

71468-6

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No. 71468-6-I

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

STATE OF WASHINGTON, Respondent,

v.

MARTIN ADAMS, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court's voir dire process substantially complied with the statutory and court rule provisions regarding peremptory challenges where the trial court did not permit the defendant to challenge a juror on the panel at the time of the alternate peremptory challenges when defendant had exhausted his challenges, and whether any error in the number of permitted peremptory challenges regarding alternates was harmless where the alternates did not deliberate.
2. Whether the trial court erred in not analyzing evidence of defendant's "controlling nature," gambling and drug use under ER 404(b) where defendant did not object under ER 404(b) and where defendant opened the door to the testimony regarding drug use.
3. Whether admission of the victim's prior consistent statements was error where defense aggressively attacked the victim's credibility, introduced evidence of the inconsistent statements initially on cross examination and where defense's questioning of the victim implied that she had a recent improper motive given her filing for divorce.
4. Whether the state commented upon defendant's privilege against self-incrimination where the prosecutor's intent was to elicit evidence of defendant's physical demeanor when the officer informed him that his wife was in the hospital, defendant did not invoke his right to remain silent, and defendant did speak with the officer.

C. FACTS

1. Procedural facts

On September 23, 2013, Appellant Martin Adams was charged with Assault in the Third Degree – Domestic Violence, in violation of, and Felony Harassment – Domestic Violence, in violation of RCW 9A.46.020(1), for his actions on or about September 19, 2013. CP 4-5. The assault charge was subsequently amended to Assault in the Second Degree, in violation of RCW 9A.36.021(1)(a), and the harassment charge was dismissed pre-trial. CP 8-9, 62; RP 66¹. He was found guilty by a jury and was sentenced to a standard range sentence of 26 months. CP 49, 58-70; SRP 520.

2. Substantive Facts

Around 3 a.m. on September 19, 2013 Kim Adams (“Kim” hereinafter), woke to her husband of 18 years, Adams, yelling about stuff on the end of the bed. RP 85, 87, 89. When she went to put the items on the couch, Adams told her to stop. RP 87-88. He hit her in the face and she fell back on the couch. RP 88, 90. He continued to hit her about the face

¹ The verbatim report of proceedings for the pretrial motions for December 10, 2013 (Vol. I) and trial (Vol. II – IV) are referred to as “RP” since they are sequentially numbered. VRP refers to the voir dire proceedings that occurred on December 10, 2013 (“Vol. V”), and SRP refers to the sentencing proceedings held on January 22, 2014 (duplicate “Vol. V”).

while she was on the couch. RP 90. Adams tripped over a water bottle² and told her to put it in the refrigerator. RP 88, 90. Adams told her she was doing it wrong and hit her so hard in her ribs with his fist that she urinated in her pants. RP 88, 90. When she came back from the bathroom, Adams had gone back to bed, and she went outside to walk around in the Fred Meyer parking lot where the RV was parked for the night. RP 88-90.

At one point she went back inside the RV, and Adams told her to go to the store to get him something to eat. RP 88. Adams then told her to forget it, that she wasn't worth it anyway, that she should leave because he didn't want her around anymore. RP 88. He said: "Why don't you go shoot yourself. You're not worth anything. I might as well kill you or you can kill yourself." RP 88-89.

Kim went outside and waited until Richard Loewen, a co-worker, picked her up sometime between 7:30 and 8 a.m. to take her to the casino where they worked. RP 89, 91, 119-20, 128. On the ride to work, Loewen could tell Kim was in a lot of pain by the way she was holding her right side. RP 128-29. He had never seen her like that before. RP 129. She told him that Adams punched her in the ribs. RP 128.

² Adams and Kim lived in an RV which had limited space to walk around. RP 356.

When she got to work, she saw another co-worker, Susan Gullock, RP 91, 134, 136. Kim looked terrible, she was pale and in a lot of pain. She could barely breathe and was having a hard time walking. RP 93, 136-37. Kim ended up going to the casino security, who told her they couldn't do anything for her and she needed to go to the hospital. RP 91, 137. Her friend, Tina Esqueda, took her to the hospital. RP 91, 193-94.

At the hospital, Kim was treated for chest and facial tenderness. RP 209-11. Kim said that Adams had assaulted her about the face and chest around 3 to 4 a.m. that morning, that it had happened before and she didn't want to report it. RP 211, 259-62. She had injuries to both cheeks, her nose, and chest. RP 262. She was diagnosed with two acute rib fractures, and was having difficulty breathing. RP 211-15, 222, 304-05. Kim's story was consistent with what the doctor observed. RP 222, 241, 306. The ER nurse eventually put her in contact with the police. RP 262.

Officer Dearborn spoke with Kim at the hospital. Kim told Officer Dearborn that Adams had woken her up because he wanted her to move the stuff that was on the end of the bed, that he assaulted her when she wasn't doing it right or fast enough, that he hit her so hard in her side that she urinated, and that he hit her in the nose when she was lying on the couch. RP 266. Kim appeared very scared and shaken to the officer, and

was afraid that if Adams found out she had reported the assault, he would beat her up or kill her³. RP 266-67.

Officer Dearborn then contacted Adams at the RV. RP 265-67. Officer Dearborn informed Adams that Kim was in the emergency room. RP 266-68. His demeanor in response to that news was not one the officer would have expected from a spouse – he was not shocked or surprised. RP 268. After the officer spoke with Adams, who denied hitting Kim and threatening to kill her, he was arrested. RP 269, 272. Adams had not been aware that Kim was in the hospital. RP 280.

When Kim was interviewed by Detective Renick the next day, Kim told the detective that she'd been woken up in the middle of the night because Adams was upset about some things that were on the bed, and that he had hit her in the ribs with his fist and in the nose with the palm of his hand⁴. RP 146-47. Although there was no bruising, Kim was wincing in pain and at one point had to stop the interview because of the pain. RP 160-61, 171.

Adams testified that he was informed by the police that his wife was at the ER, that she had internal bleeding and that he was being arrested. RP 351. He testified that the officer didn't ask him any questions

³ All this testimony came in without objection.

⁴ This testimony came in without objection.

and that he had asked the officer who was putting him into the patrol car whether he could see his wife and was told no. RP 351-52, 372. He testified that he had back problems and suffered from sciatica. RP 352-53. His back issues sometimes required Kim to help him into bed and to help him go to the bathroom. RP 106-07, 354, 365. He claimed that he'd been suffering from his sciatica that evening and that Kim had to help him. RP 354, 365. He also claimed to have been suffering from a bad case of hives for which he had taken Benadryl, though his booking photo taken the next day did not show any hives, Officer Dearborn hadn't noticed any and Kim testified that he had had hives the week before, not that night. RP 354, 359, 401; Ex. 4.

Adams said he didn't know how Kim had gotten hurt, that he had gotten up in the middle of the night, stubbed his toe on a water bottle that was on the floor and had tripped over the dog. RP 362, 364-66. He said that when he woke up and asked about breakfast, she told him peanut butter and the next time he woke up, she was gone. RP 366. He didn't notice Kim being in pain. RP 384-85. Adams' testimony was a bit rambling with a fair amount of testimony about the layout of the RV and the difficulty they'd been experiencing with the electrical system. RP 349-73.

D. ARGUMENT

1. Adams was not unjustly denied his statutory and court rule right to peremptory challenges.

Adams asserts that his right to exercise peremptory challenges was violated and that the error was structural. Adams specifically contends that he was not permitted to strike one juror, but the juror that he wished to strike was on the jury panel, he had exhausted his strikes regarding the panel and was exercising a peremptory challenge regarding the alternate juror at the time he tried to go back into the panel to strike the juror. He also contends that he was denied a peremptory challenge regarding the two alternates. The court did err in not granting him the number of peremptory challenges he was entitled to under the court rule, but he did not object at the time and no alternate deliberated. The court's mistake was therefore harmless.

“[P]eremptory challenges are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.” Georgia v. McCollum, 505 U.S. 42, 57, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). The number and manner of exercise of peremptory challenges rests exclusively with the legislature and the courts. *See, State v. Persinger*, 62 Wn.2d 362, 382 P.2d 497 (1963). Where a court's jury selection process substantially

complies with the statutory provisions, a defendant must show prejudice from an alleged violation of the jury selection procedure. If there has been a material departure from the statutes, prejudice will be presumed. State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991); *accord*, State v. Roberts, 142 Wn.2d 471, 518, 14 P.3d 713 (2000). The “trial court has broad discretion over the jury selection process,” and a decision regarding the jury selection process is reviewed for abuse of discretion. State v. Williamson, 100 Wn. App. 248, 253, 255, 996 P.2d 1097 (2000); Tingdale, 117 Wn.2d at 600. “[T]he purpose of the jury selection statutes is to ‘provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity’.” State v. Rice, 120 Wn.2d 549, 562, 844 P.2d 416 (1993)(quoting State v. Finlayson, 69 Wn.2d 155, 417 P.2d 624 (1966)).

In Washington, the manner in which peremptory challenges are exercised is governed by both statute and court rule. Williamson, 100 Wn. App. at 252-53. RCW 4.44.210 provides:

The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. *During this alternating process, if one of the*

parties declines to exercise a peremptory challenge, then that party may no longer peremptorily challenge any of the jurors in the group for which challenges are then being considered and may only peremptorily challenge any jurors later added to that group. A refusal to challenge by either party in the said order of alternation shall not prevent the adverse party from using the full number of challenges.

RCW 4.44.210 (emphasis added). CrR 6.4 provides:

After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant *until the peremptory challenges are exhausted* or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors *subsequently* called.

CrR 6.4(e)(2) (emphasis added). Thus, once a party “accepts the panel” or exhausts their peremptory challenges, that party may not exercise a peremptory challenge against any of the 12 seated jurors. *See, State v. Evans*, 26 Wn. App. 251, 263, 612 P.2d 442 (1980), *overruled on other grounds*, 96 Wn. 2d 119 (1981) (error under former RCW 4.44.210 to permit defendant to exercise peremptory challenge regarding a member of the jury panel after he had waived his first peremptory challenge because once a party declines to exercise a peremptory challenge the party is deemed to have accepted all those original jurors and future peremptory challenges are restricted to subsequent jurors).

Under CrR 6.4 the defense and prosecution are each entitled to six peremptory challenges for most felony offenses. CrR 6.4(e)(1). The

number of peremptory challenges regarding alternate jurors is addressed by CrR 6.5. When the court is selecting alternate jurors, each party is “entitled to one peremptory challenge for each alternate juror to be selected.” CrR 6.5; State v. Rivera, 108 Wn. App. 645, 647, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002), *abrogated on other grounds*, State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

Erroneous denial of a peremptory challenge is not harmless where the objectionable juror deliberates. State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). “Any impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice.” *Id.* at 931. However, an error regarding the exercise of peremptory challenges regarding *alternate* jurors is harmless if the defendants’ substantial rights were not impaired by the error, e.g., where the alternate juror did not deliberate. Rivera, 108 Wn. App. at 651.

In Rivera, the court failed to grant the proper number of peremptory challenges regarding alternates in a multiple co-defendant case, it granted only two total peremptory challenges regarding the two alternates instead of the four that should have been granted. Rivera, 108 Wn. App. at 647. After the parties had accepted the jury, the court’s error was discovered, but the court declined to reopen voir dire. *Id.* at 648. None of the alternate jurors deliberated. *Id.* On appeal, the court

concluded that the substantial rights of the defendant had not been impaired by the error because the alternates had not deliberated and the error did not implicate the impartiality of the jury that actually deliberated. Id. at 651-52.

Here, the judge inquired of counsel what their position was regarding the number of alternate jurors prior to voir dire, suggesting it might be better to have two:

You have six peremptory challenges each, it's, my custom has been to select 12 jurors and then ask each of you to exercise an additional peremptory as to the 13th and/or 14th if you want to do that, without telling the jury what the significance of all that is and without telling the jury who the alternates are, but under that procedure we then dismiss jurors 13 and 14 before the jury goes to deliberate if we don't need their attendance.

An alternative I understand some courts select all 13 or 14 jurors then drop (sic) names by lot to determine who the alternates are. If counsel agree you'd like to do that we can do it that way, otherwise we'll simply go with the way I describe where with pick 13 people, 12 people and 13th and 14th.

VRP 55-56. Neither the prosecutor nor defense counsel indicated a preference, and the judge decided to use her standard procedure. RP 56.

VRP 596-98. The prosecutor then exercised five peremptory challenges⁵ and defense counsel all six. VRP 597-98. The court then informed counsel that she believed the peremptory challenges regarding the

⁵ The judge counted the prosecutor's waiver of one peremptory as a peremptory and concluded the State had exercised six.

alternates would begin with juror number “27” and inquired if counsel were of the same opinion. VRP 599. Defense counsel confirmed the number of alternates the court was permitting was two, and the prosecutor confirmed the beginning of the peremptories would start with “27.” Id. After the prosecutor exercised a peremptory as to juror 29, defense counsel requested to exercise a peremptory regarding juror 19, but the prosecutor objected. VRP 599-60. The court denied defense counsel’s peremptory regarding juror 19. VRP 600. When defense counsel asked the court what it was she couldn’t do, the court informed her that the parties could not go back into the panel, but could only exercise peremptories forward as to the alternates. VRP 600. Defense counsel asked for the legal basis and asserted she didn’t understand that to be the court’s position, and the prosecutor explained that his understanding was once the panel was accepted, the additional peremptory challenges only applied regarding the alternate juror(s). VRP 601. The judge indicated the prosecutor’s interpretation was correct, and defense counsel “accepted the panel,” i.e., did not exercise a peremptory challenge regarding the alternate juror(s). VRP 601. No alternate jurors deliberated.

The court’s procedure regarding the alternates substantially followed the procedure set forth in RCW 4.44.210 and CrR 6.4 and CrR 6.5. Once defense had exercised its six peremptories, the original panel

was set, and defense counsel could exercise a peremptory challenge only with respect to the subsequent jurors being considered as alternate(s). The court did err in not permitting two peremptory challenges regarding the two alternate jurors. However, defense counsel accepted the panel after being informed that she could not excuse a juror that was on the seated panel, and no alternate jurors deliberated. Under Rivera, any error regarding this was harmless because no objectionable juror actually deliberated, and there is nothing else to indicate that the jury was not fair and impartial.

Moreover, there is no constitutional right to a certain number of peremptory challenges, therefore Adams was required to object at the time the court erred in granting the number of alternate peremptories. RAP 2.5(a); State v. Gentry, 125 Wn.2d 570, 615-16, 888 P.2d 1105 (1995); *see also*, State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) (violations of CrR 3.3 are not constitutionally based, therefore court declined to address alleged speedy trial right violation under CrR 3.3 where defendant failed to object below).

2. The trial court did not err in admitting evidence of Adams's "controlling nature," gambling or drug use under ER 404(b) because he never objected to this evidence on that basis.

Adams next contends that the trial court committed evidentiary error in admitting evidence of his controlling behavior, gambling and drug use. He does *not* contend that the evidence of the prior domestic abuse incident was improperly admitted. Specifically he asserts that evidence of his controlling behavior and gambling admitted during the testimony of Kim, Esqueda and Gurlock should not have been admitted under ER 404(b). He, however, never objected to the admission of that evidence on that basis. He cannot now challenge that evidence on that basis on appeal.

As long as the trial court correctly interprets the evidence rule, a trial court's decision to admit or exclude the evidence is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A defendant must object below in order to preserve for appeal an allegation of evidentiary error. State v. Finch, 137 Wn.2d 792, 819, 975 P.2d 967 (1999). An objection based on relevance under ER 401 does not preserve an objection under ER 404(b). State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (assertion on appeal that admission of evidence that defendant possessed a loaded gun and knives violated ER 404(b) was not preserved because objection below had been based on ER 401).

a. *Adams failed to preserve his allegation of evidentiary error regarding his “controlling nature” and gambling based on ER 404(b).*

Evidence of other bad acts or crimes is not generally admissible to prove character and action in conformity with that character. ER 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident.

In order to admit evidence under ER 404(b), the evidence of other wrongs or misconduct must be admissible for a purpose other than to prove character or actions in conformance therewith. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). However, the rule’s list of purposes for admission of the misconduct evidence is not exclusive. State v. Baker, 162 Wn. App. 468, 472-73, 259 P.3d 270, *rev. den.*, 173 Wn.2d 1004 (2011).

Under ER 404(b), the court applies a four factor test:

the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If a court fails to conduct the balancing process on the record, the error is harmless if the

record is sufficient to allow effective appellate review. State v. Bradford, 56 Wn. App. 464, 468, 783 P.2d 1133 (1989); *see also*, State v. Herzog, 73 Wn. App. 34, 867 P.2d 648, *rev. den.*, 124 Wn.2d 1022 (1994) (failure to weigh prejudice on the record harmless if reviewing court can determine from the record that the trial court would have admitted the evidence if it had conducted the balancing). If evidence is admitted erroneously in violation of ER 404(b), the nonconstitutional harmless error standard applies. State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). Under this standard the reviewing court must decide whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.*

Prior evidence of domestic violence between the defendant and the victim is admissible to assist the jury in assessing a recanting victim’s credibility. State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). In Magers, the appellate court found that evidence of the defendant’s prior domestic violence arrest and no contact order was admissible to assess the credibility of the domestic violence victim where the victim gave conflicting statements about the defendant’s actions. *Id.* at 186. The court in Gunderson, relied upon by Adams, declined to extend the Magers rationale to situations in which “there is no evidence” of injuries to the alleged victim and the witness neither recants nor contradicts prior

statements.” Gunderson, 181 Wn.2d at 925. The court in Gunderson acknowledged that the “opinion should not be read as confining the overriding probative value exclusively to instances involving a recantation or an inconsistent account by a witness.” Id. at 925, n.4. In Magers, the court explained:

The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.

Magers, 164 Wn.2d at 179-80 (quoting State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996)); *see also*, Baker, 162 Wn. App. at 475 (defendant’s prior assaults on the victim were relevant so the jury could assess the victim’s credibility with full knowledge of the dynamics of the domestic violence victim’s relationship with the defendant even though the victim hadn’t recanted).

Pretrial Adams moved in limine to prevent the State from introducing other acts of domestic violence under ER 404(b) and evidence that the victim feared the defendant under ER 401, 403. CP 12-14. He did not move to prohibit testimony of his “controlling behavior” or gambling under ER 404(b) or otherwise. At the hearing on the motions in limine, defense counsel noted that credibility of the witnesses was “absolutely

paramount” in the case. RP 5-6.⁶ During the course of the discussion on the admissibility of the victim’s criminal history, defense counsel explained that she had evidence of one incident in which Kim had alleged domestic violence under circumstances in which it benefitted her to make such an allegation in order to avoid the trouble she faced. RP 17. Defense counsel further explained that while Kim was not a recanting victim, there were “some inconsistencies in the various statements that [Kim had] made to law enforcement and other witnesses.” RP 19. The court tentatively ruled that if defense introduced evidence of the prior allegation of domestic violence that would open the door to the State inquiring about other incidents. RP 21. When defense counsel inquired why other incidents would be relevant, the prosecutor stated that it would be relevant to the victim’s credibility, to rehabilitate her, regarding why she hasn’t reported domestic violence in the past, referencing State v. Baker. RP 22-23.

⁶ Defense also argued that since Kim had been convicted of theft in the third degree as a result of the burglary incident, that incident would be admissible as a crime of dishonesty. RP 6. The State objected to the theft being admitted as a crime of dishonesty given that it was over 10 years old, but stated Kim could be questioned about it in the context of the circumstances of the arrest and domestic violence report. RP 11. He also explained that while he did not intend to introduce evidence of “prior domestic violence assaults or domestic violence” in his case in chief, he might if the door was opened on cross-examination. RP 14.

At trial, the prosecutor asked Kim: “Can you describe your relationship with [Adams] a little bit?” RP 85. In response Kim stated that Adams was very controlling and he wants her to do stuff but she doesn’t know how he wants her to do it, so she doesn’t do it. RP 85. Defense counsel then objected on relevance grounds, and the judge overruled stating that it was preliminary information. RP 85. When the prosecutor asked Kim give some examples of Adams’ controlling behavior, defense counsel did not object, but did interject that she believed Kim’s answer was non-responsive and the court advised the prosecutor to ask more specific questions. RP 86. Likewise, when the prosecutor inquired about finances regarding the defendant, resulting in Kim’s testimony about the defendant’s gambling, the objection was relevance, not ER 404(b). RP 86-87.

Defense counsel did not object to Gurlock’s testimony that Adams did a lot of gambling. RP 135. Defense counsel did object to Gurlock’s testimony about the interactions of Adams and Kim, but only on relevance grounds. *Id.* Likewise, Adams’ objection to Esqueda’s testimony about Adams’ controlling nature was based on relevance and not ER 404(b). RP 184-185. In discussing the admissibility of the testimony, defense counsel clarified that her objection was based on ER 401 and 403. The judge ruled

that some testimony regarding this was permissible but that it would be limited. RP 189.

Adams asserts the judge never engaged in the ER 404(b) analysis regarding the testimony of Adams' controlling nature and gambling. The judge never engaged in that analysis because there was no objection based on ER 404(b). Adams cannot now complain that the evidence was inadmissible under ER 404(b) when he either didn't object below or his objections were limited to ER 403 and 401. If defense had objected below under ER 404(b), the evidence of his controlling nature would have been admissible under Magers and Baker.

b. evidence of Kim's statement to the officer that Adams had used drugs in the past was admissible to rebut defense's allegation that Kim had lied to the officer when she told her that Adams had used drugs.

Adams asserts that “[t]he prosecutor impermissibly elicited an allegation” of drug use by Adams unrelated to the charged incident. He does not assert that the trial court erred in any of its evidentiary rulings regarding this evidence, nor does he claim that the prosecutor committed “prosecutorial misconduct” in eliciting the testimony. It’s unclear what the basis is for reversing his conviction regarding this issue. It’s clear from the record that the prosecutor was trying to rehabilitate the impression the jury could have had that Kim had lied to the officer about

Adams' drug use and that he was trying to clarify with Kim and the officer who took her statement that there may have been a miscommunication regarding the information she gave about Adams' drug use. As this information was brought up by Adams on cross examination, the trial court properly permitted the prosecutor a limited inquiry into the substance of the statements since the defense opened the door. When the trial court found the prosecutor's questions were too broad regarding Adams's drug use, she sustained the objections, and thus the jury couldn't have considered the testimony.

Inadmissible evidence may be admitted if a party "opens the door":

A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party... The introduction of inadmissible evidence is often said to "open the door" both to cross-examination and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence.

State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), *rev. den.*, 129 Wn.2d 1007 (1996). "Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness." State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002), *rev. den.*, 148 Wn.2d 1023 (2003).

On cross examination, defense counsel asked Kim whether she recalled telling the officer at the ER that Adams “had been doing meth the night of the incident.” RP 98. Kim responded, “No,” she didn’t recall saying that. Defense counsel then asked Kim whether she recalled telling the detective that Adams had *not* been using drugs that night and giving the detective a reason as to why he had not been using drugs. RP 98. Kim did not remember saying that to the detective. RP 98. On redirect, without objection, the prosecutor asked Kim if she told the “police about [Adams’] drug use,” and she responded that she did, that she told them that he did some drugs, she wasn’t sure exactly what she told them, but that she had described how he used the drug because she didn’t know the name of the drug. RP 114-15. On recross, defense counsel then pointed out that when defense counsel had asked Kim about Adams drug use that night, Kim had said she didn’t recall, but when the prosecutor asked, now Kim remembered. RP 116. The prosecutor objected and explained that his question was not the same as defense counsel’s, that she had asked about telling the police about use that night and his question was “different.” RP 116. The judge asked defense counsel to re-ask the question in a different manner because it was argumentative. RP 116. Defense counsel then asked Kim whether she recalled telling the officer at the ER that Adams used “meth” the night of the incident, and Kim responded that she didn’t

recall saying that. RP 116. Defense counsel then asked: “And do you recall the next day on the 20th telling Detective Renick that he was not using drugs?” Kim responded: “I told her he was not using drugs that night.” Defense counsel then asked whether Kim had told the detective that she didn’t know the name of the drug, which Kim denied, and then “asked” Kim whether she used the word “meth” the night before, to which Kim answered no after the prosecutor objected. RP 117.

Later on during examination of the detective, the prosecutor asked, without objection, whether Kim had “made any statements about drug use.” RP 147. The detective responded that Kim had told her no drugs or alcohol had been involved that night. The prosecutor then asked, without objection, whether Kim talked about Adams have any drug use prior to this, to which the detective responded that Kim had “talked about prior drug use for Adams.” RP 147. When the prosecutor asked the detective what Kim said, defense counsel objected as to relevance, and the prosecutor explained that he was trying to establish that there may have been

some miscommunication here about the drug use and that my victim was referring to drug use that the defendant has engaged in when she was answering questions to the police and not about that night.

So I want to be able to explore that with the jury, I think that’s why it’s relevant for the detective to about what she and Ms. Adams

spoke about that day about drug use, that's been brought up already in front of the jury.

RP 149-50. The judge found that defense had opened the door by asking the detective whether they had talked about meth use, but cautioned that the detective should not testify about any specific drug use by Adams on any night other than the night of the incident. RP 151. The judge further explained that the prosecutor could ask whether the subject was discussed in order to address the issue of miscommunication. RP 151. There followed a colloquy between the judge and the prosecutor about what specific questions could be asked, and the judge ruled that the detective could be asked whether Kim talked about Adams' drug use, and that the discussion concerned methamphetamine. RP 152-53.

The prosecutor then asked whether Kim had said that Adams had used drugs that night, and the detective responded that Kim had said he was not using that night. RP 153-54. When the prosecutor asked what drugs Kim said he had used in the past, defense counsel objected and the court sustained the objection. RP 154. The prosecutor then asked, whether Kim spoke about Adam's use of methamphetamine, to which defense counsel objected and the court directed the prosecutor to move onto a different topic. RP 154-55. The prosecutor explained that he wanted to get in that Kim had not used the word "meth," but had described it and the

detective concluded it was meth. RP 155. The judge was concerned that any further discussion was going to get into “prior bad acts” and that Adams’ use on other occasions wasn’t relevant. RP 156. The prosecutor apologized for the manner in which he had worded the question that had drawn an objection which the judge sustained, acknowledging that it was “a bad way of trying to lead into that.” RP 156. The judge ultimately ruled that the prosecutor could not ask the question about the description of the drug. RP 156-57.

The prosecutor asked questions about what Kim said about Adams’ drug use that night versus in general in order to show that there might have been a miscommunication that would explain the discrepancy between what she told the officer versus what she told the detective about his drug use. The judge agreed that the testimony was relevant for that purpose but sustained objections when it went beyond that. Much of the testimony came in without objection, presumably because defense counsel realized she opened the door with her cross-examination. Prior to any testimony being taken the judge informed the jury to not consider any evidence that she did not admit or that she told them to disregard, and presumably the jury did just that. RP 70; *See, State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012), *rev. den.* 177 Wn.2d 1010 (2013) (jury presumed to follow instructions given by the court).

3. The victim's prior consistent statements were admissible under ER 613 and/or ER 801(d)(1).

Adams next asserts that evidence of what Kim told others the next day, "her prior consistent statements," were inadmissible under ER 801(d)(1)(ii), but he does not assert that the trial court erred with respect to any particular ruling. Under ER 801(d)(1)(ii) prior consistent statements are admissible to rebut claims of fabrication or improper motive. The statements that Adams objected to below on this basis⁷ rebutted the argument that defense made that Kim's inconsistent statements at the time, and later, showed that she fabricated the incident. Even if the consistent statements that Adams objected to were inadmissible, any error was harmless under the non-constitutional harmless error analysis.

ER 801(d)(1) provides in relevant part that a statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) ... or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, ...

ER 801(d)(1). In order to be admissible, the prior consistent statement must have been made before the witness's alleged motive to fabricate

⁷ Adams has waived any error as to statements admitted that he did not object to below.

arose. State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970 (2004). The claim of recent fabrication can be implied or express. *Id.* at 866.

[t]he mere assertion that motives to lie may have existed at the time of the prior statement is insufficient to prevent their admission.” ... The trial court must decide, as a threshold matter, whether the proffered motive to lie rises to the level necessary to exclude the prior consistent statement.” ... To do so, the trial court considers whether the witness made the prior consistent statements when “the witness was unlikely to have foreseen the legal consequences of his or her statements.”

State v. McWilliams, 177 Wn. App. 139, 149, 311 P.3d 584 (2013), *rev. den.*, 179 Wn. 2d 1020 (2014).

Adams didn't object to the testimony of Gullock or Esqueda regarding what Kim had told them about what happened, therefore he cannot raise that issue on appeal. In response to the prosecutor's question to recount Kim's last day of work, Gullock testified that Kim appeared to be having a heart attack given the manner in which she was holding her chest, and when Gullock asked her what happened, Kim told her that he kicked her in the chest. RP 136. In response to the prosecutor's question about what Kim had told her about how Kim had been injured, Esqueda testified, without objection, that Adams was “complaining at her because she wasn't cleaning their RV right,” that he charged her full force as she was trying to put something away in the refrigerator and she fell onto the couch. Esqueda also testified that she thought Kim told her Adams

punched her. RP 194. Adams cannot now appeal the admission of Gullock's and Esqueda's testimony because he did not object below.

During motions in limine, the prosecutor informed the judge that he thought the defense theory was that Kim was fabricating the incident:

... I think the defense here is that the event hasn't happened and she has fabricated it so this goes into her, you know, motive or bias toward the defendant she has done this before, she has fabricated stories before I think is their theory.

RP 12. Defense counsel informed the court that she didn't have any evidence that the allegations were false, but did have evidence from the prior burglary incident that Kim had made other domestic violence allegations when it benefitted her to do so, to gain some advantage. RP 5, 16-17.

On cross examination defense counsel attacked Kim's veracity by accusing her of telling the officers things that either couldn't be true, regarding Adams' prior assault of her, or that weren't the same. RP 97-98. Defense counsel accused Kim of remembering more things now than she had before when she had spoken with Kim. RP 99-100. Defense counsel then tried to have Kim admit that she had not told Loewen that she had been assaulted, to which Kim answered she told him she was hurt but could not remember whether she told him she'd been assaulted. RP 100. Defense counsel then asked Kim what she told Gullock about what

happened. RP 100-01. Kim testified she told Gullock that Adams hit her and denied telling Gullock that he kicked her. RP 101. Defense counsel also asked Kim what she told Esqueda about what happened, and Kim replied that she told Esqueda that he hit her, but denied telling Esqueda that it was because she wouldn't give him money, when specifically asked by defense counsel. RP 101. Prior to this cross examination, the prosecutor had *not* inquired of Kim what she had told Gullock, Loewen or Esqueda. RP 89-91. Later on cross of Esqueda, defense counsel elicited testimony that Esqueda told the defense investigator that Adams had used a pillow or choked Kim that night. RP 201.

Defense counsel also crossed Kim on changing her position from the defense interview regarding the extent of Adams back injury and need for help. RP 105-06. Defense counsel had Kim admit that she had filed for divorce, and then immediately asked Kim about the incident in which defense alleged that Kim had reported that Adams had abused her before in order to get the benefit of a reduced criminal charge. RP 109-10. The prosecutor interpreted this exchange as implying that Kim was fabricating the incident in order to assist her in the divorce because on redirect he specifically asked her that. RP 115.

When Loewen was testifying about what happened that morning when he picked Kim up for work, he started to testify about what Kim told

him and defense objected based on hearsay. RP 120. The prosecutor argued that because of the aggressive cross examination eliciting Kim's alleged inconsistent statements, he should be able to elicit her consistent statements. RP 120. The court preliminarily ruled that Loewen could answer the question but needed to limit it to what Kim said, finding that what Kim said to him was not being offered for the truth of the matter asserted. RP 121. The prosecutor sought to admit the statements under ER 801(d)(1)(ii) and ER 613⁸. RP 126-27. Defense counsel asserted she hadn't accused anyone of fabrication and therefore that ER 801 didn't apply. RP 127. The judge ruled that both ER 613 and ER 801 applied because it was rehabilitation regarding prior inconsistent statements and rebuttal of at least an implied argument of recent fabrication. RP 127.

Defense counsel clearly opened the door to the questions regarding "prior consistent statements" made to Gullock and Esqueda when she asked what Kim had told them about the incident. Moreover, they were admissible to rehabilitate Kim's credibility under ER 613. *See*, Tegland, Courtroom Handbook on Evidence, §613:8 ("[o]nce a witness's credibility has been attacked, prior consistent statements by the witness may be

⁸ ER 613 provides: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same *and the opposite party is afforded an opportunity to interrogate the witness thereon*, or the interests of justice otherwise require." ER 613(b). (Emphasis added).

admissible to rehabilitate the witness's credibility," though they could only be used for rehabilitation under ER 613 and not for substantive purposes). While defense counsel did not open the door regarding what Kim told Loewen, defense had implied through cross examination that Kim had recently changed some of her testimony, had fabricated the incident, and had done so in order to assist her in her divorce. That cross examination, as the judge found, implied that Kim had recently fabricated, and/or had an improper motive regarding, her testimony. *See, State v. Makela*, 66 Wn. App. 164, 171-74, 831 P.2d 1109, *rev. den.*, 120 Wn.2d 1014 (1992) (if defense theory includes both initial fabrication at the time of the incident or report and "more recent or 'renewed' fabrication," and trial court concludes that the "proffered motive evidence does not rise to the level necessary to *exclude* the prior statement," jury should be permitted to weigh the evidence). The trial court did not abuse its discretion in admitting the testimony that Kim told Loewen that Adams hit her in her right side. RP 128.

Furthermore, whatever prejudice flowed from any impermissible testimony was harmless. The testimony of Gullock and Esqueda that Kim had told them that Adams assaulted her came into evidence without objection. Defense used Gullock's and Esqueda's testimony about what Kim told them to argue that Kim was inconsistent in her statements about

what happened and therefore not credible⁹. RP 457-59. The testimony about what Kim told the officer and detective about what happened came in without objection. The medical evidence clearly established that she had broken two ribs recently, she clearly was in a great deal of pain the following morning and hadn't been before. She told medical staff that Adams assaulted her, and there was no other explanation for how she injured herself. The outcome of the trial would not have been materially affected if Loewen's testimony that Kim told him that Adams hit her had not been admitted.

4. The State's reference in its case in chief to evidence of Adams' demeanor when he was informed that his wife was in the hospital was not an improper comment on his pre-arrest silence.

Adams asserts that his rights under the 5th Amendment and article I Sec. 9 of the State Constitution¹⁰ were violated when the officer testified that Adams showed a lack of surprise when he was informed his wife was in the hospital and when the officer testified about Adams' lack of statements on redirect after defense elicited testimony that Adams told the

⁹ Defense counsel elicited on cross from Gullock that Kim told her that Adams hit her because he wanted money and Kim had told him no. RP 141-42. Defense counsel followed up this testimony with the detective and was permitted to testify over the State's objection that Gullock had told the detective Kim had told her that Adams kicked her. RP 170.

¹⁰ The State Constitution provisions provide the same protections as the 5th Amendment. State v. Hager, 171 Wn.2d 151, 156 n.3, 248 P.3d 512 (2011).

officer he had not hit his wife. Adams did not object regarding the officer's initial testimony about Adams' lack of surprise and the "lack of statements" testimony that was elicited on redirect. The officer's testimony regarding Adams' lack of surprise was permissible demeanor testimony. Moreover, Adams was not under arrest and did not invoke his right to remain silent at the time the officers informed him his wife was in the hospital and during the ensuing conversation, and therefore he cannot assert a violation of his 5th Amendment rights. Any remarks regarding Adams' pre-arrest silence did not rise to the level of an impermissible comment on his right to remain silent, and any error in admitting the unobjected to testimony was harmless.

a. Adams' 5th Amendment privilege against self-incrimination was not violated because the testimony related to his physical reaction to the officer's statement.

The 5th Amendment right against self-incrimination does not extend to observations of conduct, but only to testimonial evidence. Schmerber v. California, 384 U.S. 757, 761-64, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *see also*, Pennsylvania v. Muniz, 496 U.S. 582, 592, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (5th Amendment privilege is a bar against compelling communications or testimony but does not extend to compelling an individual to provide physical evidence); State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996) ("Nothing in our conclusion,

however, prevents the State from introducing pre-arrest evidence of a non-testimonial nature about the accused, such as physical evidence, demeanor, conduct, or the like...). “[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. ... Only then is a person compelled to be a “witness” against himself.” Doe v. United States, 487 U.S. 201, 210, 108 S. Ct. 2341, 101 L.Ed.2d 184 (1988) (footnote omitted). Suspects may be required to provide handwriting exemplars, voice exemplars, to participate in a line-up, all without violating the 5th Amendment privilege against self-incrimination. *Id.* at 210. Moreover, “the privilege against compulsory self-incrimination is simply irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak.” Jenkins v. Anderson, 447 U.S. 231, 241, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980)(Stevens, J. concurring).

Here, the officer testified regarding Adams’ demeanor when the officer informed him his wife was in the hospital. The officer testified that she and another officer contacted Adams at the RV and informed him his wife was in the emergency room. RP 267.

Q. What was his demeanor like when you informed him of that?

A. His demeanor was not one I would expect from a spouse that had just learned their wife or significant other was in the emergency room.

Q. What do you mean?

A. He was not shocked, he was not surprised, he –

Ms. Boyd: Objection, this sounds like a commentary on what was said.

Mr. Deen: I'm not asking about any statements or not statements, I'm just asking what his demeanor looked like. That's what I am trying to elicit, I don't want to elicit whether or not he said anything or didn't say anything.

The court then overruled the objection. RP 268. The prosecutor then asked specifically what Adams' physical demeanor was, "regardless of whether he said something or didn't say something." Id. The court sustained the defense objection to the officer's response of "indifference" based on state of mind/speculation, and suggested that any question should focus on physical signs. RP 268-69.

Q. Did he have any physical reaction?

A. No. Nope. There was a lack of surprise, let me say that.

Q. What happened after that?

A. I asked him if he knew why or if he knew that she was even in the emergency room.

Q. I don't want to talk about any statements. What happened, or lack of statements, what happened after you contacted him there?

A. I placed him under arrest.

RP 269.

The prosecutor clearly only attempted to elicit testimony regarding Adams' demeanor when the officer informed Adams that his wife was in the emergency room. At this point, the officer hadn't even asked any questions of Adams and was just telling him that his wife was at the hospital. When defense counsel believed the officer's testimony was

straying from physical demeanor testimony, she objected, and it was clarified by both the prosecutor and the judge that the testimony the officer provided should be limited to physical signs of reaction or demeanor. The State did not comment on Adams' 5th Amendment privilege against self-incrimination when the officer testified about Adams' lack of surprise.

U.S. v. Velarde-Gomez, 269 F.3d 1023 (9th Cir. 2001), cited by Adams, is distinguishable and is of questionable reliance post-Salinas v. Texas, discussed in the section below. First, the silence at issue in Velarde occurred post-arrest, not pre-arrest, and occurred during the course of questioning while in custody. Velarde-Gomez, 269 F.3d at 1026-27. In addition, some of the questions explicitly elicited testimony that the defendant did not say anything in response. *Id.* at 1027. While the court concluded that the evidence of a lack of a physical response in the case was synonymous with evidence of silence, and therefore violated the 5th Amendment, the court did agree that the government may offer evidence of demeanor and physical evidence. *Id.* at 1028, 1030.

Although the court conceded that "apparent nervousness" and demeanor do not constitute "testimonial evidence" falling within the protections of the 5th Amendment, it held that the defendant's lack of physical or emotional reaction constituted testimonial silence. *Id.* at 1030-31. The only authority it cited for this proposition, however, was a

dictionary definition for the word “silence.” The court equated testimony that the defendant “just sat there, and “didn’t look surprised or upset,” with “there was no response,” he did not “say anything” and he did not “deny knowledge.” There are fundamental differences between those responses, however. One is a comment on the lack of a physical reaction or that the person’s physical demeanor remained the same, while the other is a comment on the person’s silence, lack of statements. As was noted by the dissent in the case, “Demeanor is not a proxy for silence. For demeanor relates to a defendant’s physical characteristics, says more than silence, and is something other than silence.” *Id.* at 1037 (Gould, J. dissenting). The dissent went on to discuss the relevant distinctions between physical response evidence and communicative or testimonial evidence, concluding “[s]o long as there is not inquiry about silence, explicitly or implicitly as a result of context, it is for the jury to weigh demeanor evidence. This properly includes evidence of visage, composure, surprise, or anger, or any other evidence of how the defendant acted except for a proscribed comment on silence.” *Id.* at 1038-39. Importantly, the majority conceded that the prosecutor could have asked about the defendant’s “non-testimonial physical response” but ultimately faulted the prosecutor for asking the broader question of “what was his response.” *Id.* at 1031. Here, the prosecutor’s questions clearly were

intended to elicit testimony regarding Adams' *physical* response or lack thereof.

The court in Velarde-Gomez also relied upon Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and U.S. v. Elkins, 774 F.2d 530 (1st Cir. 1985) in finding support for its conclusion that there is no distinction between introducing evidence that a defendant remained silent in the face of incriminating evidence and evidence describing a defendant's physical demeanor. *Id.* at 1032. However, both Doyle and Elkins were cases involving post-arrest, post-*Miranda* testimony about a defendant's silence, which implicates due process and not the 5th Amendment. This distinction is critical when addressing this issue because the U.S. Supreme Court recently held in Salinas that a person must invoke his or her 5th Amendment privilege against self-incrimination in order to be entitled to its protections in pre-arrest circumstances.

b. Adams' 5th Amendment right against self-incrimination was not violated because he never invoked his right to remain silent.

A remark that does not amount to a "comment on a defendant's right to remain silent" is considered a 'mere reference' to silence and is not reversible error absent a showing of prejudice and is not reviewable for the first time on appeal. State v. Burke, 163 Wn.2d 204, 225, 181 P.3d 1 (2008) (J. Madsen dissenting); State v. Romero, 113 Wn. App. 779, 790-

91, 54 P.3d 1255 (2002). The Fifth Amendment privilege also is not self-executing, and someone desiring its protections must assert it. Salinas v. Texas, ___ U.S. ___, 133 S. Ct. 2174, 2178, 186 L. Ed. 2d 376 (2013). “[P]opular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be ‘compelled in any criminal case to be a witness against himself’; it does not establish an unqualified ‘right to remain silent.’” Id. at 2182-83. “Although ‘no ritualistic formula is necessary in order to invoke the privilege,’ ... a witness does not do so by simply standing mute.” Id. at 2178. Post-Salinas, the state may use a defendant’s pre-arrest silence as substantive evidence of guilt as long as the defendant did not expressly invoke his or her privilege against self-incrimination. People v. Tom, 59 Cal. 4th 1210, 331 P.3d 303, 311 (2014). Moreover, when a person talks to the police, the state may comment on what he does, *and does not*, say. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001).

In Salinas, the U.S. Supreme Court accepted review in order to address the question of “whether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief.” Salinas, 133 S.Ct. at 2179. In that case the defendant voluntarily went to the police station where he was interviewed regarding the murder that was being investigated. Id. at 2178.

During the course of the one hour interview in which the defendant was not read the *Miranda* warnings, the defendant, a suspect, voluntarily answered questions until the officer asked whether ballistics testing would show that the defendant's shotgun would match the shell casings found at the scene. *Id.* The defendant didn't answer the question, but looked down at the floor, bit his lower lip and began to tighten up. *Id.* After some silence, the officer asked additional questions which the defendant answered. *Id.* During closing, the prosecutor argued that the defendant's reaction to the question about the ballistics suggested that the defendant was guilty. *Id.* at 2177-78.

A three member plurality found that the prosecution's use of the defendant's non-custodial silence did not violate the 5th Amendment because the defendant did not invoke the privilege against self-incrimination. *Id.* at 2180. In doing so, it found that the two exceptions to the general rule that one must assert the privilege, so as to put the government on notice that person intends on relying on the privilege, did not apply. *Id.* at 2179-80. The first exception concerns a defendant's trial testimony, such that a defendant need not take the stand and then assert the privilege. *Id.* at 2179. The second exception applies in situations "where governmental coercion makes [the person's] forfeiture of the privilege involuntary." *Id.* at 2180. For this second exception to apply, "[t]he

critical question is whether, under the ‘circumstances’ of [the] case, [defendant] was deprived of the ability to voluntarily invoke the Fifth Amendment.” Id. at 2180. In rendering its decision, the plurality rejected a third exception proposed by the defendant, that “the invocation requirement does not apply where a witness is silent in the face of official suspicions.” Id. at 2181-82. The three member plurality was joined by a two member concurrence which would find that even if the defendant had invoked the privilege, the prosecutor’s comments regarding pre-custodial silence would not have violated the 5th Amendment because the defendant was not compelled to give incriminating testimony against himself. Id. at 2184 (Thomas, J. and Scalia, J. concurring in judgment).

The Salinas case casts doubt upon the continued validity of prior Washington law regarding pre-arrest silence. The court in State v. Easter held that the 5th Amendment right against self-incrimination includes a right to silence prior to arrest. Easter, 130 Wn.2d at 241. While Salinas does not overrule this general proposition, Salinas requires a defendant specifically to invoke the right to remain silent in order to avail him or herself of the 5th Amendment protections. Salinas rejects Easter’s reliance on the presumption that the right against self-incrimination is self-executing such that a defendant need not assert the privilege in order to

exercise the right, i.e., that the defendant may be presumed to be exercising the right. Id. at 240.¹¹

At trial, after the officer testified on direct regarding her contact with Adams, the defense was permitted to elicit from the officer on cross examination that Adams told her that he didn't hit his wife because the court found that the State had opened the door by the officer's testimony regarding Adams' demeanor. RP 272-73. The officer testified that his report stated: "Martin Adams denied everything. He stated he had not hit Kim Adams and had not threatened to kill her." RP 274. On redirect, in response to this testimony, the prosecutor elicited testimony that Adams had told the officer that he had not been aware that his wife was at the hospital and that he didn't say anything else about that. RP 279-80.

Adams asserts that in addition to the officer's testimony on direct violating the 5th Amendment, the officer's testimony on redirect did as well. First, Adams did not invoke his 5th Amendment privilege against self-incrimination when the officer contacted him and informed him that

¹¹ Two cases in Washington that have addressed the application of Salinas to a prosecutor's use of a defendant's silence as substantive evidence of guilt in closing have both found that Salinas did not apply. In State v. Terry, 181 Wn. App. 880, 328 P.3d 932 (2014), the court found that the issue involved one of post-arrest silence and therefore Salinas did not apply. Id. at 887-90. The court in State v. Pinson, 183 Wn. App. 411, 333 P.3d 528 (2014) found that the second exception to the invocation requirement referenced in Salinas, regarding compelling circumstances of unwarned custodial interrogation, applied and therefore the defendant was not required to have invoked the privilege in order to benefit from it. Id. at 418-19.

his wife was in the emergency room. Therefore, any demeanor evidence regarding lack of surprise, included any evidence of “silence,” did not violate the 5th Amendment.

Second, Adams did not object to any of the questions or answers regarding his statements to the officer on redirect. He therefore waived any issue regarding their admissibility. Furthermore, when Adams’ counsel sought to introduce evidence of his statements to the officer, he waived issues regarding their admissibility and opened the door to the remainder of Adams’ statements to the officer being admitted. ER 106; *see, State v. Simms*, 151 Wn. App. 677, 692, 214 P.3d 919 (2009), *aff’d*, 171 Wn.2d 244 (2011) (under the rule of completeness, when one party introduces a statement, the adverse party may require that the other parts of the statement be admitted “which ought in fairness to be considered contemporaneously with it”). As was made clear through cross examination and redirect, this was not a circumstance in which Adams did not talk to the police. It is a mischaracterization to refer to his lack of statements as “silence.” The prosecutor was permitted on redirect to comment on what Adams did and didn’t say to the officer. *See, Clark*, 143 Wn.2d at 765 (state did not comment on defendant’s pre-arrest silence where defendant spoke with officers on two occasions prior to arrest and

provided conflicting accounts as to why he didn't follow directive to meet officers for an interview).

Even if the officer's testimony remarked upon Adams' privilege against self-incrimination, it did not constitute a comment on his silence warranting reversal. A remark that does not amount to a "comment on a defendant's right to remain silent" is considered a 'mere reference' to silence and is not reversible error absent a showing of prejudice. Burke, 163 Wn.2d at 216; Romero, 113 Wn. App. at 790-91. In determining whether the remark constitutes a "mere reference" or a "comment" on the right to remain silent, the appellate court focuses largely on the purpose of the remark. Burke, 163 Wn.2d at 216. An officer comments on a defendant's right to silence when his or her testimony implies guilt from a *refusal* to answer questions. State v. Hager, 171 Wn.2d 151, 157, 248 P.3d 512 (2011) (emphasis added). When a defendant answers questions and does not remain silent, testimony about what the defendant does not say is not a comment on the right to remain silent. *Id.* at 157-58.

Here, it's clear that the prosecutor did not manifestly intend his questions and the officer's responses to be a comment on Adams' 5th Amendment rights. His questions were designed to preclude testimony regarding any statements or lack thereof, and to address solely Adams' demeanor when contacted by the officer. Therefore, they did not impinge

on his privilege against self-incrimination. The prosecutor did not ask any questions about Adams' statement that he wasn't aware that Kim was at the hospital until defense had already elicited the testimony that Adams denied assaulting or threatening Kim.¹²

c. Even if the testimony/argument constituted a comment on Adams' right against self-incrimination, any error was harmless.

If the testimony regarding Adams' lack of surprise constituted an impermissible comment on his right to remain silent, such testimony was harmless under the constitutional harmless error test. Under this standard the State must demonstrate beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. Easter, 130 Wn.2d at 242. The rest of the evidence showed that Kim had fractured her ribs that night, she was exhibiting significant pain the next day, she told someone at work that it had happened that night, and the doctor's testimony was that it was an acute injury, meaning it had happened

¹² Q. You talked about what Martin Adams told you when you were speaking with him, did he tell you anything else?

A. In regard to anything in particular?

Q. Well –

A. Just that he denied.

Q. Did he tell you anything about the hospital?

A. No.

Q. Did you ask him about whether he knew his wife was in the hospital?

A. Yes.

Q. And what did he say?

A. He was not aware that she was there.

Q. Did he tell you anything else about that?

A. No.

recently. Kim told hospital staff that Adams was the one who had assaulted her. Adams had no other explanation for how or why Kim had hurt herself, and according to his own testimony had been unaware that she was in pain. Furthermore, Adams' testimony was not credible, his responses rambled and were frequently unresponsive. To the extent that the officer's testimony commented on Adams' privilege against self-incrimination, any reasonable jury would have reached the same result, beyond a reasonable doubt, absent that specific testimony.

E. CONCLUSION

Adams makes a general statement that he did not receive a fair trial, and appears to be claiming, by lumping a number of alleged errors together, that the prosecutor committed prosecutorial misconduct by referencing the case of State v. Fleming. He, however, does not set forth the standard for prosecutorial misconduct or otherwise provide authority for such an argument. This case in no way resembles the Fleming case, in which a prosecutor committed misconduct in closing by arguing that in order to acquit the defendant the jury would have to find that the victim was lying or was confused, clearly an improper argument under caselaw. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), *rev. den.*, 131 Wn.2d 1018 (1997). Since that type of argument had been denounced two years before in a published opinion, the court found the

prosecutor's conduct to be a flagrant and ill-intentioned violation and one which improperly shifted the burden of proof to the defendant. Id. at 214-15. Applying a constitutional harmless error analysis, the court found that the repeated misconduct was not harmless beyond a reasonable doubt and reversed the conviction even though defense counsel had failed to object at trial. Id. at 215-16.

This Court should analyze each of the alleged errors individually, determine if they were preserved, if the defense opened the door to the alleged inadmissible testimony, if error was committed, and ultimately whether the alleged individual error(s), if any, were harmless. The State submits that most or all of the alleged testimony was admissible or the error was not preserved. Even if there were error in admitting some testimony, it was harmless. The State therefore respectfully requests this Court deny Appellant's appeal and affirm his conviction for Assault in the Second Degree.

Respectfully submitted this 8th day of April, 2015.


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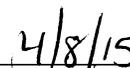
CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Date