

Original

NO. 33455-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM SMITH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00230-0

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS.....2

III. ARGUMENT.....12

 A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUSTAINED OBJECTIONS TO DEFENSE QUESTIONS ABOUT TWO ALLEGED THREATS WHEN: (1) THE WITNESS HAD ALREADY UNEQUIVOCALLY ASSERTED HER FIFTH AMENDMENT PRIVILEGE REGARDING THE THREATS; (2) FURTHER QUESTIONS REGARDING THE THREATS WERE A WASTE OF TIME; (3) THE COURT’S RULING WAS NECESSARY TO PREVENT HARASSMENT OR UNDUE EMBARRASSMENT OF THE WITNESS; AND, (4) THE ASSERTION OF A FIFTH AMENDMENT PRIVILEGE IS NOT EVIDENCE, AND THUS, REQUIRING ADDITIONAL INVOCATIONS OF THE PRIVILEGE WOULD HAVE ONLY SERVED TO EMPHASIZE AN ISSUE THAT THE JURY WAS NOT ALLOWED TO CONSIDER OR DRAW INFERENCES FROM UNDER WASHINGTON LAW.12

 1. Standard of Review.....13

 2. A Defendant’s Sixth Amendment Rights do not Override the Fifth Amendment Rights of Others.13

 3. A witness claiming a Fifth Amendment privilege need not repeatedly invoke the Fifth Amendment in response to a litany of specific

questions if the trial court can conclude that the witness could legitimately refuse to answer essentially all relevant questions.....	14
4. The trial court’s decision was proper under Evidence Rule 403 and 611(a).....	15
5. A witness’s invocation of a Fifth Amendment privilege is not generally made in front of a jury because the claiming of a privilege is not evidence and the jury is not allowed to draw inferences from the invocation.....	17
B. EVEN IF THIS COURT WERE TO ASSUME THAT THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE CHALLENGED OBJECTIONS, ANY POTENTIAL ERROR WAS HARMLESS.	21
C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE STATE’S OBJECTION AFTER THE DEFENSE COUNSEL ASKED A CIVILIAN WITNESS TO EXPLAIN WHY THE STATE HAD GRANTED HER IMMUNITY.....	27
IV. CONCLUSION.....	29

TABLE OF AUTHORITIES

CASES

<i>Doyle v. Ohio</i> , 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).....	17
<i>Malloy v. Hogan</i> , 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964).....	13
<i>State v. Benn</i> , 120 Wn. 2d 631, 845 P.2d 289	21
<i>State v. Darden</i> , 145 Wn. 2d 612, 41 P.3d 1189 (2002).....	28
<i>State v. Delgado</i> , 105 Wn. App. 839, 18 P.3d 1141 (2001).....	14, 15
<i>State v. Lougin</i> , 50 Wn. App. 376, 749 P.2d 173 (1988).....	13, 14, 22, 23
<i>State v. Lubers</i> , 81 Wn. App. 614, 915 P.2d 1157.....	28
<i>State v. Moran</i> , 119 Wn. App. 197, 81 P.3d 122 (2003).....	13
<i>State v. Parker</i> , 79 Wn. 2d 326, 485 P.2d 60 (1971).....	14
<i>State v. Powell</i> , 126 Wn. 2d 244, 893 P.2d 615 (1995).....	21, 22, 26
<i>State v. Smith</i> , 74 Wn. 2d 744, 446 P.2d 571 446 P.2d 571 (1968).....	17, 19, 25
<i>State v. Upton</i> , 16 Wn. App. 195, 556 P.2d 239 (1976).....	18

<i>United States v. Doddington</i> , 822 F.2d 818 (8th Cir.1987)	18, 19
<i>United States v. Johnson</i> , 488 F.2d 1206 (1st Cir.1973)	19
<i>United States v. Lacouture</i> , 495 F.2d 1237 (5th Cir.1974)	13
<i>United States v. Lyons</i> , 703 F.2d 815, 818 (5th Cir.1983)	19
<i>United States v. Swanson</i> , 9 F.3d 1354 (8th Cir.1993)	19, 25
<i>United States v. Whittington</i> , 783 F.2d 1210 (1986)	13

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when it sustained objections to defense questions about two alleged threats, when: (1) The witness had unequivocally asserted her Fifth Amendment privilege regarding the threats; (2) Further questions regarding the threats were a waste of time; (3) The court's ruling was necessary to prevent harassment or undue embarrassment of the witness; and, (4) The assertion of a Fifth Amendment privilege is not evidence, and thus, requiring additional invocations of the privilege would have only served to emphasize an issue that the jury was not allowed to consider or draw inferences from under Washington law.

2. Whether, even if this court were to assume that the trial court abused its discretion in sustaining the challenged objections, any potential error was harmless?

3. Whether the trial court abused its discretion in sustaining the State's objection after the defense counsel asked a civilian witness to explain why the State had granted her immunity.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Adam Smith was charged by amended information filed in Kitsap

County Superior Court with Burglary in the First Degree, Assault in the Second Degree, and Violation of a Court Order. CP 45. After a jury trial, the defendant was convicted of Burglary in the First Degree and Violation of a Court Order, but was found not guilty of Assault in the Second Degree. CP 214-18. The Defendant received a standard range sentence. CP 227-28. This appeal followed.

B. FACTS

Kyleen Campbell started dating Adam Smith in 1997, and has two children in common with him. RP 55-56. On February 11th, 2005 Ms. Campbell obtained a protection order against Smith, prohibiting him from contacting her. RP 56-57. After obtaining the restraining order, Ms. Campbell felt she wouldn't be safe in her home, so she started staying with Angel Bedrosian at her residence at 414 South Yantic. RP 58. Ms. Campbell was still staying with Ms. Bedrosian on February 17, 2005. RP 57.

On the morning of the 17th, Ms. Campbell ran some errands, and upon her return to Ms. Bedrosian's residence, she and Ms. Bedrosian saw Smith's car in front of the residence. RP 58-59. Smith drives a Honda CRX. RP 61. Smith turned his car around and parked his car in a way that almost blocked Ms. Campbell and Ms. Bedrosian in, but the women were able to pull out and drive away. RP 59. Smith followed them for a couple of blocks, but Ms. Bedrosian and Ms. Campbell kept driving. RP 59. Eventually Ms.

Campbell and Ms. Bedrosian returned home. RP 60.

Later that night, just after midnight, Ms. Campbell was sleeping in a bedroom with her children and woke up to the sound of Ms. Bedrosian yelling, "Get him Cain. Get him." RP 61-62. "Cain" is Ms. Bedrosian's dog. RP 62. In addition to Ms. Campbell and her children, Ms. Bedrosian and her husband, Louis Gaulden were in the residence. RP 62.

Ms. Campbell opened her bedroom door and looked into the entryway of the house and the front door and saw that the top of the door was bent forward and that Mr. Gaulden and Ms. Bedrosian were holding the door. RP 63. Smith was only able to get an arm, and possibly a foot, into the residence. RP 198. Ms. Campbell heard Smith's voice saying, "I just wasn't to talk to Kyleen." RP 65. She saw that Smith was wearing a black hooded sweatshirt and holding a silver gun in his hand. RP 65. The gun appeared to be real. RP 67. In a prior instance, Ms. Campbell had seen Smith with a pellet or BB gun, but she was not aware of Smith owning a pistol. RP 67.

Ms. Campbell grabbed the phone to call 911 and went back into the bedroom with her children. RP 63. Ms. Campbell called 911, as she wanted the police there immediately, as this was the only way she was going to feel safe. RP 68-69. Smith eventually left. RP 69.

Ms. Campbell observed that the door had been broken in, and there

were pieces of splintered wood on the inside. RP 69. Ms. Campbell acknowledged that the doorframe had been damaged by Bedrosian's husband two to three weeks earlier, but stated that the door remained functional and could still be locked after that earlier event. RP 71-72.

Bremerton Police Department officer David Hughes responded to the residence at 414 South Yantic for the report of male trying to kick in door, armed with a gun. RP 42-43. When he arrived, he found the females outside, visibly shaking and nervous. RP 43. Hughes saw that the door to the house had been kicked in and the front door casing was splintered. RP 44. The dead bolt and the entry lock set striker plates had been broken, and the molding was also broken. RP 47. The break looked fresh, and some debris including wood splinters and paint chips were seen on the floor. RP 50.

Officer Hughes also saw a sweatshirt laying on the side of the porch area, and found that the sweatshirt had a couple of large rocks in the pocket and a set of keys. RP 44. One of the keys was for a Honda-type car and had a "CRX" tag on it. RP 44, 102.

Officer Cronk arrived at the residence to assist, and located a Honda CRX parked about two blocks away. RP 96-97, 100. The engine was warm and it appeared that it had just been driven. RP 98. The car was the only one that did not have a layer of frost and ice on it. RP 46.

Ms. Campbell admitted that when she spoke with the police she did not tell them that Mr. Gaulden was present that night because there was a restraining order prohibiting him from contacting Ms. Bedrosian, and she was “protecting my friend.” RP 72-73. Four days before trial, however, Ms. Campbell informed the prosecutor and an investigator that Louis had been there that night, explaining that she needed “to do what’s right for me and my kids and not worry about everybody else’s problems,” and that she was more scared of Smith coming to hurt her than she was of the “repercussions” from her friends. RP 73

Ms. Campbell stated that she had a conversation with Ms. Bedrosian the Thursday before her testimony and explained that she had spoken to the prosecutor and told the whole story about what happened. RP 86-87. Ms. Campbell stated that Ms. Bedrosian then threatened her life. RP 87. Defense counsel specifically asked Ms. Campbell if Ms. Bedrosian threatened to kill her, and Ms. Campbell stated, “Yes. And I called the police.” RP 90.

The defense called Alan Smith, the older brother of the Defendant, as a witness. RP 126-27. Alan Smith claimed he went to the Yantic residence approximately a week before the incident and stated he saw that the door jam was knocked out of the frame, but that the door could be open and shut. RP 128. When Alan Smith was shown exhibits number 4 and number 8, and asked if the door looked the same when he saw it a week before the incident,

he indicated that he did not “remember seeing that.” RP 134. He also indicated that he noticed that the door had broken “from the inside out.” RP 135.

Outside the presence of the jury, the defense also made an offer of proof concerning a threat made by Angel Bedrosian. RP 129. Alan Smith stated he had heard Ms. Bedrosian threaten to have his “daughter raped.” RP 129. Defense argued that this information was relevant to Ms. Bedrosian’s veracity and bias. RP 131. Ms Bedrosian, however, had not yet testified. RP 131.

The trial court pointed this out and stated, “But at this point that witness has not testified. And so if she testifies and you ask about these things and they are denied, then this may be relevant.” RP 131. Defense counsel indicated that he would finish on another line of questioning and would “bring him in rebuttal tomorrow.” RP 131-32.

Prior to Ms. Bedrosian’s testimony the following day, a discussion was held concerning the possible testimony of Ms. Bedrosian and the potential that she could be asked incriminating questions regarding alleged threats that she had made. RP 142-45. The State informed the trial court that he could not advise Ms. Bedrosian regarding how she should proceed regarding her Fifth Amendment rights, and that he had he had informed her

that he would see if the court was willing to appoint an attorney to advise her in this regard. RP 142-43. The trial court asked both attorneys about what they expected the questions to be, and asked defense counsel specifically if he was going to be asking the witness about the alleged threats. RP 144. Defense counsel stated,

I am going to ask her – My question to her is going to be, “Have you ever threatened the life of, of damaged any persons or children in this case?” and at that point, if she takes the Fifth, I am satisfied.”

RP 144. Defense counsel acknowledged that this inquiry would potentially be incriminating, and stated, “I have run into situations several times, and each time there has been counsel appointed. In cases I have tried in Seattle like this, I have seen counsel appointed.” RP 145. The trial court then appointed an attorney for Ms. Bedrosian. RP 145.

The newly appointed attorney came before the court shortly thereafter and indicated that he needed some time to go through some of the material and speak with Ms. Bedrosian. Defense counsel then stated,

I think the issue could be more narrowly defined and I am willing to concede to anything he wants, but to me the issue is whether these would tend to incriminate her, and I think it’s immediately apparent they would.

RP 148. The defense objected to any further delay and indicated this matter

could be done “in 10 minutes.” RP 148-49.

The trial court stated that it agreed with defense counsel that the issue could probably be narrowed, and asked defense counsel, “If the questioning that’s going to be posed to her is, ‘have you ever threatened anybody?’ it’s either, ‘Yes,’ ‘No,’ or, ‘I take the Fifth.’ Is that the extent of your questions?” RP 149. Defense counsel responded, “Yes, sir.” RP 149.

The court then asked if this helped at all, and Ms. Bedrosian’s newly appointed counsel stated that he couldn’t imagine advising her to answer that question. RP 149. The trial court then ordered a fifteen-minute recess. RP 150-51.

After the recess, the State explained that it was not giving the witness immunity for the two alleged threats (the one witnessed by Mr. Smith and the one made to Ms. Campbell), but that it was granting Ms. Bedrosian immunity for the her prior false statements regarding whether Mr. Gaulden had been present at the house. RP 151-52. The State also explained that it was his understanding now that Ms. Bedrosian would be invoking her Fifth Amendment rights regarding the threats. RP 151. Ms. Bedrosian’s counsel also stated that he was advising Ms. Bedrosian to invoke her rights regarding the two threats. RP 153-54.

The trail court then asked defense counsel if he anticipated any

rebuttal testimony, and defense counsel stated,

If she is going to take the Fifth, I have those two witnesses. If she is going to take the Fifth on those, I would like to – Strike that. I am not going to have any witnesses if she doesn't respond other than the Fifth. I am just not going to have anybody.

RP 154.

Ms. Bedrosian testified, and was asked if during a previous interview she had stated that only herself and Ms. Campbell and the children had been present at the time of the incident. RP 164. Ms Bedrosian stated that this was correct. RP 164. She was then asked if prior to her testimony, she had been granted immunity by the State regarding this answer, and she indicated that she had. RP 164. Ms Bedrosian then admitted that her husband, in fact had been present. RP 164.

Near the end of Ms. Bedrosian's direct examination, the following exchange took place:

Q. When you were down here, during that dropping of the restraining order, understanding that you have spoken to your attorney, did you make any threats to any witness, any other persons, at that time?

A. Oh, actually I have been advised not to say anything about that because it may incriminate me.

Q. Also, in talking, did you have a phone conversation with Kyleen Campbell last week?

A. I talked to her yesterday. Yeah, I talk to Kyleen a lot. I am the one that found her an apartment in Silverdale.

Q. When you talked to Kyleen last week, did you make

any threats to Kyleen about her coming – what she would come and testify to in here?

A. I have been advised not to speak on that because it may incriminate me, also.

RP 172. When cross-examination began shortly thereafter, the defense counsel began as follows:

Q. Along the same line --

A. Yes, sir.

Q. -- of what he was just questioning you about --

A. Yes, Sir.

Q. -- did you ever threaten to have the daughter of one of the witnesses in the case raped and killed?

MR. LINDSAY: I am going to object. That's been asked and answered.

THE COURT: Sustained.

Q. (By Mr. Hynson) So it's a fact that you did have a restraining order against your husband the night that he was there, right?

A. That's correct, sir.

Q. And, you have got complete immunity for that, right?

A. I believe that that's what just happened a few minutes ago.

Q. Why did they give that to you?

MR. LINDSAY: I object, both relevance and --

THE COURT: Sustained.

RP 173-74.

During cross-examination, Ms Bedrosian admitted that she had

problems with her memory, and that she took a lot of medicines (specifically Depakote, Effexor, Prozac and Lithium) that affected her memory. RP 178. She also stated under cross-examination that she gets the Lithium shots when she can't control her "post traumatic [sic]." RP 178. In addition, she stated that she had a lot of things blocked out from her childhood, and that the medicine, "It helps to – I can think, I can stop getting so busy-minded and get into what's real and instead of maybe living in the past." RP 178. Ms Bedrosian also admitted that she told the police on the night of the incident that she locked the windows at night, in part, because her husband had gotten out of control and she had a restraining order against him. RP 181-82. Ms Bedrosian also admitted that, in fact, her husband had actually been at the residence during the events in question. RP 181-82. Later, but still during cross-examination, Ms Bedrosian stated, "I told the prosecutor my husband wasn't there, and I have today recanted that my husband was there." RP 193.

Defense counsel then next asked,

Q. When is the last time you talked to Kyleen?

A. Yesterday.

Q. Was that the day you threatened her that you are not going to testify about?

MR. LINDSAY: Object, asked and answered.

THE COURT: Sustained.

A. I talked to Kyleen yesterday.

THE COURT: When it's sustained, you don't

answer.

THE WITNESS: I don't understand.

Q Was it a friendly conversation yesterday?

A. Yeah. She called me and told me everything that happened at court.

RP 193-94. At the conclusion of Ms. Bedrosian's testimony the State rested, and the Defense also rested without recalling Alan Smith or any additional witnesses. RP 202.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUSTAINED OBJECTIONS TO DEFENSE QUESTIONS ABOUT TWO ALLEGED THREATS WHEN: (1) THE WITNESS HAD ALREADY UNEQUIVOCALLY ASSERTED HER FIFTH AMENDMENT PRIVILEGE REGARDING THE THREATS; (2) FURTHER QUESTIONS REGARDING THE THREATS WERE A WASTE OF TIME; (3) THE COURT'S RULING WAS NECESSARY TO PREVENT HARASSMENT OR UNDUE EMBARRASSMENT OF THE WITNESS; AND, (4) THE ASSERTION OF A FIFTH AMENDMENT PRIVILEGE IS NOT EVIDENCE, AND THUS, REQUIRING ADDITIONAL INVOCATIONS OF THE PRIVILEGE WOULD HAVE ONLY SERVED TO EMPHASIZE AN ISSUE THAT THE JURY WAS NOT ALLOWED TO CONSIDER OR DRAW INFERENCES FROM UNDER WASHINGTON LAW.

The Defendant argues that the trial court abused its discretion in

sustaining two objections after defense counsel had asked questions regarding the alleged threats made by Ms. Bedrosian. This claim is without merit because Ms. Bedrosian had already unequivocally asserted her Fifth Amendment privilege regarding the alleged threats, and the trial court's ruling was proper under Evidence Rule 403 and 611(a).

1. Standard of Review.

An appellate court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Moran*, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032, 95 P.3d 351 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable, or is based upon untenable grounds or reasons. *Moran*, 119 Wn. App. at 218, 81 P.3d 122.

2. A Defendant's Sixth Amendment Rights do not Override the Fifth Amendment Rights of Others.

The Fifth Amendment declares that no person "shall be compelled in any criminal case to be a witness against himself." The federal guaranty against self-incrimination has been extended to the states. *State v. Lougin*, 50 Wn. App. 376, 380, 749 P.2d 173 (1988) (*citing Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964)). "[T]he defendants' sixth amendment rights do not override the fifth amendment rights of others." *United States v. Whittington*, 783 F.2d 1210, 1218-19 (1986) (*citing United*

States v. Lacouture, 495 F.2d 1237 (5th Cir.1974)); *Lougin*, 50 Wn. App. at 379-80, 749 P.2d 173 (1988) (citing *State v. Parker*, 79 Wn.2d 326, 331, 485 P.2d 60 (1971)). The privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding-civil or criminal, administrative or judicial, investigatory or adjudicatory. *Lougin*, 50 Wn. App. at 380, citing *Kastigar v. United States*, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).

3. ***A witness claiming a Fifth Amendment privilege need not repeatedly invoke the Fifth Amendment in response to a litany of specific questions if the trial court can conclude that the witness could legitimately refuse to answer essentially all relevant questions.***

In general, a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony. *State v. Delgado*, 105 Wn. App. 839, 18 P.3d 1141 (2001), citing *Lougin*, 50 Wn. App. at 381. There is an exception, however, allowing a blanket privilege where the trial court, based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could legitimately refuse to answer essentially all relevant questions. *Delgado*, 105 Wn. App. at 844-46.

In *Delgado*, the defendants were charged with assault, and, outside the jury's presence, the defense announced an intention to call a witness who had been separately charged with the same assault, despite the fact that this witness intended to invoke his Fifth Amendment rights. *Delgado*, 105 Wn.

App. at 843-844. The witness invoked his Fifth Amendment right, and stated he was unwilling to answer questions about the matter. *Delgado*, 105 Wn. App. at 843. The trial court noted that the witness was represented by counsel who had advised him not to testify. *Delgado*, 105 Wn. App. at 843. The State argued that the witness should be required to invoke the privilege as to each question asked separately, but the trial court disagreed, stating that it was satisfied that the witness intended to invoke the privilege on each question and that “there was no sense going through each individual question and having him assert on the record.” *Delgado*, 105 Wn. App. at 843-844. On appeal, the court found that the exception to the general rule against blanket privilege applied as the witness was facing charges from the same assault, and had asserted his rights regarding the whole incident. *Delgado*, 105 Wn. App. at 845. Ultimately, the court held that the trial court did not err in allowing the witness’s blanket assertion of the privilege, rather than engaging “in the useless exercise of requiring him to assert the privilege with respect to every question individually.” *Delgado*, 105 Wn. App. at 845.

4. *The trial court’s decision was proper under Evidence Rule 403 and 611(a).*

Furthermore, Evidence Rule (ER) 403 states that, although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence. In addition, ER 611(a) provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of truth; (2) avoid needless consumption of time; and, (3) protect witnesses from harassment or undue embarrassment.

In the present case, the trial court was familiar with the witness and the questions that were in issue. Defense counsel had explained what the proposed areas of testimony were, and had even offered to “narrow” the range of the proposed inquiry down to questions about the threats. RP 148-49. In addition, counsel for the witness had advised that he would advise his client to not answer questions about the two threats. RP 154. Finally, the witness specifically invoked her rights regarding the two threats. RP 172. The court, therefore, was well aware of the issues involved.

When defense counsel attempted to re-address the threats after the witness asserted her Fifth Amendment rights, the State objected, stating that the questions had been “asked and answered.” RP 173-74, 193-94. The trial court properly sustained the objections, as under ER 403 additional questions about the threats were a waste of time and cumulative, given the prior invocation of the Fifth Amendment. The two assertions of privilege in this case had been discussed at length outside the presence of the jury and were

not unexpected, and the assertions themselves were unequivocal. Further inquiry regarding the assertions, therefore, was unnecessary. In addition, ER 611(a) supported the trial court's ruling, as additional questions which required the witness to re-assert her Fifth Amendment rights presented a needless consumption of time, and the objection was necessary to protect witnesses from harassment or undue embarrassment, because implicit in the Fifth Amendment privilege is the assurance that the exercise of that privilege will carry no penalty. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

5. ***A witness's invocation of a Fifth Amendment privilege is not generally made in front of a jury because the claiming of a privilege is not evidence and the jury is not allowed to draw inferences from the invocation.***

It is worth noting that, generally speaking, a witness should not be forced to invoke his or her Fifth Amendment rights in front of the jury. For instance, it is forbidden for a prosecutor to call a witness knowing that the witness will only invoke his or her Fifth Amendment privilege. *See State v. Smith*, 74 Wn.2d 744, 758, 446 P.2d 571 (1968) (citations omitted), vacated in part, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), overruled on other grounds, *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975); see WPIC 6.32 (directing the jury "not to draw any inference from the fact that a witness does not testify ... because of a claim of privilege

sustained by the court”). This principal, however, also applies to witnesses called by a defendant, on the theory that “the claiming of the privilege is not evidence, and the jury is not allowed to draw inferences from it.” *Smith*, 74 Wn.2d at 757.

In *Smith*, a co-defendant sought to call his co-defendant to the stand, despite the fact that this co-defendant had not testified, and thus, presumably would have invoked his Fifth Amendment privilege if called. *Smith*, 74 Wn.2d at 756. The Washington Supreme Court held that as a claiming of the privilege was not evidence which a prosecutor could use, “there is no reason why it should be deemed to acquire probative value simply because a co-defendant rather than the State seeks to utilize it.” *Smith*, 74 Wn.2d at 759. The court, therefore, held that the trial court correctly refused to permit the defendant to call a witness for the purpose of requiring him to claim the privilege against self-incrimination. *Smith*, 74 Wn.2d at 759.

Similarly, a witness who has previously invoked his Fifth Amendment privilege cannot be called simply to force the witness to invoke his Fifth Amendment privilege in the presence of the jury. *United States v. Doddington*, 822 F.2d 818, 822 (8th Cir.1987). Again, this is because no inference may be drawn from an individual's exercise of his or her Fifth Amendment right. *See State v. Upton*, 16 Wn. App. 195, 199, 556 P.2d 239 (1976); *Smith*, 74Wn.2d at 757, 759-60. In *Doddington*, the court stated:

Clearly [defendant] would like to benefit from the inferences that the jury could draw from [his co-defendant's] invocation of his Fifth Amendment privilege. But a defendant does not have the right to call a witness to the stand simply to force invocation of the right against self-incrimination in the presence of the jury. *United States v. Lyons* , 703F.2d 815, 818 (5th Cir.1983). “Neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that had been put to him.” *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir.1973).

Doddington, 822 F.2d at 822.

Finally, a trial court is justified in refusing to compel appearance or testimony by a witness intending to exercise his Fifth Amendment rights. *United States v. Swanson*, 9 F.3d 1354, 1359 (8th Cir.1993). In *Swanson*, the witness's attorney informed the trial court that the witness would assert his right under the Fifth Amendment against self-incrimination. *Swanson*, 9 F.3d at 1359. Given this statement, the appellate court held that the trial court's exclusion of the witness's testimony was not improper. *Swanson*, 9 F.3d at 1359.

In the present case, the State informed the trial court that normally the invocation is done outside the presence of the jury, and asked the court how it wanted to proceed. RP 152, 155. The court stated that the invocation would be done in front of the jury with her counsel present. RP 155. Defense did not object to this procedure. RP 155.

Despite the fact that the usual practice would be to have the witness invoke the Fifth Amendment outside the presence of the jury, the State's witness in the present case was made to invoke her Fifth Amendment privilege in front of the jury on two occasions. On appeal, the Defendant is essentially complaining that the witness was not forced to invoke her right four times. The record is clear that the witness in the present case invoked her Fifth Amendment privilege with respect to the two threats. The court had appointed an attorney who had advised her to assert her privilege, and the witness herself had asserted her privilege on the record. The record here established that the witness intended to, and in fact, had asserted her privilege on the issues in question, and, thus, further questions on this point were not necessary.

Additionally, as the assertions were not evidence, the Defendant can point to no evidence that he was not allowed to introduce due to the two objections sustained by the trial court in this case. Requiring the witness to again assert her privilege would have only served to draw more attention to the assertions, despite the fact that the assertions were not evidence and the law provides that a jury should not be allowed to draw inferences from the witness's exercise of her rights.

For all of the above mentioned reasons, the trial court did not err in sustaining the objections after the witness had previously invoked her Fifth

Amendment privilege, because: (1) further questions regarding the two alleged threats was a waste of time and the court's ruling was necessary to prevent harassment or undue embarrassment of the witness; and, (2) because the assertion of a Fifth Amendment right is not evidence, requiring additional invocations of the Fifth Amendment would have only served to emphasize an issue from which the jury is not allowed to draw inferences under Washington Law.

B. EVEN IF THIS COURT WERE TO ASSUME THAT THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE CHALLENGED OBJECTIONS, ANY POTENTIAL ERROR WAS HARMLESS.

An error that deprives the defendant of the right to confrontation is subject to harmless error analysis. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995), *citing State v. Hieb*, 107 Wn.2d 97, 108, 727 P.2d 239 (1986), *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993) (*quoting United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481 (1985)). The prosecution bears the burden of showing that the error established by the defendant is harmless beyond a reasonable doubt. *Powell*, 126 Wn.2d at 267 (citations omitted). An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would

have been different had the error not occurred. *Powell*, 126 Wn.2d at 267 (citations omitted). A reasonable probability exists when confidence in the outcome of the trial is undermined. *Powell*, 126 Wn.2d at 267 (citations omitted). In weighing the effect of the error, the appellate court considers factors such as “the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case”. *Powell*, 126 Wn.2d at 267, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986).

In *State v. Lougin*, 50 Wn. App. 376, 382, 749 P.2d 173 (1988) a witness claimed her Fifth Amendment privilege when she was informed that she would be subject to cross-examination. On appeal, the defense argued that the trial court erred in allowing the witness to make a blanket refusal to testify. *Lougin*, 50 Wn. App. at 381. The court found that the, in general, a claim of privilege may only be raised against specific questions, and not as a blanket foreclosure of testimony. *Lougin*, 50 Wn. App. at 381, citing *Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981). The defense, therefore argued, and the court agreed, that the proper procedure would have been to allow the witness to be called and questioned, and if at

any point she claimed a privilege against answering a question, the trial court could rule on her claim. *Lougin*, 50 Wn. App. at 382. The trial court, therefore, erred in not requiring the witness to take the stand and then claim her privilege. *Lougin*, 50 Wn. App. at 382. The court, however, found that if the indications were clear that a witness was not going to testify to anything of substance, and that “these facts strongly indicate that once on the stand, [the witness], with advice of counsel available to her, would have claimed her privilege immediately. Under these circumstances, we find the trial court’s error harmless beyond a reasonable doubt.” *Lougin*, 50 Wn. App. at 382-83.

In the present case, the disputed evidence was the two alleged threats made by Ms. Bedrosian. The Defendant argued that these threats were relevant to Ms. Bedrosian’s veracity and bias. RP 131. Despite the sustained objections after Ms. Bedrosian invoked her Fifth Amendment privilege, the Defendant was able to present other testimony that served to impeach Ms. Bedrosian. For instance, defense counsel was able to elicit on cross-examination that Ms. Bedrosian: (1) had memory problems and took multiple medications that affected her memory; (2) felt that the medication helped her to stop getting so “busy-minded and get into what’s real”; and, (3) told and/or led the police and prosecutor to think that her husband had not been present on the night in question when, in fact, he had been present. RP 178, 181-82, 193.

In addition, Ms. Campbell testifies that Ms. Bedrosian then threatened her life, and when defense counsel specifically asked Ms. Campbell if Ms. Bedrosian threatened to kill her, Ms. Campbell stated, “Yes. And I called the police.” RP 87, 90. In addition, although the trial court initially prohibited Alan Smith from testifying concerning the second threat, the trial court’s ruling was based on the fact that Ms. Bedrosian had not yet testified and thus, the impeachment testimony was not yet relevant. RP 131-32. Defense counsel acknowledged as much, and indicated that Alan Smith would be recalled the next day. RP 131-32. After the invocation, however, defense counsel decided against recalling Alan Smith, and when asked if he anticipated rebuttal testimony, stated,

If she is going to take the Fifth, I have those two witnesses. If she is going to take the Fifth on those, I would like to – Strike that. I am not going to have any witnesses if she doesn’t respond other than the Fifth. I am just not going to have anybody.

RP 154. The jury therefore, heard about one of the alleged threats directly from Ms Campbell, and the defense had the opportunity to produce Alan Smith concerning the second threat but decided against it. The jury also heard Ms. Bedrosian invoke her Fifth Amendment privilege regarding both threats. RP 172. Any error in refusing to allow further questions requiring a further invocation of the privilege was harmless, as the impeachment had

already been accomplished. Counsel's decision to not recall Alan Smith is indicative of counsel's awareness of this fact. Further evidence of this fact comes from defense counsel's own statements when he stated,

I am going to ask her – My question to her is going to be, “Have you ever threatened the life of, of damaged any persons or children in this case?” and at that point, if she takes the Fifth, I am satisfied.”

RP 144.

In addition, as mentioned above, a “the claiming of the privilege is not evidence, and the jury is not allowed to draw inferences from it.” *Smith*, 74 Wn.2d at 757. As the attorney for the witness in the present case had informed the court that he was advising the witness to not answer questions about the threats, and because the witness had already invoked her privilege, the trial court was allowed to presume that the defense questions at issue would only lead to further invocations. *See, for example, Smith*, 74 Wn.2d at 756-59, and, *Swanson*, 9 F.3d at 1359. As further invocations were not evidence, the Defendant was not precluded from asking any questions that would have led to admissible evidence, and thus was not prejudiced. The only error made in the present case was the trial court's requirement that the witness be forced to invoke her rights in front of the jury; an error that favored the Defendant and could only serve to further impeach the witness. The fact that the trial court did not compound the error by requiring the

witness to repeatedly invoke her rights in front of the jury can not be said to have prejudiced the Defendant, especially in light of the fact that the invocation itself is irrelevant and of no evidentiary value under Washington law.

Finally, the alleged errors pertained to the witness's demonstrated animosity towards the victim and a brother of the Defendant. Even setting aside the relevance of this animosity, the Defendant has failed to show that there is a reasonable probability that the outcome of the trial would have been different had the alleged error not occurred. *Powell*, 126 Wn.2d at 267 (citations omitted).

As the jury had already heard of one of the threats and counsel had the opportunity to present testimony regarding the second threat but chose not to, and because the witness had already been impeached via other methods, and because the jury had already heard Ms. Bedrosian invoke her Fifth Amendment privilege with respect to the two threats, any potential error caused by the trial court's refusal to allow further questions which would have required an additional invocation was harmless.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION AFTER THE DEFENSE COUNSEL ASKED A CIVILIAN WITNESS TO EXPLAIN WHY THE STATE HAD GRANTED HER IMMUNITY.

The Defendant next claims that the trial court abused its discretion in limiting his cross-examination of the witness regarding the State's grant of immunity regarding prior false statements by the witness. This claim is without merit because the actual question posed to the witness asked her to speculate as to why the State had granted her immunity; a question that was not proper as it either called for speculation on the part of the witness or called for hearsay.

Defendant asserts that, "Defense counsel attempted to cross exam [sic] her as to what benefit she thought she would get from the immunity but was stopped by a sustained objection from the prosecution." App.'s Br. at 10. Later, Defendant claims that he "was not allowed to explore with Angel why she needed immunity in regard to her lying to the police at the time of the incident." App.'s Br. at 13.

Defendant misstates the record, as the actual question asked was not why Ms. Bedrosian personally felt that she "needed immunity" or what "benefit she thought she would get from the immunity." Rather, the question was, "Why did they give that to you?" RP 173. The full context was as

follows:

Q. (By Mr. Hynson) So it's a fact that you did have a restraining order against your husband the night that he was there, right?

A. That's correct, sir.

Q. And, you have got complete immunity for that, right?

A. I believe that that's what just happened a few minutes ago.

Q. Why did they give that to you?

MR. LINDSAY: I object, both relevance and –

THE COURT: Sustained.

RP 173-74.

The trial court has broad discretion to admit or exclude evidence. *State v. Lubers*, 81 Wn. App. 614, 623-24, 915 P.2d 1157, *citing State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991), *review denied*, 130 Wn.2d 1008 (1996). As outlined previously, a reviewing court will not disturb a trial court's ruling on a motion in limine or the admissibility of evidence, including limitations on the scope of cross-examination, unless the trial court has abused that discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Relevant evidence is evidence that has a tendency to make the existence of a material fact more or less probable. *Lubers*, 81 Wn. App. at 623 (citing ER 401).

In the present case, the actual question posed to the witness required

the witness to speculate as to why the State had granted her immunity. RP 173-74. As the question required speculation, it was irrelevant. In addition, even if the witness had been told why the State had granted her immunity, the answer would have been hearsay.

Finally, even setting aside the speculation and hearsay problems, the issue of why the State had granted her immunity did not have tendency to make the existence of a material fact more or less probable. Even if this court were to ignore the actual wording of the question and assume that Defendant meant to ask what benefit the witness believed she was getting, the question as actually stated did not ask this, and counsel made no attempt to rephrase the question in a way that clearly expressed such an intention.

For all of these reasons, the trial court did not abuse its discretion in sustaining the objection to the question as actually asked.

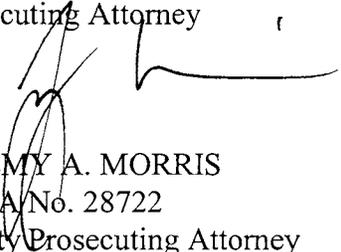
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED July 25, 2006.

Respectfully submitted,

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