

No. 47481-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYSON JAMES KILLION,

Appellant.

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

The Honorable Erik Price, Judge
Cause No. 14-1-01159-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence presented at trial to prove beyond a reasonable doubt that the defendant, Killian, sitting in the courtroom, was the same person who assaulted the victim.

2. Whether the prosecutor, by arguing during closing arguments that Killian's statements to the police following advisement of the *Miranda* warnings were inconsistent with statements an innocent person would make, impermissibly commented on his Fifth Amendment right to remain silent.

B. STATEMENT OF THE CASE.

The State accepts Killian's statement of the substantive and procedural facts of the case. Additional facts will be included in the argument section below.

C. ARGUMENT.

1. The evidence presented at trial was sufficient for any rational trier of fact to find beyond a reasonable doubt that Killian was the same person who assaulted the victim.

The State does not dispute that it bears the burden of proving beyond a reasonable doubt that the person charged with a crime is the same person who committed the acts forming the basis of the charge. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Killian argues that because there was some discrepancy in the testimony of the eyewitnesses, the State failed to prove beyond a reasonable doubt that he was the one who kicked the victim in

the face, causing serious injuries. In fact, although there were indeed some discrepancies, the evidence presented to the jury supported the conclusion that Killian was, beyond a reasonable doubt, the person who kicked the victim.

Kevin Reynolds actually saw the assault. He testified that he was sitting in his vehicle at the corner of 7th and Franklin when he saw a couple about a block and a half away from him. RP 96.¹ As they came closer to him he could tell they were having an argument and the woman was yelling for help. RP 96. He saw the man throw the woman to the ground and kick her in the face. RP 96. Within ten seconds Reynolds was on the phone calling 911. Several people had rushed to where the woman lay on the ground, but other people were chasing the man down the street. RP 98. The man was wearing a white shirt. RP 100. Reynolds did not get a good look at the man because he was focused on the victim lying on the ground. RP 101. When asked at the scene whether Killian was the person he saw kick the victim, he did not think so, partly because Killian was wearing a different shirt. RP 101, 106. He also thought Killian was a little shorter and lighter than the suspect. RP 101. Nevertheless, he was clear that the man who kicked the

¹ All references to the Verbatim Report of Proceedings are to the three-volume trial transcript dated March 30-31 and April 1, 2015.

woman wore a white shirt, left the scene, and was chased by other people.

Denise Luikart, who was in a vehicle with Greg Waldron, saw a man in the road, yelling. He was running down the street away from the woman who was injured, and people were chasing him, trying to talk to him. RP 66-68. The man was extremely upset, swearing, and saying things such as "She deserved it." "I was minding my own business. I work hard." Luikart believed he was wearing white pants and a black shirt, and was carrying a black backpack. RP 70. When he made these statements he was coming toward the vehicle Luikart was in and was within half an arm's length. Luikart rolled the window up because she was afraid of him and he was close enough to do something to her. RP 68. He was looking at Luikart and said "Fucking bitch." RP 68. Luikart called 911.

Luikart and Waldron, still in the vehicle, followed the man as he went into a crowd of people on the grounds of a church. RP 69-70. They lost sight of him in the crowd. RP69. They continued driving around the church and spotted the man on the stoop of the church on the other side of the building from where they had lost sight of him. RP 70. Luikart did not recognize him at first because

he was looking down and was now wearing a purple shirt. RP 70-71. When he looked up, Luikart recognized him. RP 71-72. Luikart and Waldron waved down a police officer they saw in front of them. The man was walking toward them at that time, and they pointed him out to the officer. RP 71-72. The two witnesses left the scene but later were called back and asked to identify the man who was with the police officer. Luikart had no doubt in her mind it was the same man. RP 72-73. She based her identification on his face. RP 74-75. She did not definitely identify him in court because he looked different—at the scene his face was red, his eyes bloodshot, and his hair was longer. RP 76, 78. She never wavered, however, in her testimony that the man in the custody of the police officer at the church was the same man she saw running from the scene being chased by other people.

Greg Waldron, who was driving the car in which Luikart was riding, heard loud screaming and saw a man on the other side of the road from his car. Two men were trying to calm him down or get him to stay still. RP 80. The man was walking toward the Capitol with the two men still trying to calm him. He was screaming “She deserved it. She deserved it,” while pointing at a woman who was rolling on the ground, screaming, and crying. RP 81-82.

Waldron followed the man in his car as he went toward the Capitol. The man said "The bitch deserved it. She cheated on me. I was nothing but good to her," as well as other vulgar statements. RP 83. Waldron was perhaps twenty feet from the man, keeping enough distance so the man could not do anything to him. RP 83. Waldron testified the man was wearing a white shirt and carrying a black backpack. RP 84. He went to a church on Washington Street where about one hundred homeless people had gathered, and joined them. RP 84. Waldron drove around to the other side of the church, looking for the man. Waldron thought the man might change his clothing. RP 85-86. He spotted the man on some stairs leading into the church, wearing a purple shirt. RP 85. The man walked back toward the place they had first seen him and Waldron and Luikart pointed him out to a police officer. RP 86. They left the scene but were asked to come back to give statements. Waldron was positive the man the police apprehended was the man they had been following and who was leaving the scene of the commotion. RP 87-88.

Olympia Police Officer Duane Hinrichs testified that he was flagged down by Waldron and Luikart, who described the suspect to him. RP 137-38. Hinrichs saw a person matching that

description on the steps of a church at the corner of 9th and Washington. RP 138. The man started to walk away; Hinrichs directed him to stop. The man walked a short distance, then produced a Leatherman-type tool with the blade exposed. He put the blade to his neck and said "The bitch broke my heart." RP 139. The man was eventually taken into custody. RP 142. Hinrichs identified Tyson Killian in court as the same man. RP 143. Hinrichs contacted Waldron and Luikart and took their statements. He was present when they identified the man he had in custody as the person they had followed. RP 151.

There was no testimony at trial that there was more than one man in a white shirt leaving the scene and yelling "she deserved it." While Luikart was unclear about the clothing Killian was wearing when she first saw him, RP 70, and Reynolds could not identify Killian in court, there was more than adequate evidence to support the jury's finding that Killian was the person who kicked the victim. One man in a white shirt kicked her. The man left the scene with people chasing him. Witnesses saw the man being chased, and yelling about how the victim deserved it. Witnesses identified Killian at the church as the same man. Killian made statements expressing rage at the victim. There was no other man around the

victim at the time she was kicked and no other man who was so distraught and enraged about something the victim had done.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be

inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Any rational juror would have found that Killian was the person who assaulted the victim. The evidence was more than sufficient.

2. The prosecutor did not impermissibly comment on Killian's right to remain silent. He waived that right and spoke to the police. Arguing that his statements were inconsistent with those of an innocent person is not shifting the burden of proof to the defendant.

The Fifth Amendment to the United States Constitution provides that no person “shall...be compelled in any criminal case to be a witness against himself.” The privilege against self-

incrimination applies to the states through the 14th Amendment. Malloy v. Hogan, 378 U.S. 1 (1964). Similarly, under the Washington Constitution, “no person shall be compelled in any criminal case to give evidence against himself.” Const. art. I, § 9. Courts interpret the federal and Washington State provisions equivalently. State v. Earls, 116 Wn.2d 466, 473, 589 P.2d 789 (1979). The right is “intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citing Doe v. United States, 487 U.S. 201, 210-12 (1988)). The Fifth Amendment prevents the State from both eliciting comments from witnesses on the defendant’s silence, and commenting on the defendant’s silence in closing arguments. See Easter, 130 Wn.2d at 236.

Comments on post-arrest, post-*Miranda*² silence violate a defendant’s right to due process because the *Miranda* warnings carry an “implicit assurance” that the defendant’s silence carries no penalty. Brecht v. Abrahamson, 507 U.S. 619, 628 (1993); Easter, 130 Wn.2d at 236. While the State may use a defendant’s pre-

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

arrest, pre-*Miranda* silence for impeachment purposes as long as he or she takes the stand, the State may not comment on the defendant's post-*Miranda* silence, even if he or she takes the stand. See State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

The right to make the State prove every element of the offense beyond a reasonable doubt is a different right than the protection against self-incrimination. The State does not dispute that the defendant has no duty to produce or present any evidence. State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 546 (1990), *review denied*, 115 Wn.2d 1029 (1990). But the prosecutor here did not imply that Killian had the obligation to produce evidence or to incriminate himself. She argued that what he said to the police was inconsistent with what an innocent person would have said.

When Officer John Herbig arrested Killian, he read the *Miranda* warnings to Killian. RP 169. Killian said that he understood them; he did not seem confused. RP 171. He agreed to answer Herbig's questions. RP 171. Herbig asked who was involved in the disturbance, and Killian responded that it was his girlfriend, Ashley Williams. RP 171-73. The victim's name, in fact, was Ashley Williams. RP 224, 316; Exhibit 11. Killian told Herbig that he and Williams, whom he considered to be his wife, had just

met for the first time in three days and she had told him she had been unfaithful to him. Killian said he was upset; he cried while speaking to Herbig. RP 173. When asked what happened physically between them, Killian responded, "I don't know." Herbig tried "numerous" times to find out how Williams had been injured, telling him that Williams had injuries and Herbig needed specifics about what happened, but Killian only repeated, "I don't know. I don't know." RP 174. He did not deny that he had had a physical altercation with Williams. RP 174.

During closing argument, the prosecutor said:

And Ofc. Herbig wants to know, well, what else happened, and he asks the defendant, well, how did she get her injuries? And at this point, the defendant says he doesn't know, and Ofc. Herbig keeps asking him, well, how did she get her injuries? And again the defendant says he doesn't know, and at some point Ofc. Herbig says, well, do you not know if you assaulted her or do you just not know how she was injured, which is it, giving the defendant the opportunity to deny what had happened. But the defendant's response isn't, "What are you talking about? I didn't assault her." His response is just, "I don't know." He is not going to lie about denying it happened, but he also isn't (sic) want to admit it, but he has tried to give Ofc. Herbig some justification for what happened as if that is a defense, and I submit to you it's not.

RP 365-66.

In his closing argument, counsel for Killian argued extensively that the State had failed to prove that Killian was the same person who had been seen kicking the victim. RP 380-86.

On rebuttal, after remarking that Herbig had given Killian the opportunity to tell what happened, she essentially asked the jurors how they would respond if they were in Killian's position. RP 390. Defense counsel objected, although on the grounds that it was a comment on Killian's right to remain silent, and the objection was sustained. The court instructed the jury to disregard the question of what the jurors would do personally. RP 390. Jurors are presumed to follow instructions. State v. Mason, 160 Wn.2d 910, 929-30, 162 P.3d 396 (2007).

The prosecutor continued:

The defendant wasn't silent. He made statements to law enforcement. He didn't invoke his right to remain silent. He didn't basically tell the police you're going to have to prove it. He made statements. He had the opportunity to provide an explanation, a defense, but he didn't. What he said was, "I don't know." Who says that? Someone who either truly doesn't know, who has no idea, and I submit to you that if the defendant were in that position, if he truly didn't know, he didn't hurt Ashley and he didn't know how she got hurt, he might have been somewhat helpful. I don't know---

RP 390-91. Defense counsel again objected; the court overruled.

The prosecutor continued:

The defendant had the opportunity to make these— give these explanations, but he did not. He said he didn't know, right? But what we do know is that he had the motive and he had the opportunity and he has been identified by impartial, uninterested eye witnesses, people who don't have a dog in the fight.

RP 391.

"When a defendant does not remain silent and instead talks to the police, the state may comment on what he does not say." State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001), *citing to State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978), *which cited to State v. Osborne*, 50 Ohio St.2d 211, 216, 364 N.E.2d 216 (1977), *vacated on other grounds by* 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1157 (1978). *See also State v. Pottorff*, 138 Wn. App. 343, 348, 156 P.3d 955 (2007). Quoting Osborne, the Young court said, "If a defendant voluntarily offers information to police, his toying with the authorities by allegedly telling only part of his story is certainly not protected by *Miranda* or *Doyle*."³ Young, 89 Wn.2d at 621.

In the instant case, the defendant chose to not remain silent. The prosecutor was entitled to argue the failure of the defendant to disclaim responsibility *after* he voluntarily waived his right to remain silent and

³ Doyle v. Ohio, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976).

when his questions and comments showed knowledge of the crime.

Id. at 621, emphasis in original.

A defendant cannot waive his right to remain silent, answer questions, and then claim that his failure to say other things is protected by the Fifth Amendment. Here Killian admitted to being with Ashley Williams at the time of the assault, was identified as the person running away from the scene yelling that she deserved what she got, told the officer that she broke his heart, and then claimed not to know how she got injured. It was perfectly proper argument for the prosecutor to point out that an innocent person would have said something different.

Contrary to Killian's argument, the prosecutor did not attempt to shift to him the burden of producing evidence of his innocence. Her argument was that if he were innocent, he would have said something other than what he did say. There was no prosecutorial misconduct.

Killion makes much of the fact that at the time Reynolds was asked to identify Killian at the scene he could not do so, largely because of the difference in clothing, but Luikart and Waldron provided evidence that the same person Reynolds saw is the one

they saw in police custody a short time later. The evidence against Killian was overwhelming, and even if the prosecutor's argument had been improper, it would have been harmless error.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id.

Neither the prosecutor's questioning of Officer Herbig, nor her closing arguments shifted the burden of proof onto the defendant, or infringed on his right to remain silent. There was no misconduct.

D. CONCLUSION.

The evidence presented at trial was sufficient to support Killian's conviction for second degree assault, domestic violence.

There was no prosecutorial misconduct. The State respectfully asks this court to affirm Killian's conviction.

Respectfully submitted this 31st day of December, 2015.



Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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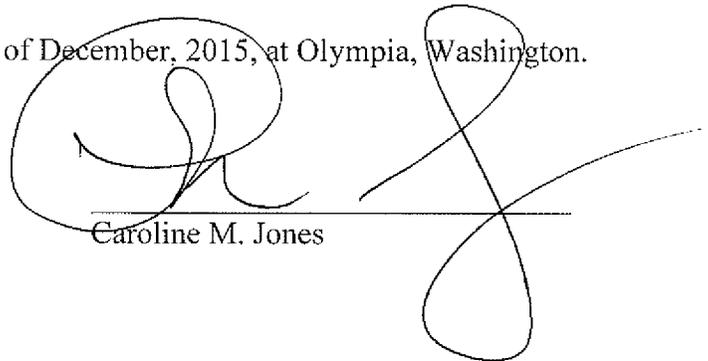
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 31 day of December, 2015, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTOR

December 31, 2015 - 11:18 AM

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