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Court of Appeals
Division III
State of Washington

33957-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY BANKS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Was it error for the deputy prosecutor to impeach Mr. Banks during cross-examination regarding his failure to contact anyone after the assault where he testified on direct examination that he fled the scene after the assault, based upon a claim of self-defense and fear of the victim?
2. Was the deputy prosecutor's mere reference during closing argument that Mr. Banks failed to contact anyone after the assault, including calling "911," permissible impeachment of Mr. Banks' testimony after he opened the door on direct examination?
3. If Mr. Banks failed to object to the comment during closing argument and the comment was improper, was the error so flagrant or ill-intentioned that the trial court could not have alleviated the error by giving a curative instruction to the jury?

III. STATEMENT OF THE CASE

The appellant/defendant, Timothy Banks, was charged by information in the Spokane County Superior Court on January 10, 2014, with one count of second degree assault. CP 1.

Victim Jerald Williams, an auto machinist, worked until approximately 5:30 p.m. on December 10, 2014. RP 109-10. After work, he drove to and entered a Fred Meyer store in Spokane to make a bank deposit. RP 110. After approximately ten minutes, Mr. Williams exited the store and returned to his car in the parking lot. RP 111, 123-24. He observed a person, later identified as the defendant's mother, Maudie McAteer, push an apparently empty shopping cart in the vicinity of the back of his car. RP 111-12, 181-83. An argument ensued wherein Mr. Williams and Ms. McAteer pushed the cart back and forth several times, and exchanged remarks. RP 112, 126, 136.

Contemporaneously, Mr. Banks exited a nearby Jeep, threw the cart onto the ground, and appeared angry. RP 113, 126. As Mr. Williams retreated toward his car, Mr. Banks quickly followed, and threw Mr. Williams to the ground. RP 137. Mr. Banks jumped on top of Mr. Williams¹ and struck him three or four times "with full force" in the

¹ Mr. Williams "curled up" during this time. RP 115.

face. RP 137. As Mr. Williams raised to his hands and knees, Mr. Banks kicked him in the face. RP 138. Mr. Williams did not attempt to fight back. RP 137-38.

After the assault, Mr. Banks ran to his mother's car and was refused access. RP 138, 185.² He then ran back to the scene, observed witness Andrea Davis on her cell phone, and "bolted" down the street, away from the scene. RP 138-39, 145.³

Several weeks later, Mr. Williams had reconstructive surgery. RP 118.⁴ Dr. Omar Husein, a board certified plastic surgeon, examined Mr. Williams. RP 207. Mr. Williams suffered external and internal nasal fractures and a cheek fracture from the assault which required surgery. RP 207.⁵

² Witness Andrea Davis did not observe anything which caused her concern for Mr. Banks. RP 140.

³ Approximately 20 – 30 people gathered to help Mr. Williams. The defendant's mother quickly accelerated out of the parking stall and struck a witness's vehicle. RP 160, 162.

⁴ In addition, Mr. Williams' hearing aid was smashed during the assault. RP 129-30.

⁵ Mr. Williams summarized his injuries as follows: "My nose was pretty much shattered, had to be completely [reconstructed]. My left eye, I believe was my left eye, was completely swelled shut. My right eye was half-way shut. I had bruises all over my head and face." RP 118.

Mr. Banks testified on direct examination that Mr. Williams approached the Jeep and began yelling at his mother. RP 219. A shoving match followed with the shopping cart between his mother and Mr. Williams. RP 220. Mr. Banks then claimed Mr. Williams walked to and slammed a door shut to the Jeep, and then walked to his own vehicle. RP 222. He then asserted that Mr. Williams searched for something inside his vehicle. RP 221. Mr. Banks claimed he subsequently asked Mr. Williams to leave, but was ultimately slammed into the Jeep by Mr. Williams. RP 222. A wrestling match ensued, and Mr. Banks punched Mr. Williams several times because Mr. Williams would not let go of Mr. Banks' leg. RP 224. Mr. Banks contended that he did not try to fracture Mr. Williams' nose. RP 227.

Mr. Banks asserted he was worried and wanted to get away from Mr. Williams. RP 224. More specifically, Mr. Banks alleged:

I was worried about my mother. She was walking the cart, I don't know if she was taking the cart in the building or what but I was worried about us getting out of there because she had the keys and the kids were in the vehicle crying. It's like he wasn't letting me get to the kids and she's off with the keys somewhere.

RP 226.

Mr. Banks then asserted he entered his mother's vehicle, and told her "let's get out of here before he grabs a gun." RP 227. Mr. Banks claimed on direct examination that he fled from the scene because:

[I] did not want to get shot and I figured he had a problem with me and I figured I was getting out of there. I was -- I wanted to get out of his way before something else happened.

RP 227.

During cross-examination, the deputy prosecutor asked the defendant why he ran from the scene. Mr. Banks claimed Mr. Williams "jumped" into his own car after the assault. RP 232. Thereafter, the following exchange took place:

[DEPUTY PROSECUTOR]: Did you go to contact anyone to get help for your mother and your brother and your nephew?

[DEFENDANT]: I went to the phone and I tried getting through to my grandmother to tell her what was going on but I couldn't get through to her.

[DEPUTY PROSECUTOR]: So you had a phone.

[DEFENDANT]: No, I didn't have a phone on me.

[DEPUTY PROSECUTOR]: I'm sorry, didn't you just say you got on the phone?

[DEFENDANT]: Yeah, pay phone.

[DEPUTY PROSECUTOR]: Where was the pay phone?

[DEFENDANT]: On Thor.

[DEPUTY PROSECUTOR]: Did you give any consideration going into Fred Meyer?

[DEFENDANT]: After that incident?

[DEPUTY PROSECUTOR]: 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?

[DEFENDANT]: No, I didn't.

[DEPUTY PROSECUTOR]: Did you ask anyone that was standing in the parking lot that night for help?

[DEFENDANT]: No, I didn't.

[DEPUTY PROSECUTOR]: There's a lot of people in the parking lot that night?

[DEFENDANT]: Yeah. That's also a good way to get shot, hanging around someone acting like that.

[DEPUTY PROSECUTOR]: What about your mother and your brother and your nephew Reilly, what about them getting shot?

[DEFENDANT]: 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.

[DEPUTY PROSECUTOR]: According to your testimony, Mr. Williams assaulted you first that night. Did you ever report this?

[DEFENSE ATTORNEY]: Objection, your Honor.

[DEFENDANT]: I was never in contact –

[DEFENSE ATTORNEY]: Wait.

THE COURT: Objection overruled.

[DEPUTY PROSECUTOR]: Did you ever contact anybody, sir?

[DEFENDANT]: I was never in contact with anyone.

[DEFENSE ATTORNEY]: Judge, can...

THE COURT: No. Proceed, counsel.

[DEPUTY PROSECUTOR] Sir, just to confirm you do have a conviction for making a false statement to police, correct?

RP 232-34.

After conclusion of testimony and release of the jury,

Judge Kathleen O'Connor commented:

Okay. Counsel, the reason I did not, I sustained -- I allowed Mr. Nagy to examine, all he asked your client was whether he reported it. He didn't ask whether he was talking to the police or didn't even ask him if he called 911. I didn't see that as a violation of our motions in limine to simply ask that question.

RP 236-37.

During closing argument, and when discussing the self-defense instructions, the deputy prosecutor commented:

The force used by Mr. Banks that night went well beyond reasonable, ladies and gentlemen. When you go over the testimony of the witnesses, it went well beyond what was reasonable. Was he concerned about his safety? Was he concerned about the way Mr. Williams was acting that night? Perhaps. Was he angry about what he said to his mother? Yes, perhaps. But there were no threats. Both

Mr. Banks and his mother said no, the only threat made was hey, I might, how would you like it if I used this shopping cart to damage your car. There were no threats made. Neither Mr. Banks nor his mother testified Mr. Williams was out there threatening him. He was angry about the car, what might happen to his car, but there were no threats made.

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 had 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 the Fred Meyer’s, he did not ask help for anywhere, he just ran.

Why do you think his mother said get out of the car. Why did he run? Because he knew he had gone too far. He knew he had gone too far that night.

MS. REARDON: Objection, speculation.

THE COURT: Sustained. Ladies and gentlemen, you’ll disregard the last comments of the prosecutor.

MR. NAGY: Why did he run away that night, ladies and gentlemen? Why did he leave the scene? Ladies and gentlemen, when you go back and you review the testimony of the witnesses, when you recall the testimony of Ms. Davis, the testimony of Mr. Reed, the testimony of Jerald Williams, the testimony of Officer Ceden, the testimony of Dr. Husein, review the exhibits that have been entered into evidence and review your instructions, I’ll ask you find Mr. Banks guilty of second degree assault.

RP 287-89.

The jury found Mr. Banks guilty of second degree assault. With an offender score of “11,” Mr. Banks was sentenced to a standard range sentence of 73.5 months. CP 72-74. This appeal timely followed.

IV. ARGUMENT

Under both the state and federal constitutions, the State may not comment on a defendant’s Fifth Amendment exercise of the right to remain silent, including prearrest silence. *See State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). “The right against self-incrimination is liberally construed.” *Easter*, 130 Wn.2d at 236.

“[W]hen the defendant’s silence is raised, [an appellate court] must consider whether the prosecutor manifestly intended the remarks to be a comment on that right.” *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008).⁶ A comment on an accused’s silence occurs when the State uses the

⁶ In *Burke*, the defendant began an interview with the police about rape allegations, but stopped the interview when his father intervened and advised his son to wait until a lawyer was consulted. *Id.* at 207. During its opening statement, the State described Burke’s father as “sensing that it wasn’t necessarily okay to have sex with [the underage girl]” and advising his son to end the interview, implying that the “guilty should keep quiet and talk to a lawyer.” *Id.* at 222. Our Supreme Court held that the State had violated Burke’s right to silence by implying that “suspects who invoke their right to silence do so because they know they have done something wrong.” *Id.* at 222.

evidence to suggest the defendant is guilty. *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997).

However, the State may use a defendant's prearrest silence to impeach his or her credibility if the defendant testifies at trial.⁷ *Burke*, 163 Wn.2d at 204. *See also Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) (“[I]mpeachment follows the defendant’s own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant’s credibility”).

A. CROSS-EXAMINATION OF MR. BANKS ABOUT HIS FAILURE TO CONTACT ANYONE AFTER THE ASSAULT WAS PERMISSIBLE TO IMPEACH HIS CLAIM OF SELF-DEFENSE ELICITED DURING DIRECT EXAMINATION.

Mr. Banks maintained during direct examination that he fled the scene because he didn’t want to get “shot,” notwithstanding that he asserted his mother and siblings were in “peril” at the crime scene. In doing so, he placed his credibility and his version of events at issue. On cross-examination, the deputy prosecutor properly sought to rebut Mr. Banks’ version of events by asking about what he did or did not do, in light of his

⁷ However, the State cannot use a defendant’s silence after *Miranda* warnings have been given even for impeachment. That is not at issue in this case. *See Burke*, 163 Wn.2d at 217.

claimed threat of death or serious bodily injury, not only to himself, but to his family members.

If Mr. Banks felt imminently threatened, a reasonable reaction would have been to contact someone to quell the immediate, perceived threat, rather than attempting to contact his grandmother. The State's cross-examination tended to show the untruthfulness of Mr. Banks' testimony, and rebutted his claim of self-defense by illustrating Mr. Banks failed to act in a manner consistent with his own testimony by not seeking immediate help. In addition, the deputy prosecutor did not reference contacting the police or a lawyer during cross-examination. As such, the State did not remark about any constitutionally protected silence and was permitted to impeach Mr. Banks' credibility. There was no error.

B. THE DEPUTY PROSECUTOR'S REMARK DURING CLOSING ARGUMENT THAT MR. BANKS FAILED TO CONTACT ANYONE, INCLUDING CALLING "911" AFTER THE ASSAULT, WAS PROPER TO IMPEACH HIS TESTIMONY DURING DIRECT EXAMINATION.

During a pretrial conference, the State agreed to a "catch all" motion in limine⁸ provision submitted by Mr. Banks that it would not mention the

⁸ The defendant moved the court and the State agreed to an order "Prohibiting the Deputy Prosecuting Attorney from commenting on the exercise of a privilege." CP 14. Although the State did not reference or comment on the defendant's right to remain silent, Mr. Banks certainly opened the door to cross-examination and argument on the subject when he

exercise of a “privilege” of the defendant.⁹ Although there was no objection, Mr. Banks argues the State commented on his right to remain silent during closing argument when the deputy prosecutor remarked that the defendant did not contact anyone after the incident, including calling “911.”

A defendant alleging prosecutorial misconduct bears the burden of proving that the prosecutor’s conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

1. There was no comment on the defendant’s constitutional right to remain silent.

“[A] prosecutor’s statement will not be considered a comment on a constitutional right to remain silent if ‘standing alone, [it] was so subtle and so brief that [it] did not “naturally and necessarily” emphasize defendant’s testimonial silence.’” *Burke*, 163 Wn.2d at 216 (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)).¹⁰ The primary concern is

testified about his own actions during and after the assault in regards to his claim of self-defense.

⁹ When defense counsel asked Mr. Banks why he ran from the scene, it certainly opened the door for the State to inquire about the same subject on cross-examination. *See, e.g., State v. Jones*, 111 Wn.2d 239, 248-49, 759 P.2d 1183 (1988) (holding that questioning by defense counsel opened the door for the prosecution to ask about otherwise inadmissible evidence).

¹⁰ An example of a “mere reference to silence” is found in *State v. Lewis*, 130 Wn.2d at 705. In *Lewis*, the defendant was charged with several sexual offenses. An officer testified on direct that he had contacted Lewis by telephone and Lewis admitted that the women had been in his apartment, but denied that anything had happened. The officer said, “my only other

“whether the prosecutor manifestly intended the remarks to be a comment on that right.” *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). So long as the focus of the questioning or argument “is not upon the exercise of the constitutional right itself,” the inquiry or argument does not infringe upon a constitutional right. *State v. Gregory*, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006). Accordingly, “[a] remark that does not amount to a comment is considered a ‘mere reference’ to silence and is not reversible error absent a showing of prejudice.” *Burke*, 163 Wn.2d at 216.

conversation was that if he was innocent he should just come in and talk to me about it.” *Id.* at 703. The court found that the officer’s testimony was not even referring to the defendant’s silence:

... the officer in this case made no comment on Lewis’s silence. The only statement he made was that Lewis had told him he was innocent.

There was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence should imply guilt. Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant’s silence. A comment on an accused’s silence occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. That did not occur in this case.

Id. at 706.

Here, Mr. Banks complains that the deputy prosecutor commented on his right to remain silent during closing argument when he referenced the defendant's failure to contact anyone for help, including calling "911," after he testified he was fearful of the victim's potential use of deadly force. Appellant's Br. at 10-11.¹¹

This was not a comment on Mr. Banks' silence or used as substantive evidence of his guilt. As discussed above, the record shows the deputy prosecutor's remark during closing argument was clearly aimed at contradicting the defendant's testimony and his claim of self-defense. It was designed to place the defendant's version of events at odds with how a reasonable person would have responded to the perceived danger under similar circumstances. Moreover, the mention of "911" was subtle and momentary, and it did not suggest guilt or an admission of guilt. Mr. Banks admits in his opening brief that credibility of the witnesses was at the forefront of this trial. Appellant's Br. at 11. The deputy prosecutor did not invite the jury to infer that Mr. Banks was guilty of the charged crime from his failure to call the police, contact a lawyer, or his right to remain silent,

¹¹ Moreover and contrary to his assertion, Mr. Banks did not object to these several remarks during closing argument. *See* Appellant's Br. at 12. Even if Mr. Banks had objected, it would have had to be specific enough to allow the trial court an opportunity to correct the claimed error and give the State an opportunity to respond. *See State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

nor was it mentioned. Certainly, the deputy prosecutor was allowed to challenge the credibility of the defendant's story. It was nothing other than legitimate impeachment. There was no error.

2. Even if the mere reference to the defendant's act of not calling "911" can be considered error, it certainly was not prejudicial.

To show prejudice, a defendant must demonstrate a substantial likelihood that the misconduct affected the jury verdict. *Emery*, 174 Wn. 2d at 760–61. An appellate court examines the effect of a prosecutor's alleged improper conduct in the context of the prosecutor's entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). A prosecutor has wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Where, as here, a defendant fails to object, he is deemed to have waived any error unless the reviewing court can determine that (1) no curative instruction could have remedied the resulting prejudice and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *Emery*, 174 Wn.2d at 761. In determining whether a failure to object should operate as a waiver, an appellate court "focus[es] less on whether the prosecutor's misconduct was flagrant or ill intentioned

and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

Mr. Banks waived any error by failing to object to the deputy prosecutor’s alleged improper conduct because he cannot establish the deputy prosecutor’s reference to “911” was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. The deputy prosecutor did not reference Mr. Banks’ right to remain silent, that his silence should be used against him, or to use his silence as evidence of guilt. The deputy prosecutor spoke of Mr. Banks’ opportunity and failure to contact any witnesses at the scene, Fred Meyer employees, or call 911 to summon help based upon his allegation of self-defense and Mr. Williams alleged threatened used of deadly force. The telephone number “911” is commonly associated with an emergency phone number wherein individuals request help for a variety of circumstances and services. It is not associated with police questioning of a witness or suspect.

Certainly, the deputy prosecutor was allowed to impeach the defendant’s testimony. The defendant bears the burden of demonstrating that the prosecutor’s remarks were improper. *Gregory*, 158 Wn.2d at 841; *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

Mr. Banks’ reliance on *State v. Jones*, 168 Wn.2d 713, 718, 230 P.3d 576 (2010) is easily distinguished. In *Jones*, the defendant argued

that the prosecutor committed prejudicial misconduct during closing argument by commenting on his exercise of his right to remain silent when the prosecutor argued that Jones fled to Texas and never called the police to try to clear up what had happened with his niece. Mr. Jones did not testify. The Supreme Court found this argument improper. Unlike the facts in *Jones*, Mr. Banks testified on direct examination regarding his perceived threat during and after the assault. Accordingly, it was permissible for the deputy prosecutor to impeach him as discussed above.

Mr. Banks has not met his burden to establish prejudice and his argument fails.

C. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY, THIS COURT SHOULD REQUIRE THE DEFENDANT AFFIRMATIVELY ESTABLISH A CLAIM OF INDIGENCY AS SET FORTH IN THIS COURT'S JUNE 10, 2016 ORDER BEFORE THIS COURT DETERMINES WHETHER TO AWARD COSTS AS AUTHORIZED IN RCW 10.73.160 AND RAP 14.2.

If the defendant is unsuccessful in this appeal, the defendant requests this Court decline to impose the appellate costs authorized in RCW 10.73.160 and RAP 14.2.¹² This Court should require the defendant to provide the requested information as set forth in this Court's general order dated June 10, 2016, regarding his claim of continued indigency.

¹² It appears this Court has addressed this issue in its General Order dated June 10, 2016, dealing with motions on costs.

V. CONCLUSION

The deputy prosecutor did not remark about any constitutionally protected silence, such as Mr. Banks' request for a lawyer or choice to remain silent after consulting with a lawyer. The cross-examination and remark during closing argument were permissible impeachment and highlighted the potential prevarication of Mr. Banks' assertions on direct examination. Mr. Banks fails to establish any error. The State requests this Court affirm Mr. Banks' conviction for second degree assault.

Dated this 14 day of December, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

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TIMOTHY BANKS,

Appellant.

NO. 33957-2-III

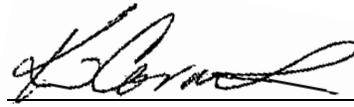
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 14, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Valerie Marushige
ddvburns@aol.com

12/14/2016
(Date)

Spokane, WA
(Place)



(Signature)