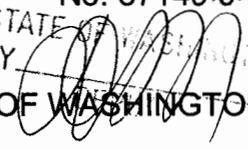


FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY: 

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO PADILLA-TAPIA,

Appellant.

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

The Honorable Richard D. Hicks, Judge
Cause No. 07-1-00953-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred by allowing testimony that improperly commented on Padilla-Tapia's constitutional right to remain silent, and, if so, whether such error was harmless.

2. Whether defense counsel's failure to explain his objection to the trial court rendered his assistance ineffective.

B. STATEMENT OF THE CASE.

The State accepts the Defendant's statement of the facts.

C. ARGUMENT

1a. The Defendant's testimony that he had not told anyone his exculpatory story before he took the stand did not constitute an impermissible comment on his right to remain silent.

The Fifth Amendment to the United States Constitution provides that no person "shall...be compelled in any criminal case to be a witness against himself." The privilege against self-incrimination applies to the states through the 14th Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). Similarly, under the Washington Constitution, "no person shall be compelled in any criminal case to give evidence against himself." Const. art. I, § 9. Courts interpret the federal and Washington State provisions equivalently. *State v. Earls*, 116 Wn.2d 466, 473, 589 P.2d 789

(1979). The privilege is “intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996) (citing *Doe v. United States*, 487 U.S. 201, 210-12 (1988)). The Fifth Amendment prevents the State from both eliciting comments from witnesses on the defendant’s silence, and commenting on the defendant’s silence in closing arguments. See *Easter*, 130 Wn.2d at 236.

Comments on post-arrest, post-*Miranda* silence violate a defendant’s right to due process because the *Miranda* warnings carry an “implicit assurance” that the defendant’s silence carries no penalty. *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993); *Easter*, 130 Wn.2d at 236. While the State may use a defendant’s pre-arrest, pre-*Miranda* silence for impeachment purposes as long as he or she takes the stand, the State may not comment on the defendant’s post-*Miranda* silence, even if he or she takes the stand. See *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

In this case, Det. Frawley *Mirandized* Padilla-Tapia after introducing himself and asking Padilla-Tapia whether he understood Spanish. RP at 449. If the silence that the State

referred to in its closing and cross examination of the defendant took place before the officers *Mirandized* the Defendant, the State would be allowed to use Padilla-Tapia's silence to impeach his version of the events at trial. However, if the silence referred to was subsequent to the Defendant being *Mirandized*, the State's comments and remarks during closing argument would violate the "implicit assurance" within the *Miranda* warnings.

Even though the Defendant was *Mirandized*, the State did not make an impermissible comment on the Defendant's right to remain silent because the silence referred to took place before Padilla-Tapia was questioned by police, *Mirandized*, and placed into custody. When Padilla-Tapia was asked whether he told the police officer his version of the events, defense counsel objected, and the trial court sustained the objection. RP at 649. The State then rephrased the question as whether the Defendant "told *anyone* this story" RP *Id.* (emphasis added). Even though "anyone" would normally have included the police officer, because the previous objection was sustained, the question clearly referred to anyone other than the police officer. Thus, the question for Padilla-Tapia on

cross examination, and the comment at closing,¹ do not implicate the defendant's right to remain silent because a Defendant's precustodial comments to individuals other than law enforcement officers are not protected by the 5th Amendment privilege against self-incrimination.

The Court in *Easter* held that the Fifth Amendment applied to pre-arrest, pre-*Miranda* silence, but its holding does not go so far as to apply to *all* pre-arrest silence. See *Easter*, 130 Wn.2d at 238-39. The silence commented on in this case did not even occur in the face of a police investigation or questioning because, as previously argued, "anyone" did not apply to law enforcement. Furthermore, Courts recognize the fact that a defendant's pre-arrest silence may be used for impeachment purposes. See *Jenkins v. Anderson*, 447 U.S. 231 (1980); *State v. Watkins*, 53 Wn. App. 264, 766 P.2d 484 (1989); *State v. Hamilton*, 47 Wn. App. 15, 20-21, 733 P.2d 580 (1987). In this case, the State was allowed to comment on such pre-arrest silence to impeach Padilla-Tapia, who voluntarily took the stand.

¹ "[H]e's never told anyone this story until now." RP at 715.

Even if this court concludes that the Fifth Amendment applies to the silence at issue in this case, the State's position that the Defendant's privilege was not violated is supported on alternative grounds because the evidence does not show that the Defendant remained silent and thus, waived the privilege.

Even if a defendant is *Mirandized*, if he or she does not remain silent and instead speaks with law enforcement officers, it is permissible for the State to comment on what the defendant does not say. *State v. Clarke*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (citing *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)); *See also, State v. Bradfield*, 29 Wn. App. 679, 685, 630 P.2d 494 (1981). In this case, Padilla-Tapia testified that he spoke with Detective Frawley "for quite some period of time," and that he was able to understand him and communicate with him in Spanish. RP at 653. Thus, the record indicates that Padilla-Tapia chose not to remain silent, and instead spoke with law enforcement officers. Therefore, the State committed no error during closing argument or cross-examination because the State is allowed, when the defendant chooses to speak, to comment on what the defendant did not say. Thus, it was not impermissible for the State to

comment on the Defendant's silence, and the trial court committed no error.

1b. Even if the trial court committed constitutional error by allowing in the testimony, any such error was harmless.

Any error that the trial court committed by allowing the State's comments during cross-examination of the Defendant, and at closing argument, was harmless because the overwhelming evidence presented at trial demonstrates beyond a reasonable doubt that the jury verdict would have been the same absent the error.

A Constitutional error is harmless if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002) (quoting *Neder*, 527 U.S. at 15). The doctrine of harmless error promotes "public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Assuming a constitutional error occurred in this case, this Court must apply harmless error analysis. *State v. Romero*, 113 Wn. App. 779, 791, 54 P.3d 1255 (2002) (stating that if the

comment is “direct,” “constitutional error exists that requires harmless error analysis.”). Washington courts have routinely applied harmless error analysis to impermissible comments on defendants’ right to remain silent. See e.g., *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008); *State v. Easter*, 130 Wn.2d at 242; *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981); *State v. Thomas*, 142 Wn. App. 589, 174 P.3d 1264 (2008); *State v. Pottorff*, 138 Wn. App. 343, 348, 156 P.3d 955 (2007); *State v. Curtis*, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002).

In *Burke*, the Court applied harmless error analysis to the State’s error of commenting on the defendant’s pre-arrest silence. *Burke*, 163 Wn.2d 204 at 223-24. The Court held that such error was not harmless, reasoning that because the trial “boiled down to whether the jury believed or disbelieved Burke’s story that the victim told him she was 16,” and the “[r]epeated references to [the defendant’s] silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury’s consideration.” *Id.*

In contrast, the Court in *Evans* held that while the trial court erred in allowing the State to introduce testimony of the defendant’s

post-*Miranda* silence, such error was harmless. *Evans*, 96 Wn.2d at 5. The defendant, who was convicted of second degree burglary, was found hiding in an office. *Id.* at 2. The safe nearby was partially broken into and drawers throughout the office were found open. *Id.* The defendant maintained that he was intoxicated and consequently did not possess the requisite intent for the burglary charge. *Id.* In support of the Evans' defense, witnesses testified that the defendant both had a drinking problem and was drinking the evening of the incident. *Id.* Nonetheless, the Court concluded that the error was not prejudicial, reasoning that there "was overwhelming evidence supporting the jury's verdict." *Id.* at 5.

Similarly, in this case, the evidence presented at trial overwhelmingly supports the jury's verdict, and any error occurring at trial did not prejudice the defendant. Testimony established the Padilla-Tapia was at trailer 4A drinking with the victim and others shortly before the incident took place. RP at 607-10. A witness testified that prior to the murder Padilla-Tapia had said that "he felt like killing someone." RP at 226. As the Defendant's brief states, Padilla-Tapia was arrested in Centralia midday after the body was found, and a car reported stolen from the area of the crime was

found nearby. RP 346-67, 397-404, 454, 475-76, 480, 521, 574, 595. His clothing and shoes had numerous contact and airborne blood stains. RP at 47, 49, 61, 64, 68, 171-72, 180, 198, 526. Expert testimony established that the blood found in the Geo Metro that was reported stolen, and on Padilla-Tapia's jeans, was the blood of the victim. RP at 506. In his defense, Padilla-Tapia contended at trial that he heard a noise and saw the victim lying down. RP at 615. Then he testified that he panicked, grabbed the victim and stayed with him on the ground for three to five minutes, and then left the trailer park in the Geo Metro car. RP at 618. However, the Defendant's version of the events was inconsistent itself, and in addition to being implausible, was completely contradicted by the expert testimony concluding that the blood spattering placed Padilla-Tapia in close proximity to the victim at the time the murder occurred. See RP at 625 (inconsistent testimony about the car in which Gabriel left the dance); RP at 506 ("the wearer of the jeans was in close proximity to the incident involving [the victim]"); RP at 63 ("the stains typically would not go any farther than six feet").

Given the evidence of blood stains, in conjunction with the defendant's flight in a vehicle reported stolen shortly after the stabbing, the jury would have found the defendant guilty beyond a reasonable doubt absent any impermissible comment on the defendant's silence in the face of arrest. Furthermore, unlike the *Burke* case, the trial did not "boil down" to the issue of the defendant's credibility. Simply put, evidence of the defendant's silence is small, unnecessary piece of evidence in the midst of an overwhelming amount of evidence demonstrating the Defendant's guilt. Thus, this court should hold that if the trial court erred in allowing an impermissible comment on the Defendant's right to remain silent at trial, such error was harmless.

2. Padilla-Tapia's counsel was not ineffective for failing to provide reasons for the objection because the defendant could not be prejudiced by harmless error.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d

668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. *In re Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. *State v. Briggins*, 11 Wn. App. 687, 692, 524 P.2d 694 (1974), *review denied*, 84 Wn. 2d 1012 (1974).

When the claim is based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the

challenged conduct; (2) that the objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The defendant has failed to satisfy the three elements of this test. As such, this court should hold that the defendant's counsel was not ineffective. First, defendant's counsel *did* object to the testimony during the defendant's testimony, and it *was* sustained. Thus, the question is whether any explanation of the objection would have changed the trial court's decision to allow the question to be reformulated as referring to "anyone" instead of the "police." Because the trial court allowed the question to be reformulated so as to not refer to law enforcement, it is clear that it understood *why* such objection was made. Thus, any explanation would not have altered the trial court's admission of the evidence. Furthermore, an objection, with an explanation, would not have been sustained for the reason argued above: the silence could be used for impeachment purposes, and by speaking to the police officers, the defendant waived his right to remain silent. Thus, the State's comment during its cross-examination of the defendant, as well as

its comment during closing argument, do not violate the Defendant's privilege against self incrimination.

Additionally, the result of the trial would not have been different had the evidence not been admitted. Due to the overwhelming amount of evidence supporting the defendant's conviction, and given the inconsequential role of the State's comments, any error was harmless. Thus, even if counsel's performance was deficient, it necessarily follows that such deficiency would not have changed the outcome of the trial because the error in admitting the evidence now challenged on appeal was harmless. Even if there was an absence of tactical or strategic reasons for defense counsel's failure to explain his objection, the defendant fails to satisfy the last two elements of the test provided by the court in *Saunders*.

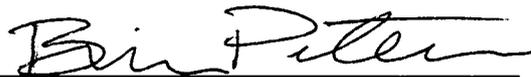
D. CONCLUSION

The Prosecutor did not impermissibly comment on the Defendant's right to remain silent because (1) by speaking to the police officer, the Defendant chose to waive his right to remain silent; (2) the Defendant's pre-arrest silence may be used for impeachment purposes; and (3) any comments made by the

Prosecutor referenced what the Defendant did not say to people other than law enforcement officers, and thus, did not implicate the Defendant's Fifth Amendment. Even if the Prosecutor did make an impermissible comment on the Defendant's right to remain silent, the trial court's admission of such evidence was harmless given the overwhelming amount of evidence supporting the jury's verdict.

Moreover, the Defendant's counsel was not ineffective because it was clear from the trial court's ruling on Counsel's initial objection *why* such objection was being made. Thus, no explanation was necessary. Additionally, the Defendant was not prejudiced because even if the trial court was unaware of the reasons for objection, had counsel explained such objection, the court would not have ruled differently.

Respectfully submitted this 14th of August, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 37149-9-II,
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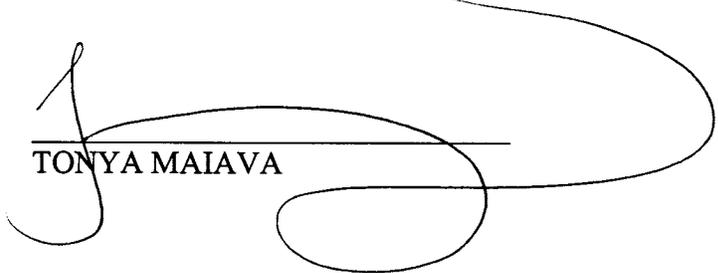
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I certify under penalty of perjury under laws of the State of
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TONYA MAIAVA