

33962-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KEITH W. BEIERS, APPELLANT

Consolidated with 35012-6-III

In Re Personal Restraint of: KEITH W. BEIERS, Petitioner

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

On October 2, 2017, this Court requested the parties “provide supplemental briefing on the issue of the prosecutor’s use of Mr. Beiers’ pre-arrest silence during trial. The parties are asked to reexamine this issue in light of *State v. Magana*, 197 Wn. App. 189, 194-95, 389 P.3d 654 (2016), and *Salinas v. Texas*, ___U.S.___, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013), and provide any new arguments the parties may have based on those two cases and other cases interpreting them.” Additionally, this Court requested the parties further “explain whether *Magana* and *Salinas* have any impact on Mr. Beiers’ claims of prosecutorial misconduct and ineffective assistance of counsel that stem from his arguments regarding the use of his pre-arrest silence.”

This supplemental brief is in response to this Court’s questions and also in response to appellant/petitioner’s answers to those questions filed on October 12, 2017.

II. STATEMENT OF THE CASE

In short, and relevant to this issue, multiple law enforcement officers responded to indecent exposure and shots fired calls in the area of 106 East Rockwell on November 3, 2012. When Officer Arthur Dollard arrived, he saw Mr. Beiers in the yard to the northeast of the intersection walking south

toward the street. RP 112.¹ Officer Dollard testified that when he first saw Mr. Beiers, Mr. Beiers was holding a gun in his hand. RP 113. Mr. Beiers complied with Officer Dollard's commands to drop the gun. RP 115. Officer Dollard noted that Mr. Beiers had an injury behind his left ear. RP 120. Mr. Beiers told Officer Dollard that his hearing aid "had been knocked off during the fight. And it would probably be near his car ... along with his glasses." RP 138. Mr. Beiers answered the officer's questions, telling him that he had fired his gun once, to the north, and that he had been injured when "they were kicking the shit out of me, and I was in fear for my life." The last statement Mr. Beiers made to Officer Dollard was, "I didn't do anything wrong. I was defending myself." RP 138.

During the 3.5 hearing, the State established that all but the last of defendant's statements were made prior to arrest and prior to *Miranda* warnings. RP 22-26. Those statements included the defendant's name, his statement as to how he had been injured, that the defendant had fired his gun to the north while standing by his vehicle, and that the defendant had had a few alcoholic beverages earlier. RP 22-26. Law enforcement then advised the defendant of his *Miranda* rights. RP 26. When asked whether he understood his rights, the defendant responded, "Yes. I have not done

¹ The report of proceedings of Mr. Beiers' trial and sentencing consists of five consecutively paginated volumes.

anything wrong. I was defending myself.” RP 28. The defendant then indicated he wished to remain silent and police ceased all questioning. RP 28.

The court determined that the defendant’s pre-*Miranda* statements were admissible. RP 33-34. The court determined that the defendant’s post-*Miranda* statements that he was defending himself and did not do anything wrong were not in response to any interrogation, and would also be admissible. RP 34.

III. ARGUMENT

A. IN ADDITION TO THOSE ARGUMENTS MADE IN THE STATE’S RESPONSE BRIEF, THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ALLUDING TO THE DEFENDANT’S PRE-ARREST SILENCE, AND COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE SAME, BASED UPON SALINAS AND MAGANA.

Previously, the State argued that it used the defendant’s lack of full candor to the police in recounting his version of events to impeach his later testimony at trial. The law cited in support of this position is still valid. However, *Salinas* and *Magana* provide additional support to reject the defendant’s claims of error. As explained below, the Courts in *Salinas* and *Magana* have indicated that a defendant’s pre-arrest, pre-*Miranda*² silence may be used as substantive evidence of the defendant’s guilt so long as the

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

defendant did not expressly invoke his Fifth Amendment privilege against self-incrimination under *Miranda* before the pre-arrest questioning and silence. It stands to reason that if pre-arrest, pre-*Miranda* silence may be used as substantive evidence of guilt, then it may also be used to impeach testimony given by the defendant at trial.

1. Implications of *Salinas* and *Magana*.

In *Salinas v. Texas*, ___ U.S. ___, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013), a three-Justice plurality opinion of the Supreme Court held that in order for a defendant to claim the privilege against self-incrimination for silence before *Miranda*/arrest, a defendant must expressly invoke the privilege; i.e., the defendant must put the interrogating official “on notice [that he] intends to rely on the privilege.” 133 S.Ct. at 2178-79, 2184. The two-Justice concurrence would have held that “*Salinas*’ claim would fail even if he had invoked the [Fifth Amendment] privilege because the prosecutor’s comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.” *Id.* at 2184. Thus, three justices agreed that the Fifth Amendment was not violated because the defendant did not expressly invoke the right, while two others agreed that the right was not violated because, under the particular facts of the case, the defendant did not have a Fifth Amendment privilege. *See Trigg v. Commonwealth*, 460 S.W.2d 322, 330 (Ky. 2015).

In *Salinas*, the plurality opinion noted exceptions to its general rule. First, the rule does not require a defendant to take the stand and assert the privilege at his own trial. 133 S.Ct. at 2179. This exception does not apply in this case. Second, the rule excuses a witness' failure to invoke the privilege where governmental coercion makes the forfeiture of the privilege involuntary. *Id.* at 2180. This exception specifically refers to the rule flowing from *Miranda*, whereby a suspect who is the subject of "inherently compelling pressures' of unwarned custodial interrogation need not invoke the privilege." *Id.* It also refers to those situations in which "some [other] form of official compulsion denies [a defendant] "a 'free choice to admit, to deny or to refuse to answer,'" to include situations where the assertion of the privilege would be, in and of itself, incriminating. *Id.*

Here, as in *Salinas*, the defendant "cannot benefit from [the latter exception] because it is undisputed that his interview with police was voluntary." *Id.* Defendant has never assigned error to the trial court's determination that his pre-Miranda statements were admissible, and therefore, were voluntary. *See generally* Br. of Appellant; RP 32 (Defense counsel's argument that the defendant's pre-Miranda statements were all admissible, and the trial court determining the same); CrR 3.5. Although defendant now attempts to argue that there was some sort of governmental

coercion which rendered his statements involuntary, the record is devoid of any support for this contention. RP at 19-30.

Similarly, under the plurality rule, the defendant would not be entitled to the protection of the Fifth Amendment because he did not expressly invoke the privilege. And, under the concurrence's rule, Mr. Beiers would not be entitled to the protection of the Fifth Amendment at all because the Fifth Amendment's protections do not exist in this context.

However, *Salinas* may be of diminished import because it is a plurality opinion. Such opinions are persuasive, but not binding. *See In Re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004); *see also Texas v. Brown*, 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (holding that while plurality opinion was "not a binding precedent, as the considered opinion of four [members of the Supreme Court] it should obviously be the point of reference for further discussion of the issue"). One court interpreting the significance of *Salinas* has stated: "Given the absence of a majority on any rationale, the splintered decision, however, fails to provide guidance as to whether pre-arrest silence is ever protected under the Fifth Amendment if sufficiently invoked or what constitutes sufficient invocation of the right." *Com. v. Molina*, 104 A.3d 430, 438 (Pa. 2014).

Notwithstanding the rule relating to the significance of plurality opinions, this Court has previously determined that *Salinas* does affect prior Washington case law on the subject. In *State v. Magana*, this Court reviewed the defendant's claimed Fifth Amendment violation in light of *Salinas*. There, the defendant argued that the State's use of his failure to appear for a pre-arrest, voluntary interview with law enforcement as substantive evidence of his guilt, was an improper comment on his right to remain silent. 197 Wn. App. 189, 194, 389 P.3d 654 (2016) . This Court rejected the defendant's argument, holding that *Salinas* had overruled the precedent upon which the defendant relied in support of his argument.³ *Id.*

This Court reiterated the *Salinas* plurality rule that, “absent an express invocation of the right to silence, the Fifth Amendment is not an obstacle to the State's introduction of a suspect's pre-arrest silence as evidence of guilt.” *Id.* at 195. Because Mr. Magana was not under arrest, was not in police custody, and his scheduled interview was voluntary, this Court held that, “to the extent Mr. Magana's failure to appear for the

³ Some states have declined to extend the *Salinas* rule in their jurisdictions based upon independent state constitutional grounds. *See, e.g., State v. Horwitz*, 191 So.3d 429, 438-440 (Fla. 2016). However, the Washington State Constitution affords the same protection to Washingtonians as does the Fifth Amendment of the Federal Constitution. *Magana*, 197 Wn. App. at 195 (citing *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); *State v. Earls*, 116 Wn.2d 364, 375, 805 P.2d 211 (1991)).

interview was relevant, the State was entitled to present this evidence.” *Id.*; *see also State v. Terry*, 181 Wn. App. 880, 888-889, 328 P.3d 932 (2014) (analyzing the significance of *Salinas*, stating the plurality decision held that the testimony and argument was unobjectionable because the defendant was speaking with police voluntarily and “it would have been a simple matter for him to say that he was not answering the officer’s question on Fifth Amendment grounds”).

Similarly, here, Mr. Beiers was not in police custody at the time he was asked to give his version of the events that had transpired. There is no evidence that he was detained, let alone subject to custodial interrogation. In addition, his statements were exculpatory. Thus, as in *Magana*, to the extent that Mr. Beiers’s pre-arrest statements and omissions were relevant to the case, the State was entitled to present that evidence. The prosecution’s use of noncustodial acts of silence or omission did not violate the Fifth Amendment because the defendant did not previously and expressly invoke that privilege. Therefore, because the prosecutor’s cross-examination and argument all involved Mr. Beiers’s actions during and after the assault, and his noncustodial statements to law enforcement (and the areas of importance he did not convey to law enforcement during that noncustodial interview), under *Magana*, those questions and argument do not implicate the defendant’s Fifth Amendment protections.

However, based on *Magana*'s reliance upon a "fractured" plurality opinion of the Supreme Court, it may be more prudent, perhaps, to decide this case not only on *Salinas/Magana* grounds, but also based upon the State's earlier argument: the State properly impeached the defendant's trial testimony with his statements to law enforcement. As previously argued in the State's amended response brief, the State may use a defendant's prearrest silence to impeach his credibility if the defendant testifies at trial. *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) ("Thus, impeachment 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"); *State v. Burke*, 163 Wn.2d 204, 232, 181 P.3d 1 (2008).

Here, the State sought to impeach the defendant's trial testimony by drawing attention to the inconsistencies in the story he had provided to police during the noncustodial interview and the testimony he gave at trial. Questions and argument serving that purpose do not implicate the defendant's Fifth Amendment right, as there were no questions or remarks made about the defendant's constitutionally protected silence after his arrest.

Under either analysis, the prosecutor did not engage in misconduct when raising the issue of the defendant's prearrest, pre-*Miranda* statements and omissions; to do so was proper, either under *Salinas/Magana* or as an effort to impeach the defendant. Because the prosecutor's statements and questions were unobjected-to, the defense is unable to demonstrate the State committed flagrant or ill-intentioned misconduct. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Any prejudice flowing from the questions and argument need not be cured if the questions and argument were proper.

Similarly, a claim of ineffective assistance of counsel cannot rest upon counsel's decision to not object to the use of defendant's pre-arrest silence – either for substantive or impeachment purposes. Given the existence of recent Supreme Court case law indicating that a defendant's pre-arrest silence may be used as evidence against him, absent an invocation of the privilege, it cannot be said that counsel was deficient for failing to object. And, as previously explained, counsel may have a variety of other tactical reasons to not object – i.e., to avoid highlighting unfavorable testimony, or, conversely, to use the testimony to his client's benefit.

2. Defendant's Supplemental Brief in Response to this Court's Inquiry.

In his opening brief, defendant claimed that “the State used Mr. Beiers' pre-arrest silence as substantive evidence of guilt.” Appellant's

Br. at 1, 7-18. Defendant's earlier briefing contained no argument whatsoever that the prosecutor commented on the defendant's post-*Miranda* silence. Now, apparently in an effort to avoid application of *Salinas* and *Magana* to his case, he claims that the defendant's silence was actually "post-arrest, post-*Miranda* silence." Appellant's Supp. Br. at 3. This change in position should be taken by this Court that the defendant concedes that, unless one of the exceptions listed in *Salinas* applies, the State may comment on a defendant's pre-arrest, pre-*Miranda* silence without offending the defendant's Fifth Amendment rights. As explained above, none of those exceptions apply.

This Court should reject the defendant's argument that the prosecutor commented on his post-*Miranda* silence because that argument has not been fully briefed to the court and is raised for the first time in his supplemental brief. *See In Re Pers. Restraint of Hall*, 163 Wn.2d 346, 350 n. 4, 181 P.3d 799 (2008); *see also State v. White*, 123 Wn. App. 106, 114 n.1, 97 P.3d 34 (2004) (declining to consider argument raised for first time in reply brief); RAP 10.3(c) (reply brief is limited to response to issues in the brief to which the reply brief is directed). If the Supreme Court declines to consider arguments made for the first time in supplemental briefing, and this Court declines to consider arguments made for the first time in a reply brief, then it should also decline to consider unsupported and

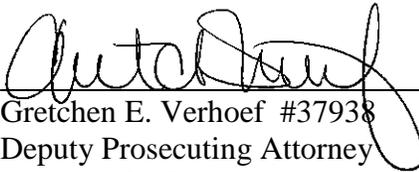
separate arguments made for the first time in a supplemental brief responding to a direct and specific inquiry from the court.

IV. CONCLUSION

The State respectfully requests that this Court deny defendant's claims pertaining to the allegedly improper use of pre-arrest, pre-*Miranda* silence. This situation was one where the defendant needed to invoke the privilege in order to later claim its protections, and, in any event, the prosecutor properly used the inconsistencies and omissions in defendant's statements as impeachment.

Dated this 23 day of October, 2017.

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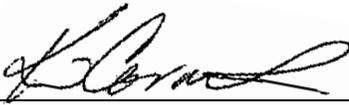
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on October 23, 2017, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Carl Hueber
ceh@winstoncashatt.com; crh@winstoncashatt.com

10/23/2017
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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