

FILED
Court of Appeals
Division III
State of Washington
2/6/2020 2:26 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 37064-0-III

STATE OF WASHINGTON, Respondent,

v.

WAYNE BERT SYMMONDS, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd #789
Kennewick, WA 99336
Phone: (509) 572-2409
Andrea@2arrows.net
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

A. Prosecutor Owens has a significant history of misconduct and pursuing trial strategies that violate defendants’ constitutional rights4

B. The trial placed at issue whether Symmonds intentionally assaulted the officers and whether the officers’ account was credible6

C. Prosecutor Owens did not prepare his witnesses to comply with the trial court’s *in limine* rulings or the rules of evidence8

E. Prosecutor Owens represented several times that he would not seek to admit statements made by Symmonds and requested no CrR 3.5 hearing, but subsequently elicited his statements anyway11

V. ARGUMENT.....16

VI. CONCLUSION.....26

CERTIFICATE OF SERVICE27

Appendix A – Washington State Bar Association Directory, Edward Asa Owens

Appendix B – *State v. Bobby Ray Curtis*

Appendix C – *State v. Carlos Edgardo Robles Silva*

Appendix D – *State v. Martenia Survell Turner-Bey*

Appendix E – *State v. Keir Albert Wallin*

AUTHORITIES CITED

Federal Cases

Berger v. U.S., 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....17

U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993).....19

U.S. v. Modica, 663 F.2d 1173 (2d Cir. 1981).....19

State Cases

In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012).....17, 20, 24

State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004).....21

State v. Bromley, 72 Wn.2d 150, 432 P.2d 568 (1967).....19

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978).....24

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).....19

State v. Fanger, 34 Wn. App. 635, 663 P.2d 120 (1983).....22

State v. Hecht, 179 Wn. App. 497, 319 P.3d 836 (2014).....17

State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (1994).....20

State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984).....18

State v. Korum, 157 Wn.2d 614, 141 P.3d 13 2006).....20

State v. Martinez, 121 Wn. App. 21, 86 P.3d 1210 (2004).....20

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).....19

State v. Smith, 189 Wash. 422, 65 P.2d 1075 (1937).....18

State v. Tweedy, 165 Wash. 281, 5 P.2d 335 (1931).....18

State v. Weber, 159 Wn.2d 252, 149 P.3d 616 (2006).....19, 20, 21

Constitutional Provisions

U.S. Const. Amend. VI.....17

U.S. Const. Amend. XIV.....17

Wash. Const. art. I § 22.....17

Court Rules

CrR 3.5.....17, 21, 22, 23

Other Sources

American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (4th Ed. 2017)18

I. INTRODUCTION

Edward Asa Owens, a long-term Grant County deputy prosecutor, committed multiple, escalating acts of misconduct during the evidentiary phase of a trial that lasted only three and one-half hours. Despite defense counsel's repeated objections and requests for a mistrial or dismissal due to repeated willful misconduct, the trial court instead instructed the jury no fewer than seven times to disregard inflammatory and inadmissible evidence that it had already heard. Its instructions were vague and conflicting, making it likely the errors tainted the jury's deliberations and the verdict. These errors rendered the trial process fundamentally unfair. The convictions should be reversed and the case dismissed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court abused its discretion by denying Symmonds's motion for a mistrial after the State's witnesses offered testimony that opined on Symmonds's guilt in direct contravention of a ruling *in limine* excluding that testimony.

ASSIGNMENT OF ERROR NO. 2: The trial court abused its discretion by denying Symmonds's motion for a mistrial or to exclude a witness after the prosecuting attorney violated a ruling *in limine* excluding witnesses

from the courtroom by bringing the witness into the courtroom during a recess to examine an exhibit prepared and discussed by a previous witness.

ASSIGNMENT OF ERROR NO. 3: The trial court abused its discretion by denying Symmonds's motion for a mistrial or dismissal after the prosecuting attorney elicited statements attributed to Symmonds after repeatedly representing at omnibus and readiness hearings that it would not introduce any statements that would require a CrR 3.5 hearing.

ASSIGNMENT OF ERROR NO. 4: Cumulative errors rendered Symmonds's trial fundamentally unfair.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the prosecuting attorney may disregard rulings of the court and procedures enacted to ensure a fair trial without consequence.

ISSUE NO. 2: Whether repeated violations of rulings in limine and misrepresentations to the court and the defense concerning the proffer of statements attributed to the defendant are improper.

ISSUE NO. 2: Whether the prosecuting attorney's repeated violations of rulings in limine and misrepresentations to the court and the defense

concerning the proffer of statements attributed to the defendant are improper.

ISSUE NO. 3: Whether the prosecuting attorney's repeated violations of rulings in limine and misrepresentations to the court and the defense concerning the proffer of statements attributed to the defendant deprived Symmonds of due process of law.

ISSUE NO. 4: Whether the trial court's conflicting rulings, vague instructions to the jury, and inexplicable refusals to enforce its pretrial rulings were adequate to remedy the harms caused by the prosecuting attorney's repeated misconduct.

IV. STATEMENT OF THE CASE

The escalation, pervasiveness, and prior history of misconduct indicate that what transpired in Wayne Symmonds's trial was no accident. Although clear and established rules governed the parties' conduct, Prosecutor Owens disregarded them in his pursuit of conviction. As a result, the jury repeatedly heard evidence it should not have, and the evidence probably affected its consideration of the case. Moreover, the fairness of the trial process was tainted by the egregious conduct of the prosecuting attorney. Under the facts present here, no reasonable judge

could conclude that the trial court adequately remedied the harm' to ensure Wayne Symmonds received a fair trial.

A. Prosecutor Owens has a significant history of misconduct and pursuing trial strategies that violate defendants' constitutional rights.

Prosecutor Edward Owens is a seasoned prosecuting attorney who was admitted to the Washington Bar in 1999. *Appendix A* (Bar info). He has represented Grant County in criminal prosecutions since at least the year 2000, suggesting that all or nearly all of his career has been spent in the Grant County Prosecuting Attorney's office. *See Appendix B*, at p. 1.

In 2000, when he prosecuted Bobby Ray Curtis, Prosecutor Owens elicited testimony from a police officer witness that after receiving his *Miranda* warnings, Curtis chose to exercise them by refusing to make a statement and requesting an attorney. *Appendix B*, at pp. 3-4. The Court of Appeals found that his actions were deliberate and served no legitimate purpose, but were only introduced to inform the jury that Curtis refused to speak to police without an attorney. *Appendix B*, at p. 6. Accordingly, the court reversed Curtis's conviction due to deprivation of due process and remanded the case for retrial in a published opinion issued in January 2002. *Appendix B*, at pp. 3, 6.

About ten months after *Curtis* was decided and four months after the mandate issued, Prosecutor Owens again solicited testimony about an accused's post-*Miranda* silence at trial. See *Appendix C* at pp. 1, 2, 9. In that case, after receiving *Miranda* warnings and assurances that his silence would not be penalized, Carlos Silva answered innocuous questions about his identity but then declined to respond to a police recitation of incriminating evidence against him. *Appendix C*, at p. 10. Again, Prosecutor Owens pointed to Silva's permissible silence to argue it demonstrated his guilt. *Appendix C*, at p. 12. Again, the Court of Appeals concluded that Prosecutor Owens's conduct violated Silva's constitutional rights and denied him due process, requiring a new trial. *Appendix C*, at p. 9.

The following year, the Court of Appeals found that Prosecutor Owens committed flagrant and ill-intentioned misconduct in his closing argument. *Appendix D* at pp. 1, 2. There, Prosecutor Owens told the jury that he did not believe Turner-Bey's testimony, he believed the alleged victim, and the alleged victim was telling the truth. *Appendix D*, at pp. 2-3. In holding that a new trial was required, the Court of Appeals noted that Prosecutor Owens's arguments were not inferences from the evidence but express statements of opinion, bolstered by telling the jury that he considered the issue from both sides. *Appendix D*, at p. 2.

Finally, nearly a decade later, Prosecutor Owens accused Keir Wallin of tailoring his testimony to the evidence presented at trial, based on nothing other than the fact that Wallin attended the trial and heard the evidence presented against him, as he is constitutionally entitled to do. *Appendix E*, at pp. 1, 3. Because Wallin did nothing to raise a reasonable inference of tailoring, such as changing his testimony from prior accounts, the Court of Appeals held that Prosecutor Owens's implication that attending his own trial gave Wallin an advantage and opportunity to fabricate testimony unreasonably abridged his rights to attend his trial and testify. *Appendix E*, at p. 7.

Twenty years into his career as a Grant County prosecutor, Prosecutor Owens continues to employ unfair trial tactics. Symmonds's trial was permeated with Prosecutor Owens's disregard for the rules of evidence and procedure, the trial court's orders, and basic fairness to the defendant. These problems are detailed below.

B. The trial placed at issue whether Symmonds intentionally assaulted the officers and whether the officers' account was credible.

Wayne Symmonds faced charges of assaulting and resisting arrest by two police officers who arrested him for trespassing at an Ephrata Conoco station. CP 1-4; RP (Bartunek) 54. A store employee asked

Symmonds to leave and called the police, who contacted him outside near the front of the store. RP (Bartunek) 57-58. One of the two officers who responded told Symmonds to leave three times. RP (Bartunek) 87, 117-19. Security video shows Symmonds beginning to walk away from the store and the police, who then grabbed his arm and turned him back toward the store. Ex. P5. Symmonds attempted to push them away, and a struggle thereafter ensued. RP (Bartunek) 88, 128.

In the probable cause affidavit, one officer swore that Symmonds cocked his left hand and started to punch at him, but he did not see where the punch went. CP 6. The other officer later told him he saw the punch and believed the first officer was hit. CP 6. At trial, the first officer said that he did not feel a punch but nevertheless believed Symmonds had punched him, pointing to a bruise he later developed on his arm. RP (Bartunek) 91-92, 102-04, 138-39. The second officer testified that he thought the punch appeared to land somewhere in the general area of the first officer's forearms and upper chest. RP (Bartunek) 131-32.

The second officer then pushed Symmonds off the curb and onto the ground on his back. RP (Bartunek) 133. Pinning Symmonds to the ground by driving a knee into his chest, the second officer commanded him to roll over and put his hands behind his back, then complained that

Symmonds did not follow the instructions but continued to flail. RP (Bartunek) 133-34. Then, while he straddled Symmonds, the second officer claimed that Symmonds grabbed his testicles and squeezed them. RP (Bartunek) 135. He then tased Symmonds twice, after which he was able to place Symmonds in handcuffs. RP (Bartunek) 135-38.

The jury ultimately convicted Symmonds of two counts of second degree assault, criminal trespass, and resisting arrest. CP 57-60. The trial court sentenced him to 57 $\frac{3}{4}$ months in prison. CP 70.

C. Prosecutor Owens did not prepare his witnesses to comply with the trial court's *in limine* rulings or the rules of evidence.

Pretrial, Symmonds moved to prohibit the State's witnesses from testifying to any opinion about whether he had committed a crime. CP 50; RP (Bartunek) 5. The State expressed concern that it be allowed to elicit testimony about why they wanted Symmonds to leave the property, and Symmonds clarified that the nature of his objection was the use of language such as "trespassing" that reflects a conclusion about an ultimate issue in the case that the jury would be asked to decide. RP (Bartunek) 5. The trial court acknowledged the distinction and granted Symmonds's motion. RP (Bartunek) 6.

The first officer to testify then referred to Symmonds “trespassing” four separate times. First, he reported that the Conoco staff had requested the day before that Symmonds be trespassed from the property. RP (Bartunek) 84. Symmonds objected and observed that the State had not sought to admit any separate incidents under ER 404(b). RP (Bartunek) 84. The trial court sustained the objection and instructed the jury to disregard “the last portion” of the answer. RP (Bartunek) 84.

Moments later, the first officer testified that the second officer had informed Symmonds that he was trespassed from the property and needed to leave. RP (Bartunek) 86. Symmonds objected and was overruled by the trial court. RP (Bartunek) 86. The first officer then said again that Symmonds was told he was trespassing and needed to leave. RP (Bartunek) 87. Symmonds again objected to the comment on guilt and the trial court instructed the jury to disregard “the last portion” of the answer. RP (Bartunek) 87. Three questions later, the officer stated for a third time that Symmonds was told he was trespassing and needed to leave. RP (Bartunek) 87. Symmonds objected to the comment on guilt and the trial court reversed itself without explanation, overruling the objection. RP (Bartunek) 87.

Similarly, the second officer also testified to his opinion that Symmonds was guilty of assault. After being asked to describe Symmonds's actions during the struggle, the second officer stated, "I would describe it as actively fighting . . . not so much resisting as actually actively trying to assault." RP (Bartunek) 137. Symmonds objected to the legal opinion and the trial court instructed the jury to disregard it.

Prosecutor Owens's witnesses also repeatedly sought to testify to inadmissible hearsay, resulting in the jury being instructed to disregard all or portions of answers on two additional occasions. RP (Bartunek) 56 (Conoco manager testifying to what she was told by staff); RP (Bartunek) 80-81 (first officer testifying that dispatch told them the subject's first name was Wayne).

D. Prosecutor Owens knew that the trial court had ordered witnesses excluded from the courtroom and chose to violate it.

Pretrial, Symmonds moved to exclude witnesses under ER 615, prohibiting them from attending the trial or discussing their testimony. CP 50; RP (Bartunek) 4-5. The State did not oppose the motion and it was granted. RP (Bartunek) 4-5.

During the first officer's testimony, the State asked him to draw an illustrative diagram of the Conoco station and the locations of the persons involved. RP (Bartunek) 82-86, 88-89. The trial then went into a brief recess. RP (Bartunek) 106. During the recess, Prosecutor Owens violated the exclusion order by bringing the second officer into the courtroom to examine the diagram drawn by the first officer and familiarize himself with it. RP (Bartunek) 107-09; CP 61. Symmonds moved for a mistrial based on a knowing violation by Prosecutor Owens that constituted misconduct, and the trial court denied the motion. RP (Bartunek) 108-09.

E. Prosecutor Owens represented several times that he would not seek to admit statements made by Symmonds and requested no CrR 3.5 hearing, but subsequently elicited his statements anyway.

In the omnibus order entered before trial, Prosecutor Owens advised the court that he would not offer any custodial statements and had provided all discovery required by CrR 4.7. CP 18. He repeated these statements in a Statement on Trial Readiness, advising the court that all discovery had been disclosed and all necessary CrR 3.5 hearings had been conducted and completed. CP 29-30. On a third occasion, the morning of the first day of trial, Prosecutor Owens again told the court that no CrR 3.5 hearing had been held. RP (Bartunek) 10-11. The trial court then noted,

“So we’re not worried about any statements from defendant.” Prosecutor Owens remained silent. RP (Bartunek) 11.

Then, while his second witness, a Conoco employee, was testifying, Prosecutor Owens asked him if Symmonds said anything to him. RP (Bartunek) 62, 63. Symmonds immediately objected and invoked CrR 3.5, advising the court that the rule required a pretrial hearing to admit statements of the defendant and it was not done. RP (Bartunek) 63. Prosecutor Owens argued that the statement was not made to a government witness. RP (Bartunek) 63. He then sought to shift the burden to the defense, arguing Symmonds should have advised the State or moved in limine to exclude statements made to lay witnesses. RP (Bartunek) 65. Symmonds then pointed out that the State had never disclosed the prior statement as required under CrR 4.7, the discovery rules. RP (Bartunek) 66. He further advised that the witness was disclosed late by the State and the witness’s written statement indicated Symmonds did not say anything to him. RP (Bartunek) 67.

The trial court acknowledged that the plain language of CrR 3.5 applies to any statements of the defendant. RP (Bartunek) 68. However, it concluded that the purpose of the rule was to evaluate whether there was coercive conduct by law enforcement, and therefore the rule did not apply

to statements by laypersons. RP (Bartunek) 67-68. He overruled the objection, and the witness then testified that Symmonds said something vulgar to him after being asked to leave. RP (Bartunek) 69.

However, the issue did not end there. Subsequently, during the first officer's testimony about asking Symmonds to leave, Prosecutor Owens asked whether Symmonds said anything to him and what he said. The officer testified that Symmonds told him, "Make me." Symmonds objected and invoked the previous CrR 3.5 conversation, but the trial court overruled the objection. RP (Bartunek) 86. In response to the next question, the officer stated, "Mr. Symmonds informed us that he could go in there and buy his stuff --." Symmonds again objected, and the trial court instructed the jury to disregard "the last portion of the answer." RP (Bartunek) 87. Describing the struggle, the first officer testified that he heard Symmonds say "How's that feel?" RP (Bartunek) 96. Symmonds objected and the trial court instructed the jury to disregard "the last portion" of the answer. RP (Bartunek) 96-97.

Having gotten away with eliciting Symmonds' statements from the first officer despite failing to hold a CrR 3.5 hearing, Prosecutor Owens sought to repeat them during the second officer's testimony. Again, during testimony describing asking Symmonds to leave, Prosecutor

Owens asked, “And did Mr. Symmonds say anything back to you?” The second officer replied that Symmonds responded by saying he could go inside if he wanted to. The second officer then corrected himself, saying that had been Symmonds’s response to another question and the original response was, “Make me.” RP (Bartunek) 117.

Symmonds again objected and referenced the prior sidebar conversation. RP (Bartunek) 118. The trial court indicated the objection was “noted,” and directed Prosecutor Owens to continue. RP (Bartunek) 118. The second officer then repeated the “Make me” comment and said Symmonds continued to make comments and mumble things. RP (Bartunek) 118. After hearing that the second officer asked Symmonds to leave a third time, Prosecutor Owens asked, “And what was the reply then?” The second officer answered that he said he could go in the store if he wanted to and made a comment about police being terrorists. RP (Bartunek) 119.

Symmonds objected and the trial court asked the jury to leave the courtroom. RP (Bartunek) 119. The trial court stated that it had overruled the earlier objection because the statement was made to a lay witness, but now Prosecutor Owens was seeking actual statements made directly to law enforcement without having held a CrR 3.5 hearing. RP (Bartunek) 120.

Prosecutor Owens argued that the statements were not custodial and were not made in response to interrogation. RP (Bartunek) 120-21. Symmonds responded that such arguments are required to be considered in a CrR 3.5 hearing, which was not held, and the statements were therefore not admissible. RP (Bartunek) 121. He also advised the court that Prosecutor Owens had explicitly said the State was not offering statements, and the trial court confirmed that at the readiness hearing, the State denied that it was offering any statements made to law enforcement. RP (Bartunek) 122.

Symmonds asked for a mistrial or to dismiss the charges for prosecutorial misconduct and mismanagement of the trial. RP (Bartunek) 122. Prosecutor Owens asked the court to find that there was no need for *Miranda* warnings and the statements were lawful. In reply, Symmonds stated,

Your Honor, a 3.5 requires it be done before the statements are offered. It requires written findings and conclusions. We don't have any of that. The state's played fast and loose with the rules here. They've violated motion in limine one, they've violated 3.5 now. I think it's a dismissal for misconduct.

RP (Bartunek) 123. The trial court ruled that it would instruct the jury to disregard any testimony it may have heard regarding statements Symmonds made directly to law enforcement and the trial would proceed. RP (Bartunek) 123-24. Symmonds noted an objection to the trial court's

ruling, stating, “I think there’s a due process problem, a fairness problem, and then the repeated misconduct issue.” RP (Bartunek) 125.

The trial court then instructed the jury:

Members of the jury: You may have heard testimony from witnesses, particularly Sergeant Harvey right now and others, about statements that the defendant may have made directly to law enforcement officers. You are to disregard any statement or evidence rather that was made today regarding statements made by the defendant directly to law enforcement officers. So you are instructed to disregard any of that testimony.

RP (Bartunek) 124-25. This instruction is the seventh occasion in a single afternoon when the trial court instructed the jury to disregard something it had already improperly heard. The record reflects no sanction of any kind imposed on the State or Prosecutor Owens.

V. ARGUMENT

A prosecuting attorney:

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from

improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. U.S., 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). In the present case, the prosecuting attorney disregarded the trial court's rulings in limine and elicited statements that Symmonds made to law enforcement witnesses knowing that no CrR 3.5 hearing had been held to determine their admissibility, after representing to the court and to parties that no such statements would be introduced. As a result of the prosecuting attorney's misbehavior, the trial court lost control of the trial, issuing the jury vague and conflicting instructions about what it could and could not consider in an effort to purge the jurors' minds of these taints. The trial court's actions were entirely insufficient to render Symmonds' trial fair or to remedy the prosecuting attorney's outrageous conduct. The conviction should be reversed and the case dismissed.

A defendant is constitutionally entitled to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, section 22 of the Washington State constitution. *State v. Hecht*, 179 Wn. App. 497, 503, 319 P.3d 836 (2014). Pervasive prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *Id.*; see also *In re Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012).

(observing that the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase the combined prejudicial effect).

A fair trial comports with the rules of evidence and procedure, including the trial court's rulings *in limine*. See, e.g., *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) (“The purpose of a motion *in limine* is to dispose of legal matters . . . unless the trial court indicates further objections are required when making its ruling, its decision is final.”). Thus, in cases where the prosecuting attorney knows of a ruling and ignores it, prejudice to the accused must be presumed even when the jury has been instructed to disregard the improperly elicited evidence. *State v. Smith*, 189 Wash. 422, 429, 65 P.2d 1075 (1937); *State v. Tweedy*, 165 Wash. 281, 288-89, 5 P.2d 335 (1931) (prosecutors “shall not be permitted to disregard the rulings of trial courts.”).

Because the primary duty of the prosecuting attorney is “to seek justice within the bounds of the law,” he is required to “respect the constitutional and legal rights of all persons.” American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (4th Ed. 2017). Trial courts have a duty not to merely assure a fair trial to the defendant before it, but to assure that “the circumstances that gave rise

to the misconduct won't be repeated in other cases.” *U.S. v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993). When misconduct contaminates at trial, it deprives the defendant of due process and may justify dismissal as a sanction for government misbehavior. *Id.* at 1324-25. Further sanctions may be required to deter an attorney who persistently engages in improper conduct. *See U.S. v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

To establish prosecutorial misconduct, the defendant must show that the attorney's conduct was both improper and prejudicial. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 616 (2006), *cert. denied*, 551 U.S. 1137 (2007). Reviewing courts consider the prosecutor's actions in the context of the total argument, the issues in the case, the evidence addressed, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). An accumulation of errors, or “matters of dubious propriety,” may deprive the defendant of a fair trial. *State v. Bromley*, 72 Wn.2d 150, 151, 432 P.2d 568 (1967); *see also State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (“[T]he ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the [accused's] due process rights to a fair trial.”).

A trial court abuses its discretion in denying a motion for a mistrial when the irregularity is so prejudicial that nothing short of a new trial can ensure that the defendant will be tried fairly. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). The reviewing court should consider the seriousness of the irregularity, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. *Id.* However, when the irregularities result from pervasive misconduct, the focus is “on the misconduct and its impact, not on the evidence that was properly admitted.” *Glasmann*, 175 Wn.2d at 711.

Similarly, a reviewing court considers a ruling to dismiss a prosecution based upon governmental misconduct for abuse of discretion. *State v. Martinez*, 121 Wn. App. 21, 30, 86 P.3d 1210 (2004). While dismissal is an extraordinary remedy, it should be granted when the government’s outrageous conduct materially prejudices the due process rights of the defendant. *State v. Korum*, 157 Wn.2d 614, 638, 141 P.3d 13 (2006). Governmental misconduct violates due process when it shocks the conscience of the court and the universal sense of fairness. *Martinez*, 121 Wn. App. at 35.

Lastly, cumulative errors may warrant reversal even when each error, standing alone, would otherwise be considered harmless. *Weber*,

159 Wn.2d at 279. Only when the errors are few and have little or no effect on the outcome of the trial should the cumulative error doctrine be disregarded. *Id.*

Here, Prosecutor Owens repeatedly elicited testimony that had been held inadmissible *in limine*, violated the pretrial order excluding witnesses by bringing a witness into the courtroom to prepare for his testimony by reviewing the exhibit prepared by the previous witness, and elicited statements the defendant made to law enforcement knowing that no CrR 3.5 hearing had been held based on his repeated representations that it was unnecessary. The trial court's ruling excluding conclusory and guilt-opining language such as that Symmonds was "trespassing" was thoroughly discussed in advance of trial and the ruling clearly put the State on notice that such language may not be used by its witnesses. Despite this, his witness testified three separate times that Symmonds was trespassing, and another witness testified that Symmonds was trying to commit assault. This testimony was exactly what the ruling *in limine* prohibited, and reflects that Prosecutor Owens took no steps to advise his witnesses of the rulings to ensure that the rulings would be given effect. It also allowed his law enforcement witnesses to leverage their authority and prestige to influence the jury with the weight of their opinions of guilt. *See, e.g., State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004),

review denied, 123 Wn. App. 373 (opinions expressed by law enforcement witnesses are particularly prejudicial because of their influence on the fact finder).

Second, the ruling excluding witnesses and prohibiting the discussion of other witnesses' testimonies was agreed to by Prosecutor Owens. Having agreed to this limitation and being on notice of its application, Prosecutor Owens then disregarded it in order to ensure that his witness knew what evidence had been offered by another before testifying. He could have asked for leave from the court or an exception from the exclusion ruling, but instead, he simply ignored it.

Third, Prosecutor Owens deliberately and repeatedly elicited statements made by Symmonds to both lay and law enforcement witnesses after having previously represented that no CrR 3.5 hearing was needed, thereby at least implicitly representing that no statement of the defendant would be introduced. On its face, CrR 3.5(a) requires a pretrial hearing "[w]hen a statement of the accused is to be offered in evidence" for the purpose of determining the admissibility of the statement. The purposes of the rule are to insulate the jury from tainted evidence and to allow the parties to determine the weaknesses in their cases, thus encouraging settlement. *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983).

Furthermore, the rule requires the trial court to document its findings and conclusions in a written order to facilitate review of the admissibility determination and identify its resolution of disputed issues of fact. CrR 3.5(c).

Here, Prosecutor Owens was on notice of the CrR 3.5 concerns when he first inquired into statements Symmonds allegedly made to a Conoco employee. He justified the lack of a CrR 3.5 hearing on the grounds that the rule was directed towards statements to law enforcement and was not intended to apply to statements by lay witnesses. But he thereafter proceeded to inquire into statements made to law enforcement officers as well, knowing that these statements were not contemplated in the trial court's earlier ruling allowing the statements to lay witnesses. Consequently, the jury heard these statements notwithstanding that Symmonds had no opportunity to testify or to cross-examine the arresting officers about the circumstances of the arrest and has no record to review the admissibility of the statements. Furthermore, he was surprised by their proffer at trial, which undermined defense arguments that Symmonds did not know he was not allowed to remain outside, did not intentionally assault the officers, and was trying to comply with police instructions to leave when he was grabbed, not trying to resist arrest.

The pervasive and escalating misconduct, consisting of direct violations of pretrial rulings and procedural requirements of which Prosecutor Owens had clear warning, as well as Prosecutor Owens's history of conduct that violates defendants' due process rights, undermines any suggestion that these were simply good faith mistakes. To the contrary, they manifest a systematic disregard for the trial court's rulings and the prosecutor's duty to ensure the fairness of the proceedings. Such egregious conduct violates principles of fundamental fairness and arise to a due process violation by permeating and cumulatively tainting the trial.

Furthermore, the trial court's corrective measures were thoroughly insufficient to remedy the harm. Its instructions to the jury were ambiguous and inconsistent, referring frequently to "the last portion" of the statement without clarifying what that meant and inconsistently instructing the jury to disregard items that, at other times, it allowed them to consider. It is therefore highly likely that the misconduct affected the jury's verdict. Furthermore, the trial court's determination not to dismiss the charges or even grant a mistrial did nothing to ensure that "warnings that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words." *Glasmann*, 175 Wn.2d at 712-13 (citing *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978)). No

reasonable judge could conclude that the trial court's toothless response rendered Symmonds's trial fair.

Accordingly, this court should hold that the trial court abused its discretion in denying Symmonds's motions for a mistrial and to dismiss the case for prosecutorial misconduct. Nothing short of a new trial could ensure that the jury returned a verdict based only on competent, admissible evidence. Furthermore, any remedy short of dismissal fails to dissuade such improper prosecutorial tactics because there is little incentive to avoid them when the worst consequence is simply a second bite at the apple, after the accused has already suffered the consequences of conviction and imprisonment. Indeed, prior reversals and condemnatory language from the courts have failed to motivate Prosecutor Owens to change his ways. If this court does not hold Prosecutor Owens accountable for his underhanded tactics, who will?

VI. CONCLUSION

For the foregoing reasons, Symmonds respectfully requests that the court REVERSE his convictions and DISMISS the case.

RESPECTFULLY SUBMITTED this 6 day of February, 2020.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

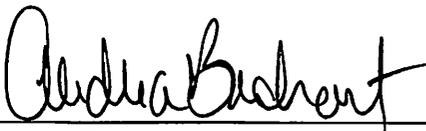
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Wayne B. Symmonds, DOC #933375
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Garth Louis Dano
Attorney at Law
PO Box 37
Ephrata, WA 98823-1685

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

Signed and sworn this 6 day of February, 2020 in Kennewick, Washington.



Andrea Burkhart

APPENDIX A

Edward Asa Owens

License Number: 29387
License Type: Lawyer
Eligible To Practice: Yes
License Status: Active
WSBA Admit Date: 11/12/1999

Contact Information

Public/Mailing Address: Grant County Prosecutor's Office
PO Box 37
Ephrata, WA 98823-0037
United States

Email: eowens@grantcountywa.gov

Phone: (509) 754-2011 EXT 450

Fax: (509) 754-3449

Website:

TDD:

Practice Information Identified by Legal Professional

Firm or Employer: Grant County Prosecutor's Office

Office Type and Size: Government/ Public Sector

Practice Areas: None Specified

Languages Other Than English: None Specified

Professional Liability Insurance

Private Practice: No

Has Insurance? - Click for more info

Last Updated: 12/17/2019 8:04:43 AM

Committees

Member of these committees/boards/panels:

None

Disciplinary History

In some cases, discipline search results will not reveal all disciplinary action relating to a Washington licensed legal professional, and may not include all documents.

APPENDIX B

Case # 196071	Court : COURT OF APPEALS-DIVISION III	Status : Stored
State of Washington V Bobby Ray Curtis		



- [Help](#)
- [Search Screen](#)
- [Logoff](#)

Superior Court Participants

Supreme Court Case

- [Basic Information](#)
- [Participants](#)
 - [Appellants](#)
 - [Petitioners](#)
 - [Respondents](#)
 - [Attorneys](#)
- [Events \(in chronological order\)](#)
- [Events](#)
 - [Briefs](#)
 - [Appellant's Brief](#)
 - [Respondent's Brief](#)
- [Decisions](#)
- [Motions](#)

GRANT COUNTY SUPERIOR COURT Case#: 001004012			
STATE OF WASHINGTON VS CURTIS, BOBBY RAY			
Role	Participant Name	Address	ID Number
DEFENDANT	CURTIS, BOBBY RAY	920 CRESTVIEW DRIVE SELAH WA 98942	57040
W/D ATTY FOR DEFENDANT	EARL, PATRICK OWEN	1334 S PIONEER WAY MOSES LAKE WA 98837-2410	22408
ATTY FOR DEFENDANT	OGLEBAY, SUSAN D	PO BOX 37 EPHRATA WA 98823-0037	39209
DEPUTY PROSECUTING ATTY	OWENS, EDWARD ASA	PO BOX 37 EPHRATA WA 98823-0037	29387
W/D ATTY FOR DEFENDANT	SCHIFFNER, ROBERT E.	PO BOX 776 MOSES LAKE WA 98837-0117	20048
PLAINTIFF	STATE OF WASHINGTON		43617

Court of Appeals Case

- [Basic Information](#)
- [Participants](#)
 - [Appellants](#)
 - [Petitioners](#)
 - [Respondents](#)
 - [Attorneys](#)
- [Events \(in chronological order\)](#)
- [Events](#)
 - [Briefs](#)
 - [Appellant's Brief](#)
 - [Respondent's Brief](#)
- [Decisions](#)
- [Motions](#)

Superior Court Information

- [Basic Information](#)
- [Charge Sentence](#)
- [Dockets](#)
- [Participants](#)

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Engelstad, Wash.App. Div. 3, September 30, 2014

110 Wash.App. 6

Court of Appeals of Washington,
Division 3,
Panel One.

STATE of Washington, Respondent,

v.

Bobby Ray CURTIS, Appellant.

No. 19607-1-III.

Jan. 15, 2002.

Synopsis

Defendant was convicted in the Superior Court, Grant County, Kenneth Jorgensen, J., of third-degree assault. Defendant appealed. The Court of Appeals, Sweeney, J., held that: (1) state violated defendant's Fifth and Fourteenth Amendment rights by commenting on his post-arrest, post-Miranda silence, and (2) error was not harmless.

Reversed and remanded.

West Headnotes (10)

[1] Criminal Law

Particular statements, arguments, and comments

Defendant's claim that Fifth Amendment rights to remain silent and to receive counsel and his due process guarantee under the Fourteenth Amendment were infringed when the state called the jury's attention to his exercise of these rights was a claim of manifest constitutional error, which could be raised for the first time on appeal. U.S.C.A. Const.Amend. 5, 14; RAP 2.5(a)(3).

17 Cases that cite this headnote

[2] Criminal Law

Review De Novo

Review of claim of manifest constitutional error is de novo.

14 Cases that cite this headnote

[3] Criminal Law

Necessity of Objections in General

Once it is established that the alleged error is both constitutional and manifest, appellate court considers the merits even if raised for the first time on appeal.

2 Cases that cite this headnote

[4] Criminal Law

Presumption as to Effect of Error; Burden

State has the burden of overcoming the presumption that a constitutional error is prejudicial.

[5] Criminal Law

Compelling Self-Incrimination

Right to be free from compelled self-incrimination is liberally construed. U.S.C.A. Const.Amend. 5.

[6] Criminal Law

Post-arrest silence; custody

Once the suspect is arrested and Miranda rights are read, the state violates a defendant's Fifth and Fourteenth Amendment rights by introducing evidence of his exercise of Miranda rights as substantive evidence of guilt, as the government, in reading these rights, implicitly assures the accused that he may assert his rights without penalty. U.S.C.A. Const.Amend. 5, 14.

7 Cases that cite this headnote

[7] Criminal Law

Silence during or subsequent to arrest

State violated defendant's Fifth and Fourteenth Amendment rights by commenting on defendant's post-arrest silence; prosecutor asked officer directly whether defendant said anything in response to receiving his Miranda rights, defendant had not asserted his rights

2

ambiguously but had directly and immediately asserted right not to answer questions and to have a lawyer, and prosecutor's question and officer's answer were injected for no discernable purpose other than to inform jury that defendant refused to talk to police without a lawyer. U.S.C.A. Const.Amends. 5, 14.

20 Cases that cite this headnote

[8] Criminal Law

⇌ Presumption as to Effect of Error; Burden Constitutional error is presumed to be prejudicial, and the state bears the burden of proving the error harmless.

[9] Criminal Law

⇌ Presumption as to Effect of Error: Burden To overcome the presumption of prejudice from constitutional error, the state must persuade appellate court that the untainted evidence overwhelmingly supports a guilty verdict.

[10] Criminal Law

⇌ Comments on evidence or witnesses, or matters not sustained by evidence
Criminal Law
⇌ Silence during or subsequent to arrest
Constitutional error in commenting on defendant's post-arrest, post-Miranda silence was not harmless, and defendant was entitled to a new trial. U.S.C.A. Const.Amends. 5, 14.

7 Cases that cite this headnote

Attorneys and Law Firms

**1275 *7 Paul J. Wasson, Spokane, for Appellant.

*8 John D. Knodell, III, Edward A. Owens, Ephrata, for Respondent.

Opinion

SWEENEY, J.

The exercise of constitutionally guaranteed *Miranda*¹ rights must be without penalty. The State penalizes a defendant for asserting those rights when it introduces evidence of the defendant's exercise of *Miranda* rights as substantive evidence of guilt. In this case, the prosecutor invited an investigating officer to comment in front of a jury that the defendant chose to remain silent and consult a lawyer after being read his *Miranda* rights. The invitation was deliberate and implicates fundamental constitutional rights. We therefore reverse and remand for a new trial.

FACTS

Bobby Ray Curtis was tried by jury for assault in the second or third degree, with a deadly weapon enhancement on both counts.

On the evening of June 11, 2000, Elizabeth LaFramboise called on her next-door neighbor, Adele Cariveau. Bobby Ray Curtis and his girl friend, Lisa Cariveau, were there. Ms. LaFramboise asked Mr. Curtis about money that he owed her husband, Nathan LaFramboise, for a tattoo. After she left, Nathan LaFramboise came over to demand payment. The door hit seven-months' pregnant Lisa in the stomach as Mr. LaFramboise barged in. Mr. Curtis refused to pay up. A brawl ensued, primarily between Mr. Curtis and Mr. LaFramboise, but also involving Lisa and Mr. LaFramboise's brother, Calvin Lynch. Mr. LaFramboise and Mr. Curtis fought to a standstill. Mr. LaFramboise *9 ended up bleeding from a wound to the back of his left thigh.

Mr. Curtis and Lisa drove away from the scene and were later picked up by the Ephrata police.

Officer John Turley ordered Mr. Curtis out of the patrol car. Officer Turley read Mr. Curtis his *Miranda* rights. Mr. Curtis refused to answer any questions and asked for an attorney. This prompted the following exchange between the prosecutor and Officer Turley at the trial:

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.

Report of Proceedings (RP) at 34–35. Officer Turley also tried to interview Mr. Curtis later in the Grant County jail. Again at trial the prosecutor asked: “Was any information gathered at that time ... by talking to Mr. Curtis?” RP at 61. Officer Turley answered that he was able to take some pictures of marks on Mr. Curtis’s shirtless body and hands.

At trial witnesses disagreed about the details of the fight, specifically how Mr. LaFramboise’s wound was caused, and whether Mr. Curtis had a knife. Much of the evidence was inadmissible hearsay. Officer Turley related, without defense objection, various damaging hearsay statements made to him at the scene.² When the defense tried to introduce its own inadmissible hearsay to counter the State’s inadmissible hearsay, the prosecutor objected. The State then released the hearsay declarant from subpoena, leaving the defense with no way to answer the damaging hearsay statements. The court ultimately admitted the evidence by bending ER 613, which permits impeachment of a witness with extrinsic evidence of a prior inconsistent statement.

*10 The defense proposed jury instructions on self-defense, defense of others, and necessity. The court refused these instructions. It **1276 ruled that they would be appropriate only if Mr. Curtis admitted he used a knife. The court characterized the defense as one of general denial and declined to give any self-defense instruction. Defense counsel concurred. But Mr. Curtis did not deny fighting Mr. LaFramboise. And in closing, the defense argued self-defense:

[M]y client was faced with one person that was over six-two ... and another, his brother, right along side them. There was information that came out that [the brother] came running out, taking off his jacket.... [H]e had two people in front of my client, Bobby, and a fight ensued.

RP at 327.

The jury found Mr. Curtis guilty of third degree assault with no weapon enhancement. Mr. Curtis was sentenced by a different judge to the middle of the standard range—45 days—and ordered to pay medical restitution and costs.

Mr. Curtis claims he was denied a fair trial because of the State’s comments on his invocation of *Miranda* rights and his lawyer’s chronic failure to recognize and object to inadmissible hearsay. He also challenges his sentencing by a judge other than the one who heard the case. He does not assign error to the jury instructions. Because the *Miranda* issue is dispositive, we do not reach the remaining issues.

COMMENT ON POST-MIRANDA ASSERTION OF RIGHTS/MANIFEST CONSTITUTIONAL ERROR

Mr. Curtis contends his Fifth Amendment rights to remain silent and to receive counsel and his due process guarantee under the Fourteenth Amendment were infringed when the State called the jury’s attention to his exercise of these rights. He contends this constituted an impermissible penalty on the exercise of his *Miranda* rights. And, as such, it violated the implied assurance that *11 no negative consequences will attach to invoking these rights. Mr. Curtis contends the prosecutor deprived him of the presumption of innocence by deliberately soliciting evidence of his failure to waive his rights.

[1] [2] [3] [4] This is a claim of manifest constitutional error, which can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995); *State v. Neidigh*, 78 Wash.App. 71, 78, 895 P.2d 423 (1995). Review is de novo. *State v. Byers*, 88 Wash.2d 1, 11, 559 P.2d 1334 (1977), *overruled on other grounds by State v. Williams*, 102 Wash.2d 733, 689 P.2d 1065 (1984). Once it is established that the alleged error is both constitutional and manifest, we consider the merits. *State v. Jones*, 71 Wash.App. 798, 809–10, 863 P.2d 85 (1993); *State v. Lynn*, 67 Wash.App. 339, 345, 835 P.2d 251 (1992). The State has the burden of overcoming the presumption that a constitutional error is prejudicial. *State v. Easter*, 130 Wash.2d 228, 242, 922 P.2d 1285 (1996).

[5] The right to be free from compelled self-incrimination is liberally construed. *Id.* at 236, 922 P.2d 1285 (citing *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951)). The seriousness of introducing testimony that a defendant exercised his *Miranda* rights depends on whether the rights were asserted before or after arrest, and before or after the reading of *Miranda* rights. Merely mentioning a

suspect's prearrest silence generally is not a violation. *State v. Lewis*, 130 Wash.2d 700, 706, 927 P.2d 235 (1996). And it may even be permissible to use a defendant's prearrest, pre-*Miranda* silence to impeach his exculpatory story if he testifies. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

Mr. Curtis's silence here was post-*Miranda*. The evidence was not offered for impeachment—Mr. Curtis did not testify. And the question was asked during the State's case in chief. See *Lewis*, 130 Wash.2d at 706 n. 2, 927 P.2d 235.

POST-MIRANDA SILENCE

[6] Once the suspect is arrested and *Miranda* rights are read, the State violates a defendant's Fifth and Fourteenth *12 Amendment rights by introducing evidence of his exercise of *Miranda* rights as substantive evidence of guilt. *Lewis*, 130 Wash.2d at 705, 927 P.2d 235; *Easter*, 130 Wash.2d at 236, 922 P.2d 1285. The reason for this is that the government, in reading these rights, implicitly assures the accused that he may assert his rights without penalty. *Doyle v. **1277 Ohio*, 426 U.S. 610, 618–19, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Easter*, 130 Wash.2d at 238, 922 P.2d 1285.

Here, Mr. Curtis responded to his arrest and the reading of his rights by immediately and unequivocally asserting his rights.

We compare the prosecutor's conduct here to that discussed in *Lewis* and *Easter*, the Washington cases most often cited on this issue. We note that both of those cases involve prearrest, pre-*Miranda* silence, and both are appeals of trial court mistrial motion rulings, which are reviewed for abuse of discretion. In *Lewis*, the burden was placed on the defendant to establish prejudice. 130 Wash.2d at 707, 927 P.2d 235. *Easter* applied the constitutional harmless error standard in which the State must prove lack of prejudice beyond a reasonable doubt. 130 Wash.2d at 242, 922 P.2d 1285.

In *Lewis*, the trial court granted a defense motion in limine to exclude reference to rape suspect Lewis's having missed some appointments with police during the investigation. *Lewis*, 130 Wash.2d at 702, 927 P.2d 235. The State's police witness did not mention the missed appointments. But he did tell the jury that, when informed he was being investigated, Mr. Lewis had asserted his innocence and the officer had remarked that, "if he was innocent he should just come in and talk to me about it." *Id.* at 703, 927 P.2d 235. This was not responsive to the prosecutor's question. And the State did not mention this testimony in closing argument. *Id.* at 703–04, 927 P.2d 235.

The trial court denied Mr. Lewis's motion for mistrial. The appellate court concluded that the mere unsolicited reference, with no suggestion it was proof of guilt, did not violate the Fifth Amendment. *Id.* at 706, 927 P.2d 235. The conviction was affirmed. *Id.* at 707, 927 P.2d 235.

Easter was a prosecution for vehicular assault. Before his arrest, Mr. Easter declined to answer questions. The court *13 ordered the State not to ask any questions about Mr. Easter's alleged evasiveness. Nevertheless, the arresting officer was permitted to testify about Mr. Easter's prearrest silence in the State's case in chief. *Easter*, 130 Wash.2d at 231–33, 922 P.2d 1285. In closing argument, the prosecutor repeatedly characterized Mr. Easter's conduct as that of a "smart drunk" and made it the central theme of the State's case. *Id.* at 234, 922 P.2d 1285. This was reversible error. *Id.* at 243, 922 P.2d 1285.

[7] Here, the prosecutor's conduct falls somewhere between that of *Easter* and *Lewis*. The State did not harp on Mr. Curtis's exercise of his *Miranda* rights. But neither was this a case where the witness just blurted out a reference to Mr. Curtis's silence in response to a question intended to elicit something else. Rather, the prosecutor asked Officer Turley directly whether Mr. Curtis said anything in response to receiving his *Miranda* rights. Also, Mr. Curtis did not assert his rights ambiguously by failing to return prearrest phone calls or to show up for prearrest appointments with investigating officers. In direct and immediate response to the reading of his rights on arrest, he baldly asserted the right not to answer questions and to have a lawyer.

Either eliciting testimony or commenting in closing argument about the arrestee's exercise of his *Miranda* rights circumvents the Fifth Amendment right to silence as effectively as questioning the defendant himself. *Easter*, 130 Wash.2d at 236, 922 P.2d 1285. The prosecutor did not directly refer to Mr. Curtis's post-*Miranda* refusal to speak without an attorney present in his closing argument. But he did invite the jury to infer that Mr. Curtis must have known he had done something wrong, because he took backroads in fleeing the scene. The jury's knowledge that Mr. Curtis refused to tell his side of the story without an attorney present may well have added weight to that inference.

In *State v. Nemitz*, this court held that the Fifth Amendment was violated when the prosecutor gratuitously elicited the fact that the defendant carried his lawyer's card, on the back of which were his rights if stopped on suspicion of *14 drunk

driving. *State v. Nemitz*, 105 Wash.App. 205, 19 P.3d 480 (2001). The court concluded that the only plausible reason to mention the card was to raise the impermissible inference that it was more consistent with guilt than with innocence.

Here, the State's inquiries might have had some valid purpose if Mr. Curtis had made some sort of admissible statement after hearing his rights. The prosecutor knew, however, ****1278** 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 a violation of his rights under the Fifth and Fourteenth Amendments.

In the Ninth Circuit case of *Douglas v. Cupp*,³ the prosecutor elicited the following from a police witness:

“Q. Who arrested Mr. Douglas?

A. I did.

Q. Did he make any statements to you?

A. No.

Prosecutor: That's all the questions I have.”

The court held that this was just the sort of inquiry forbidden by the Supreme Court in *Miranda* and *Doyle*. Even without an explicit reference to *Miranda*, the prosecutor had purposefully elicited the fact of silence in the face of arrest. This in itself was an impermissible penalty on the exercise of the right to remain silent, from which a juror might have inferred that the defendant was guilty and his defense fabricated. The court reversed, because it could not say as a matter of law that the question was harmless beyond a reasonable doubt. *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir.1978).

Our facts are more egregious than those of *Douglas*. Officer Turley specifically mentioned that Mr. Curtis's silence ***15** was in response to being informed of his *Miranda* rights.

HARMLESS ERROR

[8] Constitutional error is presumed to be prejudicial, and the State bears the burden of proving the error harmless. *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). Here,

the State attempts to shift the burden onto Mr. Curtis to prove prejudice.

[9] To overcome the presumption of prejudice, the State must persuade this court that the untainted evidence overwhelmingly supports a guilty verdict. *Id.* at 426, 705 P.2d 1182; *Easter*, 130 Wash.2d at 242, 922 P.2d 1285; *State v. Heller*, 58 Wash.App. 414, 421, 793 P.2d 461 (1990). Otherwise, what may or may not have influenced the jury remains a mystery beyond the capacity of three appellate judges. *See State v. Barker*, 103 Wash.App. 893, 904, 14 P.3d 863 (2000) (recognizing that jury's mental processes inhere in its verdict and therefore are not subject to impeachment because they are not subject to understanding), *review denied*, 143 Wash.2d 1021, 25 P.3d 1019 (2001).

That aside, eliciting such testimony puts the defense in a difficult position. Counsel must gamble on whether to object and ask for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone. *State v. Perrett*, 86 Wash.App. 312, 322, 936 P.2d 426 (1997). Other courts, including the Ninth Circuit, have expressed doubt about the effectiveness of curative instructions. *See, e.g., United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir.1978) (by itself, even a prompt and forceful instruction is insufficient to vitiate the use of postarrest silence). And, of course, injecting evidence of postarrest silence may also impermissibly pressure the defendant to testify and explain that silence. This is a further erosion of his right to remain silent. *Lewis*, 130 Wash.2d at 706 n. 2, 927 P.2d 235. The likely curative value of an instruction must be weighed against the possibility of additional damage by further impressing upon the jury's attention the defendant's decision not to talk without a lawyer. *Stewart v. United States*, 366 U.S. 1, 10, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961).

[10] The error was not harmless. Mr. Curtis must have a new trial. *Easter*, 130 Wash.2d at 242–43, 922 P.2d 1285.

We reverse and remand for a new trial.

WE CONCUR: BROWN, A.C.J., and KATO, J.

All Citations

110 Wash.App. 6, 37 P.3d 1274

Footnotes

- 1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).
- 2 RP at 35, 87–88 (Lisa Cariveau); RP at 55–56 (Calvin Lynch and Barbara LaFramboise (grandmother)); RP at 90–91 (Barbara LaFramboise); RP at 59, 65 (Mr. LaFramboise).
- 3 578 F.2d 266, 267 (9th Cir.1978) (quoting Trial Tr. at 158–59).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

APPENDIX C

Case # 217108	Court : COURT OF APPEALS-DIVISION III	Status : Stored
State of Washington v. Carlos Edgardo Robles Silva		

[Help](#)[Search Screen](#)[Logoff](#)

Superior Court Participants

**Court of Appeals
Case**
[Basic Information](#)[Participants](#)[Appellants](#)[Petitioners](#)[Respondents](#)[Attorneys](#)[Events \(in
chronological order\)](#)[Events](#)[Briefs](#)[Appellant's Brief](#)[Respondent's Brief](#)[Decisions](#)[Motions](#)
**Superior Court
Information**
[Basic Information](#)[Charge Sentence](#)[Dockets](#)[Participants](#)

GRANT COUNTY SUPERIOR COURT Case#: 021006020			
STATE OF WASHINGTON VS SILVA, CARLOS EDGARDO ROBLES			
Role	Participant Name	Address	ID Number
ATTY FOR DEFENDANT	GWINN, BRIAN DANIEL	PO BOX 37 EPHRATA WA 98823-0037	30367
W/D ATTY FOR DEFENDANT	HERNANDEZ, ALEX BENJAMIN III	306 E CHESTNUT AVE YAKIMA WA 98901-2718	21807
DEPUTY PROSECUTING ATTY	OWENS, EDWARD ASA	PO BOX 37 EPHRATA WA 98823-0037	29387
DEFENDANT	SILVA, CARLOS EDGARDO ROBLES	4175 HI LO DRIVE OTHELLO WA 99344	62815
PLAINTIFF	STATE OF WASHINGTON		44481

Trial Court Docket

GRANT COUNTY SUPERIOR COURT Case#: 021006020				
STATE OF WASHINGTON VS SILVA, CARLOS EDGARDO ROBLES				
Sub#	Date	Description/Name	Docket Code	Secondary
1	08/27/2002	INFORMATION	INFO	
2	08/27/2002	MOTION FOR ARREST/DETENT PROB CAUSE	MTADPC	
3	08/27/2002	PRELIMINARY APPEARANCE	PLMHRG	09-04-2002JC
		ARRAIGNMENT	ACTION	
4	08/27/2002	ORD DETERMIN PROBABLE CAUSE	ORDPCA	
5	08/27/2002	ORDER APPOINTING ATTORNEY	OAPAT	
		PUBLIC DEFENDER	ATD01	
6	08/27/2002	WARRANT OF ARREST COPY	WA	
7	09/03/2002	SHERIFF'S RETRN ON WARRNT OF ARREST	SSHRTWA	30.70
8	09/04/2002	INITIAL ARRAIGNMENT	ARRAIGN	09-30-2002JC
		PRETRIAL CONFERENCE	ACTION	
-	09/04/2002		NOTE	10-10-2002
		3.5/3.6 HEARING	ACTION	
9	09/04/2002	NOT OF APPEAR AND REQ FOR DISCOVERY	NTARD	
		HERNANDEZ, ALEX BENJAMIN III	ATD01	
10	09/04/2002	ACKNWLDGMT OF ADVICE OF RIGHTS	AKAR	
11	09/04/2002	ORDER OF INDIGENCY	ORIND	
12	09/04/2002	ORDER SETTING TRIAL DATE	ORSTD	10-15-2002
13	09/23/2002	PLTFS COMPLIANCE W/PRETRIAL DISC OR	CRTC	
14	09/23/2002	STATE'S LIST OF WITNESSES	STLW	
15	09/23/2002	STMT OF DEF TO BE USED AT TRIAL	ST	
16	09/26/2002	SUPPL DEMAND FOR DISCOVERY	DMF	
17	09/30/2002	PRE-TRIAL MANAGEMENT HEARING	PTMHRG	
18	10/03/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
19	10/03/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
20	10/03/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
21	10/03/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
22	10/03/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
-	10/09/2002	NOTICE OF HEARING	NTHG	10-15-2002JC
		COURTS REVIEW OF TRIAL RUN	ACTION	
23	10/10/2002	HEARING STRICKEN: IN COURT OTHER	HSTKIC	
24	10/14/2002	STATE'S LIST OF WITNESSES - AMEND	STLW	
25	10/14/2002	STATE'S LIST OF WITNESSES - SUPPL	STLW	
26	10/15/2002	MOTION HEARING	MTHRG	11-07-2002
		3.5/3.6 HEARING	ACTION	

27	10/15/2002	ORDER SETTING TRIAL DATE	ORSTD	11-19-2002
28	10/15/2002	ORDER FOR CHANGE OF JUDGE - KLJ	ORCJ	
29	10/29/2002	MTN & DCLR FOR ORDER TO SUPPRESS	MT	
30	10/29/2002	MEMO OF AUTHORITIES IN SUPPORT OF MTN FOR ORDER TO SUPPRESS	MM	
31	10/29/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
32	10/29/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
33	10/29/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
34	10/29/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
35	10/29/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	17.00
36	10/29/2002	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	31.70
-	10/31/2002	NOTICE OF HEARING	NTHG	11-04-2002SC
		RESET HEARING DATES (A/P - KLJ)	ACTION ACTION	
37	11/04/2002	MOTION HEARING	MTHRG	
38	11/04/2002	ORDER SETTING TRIAL DATE	ORSTD	11-13-2002
39	11/05/2002	DEF MT FOR RETRACTION	MT	
40	11/05/2002	NOTE FOR MOTION DOCKET	NTMTDK	11-11-2002
41	11/07/2002	MEM OF AUTHORITIES IN OPP OF MTN TO SUPPRESS EVIDENCE	MM	
42	11/07/2002	MOTION HEARING	MTHRG	
43	11/07/2002	WAIVER OF SPEEDY TRIAL	WVSPDT	
44	11/07/2002	ORDER SETTING TRIAL DATE	ORSTD	11-19-2002
45	11/08/2002	VERBATIM REPORT OF PROCEEDINGS	VRPRC	
46	11/12/2002	SUBPOENA - OSIEL SILVA	SB	
47	11/12/2002	SUBPOENA - SALLY LOPEZ	SB	
48	11/12/2002	SUBPOENA - ANN WILSON	SB	
-	11/13/2002	NOTICE OF HEARING	NTHG	11-19-2002SC
		COURTS REVIEW OF TRIAL RUN (A/P - KLJ)	ACTION ACTION	
49	11/12/2002	DEFENDANT'S LIST OF WITNESSES	DFLW	
50	11/19/2002	MOTION HEARING	MTHRG	
51	11/20/2002	MOTION HEARING	MTHRG	
52	11/20/2002	JURY TRIAL SENTENCING *TO BE HEARD BY JMA* DAY 1 - C/R T BARTUNEK JMA DAY 2 - C/R T BARTUNEK JMA DAY 3 - C/R T BARTUNEK JMA	JTRIAL ACTION ACTION	11-26-2002AC
53	11/20/2002	JURY PANEL	JYP	
54	11/20/2002	DEFENDANTS MOTION IN LIMINE	MTL	

55	11/20/2002	PLAINTIFF'S PROPOSED INSTRUCTIONS	PLPIN	
56	11/21/2002	DEFENDANT'S PROPOSED INSTRUCTIONS	DFPIN	
57	11/21/2002	COURT'S INSTRUCTIONS TO JURY	CTINJY	
58	11/22/2002	VERDICT FORM A	VRD	
59	11/22/2002	VERDICT FORM B	VRD	
60	11/22/2002	VERDICT FORM C	VRD	
61	11/26/2002	MOTION HEARING	MTHRG	12-10-2002
		SENTENCING	ACTION	
		(A/P - KLJ)	ACTION	
62	11/27/2002	MOTION IN ARREST OF JUDGMENT - FAX	MT	
63	11/27/2002	NOTE FOR MOTION DOCKET - FAX	NTMTDK	12-09-2002AC
		MOTION FOR ARREST OF JUDGMENT	ACTION	
64	12/02/2002	MOTION IN ARREST OF JUDGMENT	MT	
65	12/02/2002	NOTE FOR MOTION DOCKET	NTMTDK	
66	12/03/2002	MEMORANDUM OF AUTHORITIES	MMATH	
67	12/09/2002	MOTION HEARING	MTHRG	12-10-2002AC
		SENTENCING	ACTION	
		(A/P - KLJ)	ACTION	
68	12/10/2002	SENTENCING HEARING	SNTHRG	
69	12/12/2002	MOTION HEARING	MTHRG	
70	12/12/2002	JUDGMENT AND SENTENCE	JS	
-	12/12/2002	NOTICE OF HEARING	NTHG	12-13-2002SC
		NOTIFY DEFENDANT OF HIS RIGHT TO	ACTION	
		APPEAL	ACTION	
		(A/P - KLJ)	ACTION	
71	12/13/2002	MOTION HEARING	MTHRG	
71.2	12/20/2002	NOTIFICATION OF FELONY CONVICTION	NTFC	
72	12/31/2002	MOTION FOR ORDER OF INDIGENCY & APP OF COUNSEL	MTIND	
73	12/31/2002	DECLARATION OF ALEX HERNANDEZ	DCLR	
74	12/31/2002	ORDER OF INDIGENCY & APPT COUNSEL	ORIND	
75	12/31/2002	DECLARATION OF MAILING	DCLRM	
76	12/31/2002	NOTICE OF APPEAL TO COURT OF APPEAL	NACA	
-	01/10/2003	PROCESSED NOTICE OF APPEAL-COUNSEL NOTIFIED	NOTE	
77	01/21/2003	LTR TO COUNSEL FROM CRT OF APPEALS	LTR	
78	02/12/2003	PRAECIPE FOR CLERKS PAPERS	PRC	
79	02/14/2003	NOTE FOR MOTION DOCKET	NTMTDK	02-25-2003SC
		MOTION TO ENTER FINDINGS OF FACT	ACTION	

		ANS CONCLUSIONS OF LAW ON MOTION	ACTION	
		TO SUPPRESS	ACTION	
		(A/P - KLJ)	ACTION	
80	02/25/2003	MOTION HEARING	MTHRG	
81	02/25/2003	FIND FACT CONCLUSIONS ON MTN SUPRES	FNFCL	
82	03/26/2003	NT OF FILING VERBATIM REPORT OF PROCEEDINGS	NT	
-	04/07/2003	VERBATIM REPORT OF PROCEEDINGS VOL 1-2 FILED BY C/R BARTUNEK	VRPRC	
-	04/29/2003	VERBATIM RPT TRANSMITTED - COURT OF APPEALS - COUNSEL NOTIFIED	VRPT	
83	01/29/2004	MANDATE - REVERSED	MND	
84	02/04/2004	SPECIAL REPORT-5990 SUPERV CLOSURE	RPT	
85	03/09/2004	MOTION & AFFIDAVIT BENCH WARRANT	MTFBW	
86	03/09/2004	NOTE FOR MOTION DOCKET	NTMTDK	03-22-2004SC
		MOTION FOR BENCH WARRANT (A/P - KLJ)	ACTION	
87	03/15/2004	SPECIAL REPORT-5990 SUPERV CLOSURE	RPT	
88	03/22/2004	MOTION HEARING	MTHRG	
89	03/22/2004	ORDER DIR ISSUANCE OF BENCH WARRANT	ORIBW	
90	03/22/2004	BENCH WARRANT ISSUED - COPY FILED	BWICF	
91	02/18/2005	BAIL BOND	BLB	
92	02/22/2005	MOTION HEARING	MTHRG	02-23-2005SC
		RESET HEARING DATES (A/P - KLJ)	ACTION	
93	02/22/2005	ORDER APPOINTING ATTORNEY PUBLIC DEFENDER	OAPAT	
			ATD02	
94	02/22/2005	ORDER REVOKING BAIL	ORRBL	
95	02/23/2005	MOTION HEARING	MTHRG	03-29-2005SC
		PRETRIAL CONFERENCE (A/P - KLJ)	ACTION	
-	02/23/2005		NOTE	04-07-2005
		3.5/3.6 HEARING	ACTION	
96	02/23/2005	ORDER OF INDIGENCY	ORIND	
97	02/23/2005	ORDER SETTING TRIAL DATE	ORSTD	04-12-2005
98	03/01/2005	NOT OF APPEAR AND REQ FOR DISCOVERY	NTARD	
		GWINN, BRIAN DANIEL	ATD02	
99	03/15/2005	PLTFS COMPL W/PRETRIAL DISC ORD	CRTC	
100	03/15/2005	STATE'S LIST OF WITNESSES	STLW	
101	03/15/2005	STMT OF DEF TO BE USED AT TRIAL	ST	

102	03/21/2005	DEFENDANTS OMNIBUS RESPONSE	RSP	
103	03/23/2005	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	45.00
104	03/23/2005	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	35.00
105	03/23/2005	SHERIFF'S RETURN OF SERVICE W/FEES	SSHRTS	56.00
106	03/29/2005	MOTION HEARING	MTHRG	04-05-2005SC
		PRETRIAL CONFERENCE	ACTION	
107	04/05/2005	PRE-TRIAL MANAGEMENT HEARING	PTMHRG	04-14-2005
		3.5/3.6 HEARING	ACTION	
108	04/05/2005	ORDER SETTING TRIAL DATE	ORSTD	04-19-2005
	04/13/2005	NOTICE OF HEARING /SLW	NTHG	04-19-2005SC
		COURTS REVIEW OF TRIAL RUN	ACTION	
		(A/P - KLJ)	ACTION	
109	04/14/2005	MOTION HEARING	MTHRG	
110	04/19/2005	MOTION HEARING	MTHRG	
	04/20/2005	NOTICE OF HEARING /SLW	NTHG	04-26-2005SC
		COURTS REVIEW OF TRIAL RUN	ACTION	
		(A/P - KLJ)	ACTION	
111	04/26/2005	MOTION HEARING	MTHRG	
112	04/26/2005	MOTION HEARING	MTHRG	
	04/27/2005	NOTICE OF HEARING / MM	NTHG	05-03-2005AC
		COURTS REVIEW OF TRIAL RUN	ACTION	
		(A/P - KLJ)	ACTION	
113	05/03/2005	MOTION HEARING	MTHRG	
114	05/03/2005	MOTION HEARING	MTHRG	
114.1	05/04/2005	CRR 3.3 CASE REPORT	RPT	
115	05/04/2005	DEFENSE WITNESS LIST	WL	
116	05/04/2005	DEFENSE MOTION IN LIMINE	MTL	
117	05/04/2005	PRE-TRIAL MANAGEMENT HEARING	PTMHRG	
118	05/04/2005	JURY TRIAL	JTRIAL	05-09-2005AC
		SENTENCING	ACTION	
		DAY 1 C/R T BARTUNEK JMA		
119	05/04/2005	JURY PANEL	JYP	
	05/05/2005	DAY 2 C/R T BARTUNEK JMA	NOTE	
120	05/05/2005	PLAINTIFF'S PROPOSED INSTRUCTIONS	PLPIN	
121	05/05/2005	COURT'S INSTRUCTIONS TO JURY	CTINJY	
	05/06/2005	DAY 3 C/R T BARTUNEK JMA	NOTE	
122	05/06/2005	VERDICT FORM A	VRD	
123	05/06/2005	VERDICT FORM B	VRD	
124	05/06/2005	VERDICT FORM C	VRD	
125	05/09/2005	SENTENCING HEARING	SNTHRG	
126	05/09/2005	JUDGMENT AND SENTENCE	JS	
127	05/09/2005	NOTICE OF APPEAL TO COURT OF APPEAL	NACA	

128	05/09/2005	MOTION FOR INDIGENCY	MTIND	
129	05/09/2005	DCLR FOR ORD TO PROCEED W/APPEAL & REVIEW AT PUBLIC EXPENSE	DCLR	
130	05/09/2005	ORDER OF INDIGENCY	ORIND	
131	05/12/2005	NOTIFICATION OF FELONY CONVICTION	NTFC	
132	05/16/2005	MTN/AFF FOR APPOINTMENT OF INVEST	MTAF	
133	05/16/2005	ORDER APPOINTING INVESTIGATOR	OR	
134	05/16/2005	MTN FOR PYMT OF SRVC OF INVEST	MT	
135	05/16/2005	ORDER FOR PYMT OF INVESTIGATOR	OR	
-	05/17/2005	PROCESSED NOTICE OF APPEAL - COUNSEL NOTIFIED	NOTE	
136	05/18/2005	AFFIDAVIT/DECLARATION OF SERVICE	AFSR	
137	05/23/2005	PERFECTION NOTICE FROM CT OF APPLS	PNCA	
138	06/09/2005	PRAECIPE FOR CLERKS PAPERS & EXHIBITS	PRC	
139	07/11/2005	NT OF FILING VROP - COPY	NT	
-	07/11/2005	VERBATIM REPORT OF PROCEEDINGS (4 VOLS) FILED BY C/R T BARTUNEK	VRPRC	
140	07/13/2005	SPECIAL REPORT DTD 07-12-05	RPT	
-	07/14/2005	CLERK'S PAPERS SENT - COUNSEL NOTIFIED	CLP	
-	07/27/2005	VERBATIM RPT TRANSMITTED - COUNSEL NOTIFIED	VRPT	
-	08/01/2005	CLERK'S PAPERS - FEE RECEIVED	\$CLPR	84.88
141	06/07/2006	MANDATE - AFFIRMED	MND	
142	06/26/2006	MOTION FOR ORD IMPOSING SENTENCE	MT	
143	06/26/2006	NOTE FOR MOTION DOCKET	NTMTDK	07-10-2006AC
		MOTION FOR IMPOSITION OF SENTENCE (A/P - KLJ)	ACTION ACTION	
144	07/10/2006	MOTION HEARING	MTHRG	
145	07/10/2006	ORDER IMPOSING SENTENCE	OR	
146	07/12/2006	SPECIAL RPT - 5990/5256 SUP CLOSURE	RPT	
147	07/31/2007	SHERIFF'S RETURN ON A BENCH WARRANT	SHRTBW	
148	11/06/2007	CERTIFICATE AND ORDER OF DISCHARGE	CRORD	
149	04/12/2013	STIP&OR RET EXHBTS UNOPND DEPOSTNS	STPORE	
150	04/12/2013	RECEIPT FOR EXHIBIT/UNOPENED DEPOS	EXRECT	
151	04/25/2013	RECEIPT FOR EXHIBIT/BRIAN GWINN	EXRECT	

SCOMIS Notes:

ORD CHG OF JUDGE 10-15-02 - KLJ *CT OF APPEALS #21710-8-III* *CT OF APPEALS #241301*

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Gregory, Wash., November 30, 2006

119 Wash.App. 422

Court of Appeals of Washington,
Division 3,
Panel One.

STATE of Washington, Respondent,
v.
Carlos Edgardo Roble SILVA, Appellant.

No. 21710-8-III.

Dec. 23, 2003.

Synopsis

Background: After testimony regarding defendant's post-arrest silence was admitted into evidence, defendant was convicted in a jury trial in the Superior Court, Grant County, Evan Sperline, J., of simple possession of marijuana and possession with intent to deliver cocaine. Defendant appealed.

Holdings: The Court of Appeals, Sweeney, J., held that:

[1] detective's testimony regarding defendant's post-arrest silence constituted impermissible comment on defendant's exercise of his right to remain silent that violated his right to due process, and

[2] State failed to show that error in admitting such evidence was not prejudicial.

Reversed.

West Headnotes (15)

[1] **Criminal Law**

⇒ Review De Novo

Review of claim of manifest constitutional error is de novo.

3 Cases that cite this headnote

[2] **Constitutional Law**

⇒ Evidence and Witnesses

Criminal Law

⇒ Silence

Criminal defendant's assertion of his or her constitutionally protected due process rights is not evidence of guilt. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[3] **Criminal Law**

⇒ Statements as to Facts and Arguments

Criminal Law

⇒ Comments on Failure of Accused to Testify

State may not invite jury to infer that defendant is more likely guilty because defendant exercised his or her constitutional rights; the inference always adds weight to prosecution's case and is always, therefore, unfairly prejudicial. U.S.C.A. Const.Amends. 5, 14.

3 Cases that cite this headnote

[4] **Constitutional Law**

⇒ Silence

Due process precludes State from impeaching a defendant's testimony at trial with the fact that he or she chose to remain silent following *Miranda* warnings. U.S.C.A. Const.Amends. 5, 14.

[5] **Witnesses**

⇒ Conduct of witness inconsistent with testimony: silence

If defendant waives right to remain silent and makes post-arrest statement, prosecutor may draw attention of jury to fact that a story told at trial was omitted from that statement; such selective silence is not inherently ambiguous, but strongly suggests a fabricated defense. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[6] **Constitutional Law**

⇌ Prosecutor

Miranda warnings carry implicit assurance that the defendant's silence will carry no penalty, and telling jury that the defendant remained silent after being informed of *Miranda* rights necessarily violates fundamental due process by undermining this implicit assurance. U.S.C.A. Const.Amends. 5, 14.

1 Cases that cite this headnote

[7] Constitutional Law

⇌ Silence

Criminal Law

⇌ Post-arrest silence; custody

Detective's testimony regarding defendant's post-arrest silence in drug prosecution constituted impermissible comment on defendant's exercise of his right to remain silent that violated his right to due process of law; defendant did not give an incomplete, self-serving statement followed by inconsistent trial testimony, but rather, merely answered innocuous identification questions and then declined to incriminate himself, and State used defendant's silence as a confession by silence or as substantive evidence of guilt in State's case in chief. U.S.C.A. Const.Amends. 5, 14.

4 Cases that cite this headnote

[8] Criminal Law

⇌ Acts, admissions, declarations, and confessions of accused

State failed to show that error in permitting detective to testify regarding defendant's post-arrest silence in drug prosecution was not prejudicial, and reversal of conviction was therefore required; record failed to suggest that untainted evidence of guilt was overwhelming and that jury would have reached same result with or without error, and comment on defendant's decision to remain silent so prejudiced defendant's privilege against compulsory self-incrimination that it amounted to a denial of that right. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[9] Criminal Law

⇌ Presumption as to Effect of Error; Burden Prejudice is presumed when due process is denied. U.S.C.A. Const.Amends. 5, 14.

[10] Criminal Law

⇌ Presumption as to Effect of Error; Burden Burden falls upon State to prove that the error in denying defendant his or her due process rights did not cause prejudice. U.S.C.A. Const.Amends. 5, 14.

[11] Criminal Law

⇌ Prejudice to Defendant in General

To avoid reversal of criminal conviction by Court of Appeals, State must prove beyond a reasonable doubt that a denial of defendant's right to due process did not affect outcome of trial, and that any reasonable jury would have reached same result with or without the error; State must point to sufficient untainted evidence in the record so as to inevitably lead to a finding of guilt. U.S.C.A. Const.Amends. 5, 14.

[12] Criminal Law

⇌ Comments on failure of accused to testify

Where comment on defendant's decision to remain silent so prejudices the privilege against compulsory self-incrimination as to amount to a denial of that right, reversal is required. U.S.C.A. Const.Amends. 5, 14.

[13] Criminal Law

⇌ Place of Commission of Offense and Venue

State placed in the record sufficient evidence to permit a rational jury to find that defendant committed the alleged criminal conduct in county in which prosecution was brought, for purposes of establishing personal jurisdiction of defendant in drug prosecution.



[14] Criminal Law

↔ Effect of failure to object or except

Extraneous elements added to the jury instruction, if not objected to, become the law of the case.

[15] Criminal Law

↔ Construction in favor of government, state, or prosecution

Criminal Law

↔ Reasonable doubt

The Court of Appeals, following a conviction, inquires whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

1 Cases that cite this headnote

Attorneys and Law Firms

****891 *424** Paul J. Wasson, Attorney at Law, Spokane, WA, Appellant.

Teresa J. Chen, Edward A. Owens, Grant County Prosecutor's Office, Ephrata, WA, Respondent.

Opinion

SWEENEY, J.

With a few narrowly construed exceptions, the State may not use a criminal defendant's postarrest silence as substantive evidence of guilt. Here, police induced Carlos Silva to begin talking by assuring him that he could assert his right to remain silent at any time without penalty. After Mr. Silva answered a few innocuous background questions, the interviewing detective summarized the incriminating facts surrounding his arrest, inviting a response. Mr. Silva remained silent. At trial, the detective was permitted to relate the question, the incriminating facts, and Mr. Silva's nonresponse to the jury. This was an impermissible comment on Mr. Silva's exercise of his right to remain silent and a violation of his right to the

due process of law. And there has been no showing that it was not prejudicial. We therefore reverse the conviction.

FACTS

A team of officers from the Moses Lake Police Department, the Adams County Sheriff's Office, and the Grant ***425** County Sheriff's Office obtained a warrant to search for evidence of narcotics trafficking, based on information from a confidential informant. The warrant was for a green Nissan Pathfinder pickup with a particular license number. The Nissan was to be at the Pheasant Run gas station at the intersection of Highway 17 and Highway 170 at 11:30 p.m. on August 26, 2002. Police knew that the owner of the Nissan had a history of arrests for controlled substances violations. The warrant also authorized the search of any vehicle that would drive to that location at that time and flash its lights.

The officers were in place at the deserted, secluded gas station at the appointed time. The Nissan appeared and parked. A black Mitsubishi STR then turned on its headlights from across the parking lot. The Mitsubishi pulled in front of the Nissan and flashed its brake lights 20 or more times. It then drove slowly along the highway for some distance, turned around, and came back. It flashed its brake lights at the Nissan a second time before heading south on Highway 17 toward Othello. A convoy of police vehicles followed. Carlos Silva is the registered owner of the Mitsubishi.

A police car activated its emergency lights and siren. The Mitsubishi pulled over, but not before the driver threw a baggie out the window. Police secured and searched the vehicle and its occupants, including Mr. Silva. They recovered the discarded baggie containing about 14 grams of cocaine from the highway. ****892** Mr. Silva was handcuffed and placed in the back of a patrol car. When he was removed, a baggie of marijuana was found on the floor of the police car at Mr. Silva's feet. Mr. Silva was also carrying \$2,000 in cash.

The State charged Mr. Silva in Grant County with one count of possession of cocaine with intent to deliver and one count of simple possession of less than 40 grams of marijuana.

***426** Mr. Silva moved to suppress evidence of his postarrest, post-Miranda¹ silence. At the hearing on the motion, Moses Lake Police Detective Brian Jones testified that he arrested Mr. Silva at the scene and questioned him after reading the *Miranda* rights. Mr. Silva was "kind of half and half" when asked if he was willing to answer questions. Report of

Proceedings (RP) at 71. He never unequivocally said he did not want to talk. RP at 73, 77. The detective assured Mr. Silva that he could selectively answer only those questions he was comfortable with, and that his refusal to answer any question would be respected. Mr. Silva agreed to this:

A. ... I advised him, listen, you can stop answering questions at any time.... If you want to answer the simple questions, you know, about the vehicle and stuff like that, we can talk about those things. If there's other questions you don't want to answer, you can say, I don't want to answer them. And he agreed to that.

RP at 71.

A. I advised him of his rights and at the end of advising him his rights, I stated that part of those rights are you can stop answering questions at any time....

....

Q. And so when he did not respond, that was part of your instructions to him, was it not, that he could elect not to respond to your questions?

A. That was one of his options, yes.

Q. And that was part of his right to remain silent; isn't that correct?

A. Yes, it was.

RP at 81, 83.

Detective Jones then asked some general break-the-ice questions, such as name, marital status, place of origin, ownership of the car, and so forth, which Mr. Silva answered. The purpose of these questions was "to get him *427 used to answering questions as opposed to just putting up a wall and not wanting to deal with me." RP at 72.

Detective Jones then told Mr. Silva he knew Mr. Silva went to the gas station to deal drugs, knew the driver of the Nissan was a drug user, recognized the light flashing as a prearranged signal, and saw Mr. Silva throw the baggie of cocaine out of the car. Detective Jones characterized this as more of a statement than a question, but one made in a manner that clearly communicated that a response was expected. He testified that Mr. Silva made no answer of any kind, but just "remained quiet." RP at 76. Then Detective Jones asked Mr. Silva who his passenger was. In response Mr. Silva gave a name and a relationship which the detective could not

remember. Detective Jones then asked Mr. Silva about the marijuana found in the patrol car. Mr. Silva responded by denying any knowledge of it.

The court ruled that Detective Jones could testify during the State's case in chief that Mr. Silva remained silent following the detective's recitation of the incriminating facts. At trial, Mr. Silva again objected to the admission of the postarrest silence. The court overruled the objection.

Detective Jones then informed the jury that he told Mr. Silva that the gas station was under surveillance, that Mr. Silva was observed to approach and signal to a vehicle occupied by a known "drug dealer, drug user," and to throw drugs out the window of his car. RP at 154.

A. ... And ... I expected him to affirm or deny them. If

Q. What did the defendant do?

[Objection]

....

**893 A. He didn't do anything. He didn't answer. He just sat there. He didn't affirm or deny in any way.

RP at 154–55.

Other police witnesses testified that numerous officers converged on the gas station to execute a search warrant in the course of an investigation. The jury learned that a *428 narcotics investigation unit was involved. They were told that the driver of the Nissan was a known drug user. Police witnesses described in some detail the movements of the two vehicles in the parking lot, the taillight flashings, and the highway pursuit. One officer testified that he saw Mr. Silva throw the baggie of cocaine out the window. Others testified from their training and experience that the encounter was consistent with prearranged signals commonly used in drug transactions.

At the close of the State's case, Mr. Silva moved to dismiss the prosecution for failure to prove intent to deliver. He argued that the quantity of cocaine was the only evidence offered by the State to prove intent, and that this was insufficient. The court denied his motion. But it did instruct the jury on the lesser included offense of simple possession.

The jury found Mr. Silva guilty of simple possession of marijuana and possession with intent to deliver cocaine. After

the verdict, Mr. Silva filed a motion for arrest of judgment based on lack of personal jurisdiction in Grant County, because the offenses and arrests occurred in Adams County. He again asserted the lack of evidence of intent. The motion was denied.

DISCUSSION

Mr. Silva assigns error to the admission of his postarrest silence as substantive evidence of guilt and again challenges Grant County's jurisdiction.

ADMISSION OF POSTARREST SILENCE *Standard of Review*

[1] We review this assignment of error de novo because the claim is one of manifest constitutional error. *State v. Curtis*, 110 Wash.App. 6, 11, 37 P.3d 1274 (2002).

Due Process

[2] [3] A criminal defendant's assertion of his constitutionally protected due process rights is not evidence of guilt. *429 *State v. Lewis*, 130 Wash.2d 700, 705, 927 P.2d 235 (1996). The State may not, therefore, invite a jury to infer that a defendant is more likely guilty because he exercised his constitutional rights. *State v. Nelson*, 72 Wash.2d 269, 285, 432 P.2d 857 (1967). The inference always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial. *Id.*

[4] [5] It is, accordingly, well settled that due process precludes the State from impeaching a defendant's testimony at trial with the fact that he chose to remain silent following *Miranda* warnings. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The decision to remain silent at the time of arrest is "insolubly ambiguous," reflecting merely reliance on the right to remain silent rather than a fabricated trial defense. *Id.* at 617. But if the defendant waives the right to remain silent and makes a postarrest statement, the prosecutor may draw the attention of the jury to the fact that a story told at trial was omitted from that statement. *State v. Belgarde*, 110 Wash.2d 504, 511, 755 P.2d 174 (1988). Such selective silence is not inherently ambiguous, but strongly suggests a fabricated defense. *Id.* at 511-12, 755 P.2d 174.

[6] Moreover, the *Miranda* warnings themselves carry the implicit assurance that the defendant's silence will carry no penalty. *Doyle*, 426 U.S. at 618, 96 S.Ct. 2240; *Belgarde*, 110 Wash.2d at 511, 755 P.2d 174. Telling the jury that

the defendant remained silent after being informed of his *Miranda* rights, then, necessarily violates fundamental due process by undermining this implicit assurance. *Doyle*, 426 U.S. at 619, 96 S.Ct. 2240; *State v. Easter*, 130 Wash.2d 228, 236, 922 P.2d 1285 (1996); *State v. Nemitz*, 105 Wash.App. 205, 214, 19 P.3d 480 (2001).

[7] Here, as part of the State's case in chief, the court admitted both the police recitation of incriminating evidence and Mr. Silva's silence in response to that recitation as substantive evidence of guilt. Moreover, **894 here, Detective Jones expressly assured Mr. Silva that he would suffer no *430 penalty if he exercised his right to silence, which is precisely what he did.

The State cites to *Belgarde* as carte blanche authority to use a defendant's later decision to remain silent against him at trial if the defendant can be induced to answer some question before asserting the right. *Belgarde* addresses the exception outlined in *Doyle*. When a defendant waives the right to remain silent, makes a self-serving partial statement at the time of his arrest, then presents additional exculpatory testimony at trial, *Belgarde* allows the State to impeach the defendant with both the statement and the pertinent omissions. *Belgarde*, 110 Wash.2d at 511-12, 755 P.2d 174. This simply permits the State to draw attention to the defendant's failure to incorporate the events he relates at trial into the statement he originally gave to police. *Id.* at 511, 755 P.2d 174.

In support of this same proposition, the State cites to a number of other cases with different facts. *State v. Clark*, 143 Wash.2d 731, 764, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001); *State v. Young*, 89 Wash.2d 613, 621, 574 P.2d 1171 (1978); *State v. Osborne*, 50 Ohio St.2d 211, 216-17, 364 N.E.2d 216 (1977). But the facts here are distinguishable from all the cases cited.

Mr. Silva did not give an incomplete self-serving statement followed by inconsistent trial testimony. The State should not, therefore, have been permitted to fill in the blanks in his responses. Mr. Silva answered innocuous identification questions, then declined to incriminate himself. Moreover, Mr. Silva's silence was offered in the State's case in chief as "confession by silence or as substantive evidence of guilt." *Doyle*, 426 U.S. at 615-16, 96 S.Ct. 2240. No case cited permits a defendant's postarrest silence to be introduced as substantive evidence of guilt in the State's case in chief.

Harmless Error

[8] The State contends that Mr. Silva has failed to make a showing of prejudice, and that he has not been prejudiced.

[9] [10] [11] But prejudice is presumed when due process is denied. *431 *United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000); *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). The burden falls upon the State to prove the error did not cause prejudice. *Easter*, 130 Wash.2d at 242, 922 P.2d 1285; *State v. McReynolds*, 117 Wash.App. 309, 326, 71 P.3d 663 (2003); *Curtis*, 110 Wash.App. at 15, 37 P.3d 1274; *Nemitz*, 105 Wash.App. at 215, 19 P.3d 480. The State must persuade us beyond a reasonable doubt that the due process violation did not affect the outcome of the trial—that any reasonable jury would have reached the same result with or without the error. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Aumick*, 126 Wash.2d 422, 430, 894 P.2d 1325 (1995). The State must point to sufficient untainted evidence in the record as to inevitably lead to a finding of guilt. *Guloy*, 104 Wash.2d at 426, 705 P.2d 1182. Here, the State does not contend that the untainted evidence is overwhelming, nor does our review of the record suggest that it is so overwhelming.

[12] Moreover, where comment on the decision to remain silent “so prejudice[s] ... the privilege against compulsory self-incrimination[] as to amount to a denial of that right,” reversal is required. *Donnelly v. Christoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)).

That is the case here. The State not only violated the implicit *Miranda* guaranty of freedom from penalty; it

actively induced Mr. Silva to compromise his due process protections by express assurances that his Fifth Amendment guaranty would not be affected by responses to preliminary questions. The prosecutor then informed the jury that Mr. Silva declined to respond to specific accusations and laid out the detective's recital of incriminating evidence—not to impeach inconsistent trial testimony, but as substantive evidence of guilt in its case in chief. This was error.

****895 *432 VENUE**

[13] We address the matter of venue in the event of a retrial. Mr. Silva contends that the State did not establish the venue set out in the elements instruction.

[14] [15] Extraneous elements added to the instruction, if not objected to, become the law of the case. *State v. Hickman*, 135 Wash.2d 97, 102, 954 P.2d 900 (1998). This includes venue. *Id.* at 105, 954 P.2d 900. We make the usual sufficiency inquiry: whether, “ ‘after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *Id.* at 103, 954 P.2d 900 (emphasis omitted) (quoting *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980)). The State placed in the record sufficient evidence to permit a rational jury to find that the defendant committed the criminal conduct in Grant County.

The conviction is reversed.

WE CONCUR: BROWN, C.J., and KATO, J.

All Citations

119 Wash.App. 422, 81 P.3d 889

Footnotes

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

APPENDIX D

Case # 222641	Court : COURT OF APPEALS-DIVISION III	Status : Stored
State of Washington v. Martenia Survell Turner-Bey		



- [Help](#)
- [Search Screen](#)
- [Logoff](#)

Superior Court Participants

Supreme Court Case

- [Basic Information](#)
- [Participants](#)
 - [Appellants](#)
 - [Petitioners](#)
 - [Respondents](#)
 - [Attorneys](#)
- [Events \(in chronological order\)](#)
- [Events](#)
 - [Briefs](#)
 - [Appellant's Brief](#)
 - [Respondent's Brief](#)
- [Decisions](#)
- [Motions](#)

GRANT COUNTY SUPERIOR COURT Case#: 021008049			
STATE OF WASHINGTON VS TURNER-BEY, MARTENIA SURVELL			
Role	Participant Name	Address	ID Number
W/D ATTY FOR DEFENDANT	EARL, THOMAS JAY	1334 S PIONEER WAY MOSES LAKE WA 98837-2410	10902
DEPUTY PROSECUTING ATTY	OWENS, EDWARD ASA	PO BOX 37 EPHRATA WA 98823-0037	29387
PLAINTIFF	STATE OF WASHINGTON		65632
DEFENDANT	TURNER-BEY, MARTENIA SURVELL	110 SCHILLING DRIVE MOSES LAKE WA 98837	66016
ATTY FOR DEFENDANT	WHITE, WILLIAM ALAN	8968 GOODRICH RD SE MOSES LAKE WA 98837-9035	12879

Court of Appeals Case

- [Basic Information](#)
- [Participants](#)
 - [Appellants](#)
 - [Petitioners](#)
 - [Respondents](#)
 - [Attorneys](#)
- [Events \(in chronological order\)](#)
- [Events](#)
 - [Briefs](#)
 - [Appellant's Brief](#)
 - [Respondent's Brief](#)
- [Decisions](#)
- [Motions](#)

Superior Court Information

- [Basic Information](#)
- [Charge Sentence](#)
- [Dockets](#)
- [Participants](#)

124 Wash.App. 1002

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR
14.1

Court of Appeals of Washington,
Division 3,
Panel Two.

STATE of Washington, Respondent,
v.
Martenia Survell TURNER-BEY, Appellant.

No. 22264-1-III.

|
Nov. 2, 2004.

Appeal from Superior Court of Grant County; Hon. Evan E.
Sperline, J.

Attorneys and Law Firms

Martenia Survell Turner-Bey, Moses Lake, WA, Appearing
pro se.

Paul J. Wasson II, Attorney at Law, Spokane, WA, for
Appellant.

Teresa Jeanne Chen, Edward Asa Owens, Grant County
Prosecutor's Office, Ephrata, WA, for for Respondent.

UNPUBLISHED OPINION

KATO, C.J.

*1 Martenia Survell Turner-Bey was convicted of fourth
degree assault and unlawful imprisonment. Claiming the
prosecutor committed misconduct so prejudicial as to require
a new trial, he appeals. We agree and reverse.

On June 29, 2002, Deputy Steve Martinez was dispatched to
investigate a disturbance at the New Bride Baptist Church in
Moses Lake. Church member Johnny Barnes told the deputy
he had changed the lock on a food locker in the church.
The locker was used to store food for Project Blessing, a
food bank project funded by the National Association for the
Advancement of Colored People (NAACP). Mr. Barnes said
Mr. Turner-Bey, a church member and president of the local
NAACP chapter, became angry after learning the lock had
been changed. Mr. Barnes was in his car, preparing to go to
Wal-Mart to make copies of the key for the new lock, when

Mr. Turner-Bey approached and choked him, took his car
keys, and commanded him to remove the lock from the food
locker. Mr. Turner-Bey pushed and shoved him back into the
church and watched as he removed the lock. Mr. Barnes told
the deputy that he allowed him to leave the church only after
removing the lock.

Ruth Brooks, Mr. Barnes' 14 year-old stepdaughter, testified
she heard Mr. Turner-Bey and her stepfather discussing the
Project Blessing food locker. Mr. Turner-Bey appeared to be
mad and told Mr. Barnes that if he did not take the lock off of
the food locker, they 'were going to have problems' and 'were
going to fight.' Report of Proceedings (RP) at 86.

Ms. Brooks was near the driver's side door of Mr. Barnes' car
when she saw Mr. Turner-Bey open the car door and try to
take the keys out of the ignition. He then started to choke Mr.
Barnes. Ms. Brooks testified she heard Mr. Barnes say, ' § L
§ et me go; what are you doing man; let me go; let me go.'
RP at 89. Mr. Barnes told Mr. Turner-Bey that he would take
the lock off the food locker. He began to walk towards the
church, while Mr. Turner-Bey pushed him. Ms. Brooks then
went into the church, hid under a kitchen table, and called 911.
After Mr. Barnes took off the lock, Ms. Brooks said he tried
to walk away, but Mr. Turner-Bey pushed him again.

Mr. Turner-Bey denied involvement in the crimes. He said he
panicked after discovering the new lock on the food locker
and went outside to tell Mr. Barnes not to leave until the police
arrived. Mr. Turner-Bey believed Mr. Barnes had committed
a crime. He never touched Mr. Barnes, but he did attempt to
grab his car keys to prevent him from leaving. According to
Mr. Turner-Bey, Mr. Barnes was free to leave and could have
left the church property had he wanted to do so. After Mr.
Turner-Bey told him the police had been called, Mr. Barnes
agreed to take the lock off the food locker, rushed into the
church to take it off, and left.

Mr. Turner-Bey was charged with fourth-degree assault and
unlawful imprisonment. The jury found him guilty as charged.
This appeal follows.

*2 He contends the prosecutor committed prejudicial
misconduct in closing argument by expressing his personal
opinion as to the credibility of witnesses. The prosecutor
made these statements: 'I don't believe Mr. Turner-Bey when
he said he thinks a crime was going on and he's holding him
for the police.' RP at 278. 'But I believe Ruth Brooks when
she says that she saw Johnny Barnes being choked, grabbed

around his neck area, and pushed back into the church.' RP at 284. In rebuttal, the prosecutor stated:

I think Ruth Brooks was the only person who was really being the adult there. We train our children when there's trouble to do what? Call 9-1-1.

Call help. Call for the police. That's exactly what she did. Why did she do that? Because, number one, I say she was afraid.

RP at 297.

What would the key witness that was three feet away from all this information, what was her motivation to lie? She just came to the church in a van with Mr. Turner-Bey. They're friends. She has no animosity towards him. She doesn't hate him. She's just telling the truth.

RP at 299-300.

The prosecutor concluded by saying:

That's how I ask, when I look at this case myself, saying okay who is telling the truth. As a prosecutor I don't find cases and prove how they're guilty, I like to look at both sides of the situation. I look at the situation and who is telling the truth.

RP at 299.

Although it is improper to vouch for a witness's credibility, attorneys may argue credibility and draw inferences about it from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). A prosecutor arguing credibility only commits misconduct when it is 'clear and unmistakable' that he is expressing

a personal opinion rather than arguing an inference from the evidence. *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983). Absent an objection, a defendant cannot claim prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that a curative instruction could not have neutralized any prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Mr. Turner-Bey did not object at trial to the statements that he now challenges on appeal. He must therefore establish that the prosecutor's statements were so flagrant and ill intentioned that any prejudice could not have been cured by a jury instruction. The prosecutor's statements here clearly and unmistakably told the jury he personally did not believe the testimony of Mr. Turner-Bey. He also stated that Ms. Brooks was telling the truth. The prosecutor's argument did not make inferences from the facts in evidence, but rather expressed his personal opinion vouching for the credibility of certain witnesses. To underscore his ability to determine who was telling the truth, he told the jury he looked at both sides of the situation in this case and asked himself who was telling the truth. By making improper argument personally vouching for the credibility of Ms. Brooks, he committed misconduct. In these circumstances, the prosecutor's argument was so prejudicial as to demonstrate a substantial likelihood it affected the verdict and deprived Mr. Turner-Bey of a fair trial. *State v. Sargent*, 40 Wn.App. 340, 343-46, 698 P.2d 598 (1985), rev'd on other grounds, 111 Wn.2d 641 (1988).

*3 Because this issue is dispositive, we need not address the others raised in this appeal. The convictions are reversed; the case is remanded for new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: SCHULTHEIS and BROWN, JJ.

All Citations

Not Reported in P.3d, 124 Wash.App. 1002, 2004 WL 2445685

APPENDIX E

Case # 286711	Court : COURT OF APPEALS-DIVISION III	Status : Stored
State of Washington v. Keir Albert Wallin		



[Help](#)
[Search Screen](#)
[Logoff](#)

Superior Court Participants

Court of Appeals Case

[Basic Information](#)
[Participants](#)
[Appellants](#)
[Petitioners](#)
[Respondents](#)
[Attorneys](#)
[Events \(in
chronological order\)](#)
[Events](#)
[Briefs](#)
[Appellant's Brief](#)
[Respondent's Brief](#)
[Decisions](#)
[Motions](#)

GRANT COUNTY SUPERIOR COURT Case#: 091003311			
STATE OF WASHINGTON VS WALLIN, KEIR ALBERT			
Role	Participant Name	Address	ID Number
W/D ATTY FOR DEFENDANT	KENTNER, ROBERT STEPHEN	PO BOX 14 SEATTLE WA 98111-0014	39964
ATTY FOR DEFENDANT	NIELSEN, ERIC J.	1908 E MADISON ST SEATTLE WA 98122-2842	12773
DEPUTY PROSECUTING ATTY	OWENS, EDWARD ASA	PO BOX 37 EPHRATA WA 98823-0037	29387
ATTY FOR DEFENDANT	PERRY, JOHN C.	707 W MAIN AVE STE B1 SPOKANE WA 99201-0631	16041
PLAINTIFF	STATE OF WASHINGTON		56939
DEFENDANT	WALLIN, KEIR ALBERT	511 3RD AVE # 95673 SEATTLE WA 98104	38906

Superior Court Information

[Basic Information](#)
[Charge Sentence](#)
[Dockets](#)
[Participants](#)

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Apodaca, Wash.App. Div. 1, January 14, 2019

166 Wash.App. 364
Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,
v.
Keir Albert WALLIN, Appellant.

No. 28671-1-III.
|
Feb. 2, 2012.

Synopsis

Background: Defendant was convicted after a jury trial in the Superior Court, Grant County, John Michael Antosz, J., of possession of drugs and drug paraphernalia, and he appealed.

[Holding:] The Court of Appeals, Sweeney, J., held that defendant's mere presence at trial did not open door to inquiry during cross-examination on whether he had tailored his testimony.

Reversed and remanded.

West Headnotes (3)

- [1] **Criminal Law**
↔ On reception of evidence
Criminal Law
↔ Cross-examination and impeachment
Witnesses
↔ Defendants in Criminal Prosecutions
State violated defendant's constitutional right to be present at his trial, to confront witnesses, and testify on his own behalf by inquiring during cross-examination whether defendant had tailored his testimony based on what he had heard during trial, since defendant's mere presence at trial did not open door to inquiry; defendant did not testify that he had based any

of his answers on what he had learned from the evidence. West's RCWA Const. Art. 1, § 22.

1 Cases that cite this headnote

- [2] **Criminal Law**
↔ On reception of evidence

Witnesses
↔ Defendants in Criminal Prosecutions
State's cross-examination of defendant that generically suggests that defendant had tailored his testimony to fit what he heard during trial, rather than a specific showing of tailoring, abridges a defendant's rights to be present at trial and testify. West's RCWA Const. Art. 1, § 22.

2 Cases that cite this headnote

- [3] **Witnesses**
↔ Particular Subjects of Inquiry

Cross-examination based on a specific showing that the defendant tailored his testimony does not run afoul of rights guaranteed by state constitutions; it is questioning based upon something the defendant voluntarily puts into evidence. West's RCWA Const. Art. 1, § 22.

1 Cases that cite this headnote

Attorneys and Law Firms

****1073** Eric J. Nielsen, Jennifer M. Winkler, Nielsen Broman & Koch, PLLC, Seattle, WA, for Appellant.

Edward Asa Owens, Tyson Robert Hill, Grant County Prosecutor's Office, Ephrata, WA, for Respondent.

Opinion

SWEENEY, J.

***365** ¶ 1 Our Supreme Court recently held that the state may suggest that a defendant "tailored" his testimony based on what he heard at trial if the defendant opens the door to that suggestion. *State v. Martin*, 171 Wash.2d 521, 536-38, 252 P.3d 872 (2011), And we have recently held that an inquiry that suggests that testimony was "tailored" is proper to explain inconsistencies and contradictions between

a defendant's testimony and earlier statements to police. *State v. Hilton*, 164 Wash.App. 81, 261 P.3d 683 (2011). But here the State suggested that the defendant tailored his testimony based on nothing more than his presence at his trial. We conclude this was improper and we reverse and remand for a new trial.

FACTS

¶ 2 The pertinent factual backdrop here begins with the trial of this case. But briefly, the charges stem from a July 1, 2009 traffic stop by Moses Lake police. An officer saw a van passenger riding without a seat belt. He stopped the van and got identification from the passenger, Keir Wallin, and the driver, Anthony Antone. Dispatch reported that Mr. *366 Wallin was an "officer safety risk." Report of Proceedings (RP) (Nov. 4, 2009) at 32. So the officer frisked Mr. Wallin and searched the front passenger area of the van. He found drugs and drug paraphernalia in a wooden box and he arrested Mr. Wallin for possession of these things.

¶ 3 The State charged Mr. Wallin with possession of cocaine, morphine, ecstasy, less than 40 grams of marijuana, and possession of drug paraphernalia. His case went to a jury trial. Mr. Wallin testified that the wooden box belonged to his friend, Mr. Antone. Mr. Wallin knew about the box because the two frequently smoked marijuana together and Mr. Antone stored his marijuana and pipe in the wooden box. Mr. Wallin said that he did not tell police that the box belonged to Mr. Antone because it was an "integrity loyalty issue between one friend to another." RP (Nov. 5, 2009) at 176. He also believed Mr. Antone would admit that the box belonged to him.

¶ 4 The prosecutor asked Mr. Wallin if having access to the other evidence in the case gave Mr. Wallin the opportunity to tailor his testimony to the other evidence:

Q. Mr. Wallin, you've had the advantage of being in the courtroom and hearing all the testimony so far, correct?

A. Yes, I have, sir.

Q. You've had the chance to know ahead of time what people were going to say before you took the stand?

A. No, not really. Could you elaborate, please?

Q. Before you took the stand, you had the opportunity to hear Sergeant Jones testify?

A. Yes.

Q. And to watch the video?

A. Yes.

**1074 Q. And to see the evidence that was admitted?

A. Yes. Today or yesterday.

*367 Q. You had the opportunity to see the police reports?

A. Yes, I have.

RP (Nov. 5, 2009) at 177–78.

¶ 5 The jury convicted Mr. Wallin of all charges. Mr. Wallin appealed, arguing that the cross-examination violated his Washington state constitutional rights to appear and defend in person and to meet witnesses face to face. He filed his appellate brief in June 2010 and we stayed his appeal pending a decision in *Martin*. *Martin*, 171 Wash.2d 521, 252 P.3d 872. *Martin* was decided in May 2011 and the stay in this case was lifted in June 2011.

DISCUSSION

¶ 6 Mr. Wallin concedes the applicability of *Martin*. The State responds that this ends the discussion. Mr. Wallin's claims that his constitutional right to be present at his trial, to confront witnesses, and testify on his own behalf are all compromised by allowing the State to suggest that he tailored his testimony when the record does not support such an inference. We review his claim of error de novo. *State v. Robinson*, 171 Wash.2d 292, 301, 253 P.3d 84 (2011).

¶ 7 Article I, section 22 of the Washington State Constitution guarantees the accused rights "to appear and defend in person" and "to testify in his own behalf." Our Supreme Court only recently passed on whether a prosecutor's suggestion that the defendant "tailored" his testimony violates rights guaranteed by article I, section 22 to confront witnesses and to appear and defend. In *Martin*, it held that such cross-examination does not violate a defendant's article I, section 22 rights if the defendant opens the door to that inquiry:

Here Martin testified on direct examination about what time he was in the parking lot where the van was found as follows: "I would guess 11:30, 12:00, 12:30 at night. From prior testimony, I know it had to be before one." [Verbatim Report of Proceedings] (Dec. 11,

2007) at 28. In our judgment, this testimony opened the door to questions on cross-examination about whether he tailored his testimony to evidence presented *368 by other witnesses. Prohibiting the kind of questioning that occurred here, where the defendant states that he based his testimony, in part, on testimony of other witnesses, would inhibit the jury's ability to judge credibility and thereby seek the truth. In sum, we believe that in a case such as the instant, where the credibility of the defendant is key, it is fair to permit the prosecutor to ask questions that will assist the finder of fact in determining whether the defendant is honestly describing what happened.

Martin, 171 Wash.2d at 536, 252 P.3d 872 (emphasis added). A five-justice majority of the court then concluded that Mr. Martin had opened the door to the prosecutor's suggestion that he tailored his testimony:

We conclude, therefore, that the State did not violate article I, section 22 by posing questions during cross-examination that were designed to elicit answers indicating whether Martin tailored his testimony.

....

We conclude, however, that our state constitution was not violated when a deputy prosecutor, *in response to testimony Martin had given on direct examination*, asked Martin if he had tailored his testimony to conform to testimony given by other witnesses.

Id. at 536, 537–38, 252 P.3d 872 (emphasis added).

¶ 8 The court's conclusions in *Martin* rely on the United States Supreme Court's decision in *Portuondo*. *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000). The prosecutor made the comments at issue in *Portuondo* during closing argument: “[U]nlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.... That gives you a big advantage, doesn't it.” *Id.* at 64, 120 S.Ct. 1119. On appeal, the defendant argued these comments burdened his right to testify on his **1075 own behalf and to be present at trial. *Id.* at 65, 120 S.Ct. 1119. He attempted to analogize these *369 rights to his right to *not* testify at trial—something that is clearly prohibited. *Id.* at 65–66, 120 S.Ct. 1119.

¶ 9 A majority of the United States Supreme Court rejected the analogy and concluded that the rights are different for

two reasons. *Id.* First, prohibiting comments on a defendant's rights to testify and be present at trial is not rooted in history. *Id.* Second, comments on a defendant's failure to testify go toward guilt, not dishonesty. *Id.* at 67–68, 120 S.Ct. 1119. Comments on a defendant's failure to testify are prohibited when it is used as “ ‘evidence of guilt.’ ” *Id.* at 69, 120 S.Ct. 1119 (emphasis omitted) (quoting *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)). Comments on a defendant's rights to be present at trial and testify on his own behalf, on the other hand, touch upon the defendant's credibility as a witness. *Id.* Witness credibility is important to the “ ‘truth-seeking function’ ” of trial and a defendant-witness is therefore treated like any other witness. *Id.* (quoting *Perry v. Leeke*, 488 U.S. 272, 282, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989)). The Court ultimately held that the prosecutor's comments did not violate the Sixth Amendment.

¶ 10 Justice Ruth Bader–Ginsburg dissented. She would have held that the comments violate the Sixth Amendment. *Id.* at 76 (Ginsburg, J., dissenting). She argued that the majority “transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility.” *Id.* According to the dissent, the prosecutor's comments violated the Sixth Amendment because the comments were generalized accusations. *Id.* at 77, 120 S.Ct. 1119 (Ginsburg, J., dissenting). The dissent, however, suggested that a prosecutor pointing out specific instances of tailoring would not necessarily burden a defendant's credibility and would support a trial's truth-seeking function. *Id.* at 78, 120 S.Ct. 1119 (Ginsburg, J., dissenting).

¶ 11 *Martin* addressed similar issues but applied Washington state constitutional principles. The State questioned Mr. Martin about what time he was at an industrial *370 complex. *Martin*, 171 Wash.2d at 524, 252 P.3d 872. Mr. Martin said, “ ‘I would guess 11:30, 12:00, 12:30 at night. From prior testimony, I know it had to be before one.’ ” *Id.* When asked what time he got into a van, Mr. Martin said, “ ‘I'm saying this time, because of prior testimony, that I heard, said that the shop was closed at 1:00 a.m., so it was before 1:00 a.m.’ ” *Id.* The prosecutor then cross-examined Mr. Martin on his ability to tailor his testimony:

“A. Obviously I have been sitting in that seat the whole time, yes.

Q. And you've also had the advantage of knowing what people were going to say ahead of time, wouldn't you agree with me?

A. No, I didn't know what anybody was going to say ahead of time.

Q. You didn't get to read the police reports?

A. I got to read the police reports.

Q. And you didn't get to read witness statements?

A. I read witness statements, yes.

Q. And you weren't allowed to bring those reports and statements with you to court?

A. I read everything involved, yes.

Q. And you've had what, a little over a year to concentrate on what people were going to say, didn't you?

...

A. I've read the police reports, I've read your discovery, yes.

Q. And you've heard all the testimony so far?

A. So far, yes.

Q. And so you knew all that before you testified?

A. Yes."

Id. at 525, 252 P.3d 872.

¶ 12 The court conducted a *Gunwall*¹ analysis and concluded that the Washington State Constitution granted *371 broader rights than the United States Constitution. *Id.* at 528–29, 252 P.3d 872. Article I, section 22 **1076 then warranted an independent analysis after applying the first four *Gunwall* factors. *Id.* at 533, 252 P.3d 872. It then considered whether article I, section 22 prohibits a prosecutor from suggesting in cross-examination that a defendant tailored his testimony. *Id.* at 533–34, 252 P.3d 872. The court accepted Justice Ginsburg's dissent in *Portuondo* as controlling. *Id.* at 535–36, 252 P.3d 872. The majority reasoned that tailoring is an appropriate topic for cross-examination because cross-examination (not closing argument) is “when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.” *Id.* at 536, 252 P.3d 872. The court then concluded that the defendant's article I, section 22 rights had not been violated by the prosecutor's cross-examination. *Id.*

¶ 13 Justice Debra Stephens wrote for three justices who concurred in part and dissented in part. *Id.* at 538–42, 252 P.3d 872 (concurring/dissenting). They would have concluded that the defendant's article I, section 22 rights were violated but affirmed, nevertheless, because the evidence of guilt there was overwhelming. *Id.* These justices agreed with Justice Sanders' dissent. *Id.* at 541, 252 P.3d 872 (Stephens, J., concurring/dissenting). In a dissent, Justice Sanders urged that cross-examination implying tailoring “demean[ed],” rather than supported, the trial's truth-seeking function. *Id.* at 546–47, 252 P.3d 872 (Sanders, J., dissenting). He urged that the suggestion of tailoring implies that “all defendants are less believable simply as a result of exercising [article I, section 22] rights.” *Id.* at 546, 252 P.3d 872 (Sanders, J., dissenting).

¶ 14 The *Martin* court concluded “that Justice Ginsburg's view, that suggestions of tailoring are appropriate during cross-examination, is compatible with the protections provided by article I, section 22.” *Id.* at 535–36, 252 P.3d 872. And Mr. Martin's testimony “opened the door” to cross-examination that suggested tailoring. *Id.* at 536, 252 P.3d 872. But the court did not “decide whether generic accusations are prohibited under article I, section 22” because “the accusation of tailoring in this case was specific rather than generic.” *Id.* at 536 n. 8, 252 P.3d 872 n. 8. *372 The *Martin* court decided only that examination suggesting tailoring is generally compatible with article I, section 22. *Id.*

¶ 15 Since the *Martin* decision, we have also held that the State's suggestions that a defendant tailored his testimony did not violate article I, section 22. *Hilton*, 164 Wash.App. at 96, 261 P.3d 683 (citing *Martin*, 171 Wash.2d at 536, 252 P.3d 872). There the defendant also “opened the door” to cross-examination about tailoring during a second trial because he changed his alibi after sitting through his prior trial. *Id.*

¶ 16 Mr. Wallin did not “open the door” to such cross-examination. He did not testify that he had based any of his answers on what he learned from the evidence. Nor was that a fair inference. RP (Nov. 5, 2009) at 147–209.

¶ 17 Washington case law before *Martin* provided that “[t]he State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.” *State v. Rupe*, 101 Wash.2d 664, 705, 683 P.2d 571 (1984) (reversing death sentence because the State drew an adverse inference from defendant's legal gun possession). *Rupe* addressed article I, section 24 of this

state's constitution. *Id.* at 706, 683 P.2d 571. In *State v. Johnson*, *Rupe* was applied in the Sixth Amendment context. *State v. Johnson*, 80 Wash.App. 337, 341, 908 P.2d 900 (1996), *overruled by State v. Miller*; 110 Wash.App. 283, 285, 40 P.3d 692 (2002). In *Johnson*, the court concluded a prosecutor's closing argument infringed on a defendant's Sixth Amendment right because the prosecutor "did not merely argue inferences from the defendant's testimony, but improperly focused on the exercise of the constitutional right itself." *Id.* at 341, 908 P.2d 900.

¶ 18 In *State v. Smith*, the court applied *Johnson*, and *Rupe* by extension, again in the Sixth Amendment context. *State v. Smith*, 82 Wash.App. 327, 334–35, 917 P.2d 1108 (1996). There the prosecutor cross-examined the defendant on his ability to tailor his testimony. During the defendant's direct examination, counsel referred to photographs of an apartment where the crime happened and the defendant testified that the victim had two to three glasses of wine. *Id.* at 334, 917 P.2d 1108. On cross-examination, the prosecutor asked, "So before you decided to testify that [the victim] had two to three glasses of wine out of that bottle, you had a chance to see that that bottle wasn't all the way full, didn't you?" *Id.* The prosecutor continued; "Isn't it fair to say that after you looked at all the photographs in the case and you had a chance to read the discovery and see what people were going to say and hear what they had to testify to, it was only then that you crafted your story?" *Id.* The court concluded that these questions "raised an inference from Smith's testimony" rather than "focus[ing] on the exercise of the constitutional right itself." *Id.* at 335, 917 P.2d 1108 (quoting *Johnson*, 80 Wash.App. at 341, 908 P.2d 900).

¶ 19 Once *Portuondo* was decided, the court concluded that "*Portuondo* effectively overrules *Johnson* and *Smith* insofar as they state a different rule." *Miller*; 110 Wash.App. at 285, 40 P.3d 692. But "[a] later holding overrules a prior holding sub silencio when it directly contradicts the earlier rule of law." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash.2d 264, 280, 208 P.3d 1092 (2009). *Miller*, *Smith*, and *Portuondo* all address federal constitutional provisions. *Miller*, 110 Wash.App. at 284, 40 P.3d 692; *Smith*, 82 Wash.App. at 334, 917 P.2d 1108; *Portuondo*, 529 U.S. at 66, 120 S.Ct. 1119. In *Miller's* context, *Portuondo* overruled *Smith* because both cases address the U.S. Constitution's Sixth Amendment. However, *Miller* does not directly contradict *Smith* and *Johnson* insofar as the reasoning of *Johnson* and *Smith* still make sense when state constitutional law is applied. And it seems to us that the reasoning in *Johnson* and

Smith could apply to state law. Likewise, *Martin's* holding limited to cross-examination on specific instances of tailoring does not directly contradict *Johnson* and *Smith* insofar as they address "generic tailoring"—suggestions by the State that the defendant tailored his testimony simply because he showed up for trial.

*374 ¶ 20 The prosecutor in Mr. Wallin's case went further than asking about inferences from Mr. Wallin's testimony. The prosecutor asked him directly about "the advantage of being in the courtroom and hearing all of the testimony so far." RP (Nov. 5, 2009) at 177. The focus of this question clearly followed from Mr. Wallin's exercise of his article I, section 22 rights to confront witnesses face-to-face and to appear and defend himself. Under *Smith*, this cross-examination would be prohibited. *Smith*, 82 Wash.App. at 335, 917 P.2d 1108.

¶ 21 A handful of other states have addressed the issue of tailoring. None is completely on point but cases out of New Jersey, Minnesota, and Hawaii are helpful. *State v. Daniels*, 182 N.J. 80, 99–100, 861 A.2d 808 (2004); *State v. Swanson*, 707 N.W.2d 645, 657 (Minn.2006); *State v. Mattson*, 122 Hawai'i 312, 326, 226 P.3d 482 (2010).

¶ 22 Courts in New Jersey, Hawaii, Colorado, Massachusetts, Vermont, and Minnesota have concluded that cross-examination or closing argument suggesting that testimony was tailored is permissible only if there is specific evidence of tailoring. See *Daniels*, 182 N.J. at 99, 861 A.2d 808 (explaining that a prosecutor can cross-examine a defendant on tailoring only when there is evidence suggesting tailoring and if the prosecutor does not reference defendant attending trial and hearing prior witness testimony); *Mattson*, 122 Hawai'i at 326, 226 P.3d 482; *Martinez v. People*, 244 P.3d 135, 141–42 (Colo.2010); *Commonwealth v. Gaudette*, 441 Mass. 762, 767–68, 808 N.E.2d 798 (2004); *State v. Hemingway*, 148 Vt. 90, 528 A.2d 746 (1987); *Swanson*, 707 N.W.2d at 657. These cases are then consistent with the majority's holding in *Martin*.

¶ 23 In *Mattson*, the Hawaii Supreme Court addressed whether closing argument on generic tailoring violated the state constitution. 122 Hawai'i at 326, 226 P.3d 482. It relied on *Portuondo's* dissent to reason "that generic accusations of tailoring during closing argument that are based only on a defendant's presence throughout the trial burden the defendant's constitutional right to be present at trial and could discourage a defendant from exercising his constitutional right to *375 testify on his own behalf." *Id.* It concluded

that the Hawaii constitutional right to ****1078** confrontation would prohibit such argument but would accommodate argument based on evidence of tailoring in the record. *Id.* at 326–27, 226 P.3d 482. The Hawaiian confrontation clause guarantees the right “ ‘physically to face those who testify against him,’ ” among other rights. *Id.* at 325, 226 P.3d 482 (quoting *State v. Peseti*, 101 Hawai‘i 172, 180, 65 P.3d 119 (2003)).

¶ 24 Other cases address the propriety of comments made during closing argument and are not helpful. *Martinez*, 244 P.3d at 140; *Hemingway*, 148 Vt. 90, 528 A.2d 746; *Gaudette*, 441 Mass. at 767, 808 N.E.2d 798. Those cases rely on the rule that “closing argument should be based on the evidence in the record and all reasonable inferences to be drawn therefrom.” *Martinez*, 244 P.3d at 140; *see also Hemingway*, 148 Vt. at 90, 528 A.2d 746; *Gaudette*, 441 Mass. at 767, 808 N.E.2d 798. Cross-examination on conduct probative of truthfulness need not be supported by evidence in the record. ER 608(b). So the reasoning in the closing argument cases does not directly apply to Mr. Wallin’s complaints here on appeal.

¶ 25 New Jersey and Minnesota shared the same analysis to craft a rule that the State’s suggestion that the defendant tailored his testimony based on nothing more than his presence in the courtroom was improper. *Daniels*, 182 N.J. 80, 861 A.2d 808; *Swanson*, 707 N.W.2d 645. Neither held that it was unconstitutional; both states accepted the United States Supreme Court’s invitation to create a rule prohibiting the practice. *Daniels*, 182 N.J. at 95–96, 861 A.2d 808; *Swanson*, 707 N.W.2d at 657–58. Both reason that a criminal defendant is not like other witnesses because criminal defendants have constitutional rights that other witnesses do not have. *Daniels*, 182 N.J. at 97, 861 A.2d 808; *Swanson*, 707 N.W.2d at 657–58. Allowing a prosecutor to cross-examine a defendant on tailoring when there is no evidence of it uses the defendant’s constitutional rights to hurt rather than help him. *Daniels*, 182 N.J. at 98–99, 861 A.2d 808; *Swanson*, 707 N.W.2d at 658.

¶ 26 Connecticut, New York, the District of Columbia, and Missouri have all held that cross-examination or closing ***376** argument bringing up the defendant’s ability to tailor his testimony is not a constitutional violation. *See State v. Alexander*, 254 Conn. 290, 297, 755 A.2d 868 (2000) (explaining that a defendant cannot take the stand and not have his credibility impeached); *People v. King*, 293 A.D.2d 815, 817, 740 N.Y.S.2d 500 (2002) (“[A] defendant has the opportunity to rebut the insinuation through further testimony or introduction of a prior consistent statement.”);

Teoume–Lessane v. United States, 931 A.2d 478, 494–95 (D.C.App.2007); *State v. Norville*, 23 S.W.3d 673, 685–86 (Mo.Ct.App.2000). These cases, however, apply the federal constitution, not a state constitution. So again, these cases are not helpful here.

¶ 27 *Mattson* (Hawaii), *Daniels* (New Jersey), and *Swanson* (Minnesota) are helpful. Like Washington’s constitution, Hawaii’s constitution protects a defendant’s right to confront witnesses face to face. *Mattson*, 122 Hawai‘i at 325, 226 P.3d 482. So, it could be said that at least one other state has prohibited comments suggesting generic tailoring because they infringe on a defendant’s constitutional right to confront witnesses face-to-face. However, *Mattson* does not address cross-examination so its facts are not completely analogous. *Id.* *Daniels* and *Swanson* both address cross-examination; however, they do not rely on state constitutional law. *Daniels*, 182 N.J. at 95–96, 861 A.2d 808; *Swanson*, 707 N.W.2d at 657–58. They rely on their ability to fashion a trial practice rule, which is not something that we could do.

¶ 28 These cases, nevertheless, help clarify that cross-examination that generically suggest to the jury tailoring, rather than a specific showing of tailoring, abridges a defendant’s rights to be present at trial and testify. Cross-examination based on a specific showing that the defendant tailored his testimony does not run afoul of rights guaranteed by state constitutions; it is questioning based upon something the defendant voluntarily puts into evidence. *Martin*, 171 Wash.2d at 536, 252 P.3d 872. This seems to be the holding in *Martin*, which again was limited to specific tailoring cross-examination.

****1079 *377** ¶ 29 Ultimately, Mr. Wallin’s presence at his trial, the presence that prompted the State’s inquiry, was the result of an obligation and a right. He had the obligation to show up for his trial or, we assume, the judge and the prosecutor would have been very unhappy and may even have issued a bench warrant for his arrest. And he had a constitutional right under both federal and state constitutions to confront witnesses and participate in his own defense. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Why then should he be subject to the State’s suggestion—unfounded on this record—that he tailored his testimony?

¶ 30 Here there is no showing that Mr. Wallin had any opportunity to “tailor” his testimony other than showing up for trial. We reverse and remand for new trial.

WE CONCUR: BROWN and SIDDOWAY, JJ.

All Citations

166 Wash.App. 364, 269 P.3d 1072

Footnotes

1 *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

BURKHART & BURKHART, PLLC

February 06, 2020 - 2:26 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37064-0
Appellate Court Case Title: State of Washington v. Wayne Bert Symmonds
Superior Court Case Number: 19-1-00330-1

The following documents have been uploaded:

- 370640_Briefs_20200206142547D3437224_0579.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief.pdf
- 370640_Designation_of_Clerks_Papers_20200206142547D3437224_2276.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was Designation Clerks Papers - Supp 2nd.pdf

A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
8220 W. GAGE BLVD #789
KENNEWICK, WA, 99336
Phone: 509-572-2409

Note: The Filing Id is 20200206142547D3437224