

No. 45351-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TAMALA SUMMERHILL,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did Summerhill fail to support her assignments of error, regarding the Findings of Fact, by reference to the record or argument?
- B. Can Summerhill raise for the first time on appeal the alleged error that the deputy prosecutor elicited testimony that commented on Summerhill's right to silence?

II. STATEMENT OF THE CASE

Corey Leneker is a married father of two kids who lives in Tumwater. RP 119.¹ Corey is friends with Blake Ellison, who has a nine year old son, Luke. RP 67-68. Corey has an eight year old son Miles. RP 119. Miles and Luke are friends. RP 119-20.

On May 25, 2013 Corey took Miles and Luke to the Nike outlet in Centralia. RP 119-20. They arrived at the store between 1:00 p.m. and 2:00 p.m. RP 120. The store was crowded and busy. RP 209. Corey and the boys shopped around the store a bit and then proceeded to get into the checkout line. RP 120-21. The line was wrapped all the way around the back of the store and the wait time was approximately 30 minutes to reach a checkout stand. RP 120, 210-11. In line behind Corey and the boys were Jessie

¹ Corey Leneker will be referred to by his first name to avoid confusion with other members of the Leneker family. The Ellison family members will be referred to by their first names. Also, Jessie Summerhill will be referred to as Jessie to avoid confusion with the defendant, Tamala Summerhill. No disrespect intended.

Summerhill and his mother, Tamala Summerhill.² RP 121, 211, 250. Jessie was hungry, cranky, and tired of being in line. RP 211. Corey heard Jessie repeatedly swear, including stating that this was, “fucking bullshit.” RP 121.

Corey was looking at a different checkout stand and did not see the clerk on the far left waiving to him that it was his turn. RP 123. Jessie tapped Corey on the shoulder and told him that the checker was ready for Corey. RP 123. Corey took Jessie’s tone as being hostile and replied, “I got it, I’m going, watch your mouth.” RP 124. To which Jessie replied, “or what?” RP 213, 252. Both parties went their separate ways to checkout stands at the opposite ends of the checkout area. RP 125, 214. Jessie and Summerhill exited the store before Corey and the boys. RP 126-27. Jessie appeared agitated, he was pacing and gesticulating, and Summerhill appeared to be attempting to calm Jessie down. RP 127.

Corey exited the store and kept his eye on Jessie, who appeared to intend to have a confrontation with Corey. RP 127. Corey was supposed to go pick up something three stores down for his wife but decided it would not be in their best interest to

² Jessie Summerhill is an adult. RP 208.

purposely cross Jessie and Summerhill's path. RP 128. Corey had the boys walk towards the restroom, and waited until they could see Jessie and Summerhill begin to go back into the parking lot, away from them. RP 128. Corey believed it was now safe for them to proceed towards the car. RP 128. Corey attempted to keep things light so the boys stayed unaware of the situation. RP 129.

Jessie was still agitated. RP 130. Jessie kept looking at Corey and swearing at him. RP 130. Eventually Jessie, at approximately 25 to 30 yards away from Corey, rapidly came towards Corey. RP 132.³ Corey told the boys to get to the car as quickly as possible. RP 133. The boys ran to the car and Corey took a few steps to be a barrier between Jessie and the boys. RP 133-34. According to Corey,

The male in question (Jessie) closed the distance, got immediately in my face, began swearing at me saying things like, "You need to learn fucking manners. You need to fucking pay attention in line. What the fuck is your problem? I'm just trying to help you out. Look at you. Why are you breathing so hard? What's your fucking problem? You are going to get it." then, at that point his hands came up. I'm at this point I'm at that point I said to him clearly, "You are approaching a grown man with kids in a parking lot. Just like you to know I have young children here and you are hostile and aggressive and you are approaching me.

³ It should be noted that Jessie testified that it was Corey who was the aggressor and approached him. RP 216-19.

RP 134.

Jessie's hands came up and contacted Corey, who got both of his arms in Jessie's armpits and they ended up wrestling over into a bush and then on the ground. RP 135. Corey was fearful for his and the boys' safety, Jessie was bigger than Corey, so Corey got into Jessie's arms and drove him backwards down to the ground. RP 136. Neither man threw a punch at each other, it was just a wrestling match down on the ground. RP 136. Summerhill grabbed Corey's waistband and was eventually able to get Corey off of Jessie. RP 138. Corey could see the boys were screaming and crying. RP 139-40.

Corey felt pepper spray (OC), turned and saw Summerhill with OC. RP 140. Corey was sprayed down his left side, face, neck, back and arms. RP 140. Corey was disoriented, he ran to the kids, and got the boys to come into the parking stall. RP 141. Summerhill followed Corey. RP 141. Summerhill sprayed Corey and reached around Corey to spray the boys, as Corey attempted to shield them. RP 141. Cory explained, "I perceive there to be a pause, stop. I looked. I made eye contact with her and she proceeded to spray again both myself and the boys." RP 141. Summerhill then walked back towards Jessie, who said "Fuck you, mother fucker"

and kicked Corey's bag of clothes and shoes across the parking lot. RP 145.

Nathan Karl, a third party unknown to Corey or Summerhill, was in the parking lot during the incident. RP 96-97. Mr. Karl saw two men on the ground, fighting. RP 99. Mr. Karl saw Summerhill near the men, standing there watching. RP 99. Summerhill was yelling profanity, saying, "[y]ou fucking fagot," RP 100. According to Mr. Karl the incident did not even last a minute. RP 101.

It was just like a tumble then the dude they stood up and started screaming, "I got kids with me. I got kids with me." He yelled and he ran over to his truck. The two little kids sitting on the curb facing the freeway, and then she (Summerhill) walks and she goes up about half a length of the truck they are in between and sprays them, all three of them. He goes like this and dives over them, she turns around and walks to the end of the truck, then turns around and sprays them all again you know what I mean.

RP 101. Mr. Karl heard Corey telling them to leave him alone. RP 104. Mr. Karl stated, "I swear when she turned around the second time she looked at me. Then sprayed them, walked off all smug." RP 107.

Corey called 911. RP 268. Police, firefighters, and EMTs arrived on the scene. RP 28, 38, 43, 56-57. Officer Butcher did not observe any injuries on Summerhill. RP 28. Sergeant Warren could see that Corey had been sprayed with OC because his eyelids

were swollen, face was red. and his eyes were bloodshot and watery. RP 28. Miles told Steve Lamb, a firefighter, that his eyes and nose hurt. RP 38. Miles explained that he had been breathing in and out and that was why his nose was stinging because he had been sprayed in the face. RP 38-39. Miles also said the water flush of his eyes felt good. RP 39. The boys told Corey Freeborn, a firefighter/EMT, that a woman had sprayed them with pepper spray. RP 43. Amy Leneker, Miles' mom, explained that Miles' face had been swollen, bright red, he complained that it burned and itched, and it took hours for Miles to get back to normal. RP 90-91. Luke also felt the effects of the OC into the evening. RP 84. Corey believed the boys received the worst of the OC spray. RP 147.

Centralia Police Officer Mike Lowrey also responded to the scene. RP 184-85. Officer Lowrey is also an Oleo-capsaicin (OC) pepper spray instructor. RP 185. Officer Lowrey saw two children and a man getting OC spray off their faces. RP 185. They pointed out to Officer Lowrey who sprayed them. RP 185. Officer Lowrey spoke to Jessie, Corey, and the boys. RP 186-88. The boys told Officer Lowrey that "she" sprayed us with something. RP 189. Officer Lowrey spoke with Summerhill and then spoke to her again after he had spoken with Mr. Karl. RP 190-91.

Sergeant Warren had retrieved, with Summerhill's permission, the can of OC she had used and handed it to Officer Lowrey. RP 59-60, 191. Summerhill told Officer Lowrey that she had sprayed Corey because they were involved in a dispute and she was trying to get Corey off of her son. RP 191. Officer Lowrey inquired why Summerhill would then follow Corey back to his car and spray him again. RP 191. Summerhill did not respond. RP 191. Summerhill told Officer Lowrey she could not remember how many times she had sprayed Corey. RP 191. Summerhill acknowledged that she knew there were kids there but did not remember spraying the kids with OC. RP 192. Summerhill did not appear to have, nor did she complain about, any injuries. RP 194. Neither Summerhill or Jessie told Officer Lowrey that she had been knocked to the ground during Corey and Jessie's scuffle. RP 193-94.

Officer Lowrey could tell from his training and experience that Summerhill's OC was a stream type of spray. RP 198. The advantage to a stream type of spray is it very precise, you can aim it and it hits a precise target. RP 198. OC spray is colored orange/yellow to help medics and others know what has been sprayed. RP 199-200. Officer Lowrey could tell that boys had been hit by a stream OC spray because their faces looked painted where

they had been hit with the spray. RP 200-01. Officer Lowrey had no doubt, after 10 years as an instructor and spraying hundreds of people, that the boys were sprayed directly with a stream spray to their face. RP 202.

The State charged Summerhill with two counts of Assault of a Child in Third Degree and one count of Assault in the Fourth Degree. CP 5-7. Summerhill elected to try her case to a judge sitting without a jury. See RP. Summerhill and Jessie testified in Summerhill's defense. Jessie claimed that Corey was the aggressor and came after him. RP 216-219. Summerhill denied spraying the children with the OC spray. RP 281. The judge did not find Jessie or Summerhill's account of the incident credible. CP 11. The judge found Summerhill guilty as charged and Findings of Fact and Conclusions of Law were entered. CP 8-12. Summerhill timely appeals her conviction. CP 26-27.

The State will supplement the facts as needed throughout its argument.

III. ARGUMENT

A. SUMMERHILL FAILS TO SUPPORT HER ASSIGNMENTS OF ERROR, REGARDING THE FINDINGS OF FACT, BY ARGUMENT OR REFERENCE TO THE RECORD.

Summerhill assigns error to Findings of Fact 8, 9, 10, 11, 13, 14, 17, 19, 20, and 21. Brief of Appellant 1-2. Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *State v. Lohr*, 164 Wn. App. 414, 419, 263 P.3d 1287 (2011). Findings not assigned error become verities on appeal. *Lohr*, 164 Wn. App. at 418.

While Summerhill assigns error to these Findings of Fact, the remainder of the brief contains no reference to these findings. Nor does Summerhill ever explain which portions of each finding she believes are unsupported. Accordingly, these assignments of error cannot be reviewed on appeal. *Id.*

B. SUMMERHILL CANNOT RAISE FOR THE FIRST TIME ON APPEAL THAT THE DEPUTY PROSECUTOR ALLEGEDLY COMMENTED ON HER RIGHT TO REMAIN SILENT BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.

Summerhill argues, for the first time on appeal, that the deputy prosecutor repeatedly elicited testimony regarding Summerhill's exercise of her pre-arrest right to silence and commented on that silence during closing argument. Brief of

Appellant 10-12. Summerhill does not argue to this Court how she is able to raise this alleged error for the first time on appeal absent a passing statement that this is an error of constitutional magnitude. See Brief of Appellant 10-26. The alleged error, while of constitutional magnitude, is not manifest. Therefore, Summerhill is precluded from raising this issue for the first time on appeal.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Summerhill Did Not Object To The Questions, Testimony, And Argument She Alleges Commented On The Exercise Of Her Right To Silence And Fails To Show This Court That The Alleged Error Is A Manifest Constitutional Error.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP

2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O’Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (citations omitted). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

An alleged error regarding a defendant’s exercise of his or her right to remain silent, as guaranteed by the United States and

Washington Constitutions, is a constitutional error.⁴ Therefore, the only inquiry here is whether the alleged error was manifest. *O'Hara*, 167 Wn.2d at 98. An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a "plausible showing... that the asserted error had practical and identifiable consequences in the trial of the case." *O'Hara*, 167 Wn.2d at 99 (internal citations and quotations omitted). Summerhill has not satisfied this requirement.

Any comment in regards to Summerhill's exercise of her right to silence was brief. RP 191-92. There was no objection to any of the questions or the testimony of Officer Lowrey. RP 191-92. The testimony was primarily that when questioned about whether she sprayed Corey more than once or if she spayed the children, Summerhill stated she could not remember or she forgot. RP 191-92. This is not silence. *State v. Hager*, 171 Wn.2d 151, 158, 248 P.3d 512 (2011), *citing State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 100 (2001). The only silence mentioned was when Officer Lowrey initially asked Summerhill why she followed Corey and continued to

⁴ The State is not agreeing that there was an error, or that the State improperly elicited testimony regarding Summerhill's exercise of her right to silence. The State will fully argue below, in subsection 3, the analysis regarding commenting on a defendant's exercise of his or her right to silence.

spray him back to his vehicle. RP 191. The deputy prosecutor did not mention in his closing argument the testimony of Officer Lowrey regarding Summerhill's lack of memory of the incident. See RP 295-302, 306-07. The testimony of Officer Lowrey regarding that Summerhill "suddenly forgot a lot" was in response to questioning by Summerhill's trial attorney, not the deputy prosecutor. RP 292-93.⁵ Summerhill disingenuously argues this was presented in the State's rebuttal case, which is when the testimony was given, but fails to acknowledge the question was in direct response to a question by Summerhill's trial counsel, which would make the error, if any, invited. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); RP 292-93; Brief of Appellant 8, 10-23.

Summerhill also argues that the State, in its closing argument to the judge, argued that Summerhill's failure to call 911 after the alleged attack on her son was indicative of guilt. Brief of Appellant 15-24. Reading the entire statement by the deputy prosecutor in context it is clear the deputy prosecutor was

⁵ Summerhill cites this exchange as taking place at RP 294 – which it does in the uncorrected copy of the VRP. The second volume of the VRP has a corrected copy, which was provided to the State. The corrected copy deletes a blank page and therefore, the page numbers are off by one page. The State is citing to the corrected copy throughout its briefing.

discussing credibility of the witnesses and whether Summerhill and Jessie's version of events were believable. RP 299.

Keeping in mind that Corey Leneker is the one who called 911 -- we heard the 911 tape -- we know why he approached their car, he was talking to 911 at the time. Neither the defendant or her son called 911. Why? Her son apparently had been assaulted according to her, and she was fearful of Corey approaching her car, why wouldn't she call 911? She knew she did something wrong, and they needed to be able to stay and explain it away as best they could. **Unfortunately their stores [sic] make absolutely no sense.**

RP 300 (emphasis added). Summerhill and Jessie's testimony minimized what had happened and painted Corey as the aggressor. See RP 213-81. The role of the reviewing court does not include substituting its judgment for the finder of fact by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The deputy prosecutor was arguing to the judge why Summerhill's testimony was not credible, that her version of the events did not make sense given the facts of the case. This is not a comment on Summerhill's pre-arrest silence for

the purpose of implying guilt, therefore, the alleged error is not manifest and this Court should not consider this claimed error for the first time on appeal.

3. If This Court Permits Summerhill To Raise The Alleged Error Regarding Improper Eliciting Of Testimony Regarding Summerhill's Right To Silence, Any Comment On Summerhill's Right To Silence Was Harmless Beyond A Reasonable Doubt.

Summerhill argues that the deputy prosecutor elicited testimony from Officer Lowrey that commented on her right to silence. Summerhill also argues the deputy prosecutor commented on her right to silence when he mentioned her failure to call 911 during his closing argument. None of the alleged errors are comments on Summerhill's right to silence. If any error occurred it was harmless.

A person cannot be compelled in a criminal case to provide evidence against him or herself. U.S. Const. amend. X; Const. art. I, § 9. A person who invokes his or her right to silence may not have that silence used as substantive evidence of guilt in a criminal trial. *State v. Sloan*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006), *citing State v. Easter*, 130 Wn.2d 228, 238, 992 P.2d 1285 (1996) (additional citations omitted). It is a violation of a defendant's due process rights for the State to exploit or comment on the

defendant's choice to exercise his or her right to remain silent. *State v. Romero*, 114 Wn. App. 779, 786-87, 54 P.3d 1255 (2002), citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979). The State, therefore, "cannot elicit comments from a witness that are related to a defendant's silence or make such comments during closing arguments in order to infer guilt. *Sloan*, 133 Wn. App. at 127 (citations omitted).

When the defendant's exercise of his or her right to remain silent is raised, the reviewing Court "must consider whether the prosecutor manifestly intended the remarks to be a comment on [the right to remain silent]." *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 204 (2008) (internal quotations and citations omitted). A mere reference to a defendant's silence does not amount to a comment on his or her right to silence. *Burke*, 163 Wn.2d at 216. "When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say," as it is not a matter of pre-arrest silence. *Hager*, 171 Wn.2d at 158 (internal citations omitted).

A comment on a defendant's right to silence can be harmless error. *State v. Pottorff*, 138 Wn. App. 343, 346-48, 156

P.3d 955 (2007). In *Pottorff* the court differentiated the review standards of the harmless error analysis based upon what type of comment was made by the State. *Pottorff*, 138 Wn. App. at 347. The court explained that the prejudice incurred as the result of a direct comment about a person's right to remain silent would require the State to show the error was harmless beyond a reasonable doubt. *Id.* "A direct comment occurs when a witness or state agent makes a reference to the defendant's invocation of his or her right to remain silent." *Id.* at 346.⁶ A constitutional error is deemed harmless if the reviewing court is certain beyond a reasonable doubt that the verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). The Supreme Court has held, "[t]his court employs the overwhelming untainted evidence test and looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt." *Anderson*, 171 Wn. 2d at 770.

Whereas, the prejudice incurred when the State makes an indirect comment on a person's right to silence is reviewed under

⁶ The court gave the following as examples of direct comment on the evidence: An officer testifying that he read a defendant his *Miranda* warnings and the defendant chose not to waive his right to remain silent and would not speak to the officer. An officer testifies that a defendant would not speak to the officer and requested an attorney. See *Pottorff*, 138 Wn. App. at 347. (referring to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)).

the lower standard, which determines whether no reasonable probability exists that error affected the outcome. *Pottorff*, 138 Wn. App. at 347. The State makes an indirect comment on a person's right to silence when it, through a witness or the deputy prosecutor, references an action or comment made by the defendant which could be inferred as an attempt by the defendant to exercise his or her right to silence. *Id.*, citing *State v. Lewis*, 130 Wn.2d 700, 706, 927, P.2d 235 (1996).⁷

Summerhill takes issues with the following exchange, characterizing it as the deputy prosecutor repeatedly eliciting testimony regarding Summerhill's exercise of her right to remain silent:

Q So you go and speak with her back to the red car?

A Yes, sir.

Q Started to ask her questions?

A Yes, sir.

Q What did you ask her?

A I asked her if she had -- when I first walked up Sergeant Warren handed me the OC.

⁷ “[O]fficer did not testify the defendant refused to talk, but rather that the defendant claimed he was innocent ... [O]fficer’s testimony that the defendant would take polygraph test after discussing the matter with his attorney was an indirect reference to silence.”

Q State's in –

A Yes, and she stated that she had sprayed him because they were involved in a dispute to get him off of her son. I then asked if she had continued spraying him and asked why she would run all the way back following him back to his car and spray him as the independent witness stated? She made no comments.

Q She didn't respond?

A She didn't respond in any way.

Q Did you ask her how many times she had sprayed him?

A She told me she couldn't remember.

Q Did you ask her where she had sprayed him?

A Again she couldn't remember.

Q Not where on the person, but where in the parking lot?

A I did. Afterward I said you sprayed him there, did you spray him any place else? She said, "I can't remember."

Q When you said "you sprayed him there," where were you talking about?

A The original dispute circle you have marked up there.

Q Did you ask her about the kids?

A I asked her if she had sprayed the kids.

Q What did she say?

A She didn't remember. It almost was like she was blank at one point. She didn't remember anything that happened at that point. She knew that there were kids.

RP 191-92. Only one of the deputy prosecutor's questions could be characterized as formulated to require Officer Lowrey to testify regarding Summerhill's exercise of her right to silence. RP 191-92. Therefore it is a complete mischaracterization of the deputy prosecutor's questioning for Summerhill to state the deputy prosecutor repeatedly elicited testimony regarding Summerhill's exercise of her right to silence. Officer Lowrey's testimony regarding Summerhill's evasive answers, after she voluntarily spoke to the officer, do not implicate pre-arrest silence. The second exchange Summerhill complains about was testimony elicited by her attorney, which, as argued above, makes any error invited. RP 292-93.

In *State v. Keene*, this Court held that the deputy prosecutor and the detective who testified impermissibly commented on Keene's right to silence. *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997). The detective "testified that she never heard from Keene after she warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again." *Keene*, 86 Wn. App. at 594. The deputy prosecutor used Keene's failure to

contact the detective as substantive evidence to infer guilt by telling the jury “it could decide if Keene’s failure to contact the detective was the act of an innocent man.” *Id.*

In contrast, nothing in Officer Lowrey’s testimony is presented as substantive evidence of Summerhill’s guilt for the crime of Assault of a Child in the Third Degree or Assault in the Fourth Degree. Further, the deputy prosecutor did not attempt to use the testimony of Officer Lowrey to infer Summerhill is guilty. *Burke*, 163 Wn.2d at 216; RP 295-302, 306-07. The testimony (and lack of argument) does not amount to a comment on Summerhill’s right to silence.

Summerhill also characterizes the portion of the deputy prosecutor’s argument that mentions Summerhill and Jessie’s failure to call 911 as an impermissible comment on Summerhill’s pre-arrest silence. As argued above, the argument was not for the purpose of inferring guilt from Summerhill’s failure to call the police, it was for the purpose of illustrating how Summerhill and Jessie’s version of events did not make sense and were not credible. RP 300.

If this Court were to find that Officer Lowrey’s testimony or the deputy prosecutor’s argument was a direct comment on

Summerhill's exercise of her right to silence, any such comment is harmless. See *Pottorff*, 138 Wn. App. at 346-48. All of the alleged errors are, at best, indirect comments on Summerhill's right to silence. The verdict was unattributed to the brief testimony offered by Officer Lowrey stating that Summerhill did not answer when he asked about why she followed Corey and continued to spray him with OC, her evasive answers to Officer Lowrey's questions, or the deputy prosecutor's brief remark about Summerhill's failure to call 911.

All parties in this matter agreed there was an altercation between Jessie and Corey outside the Nike outlet store. RP 132-37, 216-19, 227-29, 257-60. The parties pointed to each other as the aggressor. *Id.* Summerhill and Corey both testified that Summerhill attempted to pull him off of Jessie by yanking on the waistband of Corey's shorts. RP 138, 260. It is at this point that the versions of events diverge, Summerhill stating she only sprayed Corey with OC once, and she did not spray him over by his car. RP 262. Corey testified that Summerhill sprayed him with OC, he ran to the boys, Summerhill follows him, and reaches around Corey to spray the boys with OC. RP 140-41. According to Mr. Karl, Summerhill was calling Corey a "fucking fagot" as she followed him

to the boys. RP 104. Mr. Karl's testimony corroborated Corey's version of the events. Mr. Karl described how Summerhill followed Corey over to his vehicle and sprayed Corey and the boys. RP 101. "[Corey] goes like this and dives over [the boys], she turns around and walks to the end of the truck, then turns around and sprays them all again you know what I mean." RP 101.

Further, Corey and Mr. Karl's version regarding the OC spraying was corroborated by the physical evidence. Officer Lowrey explained that the type of OC spray used by Summerhill sprays a stream. RP 292. This type of OC spray is very accurate and a person can hit a precise target with it rather than a wide area. RP 198. The injuries to the boys were not caused by the transfer of OC spray from Corey to the boys. RP 294. Officer Lowrey, an OC spray instructor with 10 years of experience, testified that both boys were hit with a stream of OC directly in their face. RP 201-02.

There was no reasonable probability that the errors alleged by Summerhill affected the outcome of her trial. *Pottorff*, 138 Wn. App. at 347. The indirect comments on Summerhill's right to silence were dwarfed by the overwhelming evidence that Summerhill committed the crimes of Assault of a Child in the Third Degree by spraying Miles and Luke directly with OC spray and Assault in the

Fourth Degree when she followed Corey and sprayed him again after the altercation between Corey and Jessie had ended. The State has even met the harmless error burden under the higher standard for when the error is direct comment on the evidence. The untainted evidence overwhelmingly leads to a finding of guilt and is therefore harmless beyond a reasonable doubt. Summerhill suffered no prejudice from the alleged errors and this Court should affirm Summerhill's convictions.

IV. CONCLUSION

Summerhill cannot raise the issue regarding impermissible testimony and argument touching on her right to remain silent for the first time in this appeal. Furthermore, there was no impermissible testimony or argument on Summerhill's pre-arrest silence. If this Court were to find error, it was harmless. Summerhill's convictions should be affirmed.

RESPECTFULLY submitted this 23rd day of April, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



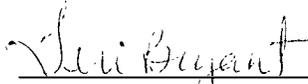
by: _____
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. TAMALA SUMMERHILL, Appellant.	No. 45351-7-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 23, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi R. Backlund, attorney for appellant, at the following email addresses: Liseellnerlaw@comcast.net.

DATED this 23rd day of April, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

April 23, 2014 - 11:12 AM

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