

72419-3

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July 23, 2015  
Court of Appeals  
Division I  
State of Washington

72419-3

NO. 72419-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR CONTRERAS,

Appellant.

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

The Honorable Theresa B. Doyle, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. BY CONTRASTING NORMAL “PROTESTATION ABOUT GUILT OR INNOCENCE” WITH CONTRERAS’ JUST SITTING THERE, THE DETECTIVE SUGGESTED THE JURY SHOULD INFER GUILT FROM CONTRERAS’ SILENCE.

The State argues the detective’s comments pertained only to Contreras’ demeanor while giving his statement. Brief of Respondent (BoR) at 8. This is incorrect. While Contreras made some statements, he also failed to account for his whereabouts. 9RP 97-98. The comment about his lack of “protestation” is a specific reference to silence. 9RP 98. The Fifth Amendment protects even partial silence. State v. Fuller, 169 Wn. App. 797, 814-15, 282 P.3d 126 (2012) (citing Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010)). Demeanor accompanying partial silence is similarly protected and may not be used as evidence of guilt. State v. Barry, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 3511916, at \*3 (no. 89976-2, filed June 4, 2015). While it considered a different question than this case, the survey of demeanor jurisprudence provided in Barry supports Contreras’ argument.

In Barry the jury inquired whether it could consider the defendant’s “actions-demeanor” during the trial. Id. at \*1. The court instructed the jury that, “evidence includes what you witness in the courtroom.” Id. Thus, the court considered whether this instruction, permitting the jury to consider demeanor in the abstract, violated the Fifth Amendment when the defendant

did not testify. Id. at \*3. The court accepted the State's concession that the instruction was error, but held the error was harmless because there was no evidence in the record of what the defendant's demeanor was. Id. at \*1, \*3.

The court explained that not all use of demeanor evidence would violate constitutional rights: “[D]emeanor evidence is constitutionally barred only if the demeanor is testimonial, or if it is merely the demeanor accompanying a defendant’s silence or failure to testify.” Id. at \*3 (citing United States v. Clark, 69 M.J. 438, 444–45. (C.A.A.R 2011)) (emphasis added). To determine whether a comment on demeanor is an implicit reference to silence, courts must look at “the nature of the statement and the context in which it was offered.” Id. at \*4 (quoting United States v. Elkins, 774 F.2d 530, 537-38 (1st Cir. 1985)). In Barry, there was no evidence the jury’s question was “an oblique reference to testimonial conduct or Barry’s failure to testify.” Id. at \*3.

In contrast to Barry, in this case it is clear what demeanor was being commented on. The detective was referring to Contreras’ demeanor when he was failing to account for his whereabouts or otherwise give incriminating answers to the detective’s questions, the demeanor accompanying his silence. As Barry explains, demeanor accompanying silence is protected by the Fifth Amendment. Id. at \*3.

The question, under Barry, is twofold: whether the comment was intended as a comment on silence and whether the jury would “naturally and necessarily” take it as such. Id. at \*4 (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).<sup>1</sup> Although the prosecutor stated that Contreras’ demeanor was not uncommon, he followed that up by expressly contrasting the “normal” protestations of guilt or innocence with Contreras, who instead “just sat there.” 9RP 97-98. This contrast was intended to suggest Contreras was guilty because he did not protest. And indeed, that is the natural inference a jury would draw from the testimony.

Cunningham v. Perini, 655 F.2d 98 (6th Cir. 1981), cited in Barry, also shows an example of demeanor that did not implicate the Fifth Amendment. In that case, the prosecutor argued the defendant did not show indignation while one of the witnesses testified. Id. at 100. The court concluded there was no comment on the defendant’s failure to testify because the natural inference was a comment on the defendant’s conduct in response to another witness’ testimony, not an inference that the defendant should have testified himself. Id. By contrast, the comments here expressly suggested that if Contreras were innocent, he would have made some

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<sup>1</sup> The Barry court explained that the earliest cases to apply this test made it disjunctive – the Fifth Amendment was violated if either were true – whereas Washington cases tended to require both questions be answered affirmatively. 2015 WL 3511916, at \*13 n. 7. However, it declined to decide whether the test was conjunctive or disjunctive because the jury instruction in that case did not satisfy either part of the test. Id. In this case, the court also need not decide because the detective’s comments meet both parts of the test.

“protestation,” instead of just sitting there. This was manifest constitutional error under RAP 2.5.

The state is correct that proper instructions are crucial to whether there was manifest constitutional error. BoR at 15 (citing State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)). But no instruction mitigated the impact of the comment on silence in this case. While the jury was instructed it could not consider Contreras’ failure to testify, it was not given any instruction about his reaction to questioning by the Detective. CP 74-117.

The State also argues it did not rely on the detective’s testimony about Contreras’ interview in closing. BoR at 15. While correct, this is immaterial. Certainly, closing argument would have aggravated the prejudice. But comment on the right to silence is constitutional error, and the burden is on the State to prove beyond a reasonable doubt that it could not have affected the verdict. State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). The mere fact that the State did not expressly rely on it in closing argument is not proof beyond a reasonable doubt that it did not play a role in the jury’s deliberations.

2. THE DETECTIVE'S OPINION THAT THE NORMAL RESPONSE IS "PROTESTATIONS ABOUT GUILT OR INNOCENCE" AMOUNTED TO AN OPINION ON GUILT.

The State also attempts to distinguish this case from State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159 (1973), by arguing that the detective did not claim to be an expert. BoR at 13-14. But the ambulance driver in Haga testified that, based on his experience with grieving spouses, the defendant's reaction was "unusual." 8 Wn. App. at 490. Here, the detective was also drawing on his experience, with criminal suspects, when he testified that "normally" there are "protestations of guilt or innocence." 9RP 98. Like the ambulance driver in Haga, the detective here did not expressly claim to be an expert, but drew on his experience to form an opinion about what was usual.

The State would have this Court instead apply State v. Allen, 50 Wn. App. 412, 749 p.2d 702 (1988). BoR at 14. In Allen, the officer was permitted to express an opinion that the defendant's grief did not appear sincere because a proper foundation in personal observation was laid. 50 Wn. App. at 418. Moreover, the opinion that her grief was insincere was not necessarily an opinion on guilt. Id. at 418-19. Instead it merely offered "an explanation and summary of [the officer's] personal observations of [the defendant's] reaction to [the victim's] death." Id. People may have many reasons for displaying false grief in the face of death. That does not

necessarily lead to the conclusion that the person is a murderer. By contrast, here, the detective strongly suggested that an innocent person would have protested instead of just sitting there. 9RP 97-98. That was a direct opinion on guilt that violated Contreras' right to a jury trial and requires reversal of his conviction. Haga, 8 Wn. App. at 492.

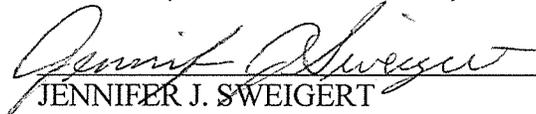
D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Contreras requests this Court reverse his convictions.

DATED this 23<sup>rd</sup> day of July, 2015.

Respectfully submitted,

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Respondent,	)	
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VICTOR CONTRERAS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 23<sup>RD</sup> DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] VICTOR CONTRERAS  
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WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF JULY 2015.

x *Patrick Mayovsky*