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Court of Appeals
Division III
State of Washington

34092-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES MICHAEL COMBS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the conviction for second degree assault.
2. The prosecuting attorney committed flagrant misconduct by commenting on Combs' exercise of his right to remain silent throughout his cross-examination of Combs and during his closing rebuttal argument.

II. ISSUES PRESENTED

1. Whether the State presented sufficient evidence proving that the defendant used unlawful force in committing the crime of second degree assault, in light of the evidence presented by the defendant that he acted to repel a trespasser from his property?
2. Whether the defendant has demonstrated any prejudice resulting from allegedly improper questions and argument made by the State where that evidence and argument was merely cumulative with other evidence, and where the defendant elicited the same evidence at trial?
3. Whether the State improperly commented on the defendant's right to remain silent when it inquired of the defendant on cross-examination and argued in rebuttal closing that the defendant refused to come out of his house because he did not want to be arrested, and used that evidence to impeach the defendant's credibility?

III. STATEMENT OF THE CASE

James Combs was charged in Spokane County Superior Court with the second degree assault of Joseph Doherty, occurring on or about March 2, 2013. CP 1.

Joseph Doherty was employed by Prince Telecom on March 2, 2013, as a subcontractor who disconnected Comcast cable services from individuals who failed to pay their cable bills. RP 82. In 2013, Mr. Doherty's job was to complete "hard disconnects" of a person's cable service; that is, his job was to disconnect the main cable line on the exterior of a person's property, so the person would not be able to receive free cable.¹ RP 82-83. He testified that he would be sent to complete a "hard disconnect" of a customer's cable service after two and a half to three months of the customer failing to pay for service. RP 84. A customer would first be notified by telephone call that their payments were delinquent, then the cable company would do a "soft disconnect" to let the person know they had not paid their bill, and then two weeks later, if the bill remained unpaid, Mr. Doherty would be sent to "hard disconnect" the cable. RP 84.

On March 2, 2013, Mr. Doherty was sent to 6720 North Regal, in Spokane, Washington, to disconnect the cable at the residence, and testified that, like any other utility or telecom professional, he was allowed on the property for this purpose.² RP 84. He wore his high visibility vest and drove

¹ Mr. Doherty testified that in 2013, a person could bypass a "soft disconnect," i.e., a shut-off of a customer's internal cable equipment, by simply unhooking the cable box and running a cable from the back of the television directly into the wall. RP 82-83. Since that time, Comcast has changed how it provides cable, such that a customer must now have operational equipment within his or her home to receive a cable signal. RP 83.

² Although the property was posted with "no trespassing signs," Mr. Doherty testified that he did not see the signs from the driveway in which he parked, and as a utility

a truck that was marked as belonging to Comcast/Prince Telecom. RP 85. He parked his truck at the residence, went to the back door and knocked a few times, without any response from within.³ RP 87-88. He “knocked again and then again,” and then proceeded to the north side of the house where the exterior cable box was located. RP 88.

Before Mr. Doherty cut the cable line, he was able to hear that the television was on inside the residence, and it sounded as though a basketball game was playing, even though the cable to the residence had already been subject to a “soft disconnect.” RP 89. Mr. Doherty opened the cable box and “tagged it” with a pink tag to demonstrate the cable was disconnected, and then “wire tied” the cable line to complete the disconnect process. RP 90. Mr. Doherty heard the television in the house go off. RP 90.

About the time that the cable was disconnected, Mr. Combs came out the back door of the residence, “one arming” the screen door with “intense” “lightning bolt” force. RP 90. Mr. Doherty then saw Mr. Combs “tak[e] his first swing with a baseball bat” toward Mr. Doherty’s face. RP 91. Mr. Combs yelled at Mr. Doherty that he was trespassing. RP 91.

telecom worker he was allowed on the property. RP 87. “When we have to access someone’s yard to disconnect their cable, we can access any yard we need to.” RP 109.

³ There was another door on the north side of the house that Mr. Doherty indicated did not appear to be used. He was unsure if he knocked on that door as well as the back door on March 2, 2013.

Mr. Doherty threw himself toward the ground to avoid the defendant's bat making contact with his face. RP 91-92. Mr. Combs took a "second full swing" of the bat at Mr. Doherty's face,⁴ at which time Mr. Doherty threw his clipboard at Mr. Combs, and identified himself as being from Comcast.⁵ RP 92. Mr. Doherty testified that if he had not moved, the bat would have connected with his head, and that he believed that he would have been killed as a result, or that he "would have been pretty messed up."⁶ RP 92-93.

Mr. Combs then stopped swinging the bat with "full swings" but continued to swing it with "quarter swings," and followed Mr. Doherty back to his Comcast truck. RP 93, 95. When Mr. Doherty reached his work truck, he called 911. RP 95; Ex. 1. Mr. Combs also called 911 twice. Ex. 1.⁷

⁴ Mr. Combs swung the bat as if he "was going for a home-run swing toward [Mr. Doherty's] face." RP 93.

⁵ "I told him that right as he's swinging on me, I'm Joe from Comcast, stop swinging that ... bat, stop swinging. I said it probably 20 times, as many times as I could say it." RP 117.

⁶ I thought I was going to die that day. If he wouldn't have stopped swinging that bat ... I thought he was going to kill me. If he would have swung one more time, I was going to eat that bat somewhere, in my arm or the clipboard or my face. I'd eat that bat if he kept swinging at me. There's nothing I could do, defense wise. Maybe by me yelling caught him off guard.

RP 94.

⁷ State's Supplemental Designation of Clerk's Papers and Exhibits, filed September 1, 2016, with the Spokane County Superior Court.

Deputies responded to the residence. RP 49. Deputy Chad Ruff interviewed Mr. Doherty. RP 48. Deputies attempted to make contact with Mr. Combs, knocking on several doors of the house, and other buildings on the property, but no one answered. RP 49. At some point, Ms. Jacqueline Smith, Mr. Combs' girlfriend, contacted Deputy Ruff and then made electronic contact with Mr. Combs, but he refused to come out of the residence.⁸ RP 50. Believing he had probable cause to arrest Mr. Combs, Deputy Ruff consulted with his sergeant to determine whether they would "write up a warrant for his arrest and get him another day" or whether he "posed a big enough threat" such that law enforcement should call SWAT to remove him from the home. RP 51. Ultimately, SWAT was not called. RP 51.

Ms. Smith testified on Mr. Combs' behalf. Ms. Smith and Mr. Combs had been in a dating relationship since 2008 and lived together. RP 154. She testified that on March 2, 2013, she and Mr. Combs were in bed watching television, getting ready to take a nap, when they heard a sudden banging on the wall like "someone [was] trying to rip the wall apart." RP 154. She said Mr. Combs jumped up, put his clothes on, took

⁸ Ms. Smith told Deputy Ruff that she was texting Mr. Combs; she confirmed that he was in the home but he was not going to come out. RP 51.

the bat and went outside. RP 157. She did not observe the incident between Mr. Combs and Mr. Doherty. RP 158.

Ms. Smith later spoke with law enforcement, who told her that all Mr. Doherty wanted was the cable box. RP 159. She testified that law enforcement threatened to call the SWAT team and “gas” the house if Mr. Combs did not return the cable box. RP 159.

Mr. Combs testified that on the date of the incident, the north wall of his leased residence “just started shaking like someone was pounding on it,” which was “very scary,” so he got up, got dressed, and grabbed a baseball bat, because he “thought somebody was going to rob the house or something.”⁹ RP 167, 177. He testified that he came around the corner of the house to see “a guy” and he stopped, because he “didn’t want to get any closer than he had to.” RP 168. Mr. Combs denied ever swinging the bat at Mr. Doherty, but agreed that he yelled at him to get off of his property. RP 168. Mr. Combs testified that he was “very scared and angry.”¹⁰ RP 169. He testified that Mr. Doherty looked at the bat and then took a step forward as if he was going to take it from him. RP 169. Mr. Combs said

⁹ Mr. Combs also testified that he never intended to assault Mr. Doherty, but that he armed himself with a bat because he was “afraid for [his] property and safety.” RP 174.

¹⁰ Mr. Combs also testified that he was trained in Taekwando, a defensive art for self-protection. RP 170-171.

that he (Mr. Combs) stepped back, at which point, Mr. Doherty identified himself as a Comcast representative, and “started to retreat.” RP 170.

After Mr. Doherty retreated to his work truck, Mr. Combs called 911. He testified that he was rude¹¹ to the 911 operator because he was “extremely afraid and angry because of the shaking on the wall.” RP 172. On cross-examination, Mr. Combs testified that when law enforcement arrived at his home, he did not come out to assist in the investigation because “[he] was really upset and [he] was already rude to the 911 operator, and just didn’t, [he] didn’t want to talk. That’s how upsetting it really was ... there was no reason to have contact. [He] just asked them to remove a trespasser.” RP 180-181.

¹¹ When the 911 operator asked Mr. Combs for his name, he responded, “You know who I am, you got my cell phone number.” Ex. 1, Track 2 at 0.37-0.39

When asked if he was armed with any weapons, Mr. Combs yelled, “Does it fucking matter ... get the motherfucker off my property. It doesn’t matter if I got weapons or not.” When asked to answer whether he was armed with any weapons, Mr. Combs yelled, “No, I’m not going to answer your question. I called you ... I’m your fucking boss. You hear me?” When told that the weapons question related to officer safety, Mr. Combs yelled, “I don’t care. Fuck officer safety. Get the motherfucker off my property.” Ex. 1, Track 2 at 0.53-1.13

When the operator asked Mr. Combs if he was in his house, he replied, “It doesn’t matter where I am...If I, if I want to, if I want to give you other information, I will fucking give it to you. I don’t need your help...Do you understand me? ... I’m your fucking boss, do you understand that? ... Don’t tell me I gotta answer a question. You don’t tell me I gotta answer anything. You understand me?” Ex. 1, Track 2 at 1.32-2.08

Mr. Combs also threatened a lawsuit for law enforcement’s “threat of extreme violence” against him “without probable cause” and reiterated his belief that the removal of the trespasser was a “very simple project.” Ex. 1, Track 3 at 1:07-2.43.

The jury was instructed with agreed upon instructions, RP 192, including the definition of assault in the second degree, and the law of defense of property. RP 198-200, 203-204; CP 191-208. The defense argued in closing that the defendant's use of a bat against a potential trespasser or burglar was reasonable, because "he didn't come out with a gun, he had a bat."¹² RP 227. The defense further argued that the defendant was only charged with assault for two reasons - he was rude to the 911 operator and he refused to come out and speak with police. RP 215-216. As to the defendant's second argument, he argued that there was no requirement for him to exit the house and speak with law enforcement, but that the defendant did not do so because:

He had received word that the police have now escalated this thing to a SWAT, I'm going to gas your house, whatever. This thing is blown out of proportion... There's a rational reason why he said, look it, I'm not going out there. I'm not going to talk to anybody at this point. So the police leave ... and they send a summons and complaint that he responded to.

RP 215-216.¹³

¹² The defense further argued that it was "very reasonable that Mr. Combs *showed* the bat, get off, and he used some "F" words and he in a very aggressive fashion, get off my property, get off my property, get off my property." RP 223 (emphasis added).

¹³ The defense also argued:

That's why we're here though, because he offended the police. There's nothing unlawful about not talking to the police, and that point where we're escalating now to the SWAT team and gassing the house, there's

Addressing the defendant's arguments that he was only charged with second degree assault because of his demeanor and refusal to exit his home at the request of law enforcement, the State responded in rebuttal closing:

We're not here because Mr. Combs wasn't nice to the dispatcher. We can't and we don't go to trial on that. We're here because Mr. Combs swung a bat at the Comcast guy who was disconnecting his Comcast feed. That's why we're here. No other reason. And this SWAT team thing and gas thing, Mr. Combs received a piece of paper in the mail that was a summons that said would you attend court on this date, you are ordered to do so. And that was the inception of this case. But Mr. Combs was probably scared and you know what, he was probably was, but it wasn't because of Mr. Doherty. It was an easy and clear reason why Mr. Combs didn't come out of the house and it wasn't because he was scared of Mr. Doherty. He's scared because he knew what he had done. And he can't swing a baseball bat on a telecom worker, natural gas worker, a phone line worker, that comes on your property because they're allowed to do so. That's their job...

So they're allowed to be there, they can't even have a trespass. Mr. Combs was scared. He was scared of getting into trouble. He didn't want to get arrested that night so he stayed in the house. He wouldn't come out, his girlfriend came out, he wouldn't come out, there was no way he was going to come out of that house because he knew and that's what that shows. He knew what he did was wrong and there was no way he was going to step out of that home. So that

a rational reason as to why he did not come out. It's not relevant to whether or not there was an assault.

RP 222-223.

left law enforcement to issue a summons to him, get a warrant for his arrest, maybe bring a higher use of force... [T]he sergeant said no. Send out a summons and get a warrant, and that's what happened.

...

There's no Mr. Combs task force, no one is out to get Mr. Combs. He got angry, he made a bad decision that day and he went after Mr. Doherty out of anger, and there's consequences for that.

RP 230-232.

The defendant was convicted as charged on November 10, 2015. CP 209. He was sentenced to a standard range sentence of twelve months and a day of incarceration, 18 months of community custody, and mandatory legal financial obligations totaling \$800, upon a joint recommendation of the parties. CP 237-240; RP 256-257. This joint recommendation on sentencing was made pursuant to an agreement reached on another criminal matter pending against the defendant, a charge of intimidation of a public servant, to which the defendant agreed to plead guilty in exchange for a sentence of 12 months in custody, to run concurrently with the second degree assault sentence. RP 257.

The defendant timely appealed.

IV. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT THE DEFENDANT COMMITTED SECOND DEGREE ASSAULT, AS IT PRESENTED SUFFICIENT EVIDENCE DISPROVING THE DEFENDANT’S CLAIM HE USED “LAWFUL FORCE” TO EJECT A “MALICIOUS” TRESPASSER FROM HIS PROPERTY.

Mr. Combs challenges the sufficiency of the evidence supporting his conviction for second degree assault. “The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.*

Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (this Court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

The State must disprove a self-defense or defense of property claim beyond a reasonable doubt, once properly raised by the defendant. *See, e.g., State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). However, because a challenge to the sufficiency of the evidence *admits* the truth of the State's evidence and all inferences that may be drawn from it, and because the weight and credibility of conflicting evidence is determined by the trier of fact, this Court is free to disregard any evidence presented by the Defendant at trial, and rely *solely* on the evidence favorable to the State to determine whether the State has shouldered this burden.

The jury was also free to disregard or find incredible the defendant's version of events and instead find that he confronted the Comcast representative because he was angry that his cable was disconnected. The jury was likewise free to determine Mr. Doherty's testimony to be credible - that Mr. Combs swung the metal bat at his head twice, rather than Mr. Combs' testimony that he merely showed Mr. Doherty the bat and told him to get off his property. The jury was able to listen to the 911 calls placed by both men immediately after the incident, and use those calls to assess the credibility of the testimony given by those witnesses at trial. Ex. 1. The testimony of Mr. Doherty, in and of itself, not only satisfied the State's burden of proof for second degree assault, but also satisfied the State's burden of proving Mr. Combs did not act in defense of his property. *See State v. Flett*, 98 Wn. App. 799, 805, 992 P.2d 1028 (2000) (witnesses' testimony that they did not threaten their attacker sufficient for a first degree assault conviction when defendant suggested that he shot at them in self-defense). Furthermore, Mr. Doherty's testimony, in combination with Mr. Combs' demeanor during his 911 telephone call and his own trial testimony that he was angry during the incident, established, beyond a reasonable doubt, that he did not act with lawful, reasonable force in defense of his property.

Additionally, the defendant argues that the State was required to substantiate Mr. Doherty's right to enter onto the defendant's property at trial, in light of the ability of a property possessor to exclude others from his or her property. Appellant's Br. at 7. This argument is not well taken because, even assuming that Mr. Doherty was a trespasser on Mr. Combs' property, the testimony presented demonstrated he was not a *malicious trespasser*, an element of the defense that the State must disprove beyond a reasonable doubt. *State v. Bland*, 128 Wn. App. 511, 116 P.3d 428 (2005).

The jury was properly instructed as to the "defense" to second degree assault - the use of lawful force. CP 203-205. It was twice instructed that the State must prove the use of "unlawful" force beyond a reasonable doubt. CP 198, 203. The jury was instructed when force is lawfully permitted, i.e., to prevent or attempt to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than necessary. CP 203. The jury was also instructed that the force used to prevent or attempt to prevent a malicious trespass or interference with property must be such that a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration of all the facts and circumstances known to the person at the time of and prior to the incident. CP 203. These instructions comport with Washington

law, and the defendant has not assigned error to these instructions, nor could he, because he affirmatively voiced no objection to them at trial. RCW 9A.16.020(3); RP 192.

Therefore, even assuming that Mr. Doherty was a trespasser and the jury believed him to be such, no reasonable jury could find that his actions fit with the definition of “malicious trespass” as there was no evidence demonstrating an “evil intent, wish or design to vex, annoy or injure another person.” RCW 9A.04.110(12); WPIC 2.13; CP 205. The evidence showed that Mr. Doherty was *only* present on Mr. Comb’s property, acting within the course and scope of his employment, for the purpose of disconnecting the cable wiring to Mr. Combs’ house, such that Mr. Combs could no longer unlawfully receive cable service without paying for it. The jury heard the testimony of Mr. Doherty, who believed he had authority to be on Mr. Combs’ property because of the nature of his employment and that he did nothing to Mr. Combs’ property *but* knock on the doors and disconnect the cable. From this evidence, a reasonable jury could find that Mr. Doherty was not a *malicious* trespasser beyond a reasonable doubt. Thus, under the instructions given, the jury could also find, beyond a reasonable doubt, that the State had met its burden of proving that the force used was unlawful.

Additionally, the jury was confronted with determining whether the force Mr. Combs used in defending his property was such force as was

necessary and reasonable. CP 203-204. The jury could have concluded beyond a reasonable doubt that *even if* Mr. Combs had been afraid of the banging on the wall of his house, intentionally swinging a metal baseball bat (twice) at the head of a man who was standing outside at the external cable box, wearing a work utility vest, and carrying a clipboard, was force that no reasonable person would use under those circumstances. As argued above, the degree of force used by Mr. Combs in response to the perceived threat is exceedingly disproportional, and the jury could have found, beyond a reasonable doubt, that this force was neither necessary nor reasonable; thus, on this issue, the jury could also have found that the State overcame its burden of proving that the force used by the defendant was “unlawful.”

The State presented sufficient evidence for the jury to conclude, beyond a reasonable doubt, that Mr. Combs did not act in defense of his property, and additionally, it presented sufficient evidence for the jury to find, beyond a reasonable doubt, that Mr. Combs committed second degree assault by swinging a metal baseball bat at Mr. Doherty’s head. The jury in Mr. Combs’ case is presumed to be a reasonable fact finder, and is presumed to follow the court’s instructions, and deference should be given to its decision. This court should not reweigh the evidence or substitute its judgment for that of the jury. Therefore, this Court should not disturb the jury’s verdict finding Mr. Combs guilty of second degree assault.

B. THE DEFENDANT’S CLAIM OF PROSECUTORIAL MISCONDUCT FAILS BECAUSE IT WAS UNPRESERVED; FURTHER, THE STATE HAD TO DISPROVE THE CLAIM OF MALICIOUS TRESPASS AND WAS ENTITLED TO IMPEACH DEFENDANT’S CREDIBILITY, AND REBUT THE ARGUMENT THAT HE WAS CHARGED WITH A CRIME ONLY BECAUSE HE DID NOT COOPERATE WITH POLICE.

To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). When, as here, the defendant fails to object at trial to the challenged conduct, he or she waives the misconduct claim unless the argument was so “flagrant and ill[-]intentioned” that “no curative instruction would have obviated any prejudicial effect on the jury.” *Id.* (quoting *Thorgerson*, 172 Wn.2d at 455.) However, “reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. ‘The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial.’” *Id.* at 762.

Defendant concedes that the error was unpreserved, Appellant's Br. at 8, but alleges that that the misconduct was flagrant and ill-intentioned. However, the defendant does not argue or explain how the argument made by the State at trial was so improper or inflammatory that a curative instruction would not have obviated any prejudicial effect on the jury. Rather, he merely concludes that, because this case hinged on the credibility of Mr. Doherty and Mr. Combs, the defendant must have been prejudiced by the State's argument. In making this blanket assertion, the defendant ignores the fact that the record is replete with references to the defendant's unwillingness to communicate with law enforcement and his unwillingness to exit his home, either introduced by the State without objection at trial (and upon which no error is now assigned) or, introduced and explained by the defendant. As such, the defendant's argument fails, because he cannot show prejudice.

1. The record demonstrates that error, if any, in the State's questions and argument, was merely cumulative or invited, and therefore, the defendant is unable to demonstrate prejudice.

The record is brimming with references to the defendant's refusal to come out of his house when requested by law enforcement, and by his refusal to answer any questions. By Mr. Combs' own statements to 911, he refused to give any answers to the dispatcher's questions and refused any law enforcement contact. Ex. 1. He also demanded that law enforcements'

lawyer talk to his lawyer. Ex. 1. At trial, Mr. Combs, through his attorney, agreed to the admission of the 911 recording. RP 37.

During Deputy Ruff's direct examination, he never testified about the defendant's silence, but rather testified regarding his refusal to exit the house. RP 49. The defense did not object to any of Deputy Ruff's testimony on this point. RP at *passim*. Deputy Ruff testified that Ms. Smith told law enforcement that Mr. Combs was inside the home and was not going to come out; this testimony was also admitted without objection. RP 51.

On cross-examination, defense counsel asked Deputy Ruff whether Mr. Combs had a "legal obligation" to "talk" with law enforcement. RP 66. Defense counsel also elicited testimony from Deputy Ruff that he was "made aware ... that [Mr. Combs] was rude and obnoxious with one of the 911 operators" and that Mr. Combs "[made] some sort of statements that didn't seem like he wanted to cooperate with our investigation and that he wasn't going to come out and talk with us." RP 67.

During redirect examination, Deputy Ruff reiterated that Mr. Combs had no obligation to come out of his home and speak with law enforcement. RP 77. The prosecutor then asked him if he wanted to speak to Mr. Combs because he wanted his "side of the story." RP 78. Deputy Ruff answered in

the affirmative, and the defense objected on relevancy grounds.¹⁴ RP 78. The State moved on from that line of questioning. RP 78-79.

This was the only occasion that the defense attorney objected to any of the testimony presented by the State during its case-in-chief regarding the defendant's refusal to exit his home and cooperate with the investigation. Defense counsel did not request any curative instruction. On the contrary, defense counsel *again* raised the issue on re-cross, reiterating that an individual does not have to speak to police, and that is what happened in this case. RP 80.

Defense witness, Jacqueline Smith, testified in response to defense counsel's questioning that Mr. Combs never came out of the house and that she was told, if he did not come out, SWAT would be called or law enforcement would be sent into the house. RP 159.

Mr. Combs testified on his own behalf. On direct examination, Mr. Combs' attorney re-raised the issue of Mr. Combs' 911 call, in which Mr. Combs directed the 911 operator to have law enforcement's lawyer talk to his lawyer. RP 174. As stated above, the 911 calls were admitted without

¹⁴ Mr. Nollette: Objection, ask that be stricken.

You know, he had a right not to come out and talk with the deputy and that's the end of it. He's trying to infer stuff that isn't relevant to the case.

RP 78.

objection by the defense, and Mr. Combs reiterated those facts during his direct examination.¹⁵

On cross-examination, the prosecutor asked the following questions of Mr. Combs, to which the defendant now ostensibly¹⁶ assigns error:

Q: And then you went back into your house and talked to 911?

A: Yes.

Q: And you were still scared?

A: Absolutely.

Q: So the police is [sic] there, they show up, you knew the police was [sic] there and you got a call from the Sheriff's Department?

A: Yes.

Q: But you didn't pick up?

A: Yes.

Q: And so you called them back?

A: Yes.

Q: And said you didn't want to have contact?

¹⁵ As argued below, it can be inferred this was a tactical decision to demonstrate the defendant's theory of the case, i.e., he was only charged because he was uncooperative.

¹⁶ The defendant's argument as to the impropriety of the questions asked by the State on Mr. Combs' cross examination is unspecific. The defendant assigns error to the State's "repeated confront[ation of] Combs about the fact that he refused to leave his house to talk to police when they arrived," Appellant's Br. at 8, but does not specifically address which questions or answers amounted to an unconstitutional comment on the exercise of the defendant's right to remain silent.

A: I believe that was it, yeah, that's...

Q: Okay. And so, but you called the police to remove what you call was a trespasser on your property?

A: Yes.

Q: But you wouldn't come out and speak with the police?

A: Right.

Q: But you definitely wanted to talk to the police?

A: Yes, he was simply trespassing.

Q: Sure. You thought -- you wanted to talk to the police and said you had a trespasser.

A: Right.

Q: But when the police showed up to investigate what happened you wouldn't come out?

A: That's correct.

Q: Why wouldn't you come out?

A: Well, like I told him on the 911 I was really upset and I already apologized. I was already really rude with the operators because I was in shock when you're laying in bed for this to happen.

MR. KUHLMAN: I understand that, Mr. Combs.

MR. NOLLETTE: Judge, he's interrupting. He was answering the question and now he's interrupting.

THE COURT: Go ahead and answer the question.

THE WITNESS: Thank you.

A: So I was really upset and I was already rude to the 911 operator and just didn't, I didn't want to talk. That's how upsetting it really was. It's hard to describe it but it's a tiny little house and you think somebody is breaking into your house and you're extremely afraid.

Q: (By Mr. Kuhlman) I understand, Mr. Combs, but officers were knocking on your door, correct?

A: Yes.

Q: Officers were calling you?

A: Yes.

Q: And it was your understanding that you did nothing wrong, you were just getting a trespasser off your property?

A: That's correct.

Q: But you wouldn't come out and speak to law enforcement?

A: That's correct. There was no reason to have contact. I just asked them to remove a trespasser.

Q: So you held up in your house?

A: I was inside the house.

Q: And you refused to come out?

MR. NOLLETTE: Judge, objection.

THE COURT: Yes.

MR. NOLLETTE: Argumentative, asked and answered.

THE COURT: Overruled.

Q: (By Mr. Kuhlman) So were you held up in your house, you refused to come out, and when you spoke with 911 you told them that you were the boss?

A: I did.

Q: And that if you want them to know anything else you will tell them?

A: Yes.

Q: And they don't need to talk to you, isn't that what you said?

A: Probably what I said, yeah.

Q: And that you don't care about answering questions with officer safety?

A: That's what I said.

Q: Because you were the boss.

MR. NOLLETTE: Objection, argumentative.

MR. KUHLMAN: It's cross.

THE COURT: Go on, if you would.

MR. KUHLMAN: Thank you, Your Honor.

RP 179-182.

On redirect examination, Mr. Combs again testified that he did not come out of his house because he was "very scared" of his belief that the

“police [were] going to SWAT team [him] and gas [him] for Comcast boxes.” RP 184.

The State did not raise the issue in its first closing argument. RP at *passim*. However, defense counsel argued in closing that Mr. Combs was charged with a crime *solely* because he was uncooperative with police and rude to the 911 operator. RP 216-216, 222-223. It was not until the State’s *rebuttal* closing that the State made *any* mention or argument regarding the defendant’s failure to exit his home at law enforcement’s request.

We’re not here because Mr. Combs wasn’t nice to the dispatcher. We can’t and we don’t go to trial on that. *We’re here because Mr. Combs swung a bat at the Comcast guy who was disconnecting his Comcast feed. That’s why we’re here. No other reason.* And this SWAT team thing and gas thing, Mr. Combs received a piece of paper in the mail that was a summons that said would you attend court on this date, you are ordered to do so. And that was the inception of this case. *But Mr. Combs was probably scared and you know what, he was probably was, but it wasn’t because of Mr. Doherty. It was an easy and clear reason why Mr. Combs didn’t come out of the house and it wasn’t because he was scared of Mr. Doherty. He’s scared because he knew what he had done.* And he can’t swing a baseball bat on a telecom worker, natural gas worker, a phone line worker, that comes on your property because they’re allowed to do so. That’s their job...

So they’re allowed to be there, they can’t even have a trespass. *Mr. Combs was scared. He was scared of getting into trouble. He didn’t want to get arrested that night so he stayed in the house. He wouldn’t come out, his girlfriend came out, he wouldn’t come out, there was no way he was going to come out of that house because he knew and that’s what that shows. He knew what he did was wrong and there*

was no way he was going to step out of that home. So that left law enforcement to issue a summons to him, get a warrant for his arrest, maybe bring a higher use of force... [T]he sergeant said no. Send out a summons and get a warrant, and that's what happened.

...

There's no Mr. Combs task force, no one is out to get Mr. Combs. He got angry, he made a bad decision that day and he went after Mr. Doherty out of anger, and there's consequences for that.

RP 230-232 (emphasis added).

The comments that the State made during its closing were aimed at explaining why Mr. Combs did not want to exit his house, rather than why he did not want to talk to police or answer their questions. The State clearly argued that Mr. Combs did not exit his home because of his prior actions toward the Comcast employee, and he did not want to be arrested that day.

The defendant fails to explain on appeal how the few questions asked of him during cross-examination or the argument made in the State's rebuttal closing prejudiced him in light of the other evidence presented to the same effect, i.e., the defendant's own 911 call, and the other testimony not objected to by him that touched on his right to not speak with police, and the fact that he refused to exit his home when requested. Even assuming the State acted with impropriety in asking the questions or making the arguments now challenged on appeal, those questions and arguments were merely cumulative with the other evidence adduced at trial, and therefore,

it was harmless. *See, e.g., State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008) (“Evidence that is merely cumulative of overwhelming tainted evidence is harmless.”)

Furthermore, because the defendant elicited some of the same testimony and agreed to the 911 recording’s admissibility, the error, if any, was invited. *See, e.g., In Re Pers. Restraint of Copeland*, 176 Wn. App. 432, 309 P.3d 626 (2013) (“A party may not set up an error at trial and then complain of it on appeal ... To determine whether the invited error doctrine is applicable to a case, we may consider whether the petitioner ‘affirmatively assented to the error, materially contributed to it, or benefitted from it.’” (Internal citations omitted)). Mr. Combs attempted to benefit from his refusal to come out of his home and speak with police, because those facts were the foundation of his argument that he was criminally charged with assault solely because he was uncooperative.

Because the challenged questions and argument were merely cumulative with other evidence, and the error, if any, was invited, and because the defendant has failed to demonstrate how a curative instruction could not have remedied any alleged prejudice that may have resulted from the claimed errors, his argument fails.

2. Viewing the record as a whole, the prosecutor's questions and argument were not improper because (1) it is not improper to argue that a defendant's actions, rather than silence, evidences a consciousness of guilt, and (2) the arguments were made in rebuttal of the defendant's claim he was defending his property, and were proper impeachment.

The Fifth Amendment of the United States Constitution provides, in part, that no person “shall be compelled in any criminal case to be a witness against himself.” In a similar provision, article I, section 9 of the Washington Constitution reads in part: “[n]o person shall be compelled in any criminal case to give evidence against himself.” Washington courts give the same interpretation to both clauses. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). The State cannot portray the exercise of this right as substantive evidence of guilt. *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002). “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.” *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).¹⁷

However, despite this rule, the introduction of nontestimonial evidence, such as physical evidence, demeanor, and conduct, is

¹⁷ In *Lewis*, the Washington Supreme Court reviewed a prosecution for rape and assault of two different women. 130 Wn.2d at 701. There, an officer testified that he told the defendant “that if he was innocent he should just come in and talk to me about it.” *Id.* at 706. The officer did not refer to appointments the defendant made and broke. *Id.* at 704. The court held that the officer’s statement did not constitute an improper comment on the defendant’s silence. *Id.* at 705–06.

permissible. *Easter*, 130 Wn.2d at 243. It is also acceptable for the State to inquire and argue that the defendant's *conduct* manifests a consciousness of guilt where the evidence allows for such a reasonable inference. *See, e.g., State v. Freeburg*, 105 Wn. App. 492, 497-498, 20 P.3d 984 (2001) ("Evidence of flight is admissible if it creates 'a reasonable and substantive inference that the defendant's departure from the scene was an instinctive or impulsive reaction to consciousness of guilt or was a deliberate effort to evade arrest and prosecution.' Actual flight is not the only evidence in this category; evidence of *resistance to arrest*, *concealment*, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime." (Emphasis added)).

Here, the State did not act improperly in inquiring into the reasons that the defendant physically remained in his home when law enforcement requested he come out, or in arguing that such conduct evidenced a consciousness of guilt. In closing argument, it is of note that the prosecutor did not mention the fact that the defendant refused to talk to police. Rather, the State simply argued that the defendant was scared of getting into trouble, and that was the reason that he would not exit his house. There is no impropriety in the State making such a statement where, as here, it is a logical inference from the evidence presented at trial.

Additionally, it is of note that the defendant was not initially “silent.” He called 911 to report a claim of trespass on his property and to seek law enforcement’s aid in ejecting the alleged trespasser. However, when 911 began asking questions that he did not want to answer, he became rude and belligerent; in his own words, he did not have to answer the questions because he was “the boss,” and the ejection of a “trespasser” from his property was a “very simple project.” Ex. 1. This evidence was introduced by the State without objection, and it bears directly on the reliability of his trespass report and argument, which, as discussed above, the State had to disprove beyond a reasonable doubt. The prosecutor had the obligation to rebut the defendant’s claim that he was the victim of a malicious trespass, and without the ability to inquire into the defendant’s demeanor with the 911 operator, and his lack of cooperation with investigators, the State would not have been able to effectively do so.

Furthermore, it is not improper to impeach a testifying defendant with his pre-arrest refusal to cooperate with a police investigation, initiated, in part, by his own telephone call.

Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-

examination. But this is a choice of litigation tactics. Once a defendant decides to testify, the interests of the other party and regard for the function of the courts of justice to ascertain the truth become relevant, and prevail and the balance of considerations determining the scope and limits of the privilege against self-incrimination.

Jenkins v. Anderson, 447 U.S. 231, 238, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

The defendant's testimony and argument in closing that he was charged with a crime "because he offended the police" and there was a "rational reason as to why he didn't come out" of his home because the situation escalated to the use of the SWAT team,¹⁸ RP 222-223, opened the door for the State to impeach that testimony and provide a logical alternative explanation as to why Mr. Combs was charged with a crime, and to posit another reasonable explanation why he failed to exit his house when requested to do so. The defendant's argument fails because the State did

¹⁸ Defense counsel also characterized law enforcement's actions as excessive:

The next issue is have your lawyer call my lawyer with an understanding, I've already said, with the understanding that at that point the SWAT or gas or all Ruby Ridges.

Mr. Kuhlman: Objection.

The Court: I'll direct the jury to disregard that comment. Go on Mr. Nollette.

Mr. Nollette: The Ruby Ridge?

The Court: Yes.

RP 228.

not act improperly during its questioning of the defendant or during its rebuttal closing argument.

V. CONCLUSION

The State's evidence was sufficient to prove that the defendant not only committed the crime of second degree assault, but also to disprove that he was acting with lawful force. The State proved that Mr. Doherty was not a malicious trespasser, and that the use of force by Mr. Combs to repel Mr. Doherty (assuming he was a trespasser) was unreasonable. Simply put, the jury believed Mr. Doherty and disbelieved Mr. Combs. Because credibility determinations are left to the trier of fact, the jury's decision should remain undisturbed on appeal.

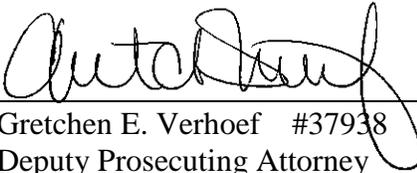
Additionally, the prosecutor did not engage in misconduct in inquiring why the defendant refused to exit his home at the request of law enforcement or in arguing that this conduct evidenced a consciousness of guilt. These questions and argument did not bear upon the defendant's exercise of his right to remain silent, but rather rebutted the arguments made by the defendant at trial and impeached his credibility in reporting that he was the victim of the crime of trespass. Furthermore, as the defendant has conceded, the error was not preserved, and the defendant has failed to demonstrate, in light of the other evidence that was introduced at trial, any

prejudice resulting from the State's questioning or argument involving his refusal to exit his home.

Therefore, the State respectfully requests that this Court affirm the trial court and jury verdict.

Dated this 7 day of September, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES MICHAEL COMBS,

Appellant.

NO. 34092-9-III

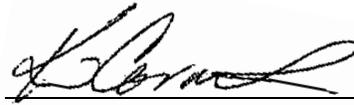
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 7, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
Andrea@BurkhartandBurkhart.com

9/7/2016
(Date)

Spokane, WA
(Place)



(Signature)