

No. 490587-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CARL BRUCE, JR.,

Appellant.

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

The Honorable Christine Schaller
Cause No. 16-1-00442-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion when it imposed leg restraints which could not be seen by the jury, and if so, was Bruce prejudiced despite no indication that the jury was aware of the shackles.
2. Whether the trial court abused its discretion when it held that defense counsel opened the door to questioning about Bruce's prior assault.
3. Whether the prosecution engaged in prosecutorial misconduct necessitating a new trial when it commented on Bruce's prior assault conviction and post-Miranda silence, or did defense counsel open the door by raising both issues at trial.
4. Whether the trial court abused its discretion, and violated Bruce's due process rights when it denied the motion for continuance, and whether defense counsel's pre-trial belief that the testimony of Bruce's investigator would not be necessary was so unreasonable as to constitute the ineffective assistance of counsel.
5. Whether the combined prejudice of Bruce's four points of error necessitates a new trial, even if, standing alone, the errors did not materially prejudice Bruce.
6. Whether the trial court's finding of indigency entitles Bruce to waive appellate costs.

B. STATEMENT OF THE CASE

On March 17, 2016, an altercation occurred between Elizabeth Sanchez ("Sanchez"), and her then boyfriend, Richard Karl Bruce, Jr. ("Bruce"). CR 146-67. At the time of the incident, Bruce had been staying with Sanchez in violation of a no-contact order stemming from Bruce's previous conviction for assaulting Sanchez. CR 163-65, 186, Following

the incident, Sanchez contacted the Thurston County Sheriff's Office, who arrested Bruce at the scene. CR 147, 197.

In her statement given to the Sheriff's Office, Sanchez wrote that an argument had broken out over the past assault conviction and the corresponding no-contact order. CR 142-43. Once the argument turned physical, Sanchez informed law enforcement that Bruce prevented her from leaving, choked her, and took her phone before leaving the premises. CR 62-63. Deputies photographed the redness around Sanchez's neck, which she claimed was the result of strangulation by Bruce. CR 157-61.

At trial, Sanchez testified as to the events surrounding the altercation, and though the parties had agreed not to mention Bruce's prior assault conviction, the court found that defense counsel's questioning had opened the door. CR 125-40. Sanchez' testimony was largely corroborated by the testimony of her neighbor and landlord, Robert McBride, CR 71-81, and Thurston County Sheriff's Deputy Jordan Potis. CR 145-171. In response, Bruce took the stand and claimed that he had not assaulted Sanchez, rather she had suffered a seizure which led to her injuries. CR 192-93.

Bruce was convicted and sentenced to seventeen months in prison, eighteen months of community custody, and the imposition of a new no-contact order between Bruce and Sanchez set to last for ten years.

Sentencing Record 13-15. Citing four points of error, Bruce appealed this conviction.

C. ARGUMENT

1. Because Bruce's Leg Restraints Were Not Visible to the Jury, the Trial Court Did Not Abuse Its Discretion, and Bruce Suffered No Prejudice.
 - i. The trial court was within its discretion to impose shackles which were not noticeable by the jury.

In his first point of error, Bruce argues that the trial court abused its discretion when it imposed leg restraints, however the facts do not support such a claim. App. Brief at 19. The record indicates that the court carefully weighed all relevant factors before ordering the least restrictive form of restraints available for Bruce, noting that steps would be taken to ensure the restraints would not be visible to the jury. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (Wash. 1981) (citing *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353 (1976)) (listing factors for a court to consider before to ordering shackling);¹ CR 24-28.

¹ *Hartzog*, 96 Wn.2d at 400 (“[T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.”).

In making its decision, the court cited the violent nature of the crimes Bruce was charged with; the fact that he was on escape status at the time of the assault against Sanchez; that bail was set at \$40,000; the small size of the courtroom; the presence of Sanchez, with whom Bruce had a violent and emotionally charged history; that the lack of restraints would require the presence of an additional deputy; and the unavailability of less restrictive alternatives. *Hartzog*, 96 Wn.2d at 400; CR 24-28. Prior to issuing its ruling, the trial judge visually inspected Bruce to ensure that the restraints were not visible. CR 25.

Although earlier cases generally disfavored shackling, they are distinguishable by the simple fact that they concerned visible restraints. *See Hartzog*, 96 Wn.2d at 400; *see also State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999); *see also State v. Donery*, 131 Wn. App. 667, 128 P.3d 1262 (2006). Primarily, that line of cases sought to avoid prejudice that may result when a jury witnesses the defendant shackled like a dangerous criminal. In the present case, the potential for prejudice is greatly reduced, as Bruce's restraints are not visible to the jury. *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (Wash. 1998) (noting that there is no prejudice if the restraints are not visible). The trial court took this reduced likelihood of prejudice into account when ruling on the

restraints. CR 25. Therefore, imposing hidden restraints was a constitutional exercise of the court's discretion.

ii. If there is no indication that the jury was aware of the shackles, then there is no indication of any prejudice, and any error must be held harmless.

Even if Bruce can establish that he was unconstitutionally shackled, absent evidence that the jury was aware of the leg restraints, any alleged error must be deemed harmless. *Hutchinson*, 135 Wn.2d at 888 (“A claim of unconstitutional shackling is subject to harmless error analysis. In order to succeed on his claim, the Defendant must show the shackling had a substantial or injurious effect or influence on the jury's verdict. Because the jury never saw the Defendant in shackles, he cannot show prejudice.”); *Rhoden v. Rowland*, 10 F.3d 1457, 1459-60 (9th Cir. 1993) (“Of course, if the jurors never saw [defendant's] shackles, then he cannot show prejudice”); *State v. Jaime*, 168 Wn.2d 857, 873, 233 P.3d 554 (Wash. 2010) (“In cases where such restraints were used, Washington courts have found that there was no prejudice to the defendant because a jury must be aware of a restraint to be prejudiced by it.”); *State v. Finch*, 137 Wn.2d 792, 861, 975 P.2d 967 (Wash. 1999); *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir.). The trial court found that the restraints were not visible to the jury, and Bruce does not argue otherwise. CR 25.

Rather than claim that the shackles were visible, Bruce instead speculates that the jury may have inferred the presence of leg restraints because when testifying, Bruce was seated prior to the juror's arrival, and remained seated until after the jury was excused. App. Brief at 23. Perhaps a seasoned trial attorney would find it noteworthy when a witness is seated before the jury enters, but twelve laypeople likely would not. After all, Bruce was the only defendant on trial, and one of only four witnesses overall, leaving the jurors with little to compare with. Even if the jurors did take note of the procedural deviation, it is unlikely they would jump to the conclusion that Bruce was shackled and unable to walk. Accordingly, Bruce's argument is nothing more than mere speculation, and not particularly persuasive speculation at that.² Unfounded speculation alone is insufficient to require a reversal. *Nelson v. W. Coast Dairy Co.*, 5 Wn.2d 284, 296, 105 P.2d 76 (Wash. 1940) ("It is true that a finding or verdict cannot be made to rest upon mere speculation or conjecture.");

² In attempting to find support for his claim, Bruce cites *Hartzog*. App. Brief at 24. In *Hartzog*, the case was decided on other grounds, but the court noted that there may have been potential prejudice because the witness stand was moved away from the jury when the defendant testified. *Hartzog*, 96 Wn.2d at 403. Noting that the jury could potentially infer that the defendant was dangerous, the court instructed the trial court to consider this on remand. *Id.* Unlike the present case, it was not mere speculation that the jury may have taken note of a procedural deviation. The jury must have been aware of the fact that the witness stand was physically moved further away. *Id.* Here, the fact that Bruce was seated prior to the jury's arrival is far less notable.

Bishop v. Miche, 88 Wn. App. 77, 86, 943 P.2d 706 (Wash. Ct. App. 1997) (“Mere speculation is not sufficient to support a claim.”). In light of these facts, Bruce’s first claim must be denied.

2. *The Trial Court Did Not Abuse Its Discretion When It Found That Defense Counsel’s Questioning Created Potential Confusion as to the Cause of the Altercation and Sanchez’ Mental State, and That This Confusion Necessitated Opening the Door to Evidence of Bruce’s Past Assault Conviction.*
 - i. *Defense counsel’s questioning created potential confusion as to the cause of the argument, thus it was not an abuse of discretion for the trial court to rule that the door had been opened to evidence of the prior assault.*

It is an all too common defense technique to put the victim on trial in domestic disputes. In the present case, defense counsel’s questioning about Sanchez’ behavior pushed the limits of 404(b), resulting in potential negative and misleading implications about Sanchez and her behavior. ER 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”). Having a far better vantage point than the court record could ever provide, the trial judge felt it was necessary to open the door to evidence of the prior assault in order to counteract any confusion. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (Wash. 1995) (noting that the trial court is in the best position to observe the fairness of the trial); CR 130-32. Unless the ruling constituted an abuse of discretion, it should not be overturned. *State v. Olson*, 187 Wn. App. 149, 158, 348 P.3d 816

(Wash. Ct. App. 2015) (“A trial court’s rulings on evidentiary issues and motions in limine are reviewed for an abuse of discretion.”); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

On the night of the assault, Bruce began discussing his prior assault conviction against Sanchez, becoming upset due to his belief that he should never have been convicted. CR 142-43. This argument is what led to the altercation between Bruce and Sanchez. CR 142-43. At trial, despite knowing full well what started the argument, defense counsel introduced a question which had no relevance other than to imply Sanchez’ earlier visit to her ex-husband was the root cause of the fight.³ CR 110-11. Next, despite knowing that Sanchez was barred from explaining why she had been angry with Bruce, defense counsel pressed Sanchez on the issue, eliciting testimony from Sanchez that she had been furious and screaming. CR 112. Defense counsel did this to paint Sanchez as irrational, knowing full well that Sanchez was upset because Bruce stated he should not have faced punishment for assaulting her. Regarding

³ “Q. And prior to picking [Bruce] up, you had been at your ex-husband’s house, correct?

A. Yes.

Q. And upon picking him up, you were upset at that time, correct?

A. Yes.”

Cross Examination of Sanchez at CR 110-11.

this line of questioning, the court noted that it was “unexplained as to how she could have gotten so upset over just an argument.” CR 132.

It is clear that Bruce intended to use 404(b) not as a shield, but as a sword, and the trial court, acting within its discretion, felt that the defense had gone too far, thus opening the door. *State v. Smith*, 82 Wn. App. 327, 337, 917 P.2d 1108 (Wash. Ct. App. 1996) (noting that the rules of evidence “should not become a sword against reasonable prosecutorial argument”); ER 404(b). Based solely off of the record, it is difficult to judge what effects defense counsel’s questions had on the jury, but the trial judge was in the court room, and felt the potential confusion was significant enough to necessitate evidence of the prior conviction. CR 132. The trial judge considered arguments from both sides, and provided a reasoned opinion on the record. *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (Wash. 1991) (“The trial court's ruling will not be disturbed on appeal unless no reasonable person would take the position adopted by the trial court.”). Accordingly, because the court’s decision cannot be said to be unreasonable, the admission of the prior conviction was not an abuse of discretion.

ii. Although the Trial Court and prosecution both cited res gestae as a basis for admitting the prior conviction, the record indicates that the ruling was actually based upon the “opening the door” doctrine.

Res gestae and the “opening the door” doctrine are two separate means of introducing otherwise inadmissible evidence. Although the court and prosecution discuss both methods seemingly interchangeably, it is clear from the record that the prior conviction was admitted under the opening the door exception.⁴ CR 125-140.

The res gestae exception exists independent of any witness testimony, and it is implicated when “evidence of other bad acts is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *Powell*, 126 Wn.2d at 263 (citing *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)). Before the trial began, the prosecution noted that the prior conviction was arguably res gestae, as it was necessary to complete the story of how the altercation began, nevertheless, the prosecution chose not to dispute the issue, agreeing to the Motion in Limine excluding the prior assault. CR 111-12. However, terminology and cases from the res gestae argument made its way into the later argument, where it merged with the

⁴ The court began its ruling by declaring that “the issue is whether the defendant opened the door.” CR 130.

opening the door argument. CR 125-140. On appeal, rather than addressing *res gestae*, the State argues that the prior conviction was properly admitted under the opening the door doctrine.

iii. The trial court did not abuse its discretion when it held that the probative value of the prior conviction outweighed its potential prejudice.

Bruce argues separately that the trial court abused its discretion by holding that the probative value of the prior conviction outweighed its potential prejudice. App. Brief at 31. To the contrary, the trial court identified the potential prejudice; specifically that Bruce's prior conviction for "the exact same crime" would lead the jury to find him guilty in the present case. CR 137-39. Seeking to minimize this prejudice, the court directed the parties to avoid any details which could imply that the prior assault was an identical offense to the March 17 altercation. CR 137-39.

Bruce goes on to contend that mention of the prior assault is prejudicial regardless of whether or not details are provided, and that not providing details could prove even more prejudicial, as jurors imaginations might run wild, filling in blanks with imagined acts more heinous and sinister than anything Bruce actually committed. App. Brief at 31. This is mere speculation, and ignores the fact that the jury was already aware of the no-contact order between Bruce and Sanchez. By Bruce's

logic, the court did him a favor by admitting testimony that the no-contact order was the result of a simple second degree assault.

Seeking further support for his claim that the court abused its discretion in finding that prior assault's probative value outweighed the prejudice, Bruce cites the fact that in the past, courts have held that limiting instructions may be insufficient to cure the prejudice of evidence of prior criminal acts. App. Brief at 31. Bruce is correct, in that it is well established that evidence of prior bad acts may be highly prejudicial, but that is not the question presently before the court. Instead the issue is whether the court abused its discretion when it held the probative value outweighed the prejudice, and cases cited by Bruce are not relevant to this issue. Rather, they address instances where a witness surprised the court by bringing up past convictions, and the court's limiting instructions sought to reverse/mitigate harm already done. *See State v. Escalona*, 49 Wn. App. 251, 255, 74 P.2d 190 (1987); *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.3d 1014. By comparison, in this case, the court heard arguments from both sides, providing limiting instructions in advance, and preventing the most prejudicial facts from coming before the jury. Because the jury was not present, any potential for harm is minimal.

Rather than abuse its discretion, the record shows that the court considered arguments from both sides, weighing the probative value

versus potential prejudice, and ultimately providing a reasoned ruling that the prior conviction was admissible for the limited purpose of explaining what led to the altercation. These actions are not characteristic of an abuse of discretion, and instead indicate that the court made a reasoned, informed and fair evidentiary ruling. *Lord*, 117 Wn.2d at 870 (“The trial court's ruling will not be disturbed on appeal unless no reasonable person would take the position adopted by the trial court.”). Accordingly, this argument must be denied.

iv. There is no basis for arguing that the trial court assumed the role of prosecutor by ruling that the prior conviction was admissible.

Bruce claims that the trial court improperly assumed the role of prosecutor by admitting evidence of Bruce’s prior conviction on grounds not argued by the prosecution, however this allegation is unsupported by the record and Washington law. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (Wash. 2004) (“There is a presumption that a trial judge properly discharged his/her official duties without bias or prejudice... Judicial rulings alone almost never constitute a valid showing of bias.”); App. Brief at 30. The mere fact that the trial court did not regurgitate the prosecution’s argument verbatim when it ruled that the door had been opened does not mean that the court improperly entered the fray.

In the relevant sections of the court record, the prosecution argued that the defendant was “trying to show a fragmented version of events” regarding the cause of the argument with Sanchez. CR 128. The court responded by ruling that the defendant’s questioning created confusion as to what started the argument with Sanchez, stating that it was unclear why she would get so upset. CR 132-33. Simply put, the prosecution argued that the prior conviction should be admissible to avoid confusion as to what started the altercation, and the court admitted the prior conviction to avoid confusion as to what started the altercation. Nothing in Bruce’s brief explains how the court’s ruling/reasoning was anything other than a restatement of the prosecution’s reasoning, much less an implicit rejection as Bruce claims.

Ra is cited by Bruce, but it has no bearing on this case. *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008). The judge in *Ra* made lengthy,

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inappropriate statements about criminal motives of gang members,⁵ and it is unclear whether the comments were made in front of the jury. There are no comparisons between the statement in *Ra*, and the statement in the present case. Furthermore, in *Egede-Nissen*, cited by *Ra*, the trial court was found to have only entered the fray after it made comments in front of the jury. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 141 P.2d 1214 (1980). In the present case, the jury was not present at the time of the ruling. CR 125-40.

To legitimize Bruce's argument that the court not only acted as the prosecution, but that its bias rose to a level necessitating a new trial sets an

⁵ The *Ra* Court's offending statements are included below. It is clear that they do not compare with the statements in the present case.

“THE COURT: What about some distorted feeling or motivation that they're big men, that they're very important people and they want to show the rest of their friends that they can take a weapon that makes them ten feet tall and kill somebody or attempt to kill somebody; and we're showing off for those in our gang, in our group, just how big we are; and we live in a free country and we can get away with it because this country is based on fundamental rights and based on non-violent behavior and freedom, and everybody is free to be in the neighborhood and go for a walk on the pier and not be subjected to some distorted character who breeds and lives violently. ... --and gets away with it because we live in a free country that protects individual rights.

THE COURT: No. Absolutely right, I don't mean Mr. Ra.... Unless the shoe fits, then you have to wear it.

THE COURT: And it is abused by many people. [To Ra:] Don't shake your head up and down at me as if you are agreeing with me.” *Ra*, 144 Wn. App. at 695.

untenable standard going forward. Consequently, this argument must be denied.

3. *Defense Counsel's Questioning Put Bruce's Prior Assault Conviction and Post-Miranda Silence At Issue, Thus the Door Was Opened and Any Alleged Prosecutorial Misconduct Was A Fair Response.*

Bruce alleges two separate instances of prosecutorial misconduct; first that the prosecution discussed impermissible details of Bruce's prior assault conviction; and second, that the prosecution impermissibly questioned Bruce on his post-Miranda silence. App. Brief at 32. Because defense counsel opened the door to both issues, this claim must fail. Nevertheless, to succeed on a claim of prosecutorial misconduct, Bruce bears the burden of establishing that the prosecution's conduct was both improper and prejudicial, and that there is a substantial likelihood that the conduct affected the jury verdict. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (Wash. 1997); *State v. Mak*, 105 Wn. 2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene*, 127 Wash. 2d 690, 701, 903 P.2d 960 (1995). Because Bruce did not object to the prosecutor's conduct at trial, he is considered to have waived any objection, unless he can show that the alleged misconduct was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Gentry*, 125 Wash. 2d 570, 596, 888 P.2d 1105, 1122 (1995).

i. The prosecution's questioning about the prior conviction was squarely within the scope of questioning allowed by the court, as it went directly to the cause of the altercation, and whether Bruce believed he could have avoided his earlier conviction. Thus, there was no prosecutorial misconduct.

Regarding the testimony surrounding the prior assault conviction, the questioning which Bruce complains of went directly to the cause of the fight between Bruce and Sanchez, and because the court held that the prior assault was admissible to mitigate confusion regarding the cause of the fight, the questions were not prohibited. CR 133-39. Furthermore, having failed to raise an objection at trial, Bruce bears the burden of proving that an admonition to the jury could not have neutralized the alleged harm, and he has failed to meet this burden. *Gentry*, 125 Wash. 2d at 596.

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When ruling on the issue, the court discussed the purpose of admitting the prior assault, and what unfair prejudice it sought to avoid.⁶ CR 137-39. The prosecution would be allowed to “elicit the testimony to complete the picture of what this argument was about and why Ms. Sanchez was so upset,” and that Bruce had believed he could beat the previous charge. CR 137-39. However, fearing that acknowledging Bruce’s previous conviction of the “exact same crime” could prove unduly prejudicial, the court prohibited any mention that the prior charge was for assault in the second degree. CR 137-39. In fact, it is plainly stated that the limitations on the scope of questioning were to avoid any inference that Bruce had a propensity for assault in the second degree. CR 138.

⁶ “Mr Griffith: Your Honor, I just ask for a clarification. Is the State going to be able to go into those prior facts of what occurred in the assault or just ask whether they have had any assaultive incidents in the past?

The Court: She is going to be able to ask in general. My understanding of what the facts are is that the argument was about the fact that Mr. Bruce had been previously charged with a crime, that he was saying he could have beat those facts, and he ultimately was convicted.

This is what I expect is going to be elicited, not what happened during the other incident, but that the argument was about the fact that he had been previously charged and he was saying that he could beat that and that made her angry, but not what the charge was except that it was an assault charge.

But she cannot testify that it was an assault in the second charge and not get into any facts, and I didn’t read any facts in the probable cause statement as to that other charge or that they were arguing about those specific facts.” CR 137-39.

The questions at issue in no way implied that Bruce's previous conviction was for assault in the second degree, or provide any facts which could lead a juror to believe that Bruce had committed an identical assault. The prosecution did not ask if Bruce had previously choked Sanchez, or if he had ever physically harmed her.⁷ Instead, Bruce was simply questioned on whether he had asked Sanchez not to cooperate with the police. CR 214-216. Bruce's belief that he could have beaten the prior conviction was the cause of the altercation, and once the court held that this was at issue, any questions as to whether he told Sanchez that her silence would have helped him escape punishment and avoid the no-contact order were reasonable, permissible and relevant to establishing the parties' state of mind at the time of the altercation.⁸

Moreover, because he failed to object at trial, Bruce must show that the prosecution's conduct was flagrant and ill-intentioned, and any

⁷ The one example of impermissible questioning was that the prosecution would not be allowed to ask whether Sanchez had been choked. CR 138-39.

"Mr Griffith: I just want to make sure, because the jury is not going to know what assault two is, so I was hoping that wasn't going to be side stepped by saying, "And did he choke you?"

The Court: There will be no details."

⁸ Expanding this line of reasoning, Bruce was upset that he had been convicted. If Sanchez had not cooperated with law enforcement, there would not have been a previous conviction. Thus, when asking if Bruce was upset, it was a logical extension to determine if he blamed Sanchez for previously cooperating with law enforcement.

harm could not have been alleviated by instructions to the jury. *Gentry*, 125 Wash. 2d at 596. As the record shows, the questions at issue fall short of establishing deliberate misconduct, and the jury could have been instructed to disregard the comments, or that they should not be considered as evidence of a propensity for dishonesty. Accordingly, this argument must be denied.

ii. Bruce put his post-Miranda silence at issue when he testified that he was never given a chance to share his side of the story, therefore the door was opened for further questioning on the subject, and the prosecutor's questioning did not violate Bruce's rights against self-incrimination

Next, Bruce claims that the prosecution's questions about his post-Miranda silence constituted prosecutorial misconduct, however, because defense counsel first questioned Bruce on his post-Miranda silence,⁹ the door was opened, and it was a fair response for the State to subsequently ask further questions. App. Brief at 34. It is critical that both the defendant

⁹ Bruce's direct examination at CR 197-98.

Q. He didn't give you an opportunity to make a statement prior to placing you under arrest?

A. No.

Q. Didn't give you an opportunity to tell your side of the story?

A. No.

Q. So you invoked your constitutional rights at that point?

A. Yes, sir.

Q. Because it was pretty clear were you going to be arrested?

A. Yeah.

Q. And your side of the story wasn't going to matter, was it?

A. No

and prosecution have the opportunity to respond to the evidence and arguments of one another. *United States v. Robinson*, 485 U.S. 25, 32 (U.S. 1988). At trial, Bruce testified that he was guilty only of aiding Sanchez as she was suffering a seizure, and that he failed to mention this notable medical episode at the time of the arrest because he was never given an opportunity to share his side of the story. CR 197-98. To bar the State from subsequently commenting on Bruce's silence would deny the State a fair opportunity to respond.

While it is well established that a defendant's post-Miranda silence generally may not be used against him, *Doyle v. Ohio*, 426 U.S. 610 (1976), that rule is not absolute. Critically, the Supreme Court has previously held that once a defendant has opened the door by claiming that they were denied an opportunity to explain their side of the story, further questioning by the prosecution regarding their post-Miranda silence is a fair response which does not violate the fifth amendment privilege against self-incrimination. *Robinson*, 485 U.S. at 32 (“[W]here ... the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege [against self-incrimination].”). Additionally, the Washington Supreme Court has held that “although the State is generally not allowed to comment on a defendant's choice to remain silent, it can do so in

rebuttal if the defense “opens the door” to the issue.” *State v. Jones*, 111 Wn.2d 239, 249, 759 P.2d 1183 (Wash. 1988). From the cases cited, it is apparent that Bruce’s testimony opened the door to further questioning.

Next, if any error did result from the prosecution’s statements, Bruce’s earlier testimony served to inure the jury from potentially harmful inferences, rendering any error harmless. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding that certain constitutional errors may be deemed harmless); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”). Typically, the danger of commenting on post-Miranda silence is that the jury may impugn guilt from the defendant’s failure to cooperate. *See Doyle*, 426 U.S. at 618; *see also State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (Wash. 2008). Here, Bruce minimized this potential harm by preemptively offering his own explanation as to why he chose to remain silent.

Finally, Bruce didn’t simply fail to mention that Sanchez had just suffered a seizure to law enforcement; Bruce also did not mention

anything about a seizure to Sanchez, Sanchez' neighbor and landlord, or even to his friend who had arrived just prior to the arrest.¹⁰ CR 218.

Despite the scant evidence supporting Bruce's narrative, he chose to rest his entire defense on his claim that Sanchez suffered a seizure. It is clear that Bruce would not have escaped a guilty verdict but for the prosecution's comments on post-Miranda silence, rather Bruce was convicted because the jury did not believe that Sanchez suffered a seizure; that Sanchez otherwise fabricated her testimony; that the redness on Sanchez' neck was the result of Bruce's medical assistance; that Bruce responded to Sanchez' seizure by taking her phone and walking into the muddy woods; that Bruce forgot to mention the seizure to Sanchez' neighbor or his own friend who arrived at the scene; and that Bruce was never given a chance to tell law enforcement that he was innocent, or Sanchez had just suffered a seizure. Because of the many significant flaws in Bruce's defense, it is apparent that Bruce would have been convicted with or without the alleged error, thus the prosecution's statements should be considered harmless. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (providing the standard for harmless error).

¹⁰ It is also curious that in Bruce's narrative, he responds to his significant other's seizure by storming out and wandering through the muddy woods. Suffice to say, his version of events likely did not inspire great confidence in the jury. CR 119-20.

4. *The Trial Court Did Not Abuse It's Discretion When It Denied Bruce's Motion for Continuance, Nor Did Defense Counsel's Failure to Request a Continuance at the Start of Trial Constitute Ineffective Assistance of Counsel.*

In Bruce's fourth point of error, he claims that the court abused its discretion by denying his motion for continuance; that the denial of the continuance prevented him from presenting a witness in violation of his due process rights; and that defense counsel's failure to make a timely request for a continuance constituted ineffective assistance of counsel. App. Brief at 37.

Essentially, the defense had knowledge that a witness would be unable to testify, yet waited until the last minute to notify the court, at which point the continuance was denied. CR 172-74. The witness in question was Dave Matthews (hereinafter "Matthews"), an investigator hired on behalf of Bruce to interview Sanchez about the events surrounding the assault. CR 172. Matthews was unavailable to testify during the week of trial, a fact which defense counsel became aware of at the start of trial. CR 172-73. Prior to that point, defense counsel had not sought to confirm Matthews' availability for certain strategic reasons. CR 173. Nevertheless, once notified of Matthews' unavailability, defense counsel chose not to request a continuance, believing that Matthews' testimony was unlikely to be necessary. CR 173.

Only after the prosecution had rested did defense counsel request a continuance, arguing that Matthews was necessary to rebut Sanchez' testimony, while conceding that he had known of Matthews' unavailability since the start of trial. CR 171-72. Unwilling to extend the trial into the next week, the court denied the continuance. CR 171-82.

i. Defense counsel chose not to make a timely request for a continuance for strategic reasons, and because he believed that the unavailable witness would not be necessary. Accordingly, the trial court did not abuse its discretion when it denied the last minute motion.

First, addressing Bruce's argument that the trial court abused its discretion by denying his motion for continuance, the facts simply do not support his claim. *State v. Downing*, 151 Wn.2d 265, 272 ("In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court."); App. Brief at 37. Defense counsel failed to request a continuance in a timely manner, and under such circumstances, there is no "clear showing that the trial court's discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons," which is the standard to establish that the denial of a continuance was an abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272-273, 87 P.3d 1169 (Wash. 2004) (citing *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995)); *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970).

Because defense counsel had foreknowledge that Matthews would be unavailable, the request for a continuance wasn't necessitated by sudden surprise, and if counsel had acted with due diligence, the continuance could have been easily obtained. *Downing*, 151 Wn.2d at 273 (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f)) (“In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.”). Furthermore, jurors were told the trial would be finished by the end of the week at the latest, yet continuing the case even a day would have pushed the case into the following week, added a delay of at least four days, and created potential conflicts with plans for the holiday weekend.¹¹ CR 179-80.

Finally, when requesting the continuance, defense counsel conceded that the initial decision not to seek a continuance was a strategic move in the hopes of securing a speedy trial dismissal, and that he initially did not believe Matthews' testimony would be necessary.¹² CR 173. To

¹¹ The request for continuance occurred on a Wednesday proceeding a three day weekend.

¹² “Prior to this trial, it was our thought that we would not need Mr. Matthews should Ms. Sanchez testify consistent with that interview, which she did in part today. but in other parts she did not.” Statement by Defense Counsel at CR 173.

remand for a new trial would reward defense counsel for attempting to game the system.

Considering all of these facts, there is nothing which indicates that the trial court's denial of the continuance was an abuse of discretion. Even if a continuance was not unreasonable, there was no obligation to grant it after defense counsel chose not to notify the court of Matthews' unavailability until the last moment. Accordingly, the denial was within the courts discretion, and is not grounds for a reversal.

ii. Because Sanchez already acknowledged inconsistencies with her testimony, Matthews' impeachment testimony would not have been highly probative, therefore the denial of the continuance, and Matthews' resulting inability to testify did not violate Bruce's due process rights.

Despite Bruce's assertions to the contrary, Matthews' testimony was not so vital to his defense that denial of the continuance, and Matthews' subsequent inability to testify violated Bruce's due process rights. *Jones v. City of Seattle*, 179 Wn.2d 322, 337, 314 P.3d 380 (Wash. 2013) (“[T]rial court's exclusion of witnesses will not be disturbed absent a clear abuse of discretion”). Had Matthews testified, he would have simply pointed out that Sanchez' testimony concerning the night of the assault was not consistent with the narrative she had provided him. However, under cross examination Sanchez already acknowledged that her testimony differed from what she had previously told Matthews, and

that she may have told Matthews that she suffered a seizure or threw an elbow.¹³ CR 114-17. Sanchez' own self-impeachment was likely more damaging to her credibility than anything Matthews could have added, thus, while relevant, it is unclear what, if any, probative value Matthews' testimony would have carried. *See Thornton v. Anest*, 19 Wn. App. 174, 181, 574 P.2d 1199 (1978) (holding that the excluded evidence was merely cumulative, so any exclusion was harmless error).

In arguing that the lost opportunity for Matthews' testimony violated his due process rights, Bruce relies upon *Cayetano-Jaimes*, noting that court rules "may not prevent a defendant from presenting highly probative evidence vital to the defense." *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296-98, 359 P.3d 919 (2015). However, as noted above, Matthews' testimony was not highly probative evidence vital to Bruce's defense, and the facts of this case do not compare with *Cayetano-Jaimes*.

¹³ Bruce claims that Sanchez denied that she told Matthews certain facts. To the contrary, she did not deny that she had told Matthews an inconsistent account. Though she denied experiencing a seizure, she acknowledged that she may have told Matthews that she suffered a seizure and that she may have thrown an elbow. CR 114-17. Notably, there was one instance where Sanchez denied making an inconsistent statement to Matthews, although arguably, her version of events were actually more favorable to Bruce.

"Q. You told Mr. Matthews that Rick acted like, that he acted like he was going to hit you but he didn't correct?"

A. No, it was the other --- that's not what I said. I said he thought I was going to hit him."

Cross Examination of Sanchez at CR 115.

In *Cayetano-Jaimes*, the defendant was accused of committing sexual assault while babysitting a young relative. The trial court excluded witness testimony from the alleged victim's mother, who was prepared to testify that the incident could not have happened because the defendant had never babysat the victim. *Id.* Such testimony by the victim's mother, claiming the incident could not have happened, was "highly probative" and "vital to the defense." *Id.* By comparison, Matthews' testimony, impeaching a witness who had already freely admitted to a number of inconsistencies, does not meet the same standard.

Other cases cited by Bruce are similarly inapplicable. *See State v. Jones*, 168 Wn. 2d 713, 720, 230 P.3d 576 (Wash. 2010) (holding that the trial court erred in using rape shield laws to bar testimony from a witness prepared to testify that the victim consented to sex during an all-night, drug-induced sex party, noting that the witness was the defendant's entire defense); *Rock v. Arkansas*, 483 US 44 (overturning the denial of trial court's exclusion of a criminal defendant's hypnotically refreshed testimony); *Washington v. Texas*, 388 US 14 (holding that a law prohibiting co-defendants from testifying on each other's behalf was unconstitutional).

Moreover, in every case cited by Bruce, the trial court directly held that a witness would not be allowed to testify, whereas in the present case,

the trial court simply ruled on a motion for continuance. The only thing that prevented Matthews' testimony was defense counsel's initial belief that his testimony would be unnecessary, not a court ruling to exclude him.

Finally, if the court did err in denying the continuance, this error was likely harmless error. *City of Seattle*, 179 Wn.2d at 356 (“[C]ourts traditionally apply harmless error analysis to witness exclusion.”). Because Matthews' testimony would have been largely cumulative, his inability to testify did not prejudice Bruce, and the error was harmless. *Thornton*, 19 Wn. App. at 181.

Ultimately, unless Matthews was prepared to impeach Sanchez with something other than inconsistencies which Sanchez had already acknowledged, his testimony was not highly probative or vital to Bruce's defense, and the denial of the continuance did not necessitate a new trial or violate Bruce's due process rights.

iii. It was not unreasonable for defense counsel to believe that the investigator's testimony would not be necessary, thus, it cannot be said that defense counsel's performance fell below the standard for effective legal assistance.

Next, while Bruce claims his trial counsel's failure to make a timely request for a continuance establishes ineffective assistance of counsel, this would impose a requirement on counsel that goes beyond

what is required by law. App. Brief at 41. To prevail on an ineffective assistance of counsel claim, Bruce must prove (1) deficient performance by counsel and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The question is whether trial counsel's performance fell "below an objective standard of reasonableness," viewed at the time of the alleged error, which in this case is when he chose not to alert the court to Matthews' unavailability at the start of the trial. *Strickland*, 466 U.S. at 688-89 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Unless there is no possible tactical explanation for his actions, the presumption is that Bruce's trial counsel provided effective assistance. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To begin, the question is whether it was unreasonable for defense counsel to fail to request a continuance at the start of trial. *Strickland*, 466 U.S. at 688-89. The trial court made it clear that by the time Sanchez had testified, it was too late to request a continuance. CR 171-82. Therefore,

defense counsel may only be judged based on the knowledge he had at the start of trial.

Moving to the first prong of the *Strickland* test, and whether Bruce's representation was deficient, defense counsel admitted that not asking for a continuance was "part of a strategic move." CR 173. The prosecution was dangerously close to the speedy trial deadline, therefore defense counsel chose not confirm Matthews' availability, because regardless of the answer, he had no intention of throwing away a potential speedy trial dismissal by requesting a continuance.¹⁴ CrR 3.3; CR 173. Unquestionably, counsel had a tactical reasons for his initial decision not to request a continuance. *Strickland*, 466 U.S. at 689.

Even once it became apparent that the case was proceeding to trial, and that Matthews was unavailable, defense counsel made a judgment call that Matthews' testimony would likely not be necessary.¹⁵ CR 173. Generally, whether to call a particular witness is a matter for differences of opinion, and therefore presumed to be a matter of legitimate tactics. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 171, 288 P.3d 1140 (Wash.

¹⁴ Under Washington law, a defendant must be brought to trial within sixty days of the date of the arraignment, or the charges may be subject to dismissal. CrR 3.3. Had Bruce's trial date been pushed back any further, it would have exceeded the sixty day time limit.

¹⁵ "Prior to this trial, it was our thought that we would not need Mr. Matthews should Ms. Sanchez testify consistent with that interview, which she did in part today, but in other parts she did not." CR 173.

2012) (holding that counsel did not provide ineffective assistance); *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (Wash. Ct. App. 1993). Notwithstanding the result of the trial, defense counsel's judgment that Matthews would not be critical was neither unreasonable nor illegitimate. Sanchez had voluntarily provided Matthews with her statement describing the events of March 17, and counsel had no reason to believe her testimony would deviate from that account. Weighing the risk that Matthews would be unavailable to rebut Sanchez' testimony with the potential consequences of a continuance and indefinite court date,¹⁶ defense counsel ultimately decided it was in Bruce's interest to proceed. Arguably, defense counsel was naïve,¹⁷ but the standard is unreasonableness, not naiveté, and it cannot be said that counsel's performance was so unreasonable that it overcame the presumption of effective assistance. *Strickland*, 466 U.S. at 689.

The second prong is not met either as the facts do not show that Bruce suffered prejudice from any presumed error. *Id.* As discussed above, Sanchez' testimony acknowledged inconsistencies between her

¹⁶ Bruce was in jail at the time of the trial. The sooner the trial concluded, the sooner Bruce could potentially be released, whereas an indefinite continuance could only lengthen his stay.

¹⁷ Defense counsel described himself as perhaps naïve when discussing why he had not chosen to request a continuance at the start of trial. CR 173.

statements. Had Matthews testified it would have been substantially duplicative of Sanchez' testimony, and Sanchez already impeached herself more persuasively than Matthews could have.

Finally, regardless of how defense counsel's actions appear in hindsight, his performance did not fall below the deferential standard of effective assistance. He had to make a judgment call, and utilizing his extensive legal experience, defense counsel decided that the risk that Sanchez' testimony might deviate from her voluntary statements to Matthews was not significant enough to warrant a continuance. Right or wrong, the decision was not unreasonable. Consequently, Bruce's fourth point of error must be denied.

5. *Presuming Bruce Proves His First Four Claims, Even Combined, the Cumulative Error Is Insufficient to Necessitate a New Trial.*

Bruce argues that even if no individual error is sufficient to require a new trial, the cumulative prejudice of the errors does. Presuming Bruce proves that his four points of error are valid, he also bears the burden of proving the aggregated errors are of sufficient magnitude such that a new trial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). Bruce has not met that burden. In his first, second and fourth issues, he claims abuses of discretion by the trial judge, and even presuming he is able to overcome this deferential standard, the first and

fourth issues are likely harmless error. Bruce's third claim is for prosecutorial misconduct, which is difficult enough to establish even if defense counsel had objected at trial, and any potential harm was invited/mitigated by defense counsel's own lines of questioning.

The cumulative error doctrine acts as an escape valve when several valid errors are too small standing alone to merit a reversal. It is not intended to incentivize the accumulation of a multitude of questionable legal arguments, as is the case here. Accordingly, this argument must fail.

6. *This Court Has the Discretion to Impose Appellate Costs on Bruce, Despite the Fact That He Was Found Indigent at Trial. If Bruce Is Unable to Pay When Judgment is Due, He May At That Time Seek a Waiver of Costs.*

In his final issue, Bruce argues that he should not be compelled to pay appellate costs since he was found indigent at trial. App. Brief at 44. It is well established that RCW 10.73.160(1) gives this court discretion as to the award of costs. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016); *see State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). Bruce claims that because the trial court found him to be indigent, costs should presumptively be waived. App. Brief at 44. This argument ignores both the language and the history of RCW 10.73.160.

To begin with, while the ability to pay is a controlling factor at the trial court level, *Sinclair* notes that 10.73.160 does not set forth parameters

for the exercise of an appellate court's discretion. *Sinclair*, 192 Wn. App. at 389. That decision goes on to hold that "ability to pay is certainly an important factor that may be considered under 10.73.160, but it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor. *Id.*

Next, in *Blank*, the Supreme Court held that an inquiry into the defendant's ability to pay is not constitutionally required before appellate costs are imposed under 10.73.160, although such an inquiry is required "before enforced collection or any sanction" for nonpayment. *State v. Blank*, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997). The court pointed out that the statute contemplates an inquiry into ability to pay at the time the defendant requests remission of costs. *Id.* at 242. "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer." *Id.* The court further held that RAP 15.2, which presumes a defendant's indigency "throughout the review" is not inconsistent with the statute because a cost award is made "after review is completed." RAP 15.2(f) ("The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds

the party's financial condition has improved to the extent that the party is no longer indigent.”); *Blank*, 131 Wn.2d at 239-42.

It is not unfair to ask the appellant to shoulder the cost of proceedings resulting from his commission of a crime. Those costs have to be paid by someone; they do not simply evaporate. If Bruce does not pay them the taxpayers must, and it takes only a glance at any newspaper to discern that a good share of the taxpayers are also struggling financially. At such future time as the State seeks to collect the costs of appeal, Bruce has the statutory right to seek remission if he truly cannot pay. He may, however, become a productive citizen who can afford to pay those costs.

The State respectfully asks this court to impose the costs as requested by the State in the cost bill.

D. CONCLUSION

For these reasons, the State asks that Bruce's conviction be upheld.

Respectfully submitted this 12th day of December, 2016.



Michael Topping, WSBA# 50995
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent and Notice of Appearance on the date below as follows:

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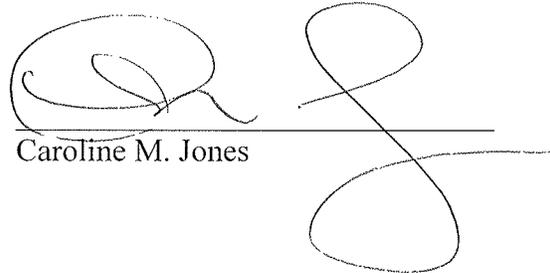
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--AND TO--

RITA J. GRIFFITH
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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 12 day of December, 2016, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTOR

December 12, 2016 - 10:40 AM

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