 99362

DATED this 25th day of June 2008.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634

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