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## **I. ASSIGNMENTS OF ERROR**

1. The prosecutor impermissibly commented on Mr. Davis' constitutional right to remain silent when he argued to the jury at closing argument that they could consider as "circumstantial" evidence that Mr. Davis knew the police were investigating a shooting that occurred at his house and yet did not come forward to make a statement.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the prosecutor impermissibly comment on Mr. Davis' constitutional right to remain silent when he argued to the jury at closing argument that they could consider as "circumstantial" evidence that Mr. Davis knew the police were investigating a shooting that occurred at his house and yet did not come forward to make a statement?

### III. STATEMENT OF THE CASE

This case arises from a shooting that occurred after a Fourth of July party in 2006.<sup>1</sup> In the early morning hours of July 5, 2006, five young women: Brittany Patterson, her sister, Megan Patterson,<sup>2</sup> Staci White, Shimarra Bennett-Ortiz, and Candace (last name not known), went to a party at the home of an acquaintance they knew as “Tino.”<sup>3</sup> Megan Patterson, Brittany Patterson, and Ms. White identified “Tino” as Lance Valentino Davis, Jr.<sup>4</sup>

When they arrived at the party, the girls realized they knew only a few of the people there.<sup>5</sup> Before long, a fight broke out between the four girls and some of the young women at the party.<sup>6</sup> Apparently, this fight was sparked when Brittany Patterson broke someone’s marijuana cigar in half.<sup>7</sup>

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<sup>1</sup> RP 1/8/08 36.

<sup>2</sup> Because Brittany and Megan Patterson share the same surname, their full names will be used hereinafter to avoid confusion.

<sup>3</sup> RP 1/9/08 124, 128, 195.

<sup>4</sup> RP 1/9/08 108, 128, 210; RP 1/10/08 435.

<sup>5</sup> RP 1/9/08 130; RP 1/10/08 344.

<sup>6</sup> RP 1/9/08 205.

<sup>7</sup> RP 1/10/08 348; RP 1/15/08 137.

The fight quickly became physical, with several of the young women from the party fighting with Brittany Patterson, Megan Patterson, and Ms. White.<sup>8</sup>

The altercation spilled outside the house into the enclosed front lawn with the other party attendees gathered round to watch.<sup>9</sup> Mr. Davis was not involved in the fighting.<sup>10</sup> He was trying to break up the fight.<sup>11</sup> Mr. Davis pulled Ms. White away from the fight and asked her to stop.<sup>12</sup>

Eventually, the five girls separated themselves from the fight and retreated to their cars.<sup>13</sup> Candace got into her car and Brittany Patterson, Megan Patterson, Ms. White and Ms. Bennett-Ortiz got into the other car.<sup>14</sup> Brittany Patterson was calling the police from her cell phone, calling out to the bystanders that she was reporting the fight.<sup>15</sup>

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<sup>8</sup> RP 1/10/08 350, 427.

<sup>9</sup> RP 1/9/08 137.

<sup>10</sup> RP 1/9/08 137; RP 1/10/08 435. Contra—Brittany Patterson testified that she saw Mr. Davis hit Ms. White, but Ms. White testified that he was helping her up and had not hit her. RP 1/9/08 137, 351.

<sup>11</sup> RP 1/15/08 140.

<sup>12</sup> RP 1/9/08 137.

<sup>13</sup> RP 1/10/08 433.

<sup>14</sup> RP 1/9/08 141.

<sup>15</sup> RP 1/10/08 357, 359.

The girls testified that Mr. Davis was in the middle of the street, insisting that the girls leave.<sup>16</sup> Some of the girls said they saw Mr. Davis pull up his shirt to show a gun in his pants.<sup>17</sup> The girls sped away.

The bystanders testified that as the girls' car pulled away, Mr. Davis was still in the street.<sup>18</sup> At that point, the girls' car swerved, apparently toward Mr. Davis.<sup>19</sup>

Several shots were fired at the retreating car.<sup>20</sup> The girls ducked down.<sup>21</sup> While initially, all of the girls told police that Mr. Davis had fired at them, on the stand most admitted that while they assumed this was true, they had not actually seen Mr. Davis fire the gun.<sup>22</sup> Brittany Patterson testified initially that did not actually see Mr. Davis fire, then said she did.<sup>23</sup>

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<sup>16</sup> RP 1/10/08 433.

<sup>17</sup> RP 1/9/08 214.

<sup>18</sup> RP 1/10/08 447.

<sup>19</sup> The bystanders believed the car swerved toward "Tino." RP 1/15/08 93, 141. The girls admitted the car swerved, but said it was not toward anyone. RP 1/10/08 438, 448.

<sup>20</sup> RP 1/10/08 361.

<sup>21</sup> RP 1/10/08 389.

<sup>22</sup> RP 1/9/08 149, 214; RP 1/10/08 436, 440, 446.

<sup>23</sup> RP 1/10/08 363, 364, 389.

Several witnesses from the crowd observing said that the shots came from behind and that Mr. Davis had not fired a weapon.<sup>24</sup>

One of the bullets shattered the rear window of the car, and one grazed Megan Patterson's side, fortunately only causing a superficial injury.<sup>25</sup>

After getting away from the altercation, the girls split up and eventually Megan Patterson went to the hospital.<sup>26</sup> She was treated with antibiotic ointment and released after a few hours.<sup>27</sup>

Police contacted Brittany Patterson and Candace in Candace's car a few blocks away from the scene.<sup>28</sup> Police took Brittany Patterson back to the scene, but found no one there and little evidence of what had happened.<sup>29</sup> Although police had arrived only a few minutes after the call, the house where the shooting occurred was deserted and apparently empty.<sup>30</sup>

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<sup>24</sup> RP 1/15/08 96-97, 106, 144.

<sup>25</sup> RP 1/9/08 147; RP 1/10/08 302.

<sup>26</sup> RP 1/8/08 48.

<sup>27</sup> RP 1/14/08 491, 495, 498.

<sup>28</sup> RP 1/8/08 46-47; RP 1/10/08 414.

<sup>29</sup> RP 1/8/08 46-47; RP 1/10/08 414.

<sup>30</sup> RP 1/8/08 39.

At the scene of the shooting, police found some shell casings in the street.<sup>31</sup> A day later, the homeowner found two more shell casings on the front lawn, where the crowd had been standing.<sup>32</sup>

Several weeks after the incident, Mr. Davis was arrested at the home of his then-girlfriend, Le'anita Brown.<sup>33</sup> A gun that was found in the possession of Ms. Brown, was matched to some shell casings found at the scene of the shooting, but did not match all of the casings.<sup>34</sup> The gun was registered to Ms. Brown.<sup>35</sup>

After his arrest, Mr. Davis gave a statement in which he denied being the shooter, saying that he believed his roommate, Rhacizio Simms, had shot at the car when the girls drove away.<sup>36</sup> Mr. Davis said he knew Ms. Brown's gun had been used in the shooting—that at the time of the shooting Ms. Brown was Mr. Simms' girlfriend and he had used Ms. Brown's gun.<sup>37</sup> Mr. Simms had been killed in a shooting two days after the incident at issue in this case.<sup>38</sup>

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<sup>31</sup> RP 1/8/08 52.

<sup>32</sup> RP 1/9/08 187; RP 1/14/08 476.

<sup>33</sup> RP 1/14/08 523.

<sup>34</sup> RP 1/14/08 517-18; RP 1/14/08 574-75.

<sup>35</sup> RP 1/15/08 36.

<sup>36</sup> RP 1/14/08 598.

<sup>37</sup> RP 1/14/08 596, 599.

<sup>38</sup> RP 1/14/08 598.

The State charged Mr. Davis with four counts of assault in the first degree and one count of unlawful possession of a firearm.<sup>39</sup>

The jury convicted Mr. Davis of the lesser-included offenses of four counts of second degree assault and one count of second degree unlawful possession of a firearm and returned four special verdicts finding that the assaults were committed with a firearm.<sup>40</sup> The parties agreed on the offender score and standard range and the court sentenced Mr. Davis to the high end of the standard range, including consecutive firearm enhancements.<sup>41</sup> This appeal timely followed.

#### **IV. ARGUMENT**

**ISSUE 1: THE PROSECUTOR IMPERMISSIBLY COMMENTED ON MR. DAVIS' CONSTITUTIONAL RIGHT TO REMAIN SILENT WHEN HE ARGUED TO THE JURY AT CLOSING ARGUMENT THAT THEY COULD CONSIDER AS "CIRCUMSTANTIAL" EVIDENCE THAT MR. DAVIS KNEW THE POLICE WERE INVESTIGATING A SHOOTING THAT OCCURRED AT HIS HOUSE AND YET DID NOT COME FORWARD TO MAKE A STATEMENT.**

During closing argument, the Prosecutor argued that Mr. Davis' failure to contact the police prior to his arrest to give a statement was "circumstantial" evidence of guilt the jury should consider. He told the jury:

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<sup>39</sup> CP 1-3.

<sup>40</sup> RP 1/22/08.

<sup>41</sup> RP 2/8/08.

Then we get to other circumstantial issues. The defendant refused to cooperate with the investigation per his statement that he understood that Detective Benson wanted to talk to him, but he wasn't going to talk to him. He knew he was being looked for. He knew that Detective Benson wanted to talk to him. He was not going to cooperate. It's probably easy to understand why every single person in this case pled. It's probably clear. You know, nobody wants to be implicated or involved in a case where someone's been shot. And at least in this crowd, nobody also wanted to help in a case someone had been shot, called the police. . . . But the defendant, when they got his name and got some information that led Detective Benson to locate him, at least over the phone through his family, he understood he wanted to talk to him and he said, "I'm not going to do it." Then he apparently fled the state. And I say "apparently," because all we know is what the defendant tells you, you know, that statement. He says he went to California to visit some friends and take some time away from, I guess, not only the heat of this, but Rhaczio's murder, and maybe that's true. But it's what the defendant says. So apparently he left the state. He took considerable time to come out of the house when he knew that the police wanted him.<sup>42</sup>

No objection was made at the time.

The prosecutor's closing argument violated Mr. Davis' constitutional right to remain silent because it was an impermissible comment on the exercise of his right to remain silent. Although in this case, the prosecutor's comments were not objected to at trial, the

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<sup>42</sup> RP 1/16/08 22-23.

court may review manifest errors affecting a constitutional right raised for the first time on appeal.<sup>43</sup>

The accused has a constitutional right to remain silent that derives from the Fifth Amendment.<sup>44</sup> In a criminal proceeding, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's pre or post arrest silence to infer guilt from such silence.<sup>45</sup>

In *Easter*, the Court made it clear that:

An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt.<sup>46</sup>

In that case, a police officer testified that the defendant was hiding his guilt by looking away and not answering his questions.<sup>47</sup> The officer also labeled the defendant a "smart drunk," i.e., he was evasive and silent when interrogated.<sup>48</sup> During closing argument, the prosecutor

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<sup>43</sup> RAP 2.5(a); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

<sup>44</sup> *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996).

<sup>45</sup> *Easter*, at 243.

<sup>46</sup> *Easter*, 130 Wn.2d at 243.

<sup>47</sup> *Easter*, 130 Wn.2d at 234, 241.

<sup>48</sup> *Easter*, 130 Wn.2d at 234, 241.

repeatedly labeled the defendant “a smart drunk.”<sup>49</sup> On appeal, the court held that the testimony and argument violated the defendant's right to silence.<sup>50</sup>

When a defendant does not remain silent and talks to law enforcement officers the State may comment on what the defendant does not say.<sup>51</sup> However, the State may not focus on the defendant's failure to make a statement in such a way as to imply guilt.<sup>52</sup>

A direct comment on a defendant's silence occurs when a witness or state agent makes reference to the defendant's invocation of his or her right to remain silent. *State v. Romero*, 113 Wn. App. 779, 793, 54 P.3d 1255 (2002). (“I read him his *Miranda* warnings, which he chose not to waive, would not talk to me,” constitutes a direct comment); *State v. Curtis*, 110 Wn. App. 6, 9, 37 P.3d 1274 (2002) (direct comment when officer testified he read defendant his *Miranda* rights and defendant refused to talk, stating he wanted an attorney).

An indirect comment on the right to remain silent occurs when a witness or state agent references a comment or action by the

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<sup>49</sup> *Easter*, 130 Wn.2d at 234.

<sup>50</sup> *Easter*, 130 Wn.2d at 241.

<sup>51</sup> *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001).

<sup>52</sup> *See State v. Belgarde*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988).

defendant that could be inferred as an attempt to exercise the right to remain silent. *See State v. Lewis*, 130 Wn.2d 700, 706, 927 P.2d 235 (1996) (officer did not testify the defendant refused to talk but rather that the defendant claimed he was innocent); *State v. Sweet*, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999) (officer's testimony that defendant said he would take a polygraph test after discussing the matter with his attorney was an indirect reference to silence).

Prejudice resulting from an indirect comment is reviewed using the nonconstitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome.<sup>53</sup>

The prosecutor's statements in this case were indirect comments on Mr. Davis' right to remain silent because the prosecutor was referencing actions by Mr. Davis that could be inferred to be an exercise of his right to remain silent.<sup>54</sup> The prosecutor argued that the jury should consider the fact that Mr. Davis knew the police wanted to

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<sup>53</sup> *Romero*, 113 Wn. App. at 791-92; *State v. Pottorff*, 138 Wn. App. 343, 348, 156 P.3d 955 (2007).

<sup>54</sup> *See Lewis*, 130 Wn.2d at 705-6.

talk to him, yet chose not to cooperate in deciding his guilt.<sup>55</sup> That was a comment on Mr. Davis' pre-arrest silence. The case law is clear that a defendant has no obligation to help in a police investigation.

Not only was the prosecutor's argument error, it was prejudicial error because this case was all about credibility. The four girls said Mr. Davis was the shooter, and Mr. Davis' statement and his witnesses all said that he was not the shooter. Therefore, there is a reasonable probability that the prosecutor's unconstitutional reference to Mr. Davis' pre-arrest silence affected the jury's verdict. Therefore, the convictions must be reversed.

## V. CONCLUSION

The prosecutor violated Mr. Davis' Constitutional right to remain silent when he argued to the jury that they could consider as "circumstantial" evidence, the fact that Mr. Davis knew the police were investigating the shooting and yet failed to come forward. That argument constituted an indirect comment on Mr. Davis' right to remain silent. Because there is a reasonable probability that the

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<sup>55</sup> The prosecutor's later argument that the jury could consider that Mr. Davis left the area after the shooting was permissible. *See State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965).

prosecutor's unconstitutional argument affected the jury's verdict, the convictions must be reversed and the case remanded.

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