

**FILED**

SEP 16, 2016

Court of Appeals  
Division III  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

Timothy Allen Michael Banks,

Appellant.

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

The Honorable Kathleen M. O'Connor

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct during cross-examination.

2. The prosecutor committed misconduct during closing argument.

3. In the event the State substantially prevails on appeal, this Court should deny any request for costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal required where the prosecutor committed misconduct by eliciting comments during cross-examination and making comments during closing argument in violation of appellant's constitutional right to silence thereby denying appellant his constitutional right to a fair trial?

2. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs where Banks is presumably still indigent because there has been no evidence provided to this Court, and no findings by the trial court, that Banks's financial condition has improved or is likely to improve?

C. STATEMENT OF THE CASE<sup>1</sup>

1. Procedure

On January 22, 2015, the Spokane County Prosecutor's Office charged appellant, Timothy Allen Michael Banks, with second degree assault. CP 1. The Honorable Kathleen M. O'Connor heard and ruled on motions in limine on September 21, 2015, including prohibiting the State from using Banks's silence against him. 1RP 18; CP 7-17, Supp. CP \_\_\_\_ (09/14/15, State's Additional Motions in Limine). Following a two-day trial, a jury found Banks guilty as charged on September 23, 2015. CP 68; 2RP 311-15. On November 20, 2015, the court sentenced Banks to 73.5 months in confinement with 18 months of community custody and imposed legal financial obligations and restitution. CP 69-82; 3RP 23-25. Banks filed a timely Notice of Appeal. CP 83-98.

2. Facts

a. Investigation

On the evening of December 10, 2014, Officer Julian Cedeno went to Sacred Heart Medical Center to follow up on a report of an assault. He spoke with Jerald Williams who had sustained injuries to his face. 1RP 99-101. Cedeno learned that the alleged assault occurred in a Fred Meyer

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<sup>1</sup> The record contains three volumes of verbatim report of proceedings: 1RP - 09/21/15, 09/22/15; 2RP - 09/23/15; 3RP - 11/20/15.

parking lot. 1RP 102-05. He interviewed witnesses and his investigation led to Timothy Banks as the suspect. 1RP 101-02.

Detective Mark Burbridge was assigned to the case. Approximately two weeks after the reported assault, he interviewed Maudie McAteer who said she saw Banks on top of Williams, punching him repeatedly in the face. 1RP 194-95.

b. Medical Examination

Dr. Omar Husein treated Williams at Sacred Heart Medical Center for a broken nose and bruising and swelling on his face. 2RP 207. The face has a lot of blood vessels which causes a lot of bleeding. 2RP 211. Williams informed him that he was taking Prevacid, Ibuprofen, and aspirin which increases bleeding. 2RP 210-11. Dr. Husein prescribed medication and antibiotics and placed Williams on a soft diet because of a cheek fracture above the teeth. 2RP 207. He subsequently performed surgery on the internal and external fractures. 2RP 207, 211-12.

c. Complaining Witness

Jerold Williams finished work at 5:30 p.m. and went to Fred Meyer to make a bank deposit. When he came out of Fred Meyer and walked to his car, he saw someone walking around his car with a shopping cart and putting the cart on the sidewalk behind his car. 1RP 110-11. As he approached his car, the woman started getting into her Jeep. 1RP 112-13.

Williams was upset because the cart was six inches away from his car. RP 112. His car is very important to him, “[i]t’s just an old beater but it’s mine.” 1RP 124-25. Williams began pushing the cart away from his car and said “[h]ow about if I just push it up against your car and hit your car with it” and he pushed the cart toward the Jeep. 1RP 112, 125-26.

Williams was about two feet from the Jeep when Timothy Banks hopped out of the other side and grabbed the shopping cart and threw it sideways onto the ground. 1RP 113. Banks looked really angry so Williams decided to leave and turned toward his car as he told the woman again, “It’s just a matter of common courtesy.” 1RP 113. He closed the door of the Jeep to open his car door and got inside. As he reached to close his car door, Banks attacked him. 1RP 113-14. Banks hit him repeatedly as he pushed his way out of the car and they fell to the ground between the cars, “he just continued to pummel me.” 1RP 114-15. All of a sudden, Banks stopped hitting him and he could not see where Banks went. 1RP 116-17.

Paramedics arrived and Williams was taken to the hospital. 1RP 117. His nose was broken and his eyes were swollen. He received treatment in the emergency room and underwent reconstructive surgery on his nose two weeks later. 1RP 118.

d. Defense Witnesses

Timothy Banks went shopping at Fred Meyer with his family. 2RP 214-15. His mother shopped for groceries and he watched his baby nephew and little brother while looking for shoes. 2RP 215-16. His mother paid for the groceries and they walked to their car using the shopping cart. His mother was pushing the cart and as she opened the hatch to their car, Banks heard a man yelling across the parking lot and throwing his hands up. 2RP 216-18. The man yelled “stupid bitch” and “why’d you leave the cart there, the cart don’t belong there.” 2RP 218.

Banks put his baby nephew in their Jeep and walked toward the shopping cart which was between the two cars. He asked the man what his problem was and the man said something about the cart rolling into his car. 2RP 219-20. The man cursed at him, telling him to put the cart where it belongs and shoved the cart into him, hitting him on the shin. Banks shoved the cart back and then his mother walked up and took the cart away. 2RP 220. Meanwhile, Banks’s little brother got into the Jeep and the door was still open. Williams slammed the door shut to get into his car which startled his little brother who started screaming. Banks wanted to check on his little brother so he asked Williams to close his car door and leave. Then Williams suddenly came flying out of his car, grabbed Banks, and slammed him against the Jeep. They wrestled around and ended up on the ground. 2RP

221-22. To free himself from Williams who kept holding on to his legs, Banks punched him several times until he let go of his legs. 2RP 223. “I was trying to get him off me, to let go of me.” 2RP 227-28.

Banks’s mother had started the Jeep, so he jumped in and told her to go before Williams grabs a gun because he saw Williams searching for something in his car but his mother ordered him to get out. Having no choice, Banks got out of the Jeep and ran away, thinking that Williams would concentrate on him and not his family. 2RP 226-27, 231-33.

Maudie McAteer, Timothy Banks’s mother, recalled that she went shopping at Fred Meyer with her two sons and grandson. 2RP 176. Banks purchased a pair of shoes and she bought some groceries. After loading the groceries into her Jeep, she pushed the shopping cart up on the sidewalk in front of the Jeep and another car parked next to her. 2RP 179-81. Then she heard a man screaming about the shopping cart. He called her a “stupid bitch” and said, “How would you like me to shove the cart into your car?” 2RP 181-82, 187. The man walked up, grabbed the cart and shoved it, hitting Banks in the leg. Banks hollered at him and shoved the cart back. When they kept shoving the cart back and forth, she took the cart away. 2RP 182-83. After she moved the cart, she turned around and “they were going at it.” 2RP 183. They were throwing punches at each other and

although she tried to separate them, she could not break up the altercation.  
2RP 184.

e. Witnesses at Altercation

As Andrea Davis parked her car in the Fred Meyer parking lot, she saw two men pushing a shopping cart back and forth. 1RP 137. She could not hear what they were saying. 1RP 142-43. Then the older man raised his hands up and walked to his car to leave. 1RP 137. The younger man ran after him and grabbed him from behind and threw him onto the sidewalk. 1RP 137. The younger man punched the older man several times in the face. The older man tried to block his face and never fought back. 1RP 137-38. After the younger man kicked the older man in the face, he tried to get in a car but the people in the car refused to let him in. 1RP 138. Davis started to get out of her car to help the older man, thinking that the younger man was gone. She then saw the younger man coming back, so she locked her doors and called 911 as she saw the younger man running down the street. 1RP 138-39, 144-45. Davis identified Banks in court. 1RP 139.

Shaylon Reed was driving into the Fred Meyer parking lot when he saw an older man on the ground with a younger man beating him up. The older man was using his hands to protect himself. 1RP 155-56. Reed felt he had to do something to help, so he parked his car and walked toward the

men. He yelled at the younger man who did not hear him, and then a lady came up and broke up the altercation. 1RP 157-58. After about 30 seconds, the younger man ran off. 1RP 159. The fire department arrived and Fred Meyer security came out to the scene. 1RP 162.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT DURING CROSS-EXAMINATION AND CLOSING ARGUMENT WHERE HE VIOLATED BANKS'S FIFTH AMENDMENT RIGHT TO SILENCE THEREBY DENYING BANKS HIS RIGHT TO A FAIR TRIAL.

A prosecutor “functions as the representative of the people in a quasijudicial capacity in a search for justice.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor does not fulfill this role “by securing a conviction based on proceedings that violate a defendant’s right to a fair trial—such convictions in fact undermine the integrity of our entire criminal justice system.” *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). “Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial.” *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)(citing *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978)).

a. Misconduct

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution provide an accused the right

against self-incrimination. At trial, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from his silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). When the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

In violation of the court's order in limine prohibiting the State from commenting on Banks's right to silence, the prosecutor improperly elicited comments from Banks during cross-examination to infer guilt from his silence:

Q. When you ran away from your mother and your brother and your nephew, did you give any consideration to running into Fred Meyer to go get help there?

A. No, I didn't.

Q. Did you ask anyone that was standing in the parking lot that night for help?

A. No, I didn't.

Q. There's a lot of people in the parking lot that night?

A. Yeah. That's also a good way to get shot, hanging around someone acting like that.

Q. What about your mother and your brother and your nephew, Reilly, what about them getting shot?

A. I figured this man was concentrating on me after he had verbally assaulted and assaulted my little brother, I figured he was more mad at me by now.

Q. According to your testimony, Mr. Williams assaulted you first that night. Did you ever report this?

[DEFENSE COUNSEL]: Objection, your Honor.

[THE WITNESS]: I was never in contact --

[DEFENSE COUNSEL]: Wait.

THE COURT: Objection overruled.

Q: Did you ever contact anybody, sir?

A. I was never in contact with anyone.

[DEFENSE COUNSEL]: Judge, can . . .

THE COURT: No. Proceed, counsel.

Q. Sir, just to confirm you do have a conviction for making a false statement to police, correct?

A. That's correct.

2RP 233-34.

The record substantiates that the prosecutor improperly used Banks's failure to "report" the altercation with Williams as substantive evidence of guilt. The prosecutor's intent to draw an inference of guilt is evident where he immediately followed up on his line of questioning by reiterating that Banks was convicted for "making a false statement to police." Banks had already admitted that he pleaded guilty to that crime during direct examination. 2RP 226. As the Washington Supreme Court held in *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010), every person has "a Fifth Amendment right to remain silent with the police." Consequently, the prosecutor improperly elicited comments from Banks to infer guilt from his silence. Furthermore, the prosecutor improperly commented on Banks's right to silence during closing argument:

You also heard testimony from Mr. Banks about "I thought maybe he had a gun in his car." Is that reasonable? Is that reasonable? If Mr. Banks really thought that Mr. Williams had a gun [in] his car, would he really have run away from his mother, his brother and his nephew in the car? Mr. Banks said I was there to protect my mother

because he was swearing at my mother. If he thinks that this person really had a gun, would he run away and not contact anyone? Not call 911, do nothing but run away? He didn't go into Fred Meyer's, he did not ask help for anywhere, he just ran.

2RP 287-88.

In *Jones*, during closing argument, the State argued that after Jones was accused of rape, he did not call the police. 168 Wn.2d at 718. The Washington Supreme Court concluded that the prosecutor committed misconduct by arguing that Jones fled to Texas and never called the police to try to clear up what had happened. The Court held that because Jones had a Fifth Amendment right to remain silent with the police, the comment was improper. "We go so far as to say that the court's imprimatur is now upon the State and that such argument is improper and should not be repeated." 168 Wn.2d at 725.

Similarly, by arguing that Banks did not call 911 or contact anyone, the prosecutor improperly invited the jury to infer guilt from Banks's silence. The prosecutor's improper closing argument and improper cross-examination constitutes misconduct.

b. Prejudice

Where the defense claims prosecutorial misconduct, it bears the burden of establishing the impropriety of the prosecutor's statements as well as their prejudicial effect. *State v. Anderson*, 153 Wn. App. 417, 427, 220

P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010). If the statements were improper, and an objection was lodged, the defense must show that there was a substantial likelihood that the statements affected the jury. *Id.* Absent an objection and request for a curative instruction, the defense waives the issue of misconduct unless the statement was so flagrant and ill intentioned that an instruction could not have cured the prejudice. *Id.* Importantly, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 710-11, 286 P.3d 673 (2012).

Here, defense counsel objected to the prosecutor's improper cross-examination but the court overruled her objections. Defense counsel did not object to the prosecutor's improper closing argument but given the court's overruling of defense counsel's objections, further objections were unlikely to succeed. Therefore, the lack of objection does not preclude review. *State v. McCreven*, 170 Wn. App. 444, 473, 284 P.3d 793 (2012)(citing *State v. Moen*, 129 Wn.2d 535, 547, 919 P.2d 69 (1996)). Furthermore, the trial court incorrectly overruled defense objections which validated the misconduct. *Davenport* 100 Wn.2d at 764 (overruling a timely and specific objection lends "an aura of legitimacy to what was otherwise improper argument).

Banks's defense was that he acted in self-defense and the court instructed the jury on self-defense. CP 60-63. Credibility was therefore a critical aspect of this case because Banks and Williams gave contrary testimony as to whether Banks assaulted Williams or defended himself. The prosecutor's violation of Banks's right to silence, so as to infer guilt, cast doubt on Banks's credibility and truthfulness. Consequently, there is a substantial likelihood that the prosecutor's improper cross-examination, compounded by his improper closing argument, affected the jury. Reversal is required because the State impermissibly infringed upon Banks's "assertion of the right to remain silent so as to invite the jury to infer guilt from the exercise of a constitutionally protected right." *Burke*, 163 Wn.2d at 222.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE BANKS REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160

specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute states that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Banks is indigent. The trial court found that he is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 99-100. This Court should therefore presume that Banks remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit 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.

RAP 15.2(f).

In *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the Court exercised its discretion and ruled that an award of appellate costs was not appropriate, noting that the procedure for obtaining an order of indigency is set forth in RAP Title 15 and the trial court is entrusted to determine indigency. “Here, the trial court made findings that support the

order of indigency. . . . We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. . . . We therefore presume Sinclair remains indigent." *Sinclair*, 192 Wn. App. at 393.

As in *Sinclair*, there has been no evidence provided to this Court, and no findings by the trial court, that Banks's financial condition has improved or is likely to improve. Banks is presumably still indigent and this Court should exercise its discretion to not award costs.

E. CONCLUSION

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. *In re Glasmann*, 175 Wn.2d at 703 (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999)). For the reasons stated, this Court should reverse Banks's conviction for assault in the second degree because prosecutorial misconduct denied Banks his constitutional right to a fair trial.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because Banks remains indigent.

DATED this 16<sup>th</sup> day of September, 2016.

Respectfully submitted,

/s/ Valerie Marushige

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Attorney for Appellant, Timothy A. M. Banks

**DECLARATION OF SERVICE**

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Spokane County Prosecutor's Office at [SCPAAppeals@spokanecounty.org](mailto:SCPAAppeals@spokanecounty.org) by agreement of the parties and by U.S. Mail to Timothy Allen Michael Banks, DOC # 767119, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, Washington 99362.

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

DATED this 16<sup>th</sup> day of September, 2016.

/s/ Valerie Marushige  
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