

71756-1

71756-1

NO. 71756-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ELMER VILLAFUERTE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

NAMI KIM
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

FILED
COURT OF APPEALS DIVISION I
JAN 11 2013
SEATTLE, WASHINGTON

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS.....	3
2. SUBSTANTIVE FACTS	4
a. History Of The Relationship	4
b. Trial	6
C. <u>ARGUMENT</u>	14
1. VILLAFUERTE'S FIFTH AMENDMENT CLAIM	14
a. Pretrial Motion.....	14
b. The State Did Not Comment On Villafuerte's Right To Silence	18
c. Any Error Was Harmless.....	30
2. VILLAFUERTE FAILS TO MEET HIS BURDEN ESTABLISHING PROSECUTORIAL MISCONDUCT	33
a. Closing Argument	33
b. The State Did Not Direct The Jury That Its Role Was To Declare The Truth Or Solve The Case	37
3. CUMULATIVE ERROR DID NOT DENY VILLAFUERTE A FAIR TRIAL	42

4. THE COURT DID NOT ERR IN PROHIBITING VILLAFUERTE FROM CONSUMING "NON-PRESCRIBED DRUGS" AS A CONDITION OF COMMUNITY CUSTODY 43

5. THE COURT DID NOT ERR IN FINDING THAT VILLAFUERTE HAD A CHEMICAL DEPENDENCY THAT CONTRIBUTED TO HIS OFFENSE 46

D. CONCLUSION 50

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Anderson, 153 Wn. App. 417,
220 P.3d 1273 (2009)..... 39

State v. Burke, 163 Wn.2d 204,
181 P.3d 1 (2008)..... 19, 20, 24, 25, 30

State v. Crane, 116 Wn.2d 315,
804 P.2d 10 (1991)..... 19, 20

State v. Easter, 130 Wn.2d 228,
922 P.2d 1285 (1996)..... 22

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012)..... 37, 38

State v. Evans, 163 Wn. App. 635,
260 P.3d 934 (2011)..... 38, 39, 40

State v. Gower, 179 Wn.2d 851,
321 P.3d 1178 (2014)..... 30

State v. Greiff, 141 Wn.2d 910,
10 P.3d 390 (2000), review denied,
151 Wn.2d 1031 (2004)..... 42, 43

State v. Guerrero, 163 Wn. App. 773,
261 P.3d 197 (2011)..... 48

State v. Hodges, 118 Wn. App. 668,
77 P.3d 375 (2003)..... 42

State v. Keene, 86 Wn. App. 589,
938 P.2d 839 (1997)..... 28, 29, 30

State v. Knapp, 148 Wn. App. 414,
199 P.3d 505 (2009)..... 25

<u>State v. Lewis</u> , 130 Wn.2d 700, 327 P.2d 235 (1996).....	19, 21, 22, 23, 24, 28
<u>State v. Lindsay</u> , 180 Wn.2d 423, 326 P.3d 125 (2014).....	38
<u>State v. Lopez</u> , 142 Wn. App. 341, 174 P.3d 1216 (2007).....	47, 48
<u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	37
<u>State v. Motter</u> , 139 Wn. App. 797, 162 P.3d 1190 (2007).....	45
<u>State v. Powell</u> , 139 Wn. App. 808, 162 P.3d 1180 (2007).....	49
<u>State v. Romero</u> , 113 Wn. App. 779, 54 P.3d 1255 (2002).....	30
<u>State v. Russell</u> , 69 Wn. App. 237, 848 P.2d 743 (1993).....	49
<u>State v. Smith</u> , 97 Wn.2d 856, 651 P.2d 207 (1982).....	8, 31, 41
<u>State v. Sweet</u> , 138 Wn.2d 466, 980 P.2d 1223 (1999).....	25
<u>State v. Thomas</u> , 142 Wn. App. 589, 174 P.3d 1264 (2008).....	26, 27
<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	37, 38, 42
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	38

Constitutional Provisions

Federal:

U.S. Const. amend. V 14, 19, 20, 21, 30

Washington State:

Const. art. I, § 9..... 20

Statutes

Washington State:

Former RCW 9.94A.505..... 47
RCW 9.94A.030..... 44
RCW 9.94A.500..... 3, 47, 48
RCW 9.94A.607..... 3, 46, 47, 48, 49
RCW 9.94A.660..... 48
RCW 9.94A.703..... 44

Rules and Regulations

Washington State:

ER 404 4
ER 801 8

A. ISSUES PRESENTED

1. The State impermissibly comments on a defendant's right to silence when it invites the jury to either use silence as substantive evidence of guilt or suggests that it is an admission of guilt. Here, an officer testified that she told the defendant on the phone that his wife was actually the suspect in an assault case because she wanted to get both sides of the story and see if he would come back to the scene. The defendant responded by telling her that his wife had done nothing wrong and not to arrest her. She testified that she did not locate him that night. The prosecutor made no argument that the defendant was silent or that his silence was evidence of or an admission of guilt. Has the defendant failed to show that the State commented on his right to silence?

2. It is a misstatement of the burden of proof to instruct a jury that its role is to "speak the truth" or "declare the truth" when it issues a verdict. Defense counsel told the jury that the victim's in-court recantation was "what the truth looks like," that her prior account of strangulation was "not what actually happened." The prosecutor responded that the jury should not simply accept the victim's in-court testimony without examining the contrary evidence and her open desire to "stick in this relationship . . . [because] her

decision is not your decision. Your decision, your job is to figure out what happened here.” Has the defendant failed to show that the prosecutor’s response to his attorney’s comments committed reversible misconduct? If not, has he failed to establish prejudice?

3. To obtain reversal pursuant to the “cumulative error” doctrine, a defendant must establish the presence of multiple trial errors *and* show that the accumulated prejudice affected the verdict. Where errors have little or no effect on the trial’s outcome, the doctrine is inapplicable. The defendant has failed to establish either the existence of multiple errors or that any error affected the verdict. Is the cumulative error doctrine inapplicable?

4. A trial court may order a defendant not to use or possess any controlled substances without a prescription as a condition of community custody. A defendant may challenge a sentencing condition only if he can establish that he has been harmed by the trial court’s alleged error. Here, the trial court ordered the defendant to “not consume or use any non-prescribed drugs or controlled substances” both orally and in writing. Given the context of the trial court’s reference to “non-prescribed drugs,” has the defendant failed to establish that the court meant he could not possess items like aspirin or cold medicine? Because he has alleged

only potential harm in his claim, has he failed to establish that this issue is ripe for judicial review?

5. A court may “specifically waive” a presentence Department of Corrections (DOC) chemical dependency screening under RCW 9.94A.500 by simply declining to order one. Here, the trial court ordered a substance abuse evaluation without orally waiving a DOC chemical dependency screening. Has the defendant failed to establish that the trial court failed to adhere to statutory requirements prior to ordering a substance abuse evaluation?

6. There is sufficient evidence to support a trial court’s finding that chemical dependency contributed to an offense under RCW 9.94A.607 if there is evidence that the defendant used substances before the criminal act occurred. There was evidence in the record that Villafuerte had “too much” to drink and had imbibed 2-3 glasses of champagne before strangling his wife. Was there sufficient evidence to support a finding under RCW 9.94A.607?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged defendant Elmer Villafuerte by information with assault in the second degree—domestic violence with the aggravating factor of a history of domestic violence.

CP 7-8. The State alleged that Villafuerte had strangled his wife, Christelle Villafuerte.¹ CP 1-11. A jury found Villafuerte guilty as charged. CP 3-4, 7-8. The court imposed a standard range sentence of 6 months, with the first half to be served in the King County Jail and the second to be completed by Work Education Release. CP 81.

2. SUBSTANTIVE FACTS

a. History Of The Relationship.

Christelle began dating defendant Elmer Villafuerte when she was 18 years old. RP 295.² At the time of trial, they had been together for four years and had two children, ages 3 and 1 ½ years, with another baby due in just 3-4 weeks. RP 295-96. Their relationship was rocky.³ RP 298. Christelle had been arrested once for slapping Elmer in February 2012; the charge was later dropped. RP 324-26. She claimed to have slapped or grabbed him before on other occasions. RP 357-58.

¹ Because Christelle and Elmer Villafuerte share the same last name, Christelle will be referred to by her first name. No disrespect is intended.

² The verbatim report of proceedings consists of 7 consecutively numbered volumes, which will be referred to as RP.

³ The trial court admitted evidence of the prior incidents of domestic violence described herein under ER 404(b). RP 76-77.

On June 23, 2012, when she was six months pregnant with her second child, Villafuerte became angry at Christelle for lending her parents money. RP 327. As Christelle held her 15-month old son in her arms, Villafuerte pulled her arm and tried to forcibly remove her from the room. RP 330-32. While she was on the ground, Villafuerte pulled her leg up until she felt pressure on the fetus inside her “like . . . [it] was being squished” and could no longer feel the baby moving. RP 330, 332-35.

Fearing for the baby’s welfare, she went to the hospital, where she gave a sworn statement about the assault to King County Sheriff’s Deputy Scott Mandella, describing pain in her right shoulder, foot, and ankle, corroborated by visible redness. RP 330-31, 363, 367-38. Although Christelle later insisted that she did not remember describing Villafuerte’s previous abuse in her statement to Deputy Mandella, including a prior suffocation attempt, she testified at trial that “[i]t’s been back and forth with us” and that she had not called police after every incident because she worried about getting Villafuerte in trouble and felt that she was partly to blame: “I feel like out of all those times that we’ve had problems where the cops were involved I realize I was pregnant at each time and so I feel like my hormones, my emotions got the best of me.” RP 337-40.

b. Trial.

On July 24, 2013 in the early evening, Teresa Coalman was driving home with her husband from a family function. RP 419. Coalman lived about a block and a half from the Space Needle. RP 418-19. As she drove towards her building at 43 Roy Street, she saw a young lady, later identified as Christelle Villafuerte, flagging her down on 4th Avenue. RP 420. Christelle appeared upset and in need of help, making “scared” and “excited” gestures. RP 420. Coalman asked her husband to pull over and saw that Christelle was “very visibly upset. She was crying. She was shaking.” RP 420-21.

Christelle blurted out that her husband had choked her: “She said that he choked me, he choked me. She said that three times to me.” RP 421. Coalman got out and asked Christelle if she was okay and where her husband was; Christelle pointed down the sidewalk to a man who then proceeded to “take off running.” RP 421-22. Because Christelle wanted to call 911, Coalman used her own cell phone to dial and spoke to the operator. RP 421-22.

On the 911 recording, Christelle could be heard speaking tearfully in the background to Coalman, describing how she had grabbed Villafuerte’s shirt and how he had choked her and hit her

across the face. RP 423-25; Ex. 2,⁴ 911 Call (4:21-4:32). Coalman testified that Christelle made a motion to the left-hand side of her face when describing where she had been hit. RP 425. Coalman held Christelle's hand and tried to calm her down as they waited for the police to arrive, but Christelle was "shaking, she was crying, she was very upset the entire time." RP 421, 425.

Seattle Police Officer Daljit Gill was the first officer to respond to the scene at 7:00 pm. RP 238-40, 244. She found Christelle distraught and holding the front of her neck: "I saw Mrs. Villafuerte crying, sobbing . . . She blurted out he choked me, he choked me. And I immediately asked her who and she said that it was her husband." RP 241, 274. Gill noted Christelle's red, watery eyes and hoarse voice: "She told me that her breathing had stopped. She could tell her face was turning red." RP 241. Recognizing these as potential signs of strangulation, Gill requested a medic for Christelle, describing her as "hysterical, she was crying, she was in shock and she needed medical aid." RP 242, 278. Although Gill testified that she did not observe swelling, abrasions or bruising, photographs

⁴ Exhibit 2 contains three audio files under the folder titled "Music": (1) 911 Call; (2) Audiostatement V Villafuerte, Christelle, (3) Audiostatement W Coalman. Only the first two were played for the jury.

taken at the scene showed redness and discoloration on each side of her neck. RP 276, 287-89; Ex. 6-8.

EMT Shane Kidwell of the Seattle Fire Department arrived to provide medical aid to Christelle just before 8:00 p.m., when Christelle was still “distraught” and police were trying to “calm her down.” RP 383-88. Kidwell asked what had happened and Christelle responded that “her husband grabbed her neck,” clutching her neck with one hand to demonstrate. RP 390. Kidwell noted minor abrasions on both sides of her neck, described as “scuffing of the skin.” RP 390, 382. Because of the lack of lighting late at night, he was unable to see more detail. RP 392.

Christelle gave Gill an audiorecorded statement sworn under penalty of perjury which was admitted at trial as substantive evidence as a Smith⁵ affidavit under ER 801(d)(1)(i). Ex. 2; RP 254-56. On that sworn statement, Christelle stated that Villafuerte “choked her, told me to get off of him and then he slapped me across the face and then he ran off.” Ex. 2, Audiostatement V Villafuerte, Christelle (“Audiostatement”) (2:12-2:16). She further detailed how Villafuerte had put his hands over “where my . . . glands are, I wasn’t breathing. I could feel my face, like, losing oxygen. I could feel my face turning

⁵ State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982).

red.” Ex. 2, Audiostatement (2:21-2:38). She said the strangulation lasted for at least 10 seconds. Ex. 2, Audiostatement (2:40-2:44).

Christelle told Officer Gill her husband’s name and cell phone number. RP 243, 245. On direct examination, Gill explained that she called the number and asked to speak to Elmer Villafuerte, who identified himself and seemed familiar with the situation he had just left. RP 245-46. Villafuerte told Gill that he was underneath the monorail, an area close to the scene. RP 246.

Gill told Villafuerte that she was with Christelle and might have to arrest her. RP 246. Gill explained at trial that she was bluffing and wanted to see if Villafuerte would come back so that she could get more information about what had happened: “There’s two sides to every story, and I wanted to get his side as well.” RP 246. After Gill told him that she’d have to arrest Christelle unless she gathered more information, Villafuerte responded that Christelle had done nothing wrong and to not arrest her. RP 247. Gill related that she and other officers did not locate Villafuerte that night. RP 267-68.

At trial, Christelle minimized Villafuerte’s actions. She said that she and Villafuerte had attended a party hosted by her employer near McCaw Hall at the Seattle Center that night. RP 297, 299. She testified that “we both drank too much,” having drunk 2 glasses of

champagne herself while Villafuerte had imbibed 2-3 glasses. RP 299-300. Villafuerte became jealous, believing that Christelle was flirting with a co-worker, and walked across the street in anger. RP 299-301.

Christelle followed and confronted Villafuerte, who was very upset, and the two began arguing. RP 301. He then ran off again and Christelle pursued, eventually finding him 15 minutes later and telling him that they needed to go home. RP 301. Villafuerte refused and Christelle pulled on his side and shirt to come with her. RP 301-03. At trial, she claimed that he pushed “towards my chest area, by my neck,” grabbing her with one hand. RP 304. She said this “shocked” and filled her with embarrassment, anger, and sadness, and she went backwards. RP 304. Villafuerte fled, running towards the Space Needle and the Experience Music Project museum. RP 305. Christelle testified that she tried chasing him before flagging down Teresa Coalman in tears while holding her neck. RP 304.

Christelle testified to feeling inner conflict even at the scene: “My intentions were to call the cops, but I think in the back of my mind I kind of knew what was going to happen especially with me flagging down that lady. It’s weird because at that point I felt like I didn’t really want that to happen and I kind of regretted what had happened at

that point . . . even flagging down the lady and having her call the police.” RP 305-06. She described “the male cop kind of telling me, ‘Did he choke you?’ [sic] And I said, ‘Okay, yeah, that’s what it was.’” RP 322.

Christelle attested to selective memory loss, stating “it’s hard for me to remember it was so long ago. I just remember being angry.” RP 322. She claimed that she did not remember describing the strangulation to Coalman, how she had grabbed Villafuerte’s shirt and how he had choked and hit her in retaliation, nor any memory that her first words to Coalman were that she had been choked. RP 323. Christelle also insisted that she did not remember asking Coalman to call the police. RP 306-07.

Christelle further alleged that she had been manipulated by the officers:

I told them that I had gotten in an argument with my husband and that things got physical and that he ran off and I was chasing after him. And I told them that I felt like he grabbed me over here, I don’t know. And then I remember the cops saying that, oh, did he choke you because if he choked you that’s a felony. And that shocked me there. I wasn’t expecting that. And he just asked if he had grabbed my neck. And I was like, yeah, I think he did, I think he grabbed by neck.

But at the same time I felt like that’s not really what happened, like I don’t even know what happened because I was still in shock. I was still emotional, I was still angry and sad, so I don’t know. I felt like the cops were just trying to get me to say that

he choked me, like choked me choked me [sic], strangled me. I remember him asking me how long his hands were around my neck or around that area. I don't remember what I said after that.

RP 308-09.

Although she continued to claim that she had forgotten key details of the incident, Christelle remained reluctant to outright deny them. RP 347-56. During cross-examination, she agreed with counsel's suggestion that "it appeared that Mr. Villafuerte was trying to get loose from you" and that he wasn't "trying to purposely hurt her." RP 348. However, when asked whether she "actually consider[e]d what happened to have been Mr. Villafuerte choking you," she responded, "I don't know. I don't remember." RP 348. When asked if he slapped her, she said, "I don't remember any of that." RP 349. When asked if some of the things she told the police were untrue, she said, "I guess not. I don't remember." RP 351. It was only after repeated questioning by defense counsel, to whom she admitted that her memory of that day was "imperfect," that Christelle stated that he didn't "actually" choke her. RP 351, 356. When pressed about the description of the assault that she had given that night, she simply said, "I don't know. I got [sic] really remember. I just remember saying that he grabbed me. I don't know." RP 311.

Christelle spoke openly about her fears regarding the potential consequences of disclosing the abuse, telling the jury how concerned she was for their family's future: "I have a kid on the way, I have two other kids with him and this isn't how it should be. I want us to go along with our plans to go to school like we planned and to finish college, get a good job . . . I need him for that." RP 339-40. Given that Christelle and her children were already living from place to place with various family members, their family's very stability was at risk: "I knew that he had that job coming up and I think that's what scared me the most because I wanted him to get that, but I knew that now that wasn't good [sic] to happen." RP 295-96, 310.

Most of all, Christelle spoke emotionally about the difficulties of raising her small children alone and her devastation at the thought of her children growing up without a father. RP 298, 340. She wept on the stand as she described losing the person whom she deemed her "best friend." RP 298. Christelle admitted openly to the jury that she had forgiven Villafuerte for his prior abuse and did not want to testify against him, preferring that the case just went away. RP 359-61. She admitted that she still loved her husband, wanted to protect him, and wished for him to come home to their family. RP 299, 360-61.

Being separated “breaks [her] heart” and “in a perfect world,” he would not get into any trouble for what happened. RP 360.

Additional facts are included in relevant sections below.

C. ARGUMENT

1. VILLAFUERTE’S FIFTH AMENDMENT CLAIM.

a. Pretrial Motion.

During a pretrial hearing, Officer Gill testified that she employed a ruse with Villafuerte and told him that a witness had seen his wife pushing him, that she wanted to see if he was all right, and that she would be arresting Christelle if he didn’t come back: “I told him that I wanted to get his side of the story. I wanted him there . . . because there’s always two sides to every [sic] story.” RP 25-26. Villafuerte responded “that [Christelle] had done nothing wrong, and he’d come back and talk to me.” RP 26. Gill called him back twice, and although he reassured her that he was walking back, he never returned and his phone began going directly to voicemail. RP 26-27.

Defense counsel agreed that the conversation was noncustodial but argued that it was “inappropriate” to use Villafuerte’s failure to come back to the scene as substantive evidence of guilt. RP 5, 35. The Court found that Villafuerte’s statements that Christelle “didn’t do anything to me” were “highly relevant” given

Christelle's new version of events in which she blamed herself for the attack.⁶ RP 31. The court also ruled that it was not an improper comment on Villafuerte's right to remain silent because Gill had not accused Villafuerte of any wrongdoing: "She didn't accuse him . . . She instead said something about a witness saw her, the wife . . . push him or do something and with only that information or without hearing your side of it, I'll need to arrest her." RP 39. The court agreed that the phone call was not a custodial interrogation. RP 39.

Defense counsel made a motion to reconsider, stating that "*it's the invitation from law enforcement to come back and speak . . . [that] I'm obviously focused on.*" CP 45-46; RP 61-70 (emphasis added). While evidence that Villafuerte never came back was relevant and admissible, counsel stated, "I don't think we need to establish that *the officers invited him to come back and share his story and then failed to do so* to establish that Mr. Villafuerte left the premises and did not return." RP 63-65 (emphasis added).

The court ruled that "the fact that [Villafuerte] agreed to come back and didn't come back" should be excised from Gill's testimony: "The word 'return' troubles me because it sort of assumes that there was some invitation to return, and . . . *if there was an invitation to*

⁶ Villafuerte asserted self-defense at trial. CP 31; RP 234.

return then that gets into him choosing to remain silent, but as far as [questions about] did he come to the scene, were you able to make contact that day, would be fine.” RP 67-68 (emphasis added).

The trial court also found that Gill's bluff about arresting Christelle was admissible:

*Well, that's the statement that provoked, ["D]on't do that, she's done nothing wrong["] . . . So in my view that's admissible; *it's just that you don't go further to indicate his agreement to come back and his failure to come back . . .**

RP 69-70 (emphasis added).

The trial court also granted the State's request to give Gill the opportunity to explain that she had used this tactic partly to confirm that Gill was not, in fact, the victim: “[O]ften in these situations both parties could be hurt and she wanted to also see that he wasn't hurt and if Christelle's version was correct.” RP 226-27.

During direct examination, Gill testified to the following:

[PROSECUTOR]: Did you mentioned [sic] that you were with Christelle?

[GILL]: Yes, I did.

Q. Did you mention that you may have to arrest Christelle?

A. Yes.

Q. Why.

A. I was bluffing and the reason why was because I wanted to see if he would come back so that I could get --

MR. GARRETT: Your Honor, I'm going to object.

THE COURT: I'm going to ask you to ask another question. The answer will stand.

Q. Were you trying to get more information about what had happened?
A. Yes.
Q. And why is it important to get more information on what had happened?
A. There's two sides to every story, and I wanted to get his side as well.
Q. Had you actually received any information that Christelle had actually assaulted the Defendant?
A. No.
Q. That was just a bluff, as you put it?
A. Yes.
Q. Did you tell him that if you didn't hear more of the story you'd have to arrest Christelle?
A. Yes.
Q. And what did he tell you in response to that?
A. She didn't do anything, don't do that.
Q. Did he say anything about Christelle attacking him?
A. No.
Q. Did he say anything about Christelle hurting him?
A. No.
Q. Did he say anything that he was protecting himself from Christelle?
A. No.

RP 246-47.

Gill later testified that officers did not find Villafuerte that night and that she did not speak to him again. RP 267-68. The State made no mention of the phone call during closing argument. RP 468-92. Defense counsel, however, brought it up as evidence of his client's innocence, highlighting Gill's use of a "trick" and citing Villafuerte's response as an example of his client's "perfectly appropriate" reaction. RP 480.

b. The State Did Not Comment On Villafuerte's Right To Silence.

Villafuerte claims that the State impermissibly commented on his right to silence when Officer Gill testified that she wanted him to come back to get both sides of the story and that she did not see him again that night. This claim fails because the State neither invited the jury to use silence as substantive evidence of guilt nor suggested that it qualified as an admission of guilt. Contrary to Villafuerte's assertions, the jury did not hear that Villafuerte was silent, but rather that he responded to Gill's query by insisting that his wife had done nothing wrong. Nor did Gill ever accuse Villafuerte of any wrongdoing. Moreover, Gill never testified that she had invited Villafuerte back to the scene, much less that he refused or failed to keep his promises to return. Finally, given the extremely oblique nature of any alleged "silence" and Villafuerte's acknowledgment that the State made no mention of it during closing argument, any error was harmless beyond a reasonable doubt.

At the outset, Villafuerte admits that the State made no argument to the jury equating silence with guilt; indeed, the State never even mentioned Gill's conversation with Villafuerte during

closing remarks. His claim is thus based solely on Gill's brief testimony alone. Essentially, he alleges a violation of his right to silence merely because Gill testified that she had wanted him to return and to hear his side of the story, and that there was later testimony that officers never contacted him that night.

The Fifth Amendment prohibits the State from commenting on a defendant's right to silence. State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). It also prohibits the use of a defendant's pre-arrest silence as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 215, 181 P.3d 1 (2008). The courts have distinguished between "comments" and "mere references" to a defendant's prearrest right to silence. Burke, 163 Wn.2d at 216. A "mere reference" to silence does not amount to a comment on a defendant's Fifth Amendment right absent a showing of prejudice. Id. at 216.

"A comment on the accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt."

State v. Lewis, 130 Wn.2d 700, 707, 327 P.2d 235 (1996)

(emphasis added). A prosecutor's statement is not considered a comment on the right to remain silent if "standing alone, [it] was so

subtle and so brief that [it] did not naturally and necessarily emphasize a defendant's testimonial silence." Burke, 163 Wn.2d at 216 (citing State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)) (internal quotations omitted). It is only "when the State *invites the jury to infer guilt* from the invocation of the right to silence . . . [that] the Fifth Amendment and article 1, section 9 of the Washington Constitution are violated." Id. at 217 (emphasis added).

In making this distinction, a reviewing court must "focus largely on the purpose of the remarks" and consider "whether the prosecutor manifestly intended the remarks to be a comment on that right." Id. at 216 (quoting Crane, 116 Wn.2d at 331). "A proper analysis requires careful attention to what was said, what was not said, the invocation of silence, proper impeachment, and the use of silence itself to imply guilt." Id. at 218.

Here, none of the allegedly offending testimony was used as substantive evidence of guilt nor used to invite the jury to infer guilt. Indeed, Gill's subtle and brief comments about the conversation excised any mention of the invitation and agreement to return and talk. The record also shows that the purpose of the prosecutor's inquiry was not to highlight Villafuerte's silence but to give Gill an

opportunity to explain why she had used a ruse: namely, that she had hoped to get both sides of the story without accusing Villafuerte directly of anything and to illustrate that his statements at the time conflicted with his later claim of self-defense.

The supreme court case of State v. Lewis is factually indistinguishable from the case at hand and should control the outcome here. 130 Wn.2d at 700. In Lewis, defense counsel successfully moved to exclude the fact that the defendant had failed to show up for multiple follow-up appointments with the police after being informed by phone that he was a suspect in multiple assaults. Id. at 702. At trial, the detective testified that after telling the defendant of the accusations against him, he told Lewis that “if he was innocent he should just come in and talk.” Id. at 702-03. The detective then described how he put up bulletins for Lewis’ arrest and drove to his house to find him, but that Lewis was not arrested until more than a month later. Id. at 703.

The court rejected the claim of a Fifth Amendment violation, noting that “[t]he officer *did not testify about any appointments made and broken* by the defendant. There was *no mention at all by the prosecutor in closing argument* about the defendant’s refusal to speak with police about the charges or about his failure to keep

appointments with the officer.” Id. at 704 (emphasis added). The relevant question according to the court was “whether Lewis’ silence was used as evidence of his guilt,” explaining that “[a] comment on the accused’s silence occurs *when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.* That did not occur in this case.”⁷ Id. at 705, 707 (emphasis added).

To the contrary, the Lewis court found that “[t]he detective did not say that Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments. The officer did not make any statement to the jury that Lewis’ silence was any proof of guilt.” Id. at 706. In addition to the complete lack of any prosecutorial argument on the subject, no other witnesses had mentioned the exchange. Id. The court concluded, “Most jurors know that an accused has a right to remain silent, and *absent any statement to the contrary by the prosecutor*, would probably derive

⁷ In contrast, the court held that a State witness had commented on the defendant’s silence in State v. Easter, the companion case issued simultaneously with Lewis. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); Lewis, 130 Wn.2d at 705. In Easter, the arresting officer had described the defendant as a “smart drunk,” explaining that he “*was evasive, wouldn’t talk to me.*” Easter, 130 Wn.2d at 233 (emphasis added). The prosecutor then picked up this theme during closing argument, arguing that the term “smart drunk” aptly summarized the State’s entire case against Easter, using the phrase repeatedly to describe the defendant’s refusal to talk, and “urg[ing] you . . . to find Mr. Easter the smart drunk in this case, guilty.” Id. at 234.

no implication of guilt from a defendant's silence." Id. at 706 (emphasis added).

This reasoning is apt here. First, just as the detective in Lewis never told the jury the key fact that Lewis had failed to keep meetings, Officer Gill never mentioned on the stand that Villafuerte had promised to return to the scene, much less that he failed to do so. Gill testified only that officers had not located him that night, which is far more innocuous than the situation in Lewis where a detective described putting up posters and driving to the defendant's house until finally locating him a month later. Gill's brief description of her phone exchange with Villafuerte pales in comparison to the comments that were found to be proper in Lewis (that "if [Lewis] was innocent he should come in"), which arguably constituted far more of a challenge/invitation to talk.

Second, as the trial court correctly pointed out, Gill never accused Villafuerte of any wrongdoing, weakening any possible link between his alleged "silence" and the issue of guilt. RP 39-40. Unlike Lewis, where the officer directly confronted the defendant with the complaints of assault against him, Gill did not present Villafuerte with the option to tell his "side of the story" after first listing the incriminating evidence against him. Instead, it was

presented to him as an opportunity to further incriminate Christelle, who was portrayed as the assailant by Gill. There could therefore be no “inference of guilt” drawn by the State to Villafuerte.

Third, just as the detective in Lewis had never stated that the defendant there had refused to talk to him, Gill never testified or indicated that Villafuerte had declined to speak. To the contrary, she told the jury that Villafuerte had in fact responded to her after she used her ruse. His response made it less probable that he had a viable self-defense claim at trial. At base, Lewis, Burke, and their progeny show that the State must actually allege a defendant’s silence before it can possibly comment on it. Here, there was less than a “mere reference” to silence – there was no silence alleged at all. To the contrary, Gill told the jury that he had responded to her bluff by saying that his wife had done nothing wrong, asking Gill not to arrest her. As far as the jury knew, Villafuerte had given his side of the story: that Christelle had done nothing wrong.

Villafuerte’s attempt to interpret Gill’s testimony as a comment on the right to silence would require a strained and highly improbable series of inferences. Courts will not recognize such strained nuances. See e.g. Burke, 163 Wn.2d at 215 n.6 (emphasizing that in Lewis they had found that “the officer’s

testimony was not even *referring* to the defendant's silence, let alone an implication that such silence was the result of the defendant's guilt."); State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999) (holding that an officer's testimony that the defendant had agreed to provide a written statement and polygraph examination once he spoke with his lawyer, coupled with the lack of any such documents produced at trial, was "at best" a mere reference to, not a comment on, the right to silence).⁸

Villafuerte nevertheless insists that the State commented on his right to silence because Gill "explicitly testified that she wanted to get Villafuerte's side of the story but had no contact with him after the call." BOA at 14. But even Villafuerte's own characterization of this exchange attributes no evasiveness or conscious refusal to Villafuerte. It simply conveys that Gill, *having leveled no accusations against Villafuerte* during their phone conversation, wanted information but ended up having no further

⁸ Far more is needed to qualify as an affront to the right to prearrest silence. Burke, 163 Wn.2d at 208-09, 221-22 (prosecutor "stressed Burke's silence" during examination of multiple witnesses and suggested in opening and closing arguments that Burke had terminated a police interview because he knew that he had done something wrong and "thus advanced the link between guilt and the termination of the interview."); State v. Knapp, 148 Wn. App. 414, 420, 199 P.3d 505 (2009) (prosecutor elicited testimony from a detective that a defendant "hung his head but did not say anything" after being confronted incriminating information, and then invited the jury to find him guilty because he had not said, "No. It wasn't me[.]").

contact with him that night. This in no way imputes guilt to Villafuerte. It says something only about Gill's state of mind.

Acknowledging the lack of any direct invitation and refusal to return, Villafuerte argues that "the message was the jury should consider Villafuerte's silence and find him guilty because he did not give his side of the story to the police, even to avoid his wife's unjust arrest." BOA at 14. This requires not just a strained reading but an inaccurate one: Villafuerte did give his side of the story by responding that his wife had done nothing wrong. There could be no such "message" to take his "silence" as evidence of guilt because he was never, in fact, silent. If there was any message conveyed by this exchange, it was a proper and probative challenge to Villafuerte's later self-defense claim, given that he later contradicted himself at trial by arguing that his wife had done something legally wrong.

Villafuerte nonetheless cites to two cases to argue that his right to silence was violated solely by Gill's testimony. Both cases can be distinguished on their facts and, upon close examination, actually cut against his arguments. Villafuerte first relies on State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264 (2008). Thomas involved an evocative refusal to speak with police, in which the

defendant told an officer on the phone after fleeing the scene, “I don’t want to talk to you.” Id. at 592-93. The court held that this constituted “no more than a passing reference” to Thomas’ silence. Id. at 596. It was, in fact, the prosecutor’s closing argument in Thomas that “turned Officer Peterson’s testimony into more than a passing reference” by emphasizing that “although he had been accused of a crime, Thomas would not return to tell his story . . . These comments plainly conveyed the message that if Thomas was not guilty, he would have returned to the crime scene to tell his side of the story.” Id.

Such was not the case here. Villafuerte admits that the State made no such argument in his case, or even mentioned the exchange during closing remarks. Further, compared to the defendant’s forthright announcement in Thomas that he did not want to speak to police, Gill’s description of her discussion with Villafuerte was undeniably benign.

Villafuerte nonetheless attempts to present Gill’s testimony as “more explicit” than the officer’s “passing reference” in Thomas because “Gill testified that she wanted Villafuerte to come back to get his side of the story, Villafuerte did not come to the scene, and neither Gill nor any other officer had further contact with Villafuerte.”

BOA at 13. But this recitation eliminates the key fact that Gill never testified that she had actually told Villafuerte that she wanted him to return, nor did she tell them that he had expressly promised to do so before renegeing. As far as the jury knew, therefore, Villafuerte had an opportunity to refuse or invoke his right to silence.

Villafuerte next turns to State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997). There, a detective told the jury that she had warned the defendant several times over the phone that she would have to turn his case over to the prosecutor for potential rape charges unless the defendant met with her by a certain date. Keene, 86 Wn. App. at 592. The detective testified that he missed one agreed appointment and never returned her final phone call, a comment further exacerbated during closing argument when the prosecutor asked if Keene's repeated failure to return messages "are the actions of a person who did not commit these acts." Id.

Both argument and testimony were a comment on the defendant's right to silence: "Unlike in Lewis, [the officer here] testified that she never heard from Keene *after she warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again* . . . Furthermore, unlike in Lewis, the prosecutor then argued to the jury that it could decide if Keene's

failure to contact the detective was the act of an innocent man.”

Keene, 86 Wn. App at 594 (emphasis added).

Villafuerte argues that Gill’s testimony about “never hear[ing]” from Villafuerte was “just as explicit” as the officer’s testimony in Keene about failed appointments and return calls. BOA at 15. But this ignores several key points. First, the detective in Keene explicitly confronted Keene about the accusations against him and plainly warned Keene that *he* (not another suspect) would face potential criminal charges if he did not return her calls. This is far different from the case at bar, in which Gill made no such threats or even implications, instead telling Villafuerte at all times that *someone else* would be arrested.

As defense counsel later said in his closing argument, this was hardly an accusation but rather “the perfect opportunity to shift blame.” RP 480. Even if Gill *had* testified that Villafuerte remained silent in response to her stated plan to arrest Christelle (which he did not), it would be impossible for the jury to conflate this silence with his own guilt; the person accused, as far as *Villafuerte* knew, was Christelle, not him.

Second, unlike in Keene, Gill specifically excluded the fact that she and Villafuerte had exchanged multiple calls in which he

had agreed, and then failed, to show up for an appointment, eventually ceasing to pick up the phone altogether. All of this information was kept from the jury. Keene's holding is thus inapplicable to the facts here.

c. Any Error Was Harmless.

A constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result and the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Burke, 163 Wn.2d at 222. However, a "mere reference" to silence is not of constitutional magnitude and therefore it does not merit use of the constitutional harmless error standard; instead, a non-constitutional standard of review applies. State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002); see also Burke, 163 Wn.2d at 216 (holding that a "mere reference" to silence does not violate a defendant's Fifth Amendment right absent a showing of prejudice).

Under the nonconstitutional harmless error standard, an error is harmless unless there is a reasonable probability that, absent the error, the outcome of the trial would have been materially affected. State v. Gower, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014). As argued above, any error here was, at most,

a “mere reference” to silence, so indirect and subtle was the testimony about Villafuerte’s exchange with Gill. Given the strength of the evidence against him, he has failed to show prejudice.

However, to the extent that this Court finds that Gill’s testimony demands a constitutional standard of review, there is evidence sufficient to convince this Court beyond a reasonable doubt that any reasonable jury would have come to the same result; the remaining untainted evidence was overwhelming and necessarily led to a finding of guilt. The jury heard from multiple witnesses describing what happened that day, including two consistent accounts provided by Christelle herself on the day of the attack: her frantic voice in the background of the 911 call as she described being “choked,” and the audio-recorded Smith affidavit in which she confirmed how Villafuerte had strangled her for at least ten seconds around her “glands,” cutting off her oxygen, such that she could feel her own face turning red.

These accounts were corroborated by Teresa Coalman, who found Christelle hysterical on the sidewalk and holding her throat immediately after the attack. Even Christelle acknowledged that clutching her neck. Both Coalman and Officer Gill described how Christelle had blurted out that Villafuerte had “choked her.”

Coalman noted that it was the first thing Christelle blurted out, even repeating it three times. Christelle reiterated this to EMT Shane Kidwell, telling him that Villafuerte had grabbed her neck. Kidwell also noted minor abrasions on each side of her neck consistent with strangulation. Photographs taken at the scene showed obvious redness on each side of Christelle's neck, on her "glands" just as she had described. Ex. 5-8.

Christelle's halfhearted recantation at trial did not diminish the weight of the State's evidence against Villafuerte. She acknowledged what was obvious through her stilted testimony on the stand: that her memory at trial was, at the very least, "imperfect." This contrasted sharply with her multiple consistent statements minutes after the attack. On the stand, Christelle struggled to deny the substantive statements she had made that night, offering up only her faltering memory to the jury and unable to square her new, minimized testimony with the statements made by her and others. Mostly, Christelle spoke of substantial interest she had in the outcome of the case, her heartbreak at losing the father of her children, and the immense pressure she was under as a single mother of two with a third baby on the way.

Against this backdrop of overwhelming evidence of guilt, Gill's brief, edited description of her telephone conversation with Villafuerte, in which she made no mention of a broken promise to return but only his response that Christelle was innocent, was inconsequential. Moreover, unlike almost every case involving comments on prearrest silence, Villafuerte admits that the prosecutor here did not even mention Gill's conversation with Villafuerte. It was in fact Villafuerte's own attorney who brought it up, exploiting it as exculpatory evidence that showed that Villafuerte had acted "appropriately." RP 480.

The untainted evidence was overwhelming and any reasonable juror would have come to the same result in this case.

2. VILLAFUERTE FAILS TO MEET HIS BURDEN ESTABLISHING PROSECUTORIAL MISCONDUCT.

a. Closing Argument.

During closing argument, defense counsel told the jury that "Ms. Villafuerte's the only one who was actually present and the only one you've heard from who could actually . . . *explain what happened.*" RP 470 (emphasis added). He then argued that the jury should accept Christelle's testimony at trial as what happened that day, that "[s]he did tell you in short order . . . that she did not

get choked on that day.” RP 473. Counsel then expounded on a hypothesis as to why Christelle’s initial account was a lie; namely, that she was an angry wife motivated by a desire for revenge:

Let’s ask this: Is it not possible that Ms. Villafuerte in that moment might have decided to lash out at Mr. Villafuerte when she comes upon Ms. Coalman? Presumably, she’d been arrested, he’d been arrested, she knew that an accusation is power. She knew she could get him in trouble. She literally physically lashed out at him when she’s angry on other occasions. And she told you that she hadn’t been able to control what she’s said when she’s angry in the past before [sic].

RP 475.

Defense counsel continued to urge the jury to accept Christelle’s trial testimony as the correct account of what occurred that night, imploring them to “[t]hink about her testimony . . . [w]hat she said here in court,” and telling them that “you know that there’s no strangulation because that’s what she testified to.” RP 476-78. He then juxtaposed Christelle’s two stories against one another as dueling accounts, arguing which version represented the “truth” about “what actually happened”:

I submit to you that her statements in court are what the truth looks like when you’ve made a false accusation on the front end . . .

Frankly, if she was telling the truth in the [audio] recording, you’d think she could have remembered, oh, yes, I told the truth at that time . . . If the statements were the truth in the

recording why would she not remember that? . . . She was actually surprised because that's not what actually happened.

RP 477 (emphasis added).

Although counsel later told the jury that it did not have to “solve the case” or “pick an account as true,” he clarified that this applied only to finding a reasonable doubt as to guilt: “[Y]ou don’t need to take any sort of particular account as to which one is the true one, that may be unknown and you can still decide if there’s not proof beyond a reasonable doubt.” RP 484, 490. However, he conditioned a finding of *guilt* on making *exactly* such a choice:

I submit to you that in order to conclude that Mr. Villafuerte is actually guilty of this crime, you need to believe beyond a reasonable doubt the initial statement that Ms. Villafuerte [made]. . . You would need to believe that beyond a reasonable doubt, and you need to believe beyond a reasonable doubt that she came in here and she just lied, lied, lied.

RP 490 (emphasis added).

In rebuttal, the prosecutor refuted counsel’s “angry wife” theory, noting that no evidence had been presented that Christelle had made up her initial account in a purposeful attempt to have her husband arrested. RP 492-93. Countering counsel’s claims that “[Christelle’s] statements in court are what the truth looks like,” the

prosecutor argued that the jury did not have to simply accept her in-court testimony, listing the copious evidence undermining it

The other thing I heard is, you know, you have to believe what Christelle told you in court because that's the truth and completely ignore everything that she said before, just ignore it completely. Well, the problem with believing what she said here is that it wasn't true.

You heard today from Teresa Coalman the first thing Christelle said was, he choked me, he choked me, he choked me. You heard the 911 call or a portion of the 911 call when Christelle says in her own words, I grabbed his shirt, he choked me and hit me in the face before police arrived. You heard from Officer Gill who said I asked her what happened. Christelle told me he choked me, he choked me.

What she said here wasn't all the truth . . . What else she said here is that she just wants this to go away, she wants to protect him, she loves him, she wants him to be there for her and the children. That's pretty noble that she's willing to stick in this relationship. But her decision is not your decision. Your decision, your job is to figure out what happened here.

RP 477, 493-94 (emphasis added).

Defense counsel objected on the basis of improper argument. The court overruled the objection, stating, "The jury's instructed to follow the Court's instruction on the law." RP 494.

b. The State Did Not Direct The Jury That Its Role Was To Declare The Truth Or Solve The Case.

Villafuerte contends that the prosecutor committed reversible misconduct in closing argument by isolating a single remark (“your job is to figure out what happened here”) and arguing that it was the equivalent of directing the jury to “speak the truth” or to “solve the case.” The court should reject this claim. Defense counsel set up the verdict as a choice between two stories, directing the jury to select Christelle’s in-court testimony as “the truth” and that her statements at the scene were “not what actually happened.” The prosecutor responded appropriately to these arguments; the argument was not improper nor was it prejudicial.

To establish prosecutorial misconduct, Villafuerte must show “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Our Supreme Court has repeatedly stated that “we do not look at the [prosecutor’s] comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.” State v. Emery, 174 Wn.2d 741, 764

n.14, 278 P.3d 653 (2012). Prejudice is established only when “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.” Thorgerson, 172 Wn.2d at 442-43.

To establish error, Villafuerte argues that the prosecutor’s reference to “figur[ing] out what happened here” shifted the burden of proof and distorted the jury’s role. In doing so, however, he relies almost exclusively on cases in which the State instructed the jury that its job was to divine “the truth.” See State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (“Telling the jury that its job is to ‘speak the truth,’ or some variation thereof . . . is improper”); State v. Walker, 164 Wn. App. 724, 732-33, 265 P.3d 191 (2011) (“[B]y your verdict, you . . . will decide the truth of what happened” on the night of the crime); State v. Evans, 163 Wn. App. 635, 644-45, 260 P.3d 934 (2011) (requesting that jurors peel back “different layers of the onion to get to the truth” and decide “Is [this] what happened?”).

However, these cases are inapposite. In Lindsay, the prosecutor asked the jury to “only do what you swore to do: Render verdicts,” “exhorted the jury to ‘[s]peak the truth,’” and told them “to do what you know is true: Speak the truth. Convict both of these defendant . . .” 180 Wn.2d at 429. The offending statements in Walker similarly equated a verdict with “the truth,” telling the jury that

“declaring the truth [was] part of your role in returning a verdict” and that the truth was guilt. 164 Wn. App. at 733. The prosecutor’s directive to peel back “different layers of the onion to get to the truth” in Evans also presented the verdict as a search for the truth with an undertone that the jury “should disregard the less appealing parts of the State’s witnesses’ testimony.” 163 Wn. App. at 645.

State v. Anderson is also inapposite. 153 Wn. App. 417, 424-25, 220 P.3d 1273 (2009). The prosecutor there told the jury that “by your verdict in this case, you will declare the truth about what happened,” that “the truth of what happened is the only thing that really matters in this case,” and that “the truth” meant a verdict of guilt. These “repeated requests that the jury ‘declare the truth’” were improper because “[a] jury’s job is not to ‘solve’ a case or ‘declare what happened on the day in question.’” Id. at 429.

This direct association between a verdict of guilt and a declaration of “the truth” is a far cry from what occurred here. The prosecutor did not announce to the jury, apropos of nothing, that its role was to seek out the truth of what happened that night. The prosecutor merely argued that the jury should reject counsel’s invitation to accept Christelle’s recantation without scrutiny, and to instead examine the countervailing evidence and her ulterior motives

prior to rendering a verdict. A prosecutor “can fairly argue that the jury should evaluate the credibility of its witnesses and the persuasive force of its evidence as compared to conflicting evidence from the defense.” Evans, 163 Wn. App. at 644.

The prosecutor here never equated the jurors’ verdict with a declaration of truth. Examining the words spoken in context of the entire argument and the evidence at trial, the prosecutor was merely responding to the testimonial dichotomy set up by defense counsel: Christelle’s initial account (“not what actually happened”) versus her recantation (“what the truth looks like”). The prosecutor properly responded that the jury should not just “ignore” what Christelle had told multiple people at the scene, listing all of the evidence corroborating her initial account. The jury still had a responsibility to examine the bounty of evidence contradicting Christelle’s halting recantation and minimization on the stand and could not simply abdicate its decision based on “her decision” to forgive Villafuerte. This obligation to examine the evidence and decide the facts was correctly reflected in Instruction No. 1:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial . . . You must

apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

CP 52.

Even if this court finds that the State's argument constituted error, Villafuerte has not demonstrated a substantial likelihood that the argument affected the verdict. The single remark of which Villafuerte complains constituted but a handful of words in an otherwise objectionable closing argument. It is in this respect unlike the cases cited by Villafuerte, which involved multiple offending remarks through closing argument.

The remainder of prosecutor's argument here accurately described the law, the evidence, and the State's burden. RP 455-68, 492-95. The prosecutor began closing argument by going over the elements of the crime in Instruction No. 7 (the "to convict instruction") and explaining the State's burden to prove each element beyond a reasonable doubt. RP 457. The prosecutor then explored the physical evidence and witness testimony supporting the act of strangulation, concluding with Christelle's own audiotaped Smith affidavit to Officer Gill.

Additionally, as described above, the jury was properly instructed as to what its duties were. CP 52-55. The jurors were

further instructed that the defendant was not required to testify and could not use that fact to infer guilt or to prejudice him in any way, which reinforced his right to silence. CP 58. The jury is presumed to follow the court's instructions. Thorgerson, 172 Wn.2d at 444.

Further, although the case depended to some degree on the credibility of the witnesses, as argued above in Section C.2.b., the evidence of guilt was nevertheless considerable. Given the strength of this evidence, it is unlikely that the jury was influenced to any significant degree by the prosecutor's single isolated remark.

**3. CUMULATIVE ERROR DID NOT DENY
VILLAFUERTE A FAIR TRIAL.**

Villafuerte also argues that, if none of the alleged errors he has claimed warrants reversal of his conviction on their own, the conviction should nevertheless be reversed based on the combined effect of these errors. This argument fails.

The cumulative error doctrine applies only where several trial errors occurred that, standing alone, may not be sufficient to justify reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000), review denied, 151 Wn.2d 1031 (2004)). It is axiomatic, however, that to

seek reversal pursuant to the “accumulated error” doctrine, the defendant must establish the presence of multiple trial errors *and* must show that the accumulated prejudice affected the verdict. Where errors have little or no effect on the outcome of trial, the doctrine is inapplicable. Greiff, 141 Wn.2d at 929. Here, as explained above, Villafuerte has failed to satisfy this burden.

4. THE COURT DID NOT ERR IN PROHIBITING VILLAFUERTE FROM CONSUMING “NON-PRESCRIBED DRUGS” AS A CONDITION OF COMMUNITY CUSTODY.

Villafuerte next argues that the court erred in ordering him not to consume any non-prescribed drugs as a condition of community custody. Because the record shows that the trial court intended this to mean controlled substances, and because Villafuerte has failed to establish that this issue is ripe for review, this claim should fail.

As a condition of community custody, the trial court ordered in Appendix H of the written judgment and sentence that Villafuerte “not possess or consume controlled substances except pursuant to lawfully issued prescriptions” and that “[t]he defendant shall not consume any alcohol or non-prescribed drugs.” CP 84. The condition regarding “controlled substances” was pre-printed in

Appendix H; the court hand-wrote the words “or non-prescribed drugs” after the pre-printed language about alcohol. CP 84.

This followed an oral ruling in which the court conditioned the possibility of in-person contact with Christelle on Villafuerte’s completion of a drug and alcohol evaluation:

[The no contact order is] something that can change when you bring in proof that you’re in the counseling that the Court has ordered and have had the drug and alcohol evaluation and so forth. I’m going to order also for that 12-month period that you not, of the community custody that you not consume any alcohol and that you not consume or use any non-prescribed drugs or controlled substances.

RP 526-27.

Villafuerte acknowledges that RCW 9.94A.703(2)(c) authorizes the court to order the defendant to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” However, he argues that a prohibition on the consumption or use of “non-prescribed drugs” is not encompassed by RCW 9.94A.703(2)(c) and not authorized by RCW 9.94A.703(3)(f) (permitting a court to impose crime-related prohibitions). RCW 9.94A.030(10) defines “crime-related” as something that “directly relates to the circumstances of the crime for which the offender has been convicted.”

Villafuerte contends that the prohibition on “non-prescribed drugs” is too broad and unauthorized, as it could encompass drugs such as aspirin or cold medicine. But there is no support in the record that this was in fact the court’s intention. To the contrary, the record shows that the court used the term “non-prescribed drugs” as a synonym for controlled substances (“any non-prescribed drugs or controlled substances”). The term arose during the court’s oral discussion of the defendant’s upcoming “drug and alcohol evaluation.” Certainly Villafuerte does not argue that the court was ordering an evaluation for his use of aspirin or cold medicine. Given this context, it is clear that the court was not envisioning a prohibition on benign over-the-counter items like cough drops or aspirin.

Moreover, Villafuerte’s challenge to this condition is not ripe for judicial review. In State v. Motter, the defendant asserted as void for vagueness the sentencing court’s prohibition on his possession of items “that can be used for the ingestion or processing of controlled substances.” 139 Wn. App. 797, 803, 162 P.3d 1190 (2007). Motter argued that this overbroad language could potentially prohibit him from using “innocuous items” such as knives and kitchen utensils. Id. at 803-04. The reviewing court held that this claim failed because “Motter has not been harmed by this potential for error and this issue

therefore is not ripe for our review . . . [W]e can review Motter's challenge only in context of an allegedly harmful application of this community custody condition." Id. at 804.

This Court should therefore reject Villafuerte's claim that the trial court's language prohibits items like aspirin and cold medicine, and hold that his challenge is not ripe for review.

5. THE COURT DID NOT ERR IN FINDING THAT VILLAFUERTE HAD A CHEMICAL DEPENDENCY THAT CONTRIBUTED TO HIS OFFENSE.

The trial court also orally ordered Villafuerte to "obtain an alcohol and drug evaluation and engage in any counseling." RP 256. The court made a written finding in the judgment and sentence that alcohol had contributed to Villafuerte's offense and that "treatment was reasonably related to the circumstances of this crime and reasonably necessary or beneficial to the defendant and the community. (RCW 9.94A.607).⁹ Therefore, the defendant shall participate in the following treatment: substances abuse treatment as recommended." CP 84.

Villafuerte contends that the trial court erred in ordering substance abuse treatment as a condition of community custody on

⁹ RCW 9.94A.607(1) provides in part that "[w]here the court finds that the offender has a chemical dependency that has contributed to his or her offense," the court may order a defendant participate in rehabilitative programs.

three separate grounds. First, he argues that the trial court did not “specifically waive” a Department of Corrections (DOC) chemical dependency report prior to ordering a substance abuse evaluation.

Villafuerte cites to RCW 9.94A.500, which states in relevant part: “Unless specifically waived by the court, the court shall order [DOC] to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of . . . any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense.” Reading RCW 9.94A.500 and RCW 9.94A.607(1) together, Villafuerte asserts that the trial court failed to follow proper statutory procedure in ordering him to engage in a substance evaluation because it did not first “specifically waive” a chemical dependency screening report prepared by DOC.

He analogizes this failure to that in State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007), where the court imposed mental health conditions without a statutorily-required DOC presentence report. However, Lopez can be distinguished because the relevant statute in that case, former RCW 9.94A.505(9), had no opt-out provision like RCW 9.94A.500 and stated plainly that “[a]n order requiring mental status evaluation or treatment **must** be based

on a presentence report.” The court in Lopez thus failed to meet this mandated requirement and was ordering an unlawful condition.

Here, however, the governing statute, RCW 9.94A.500, specifically allows for a trial court to waive a chemical dependency screening prior to sentencing. The trial court’s decision not to do so was therefore permissible. Villafuerte nonetheless takes issue with the fact that the trial court did not “specifically waive” a DOC screening report. However, in State v. Guerrero, the court held that because RCW 9.94A.500 “is not clear how a court ‘specifically waives’” a chemical dependency screening, “[t]he most reasonable reading” of that statute alongside the DOSA statute (RCW 9.94A.660), which states that a court “may” order a screening, is that “a court waives the report by declining to order one.” 163 Wn. App. 773, 778, 261 P.3d 197 (2011).

Similarly here, reading RCW 9.94A.500 alongside 9.94A.607(1), which also does not require a chemical dependency screening prior to ordering a defendant to participate in rehabilitative programs, the most reasonable reading of RCW 9.94A.500 is that the court specifically waives the screening report by declining to order one. Here, the trial court declined to order the report. This Court should find that the report was specifically waived.

Villafuerte next argues that the chemical dependency finding was unsupported by substantial evidence. A sentencing court's factual findings are reviewed under the clearly erroneous standard, and reversed only if no substantial evidence supports the findings. State v. Russell, 69 Wn. App. 237, 250, 848 P.2d 743 (1993). In State v. Powell, the reviewing court held that the record supported a finding that chemical dependency had contributed to the offense because there had been evidence at trial that the defendant had consumed methamphetamines before committing his crime. 139 Wn. App. 808, 820, 162 P.3d 1180 (2007). Here, the record establishes the undisputed fact that Villafuerte "drank too much" that evening, having imbibed 2-3 glasses of champagne and then strangling his wife. RP 229-300.

Nevertheless, Villafuerte argues without citation to any authority that there is a legal difference between alcohol consumption and chemical dependency under RCW 9.94A.607. BOA at 209. Because the SRA does not define the term "chemical dependency," he asks this Court to adopt the definition of "substance dependence" from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Id. This Court should decline to do so. The record establishes that after drinking "too much" alcohol that

evening, Villafuerte engaged in erratic behavior by committing a public, violent act against his wife. This is evidence sufficient to support a finding that chemical dependency contributed to his offense.

Finally, Villafuerte argues that the court erred in ordering substance abuse treatment because there was no evidence that anything other than alcohol contributed to Villafuerte's offense. This is correct. This Court should remand this matter to the sentencing court to revise that provision to impose only "alcohol abuse treatment as recommended."

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Villafuerte's conviction and sentence and to remand solely to revise the provision for "substance abuse treatment to "alcohol abuse treatment."

DATED this 4th day of March, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: *Nami Kim*
NAMI KIM, WSBA #36633
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, CASEY GRANNIS, containing a copy of the Brief of Respondent, in STATE V. ELMER VILLAFUERTE, Cause No. 71756-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

Name

Done in Seattle, Washington

3/4/15

Date

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR -4 PM 2:53