

70936-4

70936-4

COA NO. 70936-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

CARLA FORD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard T. Okrent, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373



A handwritten signature in black ink, appearing to be 'Casey Grannis', is written over a circular court stamp. The stamp contains some illegible text, possibly a date or time stamp.

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE STATE'S IMPROPER COMMENT ON FORD'S EXERCISE OF HER POST-ARREST RIGHT TO REMAIN SILENT REQUIRES REVERSAL	1
a. <u>The State Invokes The Wrong Legal Standard For Determining Whether A Prosecutor Has Commented On The Right To Silence</u>	1
b. <u>Ford Did Not Make A Statement In Response To The Officer's Incriminating Question; She Was Silent And The Prosecutor Could Not Use That Silence As Evidence Of Guilt.</u>	7
c. <u>The State Cannot Show This Constitutional Error Was Harmless Beyond A Reasonable Doubt</u>	9
B. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>DeHeer v. Seattle Post-Intelligencer</u> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	3
<u>In re Dependency of Penelope B.</u> , 104 Wn.2d 643, 709 P.2d 1185 (1985).....	7
<u>State v. Burke</u> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	4
<u>State v. Fuller</u> , 169 Wn. App. 797, 282 P.3d 126 (2012), <u>review denied</u> , 176 Wn.2d 1006, 297 P.3d 68 (2013)	4, 9
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	5, 6
<u>State v. Gutierrez</u> , 50 Wn. App. 583, 749 P.2d 213 (1988).....	5, 6
<u>State v. Holmes</u> , 122 Wn. App. 438, 93 P.3d 212 (2004).....	3, 10
<u>State v. Knapp</u> , 148 Wn. App. 414, 199 P.3d 505 (2009).....	8
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	9
<u>State v. Piatnitsky</u> , 180 Wn.2d 407, 325 P.3d 167 (2014).....	1, 2
<u>State v. Rogers</u> , 44 Wn. App. 510, 722 P.2d 1349 (1986).....	9
<u>State v. Silva</u> , 119 Wn. App. 422, 81 P.3d 889 (2003).....	5, 6, 9

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Terry,
__ Wn. App. __, 328 P.3d 932 (2014)..... 4, 10

FEDERAL CASES

Berghuis v. Thompkins,
560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010)) 1, 2

Davis v. United States,
512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)..... 1, 2

Doyle v. Ohio,
426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)..... 3, 4

Grieco v. Hall,
641 F.2d 1029 (1st Cir. 1981)..... 5

Hurd v. Terhune,
619 F.3d 1080 (9th Cir. 2010) 5

Jenkins v. Anderson,
447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980)..... 3

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 1-4

United States v. Ghiz,
491 F.2d 599, 600 (4th Cir. 1974) 5

United States v. May,
52 F.3d 885 (10th Cir. 1995) 5

United States v. Scott,
47 F.3d 904 (7th Cir 1995) 5

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Wainwright v. Greenfield,
474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986)..... 3

OTHER STATE CASES

Commonwealth v. Harris,
371 Mass. 462, 358 N.E.2d 982 (Mass. 1976)..... 8

Commonwealth v. Thompson,
431 Mass. 108, 725 N.E.2d 556 (Mass.),
cert. denied, 531 U.S. 864, 121 S. Ct. 157, 148 L. Ed. 2d 105 (2000) 8

Commonwealth v. Wetzel,
214 Pa. Super. 536, 257 A.2d 310 (Pa. Super. 1969) 8

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.680 11

U.S. Const. amend. V 6

A. ARGUMENT

1. THE STATE'S IMPROPER COMMENT ON FORD'S EXERCISE OF HER POST-ARREST RIGHT TO REMAIN SILENT REQUIRES REVERSAL.
 - a. The State Invokes The Wrong Legal Standard For Determining Whether A Prosecutor Has Commented On The Right To Silence.

The State contends Ford did not unambiguously invoke her right to remain silent and therefore the State could comment on her silence in response to the officer's question. Brief of Respondent (BOR) at 8, 10 (citing Berghuis v. Thompkins, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); State v. Piatnitsky, 180 Wn.2d 407, 325 P.3d 167, 171 (2014)). The State, however, relies on a legal standard that is inapplicable to the question of whether the prosecution impermissibly comments on post-arrest silence.

The cases cited by the State all address what is required to invoke the Miranda¹ right to silence or an attorney so that police must cease interrogation. Berghuis, 560 U.S. at 381-82; Davis, 512 U.S. at 459; Piatnitsky, 180 Wn.2d at 412-15. The question resolved in those cases is whether the defendant's *statements* could be used against him as evidence

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

at trial, not whether his silence could be used against him. Piatnitsky, 180 Wn.2d at 415 ("We find the statements were properly admitted at trial"); Davis, 512 U.S. at 462 ("there is no ground for suppression of petitioner's statements"); Berghuis, 560 U.S. at 381 ("Thompkins makes various arguments that his answers to questions from the detectives were inadmissible.").

The admissibility of the statements Ford gave in response to questioning is not at issue here. Nor is there any challenge to when the officer was required to cease questioning. The officer in Ford's case properly ceased interrogation once Ford hung her head and said nothing and asked for her attorney. CP 63-64; 2RP 17-18. The line of cases represented by Berghuis, Davis and Piatnitsky has no application here. None of those cases address whether or under what circumstances the prosecution may comment on a defendant's silence in response to a question during interrogation following Miranda warnings.

The State cites to no authority that applies the "unequivocal" invocation standard to a claim that the prosecution has improperly commented on a defendant's post-arrest silence. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found

none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The law is clear. Due process prohibits prosecutors from pointing to the fact that a defendant was silent after receiving Miranda warnings, either as substantive evidence of guilt or as impeachment evidence. Doyle v. Ohio, 426 U.S. 610, 617-618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Wainwright v. Greenfield, 474 U.S. 284, 292, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). The reason for the rule is that Miranda warnings carry an implicit promise that an arrestee will not be penalized for her silence, which may be nothing more than an exercise of her Miranda rights. Doyle, 426 U.S. at 617-618; Jenkins v. Anderson, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). The State therefore commits error when it uses the defendant's post-Miranda failure to deny an accusation as a tacit admission of guilt. See State v. Holmes, 122 Wn. App. 438, 440, 444-45, 93 P.3d 212 (2004) (testimony that defendant did not act surprised or deny allegation at the time of his arrest was comment on silence).

Ford was given Miranda warnings. CP 57. She did not deny being present when Nance pulled the gun. 2RP 123. She was promised that her silence would not be used against her. The State used it against her at trial anyway. That is constitutional error. "For the government to comment on post-Miranda silence is to '[break] its promises given in the Miranda

warnings and violate[] due process of law." State v. Terry, __ Wn. App. __, 328 P.3d 932, 937 (2014) (quoting State v. Burke, 163 Wn.2d 204, 213, 181 P.3d 1 (2008)).

One of the reasons why the State is not permitted to use post-arrest silence as evidence of guilt at trial is that such silence is "insolubly ambiguous." Doyle, 426 U.S. at 617. The State points out just how ambiguous Ford's silence was. BOR at 11. That fact proves Ford's point, not the State's. Post-arrest silence is inherently ambiguous. The State seeks to use the nature of that silence to its advantage by turning the requisite legal standard on its head, advocating for a rule that requires an unambiguous assertion of silence in order to prevent the State from commenting on post-arrest silence. That is not the law.

A prosecutor may not comment on the fact that a defendant in custody, after receiving Miranda warnings, "stood mute." Miranda, 384 U.S. at 468 n. 37. A defendant's silence in response to an incriminating question following receipt of the Miranda warnings is all that is required to prevent the prosecution from attempting to use that silence against the accused at trial. This rule applies even where the defendant, having received Miranda warnings, answers some questions while remaining silent as to others. State v. Fuller, 169 Wn. App. 797, 815, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013); State v.

Silva, 119 Wn. App. 422, 429-30, 81 P.3d 889 (2003); Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010); United States v. May, 52 F.3d 885, 890 (10th Cir. 1995); United States v. Scott, 47 F.3d 904, 907 (7th Cir. 1995); Grieco v. Hall, 641 F.2d 1029, 1034 (1st Cir. 1981); United States v. Williams, 665 F.2d 107, 109 (6th Cir. 1981); United States v. Ghiz, 491 F.2d 599, 600 (4th Cir. 1974).

All that being said, Ford clearly invoked her right to silence. In response to the officer's question, she closed her eyes, hung her head *and asked for her attorney*, at which point the interrogation stopped. 2RP 17-18. The State leaves the part about asking for an attorney out of the equation. This is not even a case where a person declines to answer a question and then goes on to answer other questions afterwards. Ford stopped talking and the interrogation ended when she did not answer the question and requested an attorney. There is no sensible or meaningful way to separate the closing of the eyes and hanging of the head from the request for an attorney. They are naturally part and parcel to one another. The officer rightly ceased interrogation because Ford clearly invoked her right to silence in this manner.

The State's reliance on State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) is unavailing. BOR at 9-10. In Gregory, the defendant did not refuse to answer "any question posed to him" and thus the right to

remain silent was not implicated. Gregory, 158 Wn.2d at 837. Gregory is thus readily distinguishable from Ford's case.

Ford's case is more like Silva. Indeed, the Supreme Court in Gregory distinguished Silva, which involved a defendant who answered preliminary questions, but then refused to answer more incriminating questions about the crime. Id. (citing Silva, 119 Wn. App. at 426-27). The detective in Silva testified that when confronted with specific incriminating facts during the interview, he expected Silva to affirm or deny those facts, but instead Silva remained silent and did not answer the question. Id. The Supreme Court in Gregory recognized that Silva "clearly exercised his Fifth Amendment right to remain silent," whereas Gregory failed to "establish that his refusal to be recorded or make a formal statement implicates the Fifth Amendment right where there was no testimony that Gregory ever refused to answer a question." Id.

Ford, like the defendant in Silva, answered some questions but refused to answer an incriminating question. As the Supreme Court recognized in Gregory, that is sufficient to exercise her right to silence such that the prosecution is prohibited from commenting upon it. Id. at 837.

b. Ford Did Not Make A Statement In Response To The Officer's Incriminating Question; She Was Silent And The Prosecutor Could Not Use That Silence As Evidence Of Guilt.

The State argues that Ford's reaction to the question was not silence but rather a "nonverbal statement" capable of being commented upon. BOR at 9-10. It cites In re Dependency of Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985) for the proposition that nonverbal conduct is a statement when intended as an assertion. BOR at 10. Penelope B. addresses when nonverbal conduct is not hearsay under the evidentiary rules. Penelope B., 104 Wn.2d at 651-53. It has no bearing on the constitutional right to silence. The State cites no case where closing the eyes or hanging the head, coupled with not verbally answering the question, amounted to a statement rather than silence for purposes of determining whether the State could properly comment on it at trial.

The State is apparently advocating for a rule that it may comment on a defendant's post-arrest failure to answer a question anytime the defendant remains anything but motionless and emotionless. Under the State's theory, any number of physical responses could be interpreted as statements susceptible to being commented on as evidence of guilt even though the accused does not verbally answer the question. Such a rule would severely undermine the right to silence. In this regard, the State

does not even acknowledge State v. Knapp, 148 Wn. App. 414, 419-21, 199 P.3d 505 (2009), where the Court of Appeals held a prosecutor impermissibly commented on silence in using evidence that the defendant hung his head and did not respond to a question. Knapp supports Ford's argument.

Other authority supports Ford's argument as well. See Commonwealth v. Wetzel, 214 Pa. Super. 536, 538-39, 257 A.2d 310 (Pa. Super. 1969) (testimony that defendant hung his head and said nothing when identified by alleged victim as the perpetrator was inadmissible and required a new trial); Commonwealth v. Thompson, 431 Mass. 108, 117, 725 N.E.2d 556 (Mass.), cert. denied, 531 U.S. 864, 121 S. Ct. 157, 148 L. Ed. 2d 105 (2000) (testimony regarding defendant's "action of staring at the floor should not have been admitted for purposes of proving consciousness of guilt") (citing Commonwealth v. Harris, 371 Mass. 462, 476-477, 358 N.E.2d 982 (Mass. 1976) (defendant's "hanging his head" and "biting his lips" part of "failure to respond" to police questioning after arrest and not admissible as "nontestimonial admissions demonstrating a consciousness of guilt"))).

c. The State Cannot Show This Constitutional Error Was Harmless Beyond A Reasonable Doubt.

The State further contends that if this Court determines the prosecutor violated Ford's right to remain silent, "the defendant fails to show prejudice." BOR at 12. *Ford*, however, does not need to establish prejudice. *The State* needs to show the error was not prejudicial. The State bears the heavy burden of establishing the constitutional error was harmless beyond a reasonable doubt. *Fuller*, 169 Wn. App. at 813. The State fails to meet that burden here.

The State points to Nance's identification testimony in support of its argument. BOR at 14. It acknowledges Ford put on an alibi witness, but claims the testimony from that witness was "not so compelling that it undermined Mr. Nance's identification." BOR at 14. The State's choice of language — "not so compelling" — is freighted with import. The State is essentially arguing that Nance's identification testimony was more credible and persuasive than the testimony of Ford's alibi witness.

But "[a]n appellate court ordinarily does not make credibility determinations." *State v. Maupin*, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). Credibility is for the jury to decide, as is the weight to be given to testimony. *State v. Rogers*, 44 Wn. App. 510, 517, 722 P.2d 1349 (1986). And in considering the persuasive value of Nance's identification

testimony versus the alibi witness testimony, the jury may have sided with Nance's testimony based on the prosecutor's comment on Ford's silence.

Inviting a jury to infer that a defendant is more likely guilty because he exercised a constitutional right "always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial." Silva, 119 Wn. App. at 429. The comment on Ford's silence added weight to Nance's testimony. "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable.'" Holmes, 122 Wn. App. at 447 (quoting State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)). For this reason, this Court is not in a position to say that the jury would necessarily have reached the same result if the jury had not been tainted by the improper comment on Ford's silence.

Again, this constitutional error is harmless "only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Terry, 328 P.3d at 940. The evidence in Ford's case was not sufficiently overwhelming to necessarily lead to a finding of guilt. There is a real risk that the jury attached special significance to Ford's silence, and the prosecutor's argument about the significance of that silence. The

prosecutor certainly thought this evidence so important that it made a point of addressing it in opening statement² and then returned to it in closing argument. 2RP 225. The trial prosecutor's use of that evidence in an attempt to convince the jury of Ford's guilt belies the State's effort on appeal to cast the comment on silence as so minimally important that it could not have contributed to the verdict.

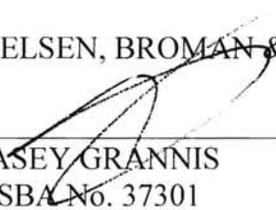
B. CONCLUSION

For the reasons set forth above and in the opening brief, Ford requests that this Court reverse the conviction and also hold that the trial court failed to comply with RCW 9.94A.680.

DATED this 3rd day of September 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

² See RP (7/29/13) ("Now it had been approximately eight days since the burglary so they didn't find any property and both defendants denied they had anything to do with this. But when Detective Ludwig asked Carla Ford, "What about the gun being pulled?" She dropped her head. She sighed." RP 6 (7/29/13).

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70936-4-1
)	
CARLA FORD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF SEPTEMBER 2014.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
SEP 3 2014
11:14 AM