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Division III
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NO. 36633-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JAIME MUNGUIA ALEJANDRE, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

- A. Should this court deny review of Alejandro's prosecutorial misconduct claim because Alejandro explicitly waived any claim of misconduct on the record?
- B. Did the prosecutor comment on Alejandro's right to remain silent where the prosecutor's question, "Did the defendant want to speak to you?" was quickly objected to and sustained before the sergeant answered?
- C. Has Alejandro failed to show any prejudice resulting from the prosecutor's unanswered question where there was no testimony or argument that Alejandro refused to talk with the police, nor any statement that silence should imply guilt?
- D. Could a rational trier of fact have found that the victim and defendant were spouses beyond a reasonable doubt because of the overwhelming and uncontroverted testimony referring to them as husband and wife?

II. STATEMENT OF THE CASE

On the morning of June 2, 2017, Maria Gonzalez's children woke up to find their mother missing. RP 83, 102-3. The children found a bloody mattress in their parents' bedroom and what remained of their mother's body in a fire pit behind their home. RP 107, 111, 148-50. Their mother's skull was burned beyond recognition. RP 382. Soon thereafter, their father, Jaime Munguia Alejandro, was charged with the following crimes: 1) second degree murder, 2) unlawful disposal of human remains, and 3) alien in possession of a firearm. CP 17-8.

The State also alleged that Alejandro committed the first two crimes against a family or household member. *Id.* For the crime of second degree murder, two aggravating factors were also alleged. CP 17. The State alleged that the crime involved domestic violence and occurred within the presence, sight, or sound of the victim's or the offender's minor children. *Id.* The State also alleged that the crime involved a destructive and foreseeable impact on persons other than the victim. *Id.* Count three was bifurcated from the other two counts and ultimately dismissed on the State's motion after guilty verdicts were returned on the other counts. CP 787, 790.

The convictions were based on the following facts elicited at trial:

On the evening of June 1, 2017, Alejandro was very drunk and fidgety. RP 93. He was laughing like a little kid. RP 93. His oldest daughter, M.A., who was 17 years old, was doing her homework in the living room, but he was turning the light on and off. RP 94. She told him to go to sleep. RP 94. He said, "you guys are always planning something against me." RP 95. She asked him what he meant and told him he was drunk and to go to sleep. RP 95. Her mother went into the bedroom with him and M.A. heard them arguing. RP. 95. M.A. testified that her parents always argued about their relationship or money and that on this evening,

it was about money. RP 95. At the time, Alejandre was behind in rent for the month of May. RP 592-93.

M.A. continued to do her homework and at one point, she heard a big thud that sounded like a body fall. RP 95, 97. She ran to her parents' bedroom and knocked on the door. RP 97. She said, "What's going on? Open the door." RP 97. Her father told her he was going to take a shower and not to open the door. RP 98. The home at the time had no running water. RP 98. M.A. also heard a little click in the closet, which contained her father's rifle. RP 98. She asked her father to leave her the car keys for work the next day and went back to her homework. RP 99.

When M.A. woke up, she texted her father about the keys but he did not respond. RP 101. She went back to sleep and waited for her mother to wake her up. RP 101. When she woke back up, her 5-year-old sister was sitting with her 1-year-old sister on the couch. RP 83, 102. Her older brother, Manuel Alejandre, was home, but her other siblings had left for school already. RP 101, 146. Manuel worked with his father at Carpenter Ranch and they typically drove together to work.¹ RP 141. When Manuel woke up, he tried to call his father to see where he was but there was no answer. RP 146.

¹ The State will use first names of witnesses to avoid confusion where multiple witnesses have the same last name. The State intends no disrespect.

M.A. and Manuel looked for their mother and could not find her. RP 103. M.A. saw her mother's purse in the laundry room and her shoes on top of the laundry. RP 106. M.A. looked in her parents' bedroom and it looked really odd to her because the thick blanket they slept with was gone and it looked really clean. RP 104.

M.A. called her father and asked him, "Where's mom?" RP 105. He replied that he did not know. RP 105. M.A. asked him, "How do you not know where she is?" RP 105. He said that maybe someone picked her up. RP 105. He told her he had to go and hung up. RP 105.

Manuel pulled up his parents' mattress and saw pools of blood underneath it. RP 148. He pointed this out to M.A. and they both started to cry. RP 107-8. M.A. tried to keep her 5-year-old sister from looking at the blood. *Id.* M.A. drove to her neighbor's house to drop off her younger sisters. RP 107-9. Her neighbor, Esperanza Sanchez, would watch the girls and was the godmother of the youngest girl. RP 45, 47, 53. M.A. told her neighbor about the blood that was found on the bed. RP 48.

Mrs. Sanchez tried to call Alejandro more than once, but he did not answer. RP 49. She kept trying and he eventually answered. RP 49. She told him that they were looking for Maria and were worried about her. RP 49. Alejandro told her that Maria was fine, and that she had just left with her lover. RP 50.

Mrs. Sanchez told her husband, Rafael, that Maria Gonzalez was missing and that the girls were worried. RP 61. Mr. Sanchez also called Alejandro and asked what happened to Maria. RP 61-62. Alejandro told him to quit looking for her because they probably were not going to find her because she had left with another man. RP 62. Mr. Sanchez asked him why he was working when his kids were worried, and Alejandro said he had to work. RP 62.

On the way back from dropping off the girls with Mrs. Sanchez, M.A. saw smoke coming from a piece of land next to her house. RP 109. When she opened the window, it reeked of meat. RP 110. Manuel also saw something burning outside and smelled burning flesh. RP 149-50. M.A. called Mrs. Sanchez and described what they found outside, and she told M.A. to call the police. RP 50. Manuel called the police at 9:05 a.m. RP 641.

M.A. walked with Manuel to the fire. RP 110. They saw what looked like a body in the fire pit. RP 111. Shortly thereafter, the Yakima County Sheriff's Office responded to the crime scene and contacted Manuel and M.A., who were shocked and visibly shaken. RP 226, 639, 642-3. When officers arrived, the fire was still burning, and there was smoke coming from it. RP 225, 705. Earlier in the morning, around 5:30

a.m., a driver passing by saw three- to five-foot-high flames and smoke coming from the fire pit. RP 172, 174.

When deputies looked in the fire pit, they could see bones including femur bones sticking out of it. RP 196, 225-6. Deputy Eric Wolfe lifted a body out of the fire pit and found a skull that was burned beyond recognition. RP 204, 382. The bones were identified as human bones. RP 227, 250. Later, dental x-rays of the remains were matched to the known dental x-rays of Maria Gonzalez. RP 375.

Deputies went to Alejandro's workplace, but he was not there. RP 228. His foreman, Jose Perez, testified that Alejandro arrived late to work on June 2 and that his son, Manuel did not show up to work as scheduled. RP 622, 628. They were supposed to arrive at 5 a.m. but Alejandro did not arrive until after 6 a.m. RP 622-3, 628. The assistant foreman, Luis Arias, testified that Alejandro would normally drive Manuel to work. RP 627. Mr. Perez told Alejandro to go home because his brother was trying to contact him. RP 624. Alejandro left work between 10 and 10:30 a.m. RP 629.

Because nobody knew where Alejandro was, M.A. called him at 12:13 p.m. and made up a story about her sister being sick. RP 114, 116. Her father said he would be home. RP 115-6. At around 12:30 p.m., deputies located Alejandro's truck, stopped it, and took Alejandro into

custody. RP 208, 213, 230. They collected the shirt Alejandro was wearing. RP 345.

The Washington State Patrol Crime Lab was called to assist with the investigation. Forensic scientist Elizabeth Schroeder, along with Deputy Wolfe and Sergeant Mike Russell, found a significant amount of blood in the master bedroom between the mattress and box spring. RP 200, 289, 454. The blood was still wet. RP 454, 461. The staining on the mattress tested positive for blood. RP 453, 461. Ms. Schroeder concluded that the blood was consistent with someone being injured near the bed and laying there bleeding for a period of time before the mattress was flipped over. RP 461, 463. Detective Sergio Reyna also found a rifle in the master bedroom closet. RP 317-19.

In addition, Ms. Schroeder saw spatter bloodstains on the drapes and transfer bloodstains on the window and walls of the master bedroom. RP 455-56. Ms. Schroeder testified that bloodstains on the inner surface of the window frame were indicative of being deposited when the window was open or by someone opening the window with blood on them. RP 456-7. Ms. Schroeder, along with Sheriff's detectives, observed blood smears and blood drops outside of and below the master bedroom window, and a blood trail from the master bedroom to the fire pit. RP 289, 321, 446-7, 691-2. There were also blood drops on the grass, damaged irises

below the bedroom window, and a blood smear on an outside telephone box. RP 443, 446, 691-2. Based on what they found, Ms. Schroeder concluded that the victim's body was carried out of the master bedroom and carried to the fire pit. RP 462, 464.

Another forensic scientist, Trevor Chowen, examined the shirt Alejandro was wearing and found two areas of staining that tested positive for blood and matched Maria Gonzalez's DNA profile. RP 551, 584. Other areas tested positive for the victim's DNA as well, including 1) a stain on the ground below the master bedroom window, 2) a stain on the interior of the master bedroom window, 3) a stain on the telephone box, 4) a stain on the master bedroom mattress, and 5) a swab from the barrel of the rifle found in the master bedroom. RP 557, 562-4, 568-9.

Forensic pathologist Jeffrey Reynolds performed the autopsy of Maria Gonzalez. RP 386-9. He concluded that she had a fatal depressed skull fracture that would have rendered her unconscious instantly and would have resulted in a lot of blood. RP 304, 396, 398, 401, 405. He opined that her skull fracture could have been caused from the butt of the rifle. RP 396, 398. He did not know if she sustained additional trauma because there was little soft tissue left of her body. RP 409. He also concluded that she would have died within minutes from her skull being fractured and was already dead before being set on fire. RP 409-410.

The State also called Erica Gonzalez. She testified that she met Alejandro at a casino in April or May of 2017. RP 594, 596-7. They exchanged 414 text messages between each other. RP 662. Alejandro told her he lived alone and asked her out. RP 596, 598, 600. She decided not to answer him. RP 599. He never mentioned to her that he had a wife. RP 600.

During the State's case, the defense made a motion for a mistrial based upon a question the prosecutor asked Sergeant Russell. Sergeant Russell had just testified that Alejandro was taken into custody and read his *Miranda* rights. RP 288. The prosecutor asked, "Did the defendant want to speak to you?" The defense objected and the objection was sustained. RP 288. The prosecutor moved on to an unrelated subject, the initial walk-thru of Alejandro's residence. RP 288.

The defense later moved for a mistrial, claiming that the State impermissibly commented on Alejandro's right to remain silent. RP 296-99. The defense informed the court that they were not accusing the prosecutor of misconduct. RP 299. The State argued that the questioning was a brief exchange that was immediately addressed and corrected by the court. RP 303. The trial court denied the motion for mistrial and ruled that the question

was not a comment on Alejandro's right to remain silent and offered the defense a curative instruction. RP 305-6.

The defense later renewed the motion for a mistrial before the State rested. The Court again denied the motion and offered a curative instruction, which the defense declined. RP 715, 724.

The defense also decided not to propose language on the right not to testify. RP 717, 724. The defense stated that the reason for not doing so was because "...the jury does not know the defendant did not make a statement" and that "[a]ny instruction given would tell them he didn't make a statement, which would be a problem." RP 724.

Alejandro did not testify or call any witnesses at trial. RP 721. He was convicted of second degree murder and unlawful disposal of human remains. CP 121-22. By special verdicts, the jury also found that murder was an aggravated domestic violence offense and involved a destructive and foreseeable impact on persons other than the victim. CP 124-25.

At sentencing, Alejandro renewed his motion for a new trial and it was denied. RP 808, 811. He also moved to strike the domestic violence aggravator, arguing that there was never any information presented in the trial that Alejandro and the victim

were “formally, legally married under Washington state law.” RP 812. The State argued that there was sufficient evidence that the two were spouses and that a reasonable jury could find that they were spouses. RP 816. The court denied his motion to strike the aggravator. RP 816-17. Alejandre was sentenced to 220 months as a base sentence for the murder, plus 110 months for the aggravating circumstances, and 90 days on the gross misdemeanor, unlawful disposal of remains. RP 132.

Alejandre now timely appeals.

III. ARGUMENT

A. This court should deny review of Alejandre’s prosecutorial misconduct claim because Alejandre explicitly waived any claim of misconduct on the record.

In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Alejandre must show that the prosecutor’s conduct was improper and prejudiced his right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). However, failure to object to an allegedly improper remark constitutes waiver unless the remark is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *In re Pers. Restraint of Sandoval*, 189 Wn.2d 811, 832, 408 P.3d 675, 687 (2018).

In this case, there was more than simply a failure to object. The defense specifically stated on the record that they were not raising a claim of prosecutorial misconduct. The following exchange took place between the court and the defense during the hearing on the motion for a mistrial:

THE COURT: All right. Well, it's Mr. Crawford that's being accused of misconduct. Go ahead, Ms. Wright.

[Defense Counsel]: You Honor, just very technically, we are not accusing anyone of misconduct at this stage. What I'm saying is the state impermissibly commented on my client's right to remain silent.

RP 299. The defense now raises a claim of prosecutorial misconduct for the first time on appeal. As such, this court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a).

Furthermore, even if the court were to consider this issue, the prosecutor's question was not "flagrant and ill-intentioned" misconduct and did not prejudice the defendant. The question, "did the defendant want to speak to you?" did not tell the jury whether Alejandro invoked or spoke to law enforcement. It was non-leading and did not hint at any particular answer. In fact, the defense, on the record, agreed that "the jury does not know the defendant did not make a statement." RP 724. The unanswered question was also neither repeated nor emphasized. It was objected to, the court sustained it, and the prosecutor moved on to an

unrelated topic. This was not “flagrant and “ill-intentioned” misconduct such that a reversal is the only remedy.

In addition, Alejandre has not identified any prejudice caused by the prosecutor’s question. Alejandre sole argument as to prejudice is that the objection by his attorney “invited the jury to speculate that Mr. Alejandre was trying to prevent the jury from hearing a statement he gave to police, meaning he must be guilty.” Appellant’s Br. 18. This argument is mere speculation. The jury was instructed to “not make any assumptions or draw any conclusions based on a lawyer’s objections.” CP 96. “Juries are presumed to follow instructions absent evidence to the contrary.” *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Here, there is no evidence that the jury did not follow the court’s instruction.

In sum, the court should deny review of Alejandre’s prosecutorial misconduct claim because it was waived at trial. And even if the court accepts review of this issue, a new trial is not warranted because Alejandre has not shown “flagrant and ill-intentioned” misconduct that prejudiced his right to a fair trial.

B. The prosecutor did not directly or indirectly comment on Alejandro's right to remain silent during his trial where the prosecutor's question, "Did the defendant want to speak to you?" was quickly objected to and sustained before the sergeant answered.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." *State v. Pinson*, 183 Wn. App. 411, 416, 333 P.3d 528 (2014). Article I, section 9 of the Washington Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." *Id.* at 416-17. Both provisions safeguard a defendant's right to be free from self-incrimination, including the right to silence. *Id.* at 417. This means that the State may not use a defendant's silence as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

Our Supreme Court has distinguished between a "comment" on the constitutional right to remain silent and a "mere reference" to silence. *Burke*, 163 Wn.2d at 216. If the State references a defendant's silence, the court must determine whether the State manifestly intended the reference to be a comment on the right to silence or a mere reference to silence. *Id.* at 216. A direct "comment" occurs when a witness or state agent makes reference to the defendant's invocation of his or her right to remain silent. *State v. Pottorff*, 138 Wn. App. 343, 346, 156 P.3d 955 (Div. 3, 2007)

(citing *State v. Curtis*, 110 Wn. App. 6, 9, 37 P.3d 1274 (2002)). “I read him his *Miranda* warnings which he chose not to waive, would not talk to me” constitutes a direct comment. *Id.* (citing *State v. Romero*, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002)). A direct comment on silence violates the defendant’s constitutional right to silence and occurs when the State “invites the jury to infer guilt from the invocation of the right of silence.” *Burke*, 163 Wn.2d at 217.

Conversely, a “mere reference” is a statement that only indirectly refers to a defendant’s silence. *See Pottorff*, 138 Wn. App. at 347. The State merely references a defendant’s silence if the reference was subtle and brief enough that it did not naturally and necessarily emphasize the defendant’s testimonial silence. *Id.* at 216. For example, in *State v. Lewis*, the officer did not testify that the defendant refused to talk, but rather that the defendant claimed he was innocent. 130 Wn.2d. 700, 703, 947 P.2d 325 (1996). The officer in *Lewis* testified, “I told him... that if he was innocent he should just come in and talk to me about it.” *Id.* Our State Supreme Court held this was not a comment on the defendant’s silence. *Id.* at 707. Similarly, in *State v. Sweet*, an officer’s testimony that the defendant said he would take a polygraph test after discussing the matter with his attorney was an indirect reference to silence. 138 Wn.2d 466, 480, 980 P.2d 1223 (1999). A mere reference to silence is not a

constitutional violation unless the defendant shows some prejudice.

Burke, 163 Wn.2d at 216.

Here, the record shows that the prosecutor never got to the point of commenting on Alejandro's post-arrest silence. That part of the direct examination went as follows:

[Prosecutor]: Okay. Thank you, Sergeant. You can have a seat. After the defendant was taken into custody, what was your role at that time?

[Sgt. Russell]: When the defendant was taken into custody, he was put into a police car. I saw he was taken into custody without apparently resisting arrest or any violence. He was brought in front of the house where I was situated. I saw Detective Reyna advise him of his Miranda warnings to see if he wanted to speak with us about what was going on.

[Prosecutor]: Okay. Did the defendant want to speak to you?

[Defense Counsel]: Objection.

THE COURT: Sustained.

[Prosecutor]: I'll move on.

RP 288.

Up to the point of the defense counsel's objection, which the court sustained, the focus was on Alejandro being cooperative while being arrested and him being advised of his *Miranda* warnings. RP 288. There

simply was no reference to Alejandro's post-arrest silence. The trial court properly sustained the objection because Sergeant Russell may have commented on Alejandro's post-arrest silence. But the sergeant never reached that point.

This is unlike cases in which the courts found comments on a defendant's post-arrest silence to be problematic. In those cases, the State elicited comments from witnesses or made closing arguments relating to a defendant's silence to infer guilt from such silence. For example, this case is distinguishable from the facts of *State v. Curtis*, where the officer answered the prosecutor's question about what the defendant said:

Q. Go ahead. And you had him—once he got out, then you—

A. I read him his Miranda, his constitutional rights.

Q. Was anything said at that time?

A. **He refused to speak to me at the time and wanted an attorney present.**

110 Wn. App. 6, 9, 37 P.3d. 1274 (Div. 3, 2002) (emphasis added). Had there been a sustained objection after the prosecutor's question, there would have been no error. The problem in *Curtis* was that the officer directly commented on the defendant's invocation of *Miranda* rights. The court in *Curtis* relied upon the Ninth Circuit case of *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978), where the prosecutor elicited the following from the police officer:

Q. Who arrested Mr. Douglas?

A. I did.

Q. Did he make any statements to you?

A. No.

Id. at 14 (emphasis added). In that case, the Ninth Circuit held that the prosecutor impermissibly introduced evidence concerning the defendant's exercise of his right to remain silent. *Id.* Both cases are distinguishable from Alejandro's case in that evidence of invocation was introduced in those cases.

Here, the evidence was not introduced because of a timely objection. Sergeant Russell never said what happened *after* the reading of *Miranda*. He never testified that Alejandro refused to talk to him or invoked his right to remain silent. As in *Lewis*, there was simply no statement made during any testimony or during any arguments by the prosecutor that Alejandro refused to talk to police, nor was there any statement by the prosecutor that silence should imply guilt. *See Lewis*, 130 Wn. at 706.

In addition, the prosecutor's unanswered question did not hint to the jury that the defendant did or did not want to speak to the officer. The jury did not know the answer to the prosecutor's question because no one answered it. The defense agreed, stating "...the jury does not know the defendant did not make a statement." RP 724. Furthermore, after the

defense objected, the State moved on with unrelated questioning. The State never brought up the issue again.

Alejandre has provided no legal authority for his argument that merely asking the question, “Did the defendant want to speak to you?” is a comment on the right to remain silent. Alejandre mistakenly asserts that “The Washington Supreme Court has held when a prosecutor asks about a defendant’s custodial statements while knowing that the defendant did not make any, the question constitutes a comment on the right to remain silent.” Appellant’s Br. 17. In support of this claim, Alejandre cites footnote 7 of *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008), and points to the *Curtis* case cited within that footnote.

First of all, this was not the Supreme Court’s holding. A “holding” is a “court’s determination of a matter of law pivotal to its decision.” BLACK’S LAW DICTIONARY 879 (11th ed. 2019). The footnote Alejandre relies on came at the end of this sentence: “Thus, focusing largely on the purpose of the remarks, this court distinguishes between ‘comments’ and ‘mere references’ to an accused’s prearrest silence.” *Burke*, 163 Wn.2d at 216. The footnote starts off with, “The following are some examples of what courts have and have not considered ‘comments’ on the right to silence.” *Id.* at 216 n.7. The court then lists five cases as examples, one where a statement was a “mere reference” and four where the statement

was an impermissible “comment.”² *Id.* No part of footnote seven can be called a “holding” because nothing was necessary to the decision in the case. Footnote seven was a merely a string citation of caselaw examples. *See id.* The Supreme Court did not make any binding holdings within that footnote.

Second, the *Curtis* case also does not support Alejandro’s claim that merely asking the question, “Did the defendant want to speak to you?” is a comment on the right to remain silent. In *Curtis*, the officer answered the prosecutor’s question, thereby telling the jury that the defendant did not make any statements. 110 Wn. App. at 9. The court found a constitutional violation, not based solely on the prosecutor’s question, but because of the question *and* answer:

The prosecutor knew, however, that the question would elicit only the facts that Mr. Curtis chose to remain silent and that he asked to talk to a lawyer. As in *Nemitz*, the question **and answer** were injected into the trial for no discernible purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer. This was

² The relevant language of the footnote was as follows: “In contrast, the following have been found to be impermissible comments on the right to remain silent:...(3) prosecutor asked the officer whether the defendant said anything in response to receiving *Miranda* warnings, and there was no purpose other than to inform the jury that the defendant refused to speak with police without the presence of an attorney, *State v. Curtis...*” *Burke*, 163 Wn.2d at 216 n.7.

a violation of his rights under the Fifth and Fourteenth Amendments.

Id. at 14 (emphasis added).

Furthermore, caselaw has held that testimony solely about the reading of *Miranda* warnings is not a comment on the defendant's right to remain silent. In *State v. Sloan*, 133 Wn. App. 120, 134 P.3d 1217 (2006), the defendant claimed that the State committed reversible error when it presented evidence that an officer read the defendant his *Miranda* rights. The defendant argued that the jury would infer that he had remained silent, and was therefore, guilty. *Id.* at 124. However, the Court of Appeals held that testimony that an officer read a defendant his *Miranda* rights, by itself, does not amount to an impermissible comment on the defendant's right to remain silent. *Id.* at 126. The court agreed with the trial court that jurors are generally aware that police systematically read arrestees their *Miranda* rights. *Id.* at 129.

The Court of Appeals distinguished the cases cited by Sloan, noting that all three cases involved testimony about what the defendant did *after Miranda* rights were read:

...these cases all involve officers who testified about how these defendants reacted or what the defendants said **after** the officers read them their *Miranda* rights. See *State v. Romero*, 113 Wn. App. 779, 785, 54 P.3d 1255 (2002) (testimony that defendant

would not talk to the officer but did not waive rights); *State v. Curtis*, 110 Wn. App. 6, 9, 37 P.3d 1274 (2002) (testimony that defendant refused to speak to the officer and wanted an attorney present); *State v. Nemitz*, 105 Wn. App. 205, 213, 19 P.3d 480 (2001) (testimony that the defendant gave the officer a defense attorney’s business card, which explains a person’s rights if stopped by an officer). In these Division III cases, **it was the officers’ testimonies about the defendants’ behaviors or responses following their *Miranda* warnings that the court considered unconstitutional, not merely the fact that the officers read the defendants their *Miranda* rights**, as was the case here. Therefore, we find these three cases inapplicable.

Id. at 128 n.6 (emphasis added). Similarly, here there was no mention of how Alejandro responded to his *Miranda* rights and no testimony that he refused to provide a statement. As in *State v. Lewis*, the State neither commented on Alejandro’s silence nor used his silence to suggest to the jury that silence was an admission of guilt. As such, the State did not violate Alejandro’s right to remain silent.

Alejandro claims that his objection to the prosecutor’s question “invited the jury to speculate that [he] was trying to prevent the jury from hearing a statement he gave to police, meaning he must be guilty.” Appellant’s Br. 18. In other words, Alejandro argues that the State invited the jury to assume he made a statement to police. *Id.* This is contrary to

the argument that the State used silence to suggest to the jury that silence was an admission of guilt. Here, Alejandre claims that the prosecutor's question led the jury to speculate that he in fact made a guilty statement that he did not want the jury to know about. This is inconsistent with a claim that the jury inferred guilt from his refusal to speak with the police. As such, Alejandre has not shown that the prosecutor directly, or even indirectly, commented on his right to remain silent.

C. Alejandre has not shown any prejudice resulting from the prosecutor's unanswered question where there was no testimony or argument that Alejandre refused to talk with the police, nor any statement that silence should imply guilt.

A "mere reference" to silence is not a constitutional violation unless the defendant shows some prejudice. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). Assuming, for sake of argument only, that the prosecutor's unanswered question rose to the level of a mere reference to silence, Alejandre still has not shown prejudice. Prejudice resulting from an indirect comment is reviewed using the nonconstitutional error standard to determine whether no reasonable probability exists that the error affected the outcome. *State v. Pottorff*, 138 Wn. App. 343, 347, 156 P.3d 955 (2007).

Here, the State immediately continued with unrelated questioning and did not mention the question again in front of the jury. As in *State v.*

Lewis, 130 Wn.2d. 700, 947 P.2d 325 (1996), there was no statement made during testimony or during argument by the prosecutor that the defendant refused to talk with the police, nor 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. *Id.* at 706. In this case, the jury could not have relied upon Alejandro's silence as an admission of guilt because they did not know he was silent after being read *Miranda*. No one testified how Alejandro responded after being read his *Miranda* rights.

In addition, the jury had the benefit of the jury instructions, which included the following standard jury instruction:

You may have heard objections made by the lawyers during the trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

WPIC 1.02, CP 96. As such, the jurors were not to make any assumptions or draw any conclusions based upon the objection to the prosecutor's question, "Did the defendant want to speak to you?" The jury was also instructed as follows:

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

WPIC 1.02, CP 95. As such, the jury could not speculate as to what the answer to the prosecutor's question would have been and were instructed not to speculate on whether evidence would have favored one party or the other. The jury was also instructed:

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or prejudice him in any way.

WPIC 6.31, CP 101. "Juries are presumed to follow instructions absent evidence to the contrary." *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Here, we can assume that the jurors followed the law. There is no evidence to the contrary.

In this case, the jury would have reached the same result if they did not hear the prosecutor's unanswered question, "Did the defendant want to speak to you?" The evidence in this case was so overwhelming that it necessarily led to a finding of guilt. First of all, State presented substantial

evidence that Maria Gonzalez was killed in the bedroom she and her husband shared. Her blood was found on the mattress and a trail of her blood led to the burning fire pit that contained what was left of her burned body. The DNA testimony was overwhelming. Numerous areas tested positive for her DNA. Second, it was clear that she died in the master bedroom and that someone dragged her to the pit and set her on fire to conceal her murder.

Furthermore, substantial evidence pointed to Alejandro as the person who murdered her. The night before his wife was found dead, Alejandro was acting oddly and had been drinking. At one point, M.A. heard her parents' arguing and heard a loud thud come from their bedroom. When she told her father to open the door, he refused and told her he was going to take a shower.

The next morning, M.A.'s mother was missing. A man driving past their house saw a burning fire at around 5:30 a.m. in the morning. Alejandro was an hour late for work, arriving a little after 6:00 a.m. He did not take his son, Manuel, with him to work as planned and his son did not know why.

When called by numerous individuals, Alejandro denied knowing where his wife was and gave inconsistent statements about her leaving with someone else. He told his neighbors to stop looking for her, and that

they would probably not find her because she had left with another man. Alejandre then left work early that day, between 10 and 10:30 a.m. but did not go home right away. M.A. finally got him to return home by using a ruse that her sister was sick. When Alejandre was apprehended around 12:30 p.m., he had a t-shirt on that had his wife's blood on it. Her blood was also found on his rifle, the weapon that the forensic pathologist concluded could have been used to fracture the victim's skull.

Based on the significant evidence of Alejandre's guilt presented at trial, the quick objection to the prosecutor's unanswered question, and the instructions given to the jury, Alejandre has failed to show any prejudice caused by the prosecutor's question. As such, Alejandre's demand for a new trial should be denied and his convictions affirmed.

D. A rational trier of fact could have found that the victim and defendant were spouses beyond a reasonable doubt because of the overwhelming and uncontroverted testimony referring to them as husband and wife.

A trial court's ruling to vacate a special verdict based on insufficient evidence is reviewed for an abuse of discretion. *State v. Pearson*, 180 Wash. App. 576, 580, 321 P.3d 1285, 1287 (2014). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Id.* at 580.

The facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3). This court uses the same standard of review for the sufficiency of the evidence of an aggravating factor as it does to the sufficiency of the evidence of the elements of a crime. *State v. Webb*, 162 Wash. App. 195, 206, 252 P.3d 424, 430 (2011). 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. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. A jury may make inferences based on circumstantial evidence. *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013). Circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the jury found that the crime of second degree murder was an aggravated domestic violence offense. CP 124. To find that Alejandro's crime was an aggravated domestic violence offense, the State had to prove that the crime involved domestic violence, as defined in RCW 10.99.020, and that the crime was committed within the sight or

sound of the victim's or the defendant's children who were under the age of 18 years. RCW 9.94A.535(3)(h)(ii). In order to find that the crime involved domestic violence, the jury in this case was instructed that they had to find that the victim and defendant were "spouses." RCW 10.99.020(5)(b), RCW 26.50.010(7)(a), CP 117. Alejandro did not object to this jury instruction and he did not propose his own jury instruction.

The term "spouse" is not defined by statute. If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

Legislative definitions included in the statute are controlling, but in the absence of a statutory definition, this court will give a term its plain and ordinary meaning ascertained from a standard dictionary. *Id.* at 954-55.

Spouse is defined as a "married person: husband, wife." Merriam-Webster's Collegiate Dictionary 1138 (10th ed. 1994). Another definition states that a spouse is "[a] marriage partner; a husband or wife."

American Heritage Dictionary of the English Language 1694 (5th ed. 2011).

The record here shows that a rational trier of fact could have found that the victim and defendant were spouses beyond a reasonable doubt because of the overwhelming and uncontroverted testimony referring to them as husband and wife. During the trial, three witnesses, Esperanza

Sanchez, Rafael Sandoval, and Gerardo Alejandre, and two officers referred to Maria Gonzalez as Alejandre's wife. RP 45, 57, 64, 65, 69, 205, 228. In addition, Alejandre was referred to as Maria Gonzalez's husband. RP 205, 228. And both of them were referred to as a "married couple." RP 70.

Gerardo Alejandre, the defendant's older brother, testified that he knew the defendant's **wife**, RP 69 (emphasis added). He was asked, "What was your the impression of their relationship as a **married couple**?" RP 70 (emphasis added). He responded, "They lived well. They lived well. They were always happy. They got along." RP 70.

Esperanza Sanchez, Alejandre's neighbor, was asked "Did you know his **wife**?" RP 45 (emphasis added). She testified that she did and that her name was Maria Gonzalez. RP 45. Esperanza's husband, Rafael Sanchez, was also asked, "Did you know his **wife** as well? RP 57 (emphasis added). He testified that he did and that he knew her as "Mari." RP 57.

On cross-examination, Mr. Sanchez was asked by defense counsel, "After that, my client and his **wife** were getting water from your residence?" RP 64 (emphasis added). He replied, "yes." RP 64. Another time, defense counsel asked, "Did my client and his **wife** socialize with your family at other times besides when they were getting the water?" RP

65 (emphasis added). Mr. Sanchez responded, “Yes. They would always come over, especially my goddaughter’s mom....” RP 65.

In addition, police officers also referred to the victim and Alejandre and husband and wife. For example, Deputy Wolfe testified:

Sergeant Peterschick arranged for another patrol deputy to show up and secure the scene where the remains were at, and we arranged to try to contact our suspect **husband**, Jamie, at his place of work. Sergeant Peterschick and I traveled to the Carpenter Ranches. When we got there, we were advised that Jaime has been advised by somebody that his **wife** had been murdered and was returning to the residence.

RP 205 (emphasis added). And Sergeant Peterschick testified:

I went to the suspect’s, the **husband’s**, place of work.... We had gone there and spoke to a supervisor of some sort, who said he did, in fact, work there but was at another job site but had been informed his **wife** was deceased and he needed to return home.

RP 228 (emphasis added).

In sum, there was overwhelming and uncontroverted testimony that the victim and Alejandre were husband and wife. Nothing else was required. Alejandre provides no statute or case law to support his argument that the State had to provide evidence of a “legal marriage.” And “where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after

diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the victim and Alejandro were “spouses” beyond a reasonable doubt. As such, the trial court did not abuse its discretion in denying the motion to strike the domestic violence aggravator.

IV. CONCLUSION

For all the above reasons, the State asks that Appellant’s convictions be affirmed.

Respectfully submitted this 21st day of January, 2020,

s/Tamara A. Hanlon
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Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on January 21, 2020, via the portal, I emailed a copy of BRIEF OF RESPONDENT to Lise Ellner and Spencer James Babbitt. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of January, 2020 at Yakima, Washington.

s/Tamara A. Hanlon
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