

COURT OF APPEALS
DIVISION II

09 JUN 09 AM 9:19 NO. 38325-0-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MICHAEL ABUAN,

Appellant.

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

The Honorable Bryan E. Chushcoff

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The search of the vehicle in which appellant was a passenger constitutes an unreasonable and unlawful search and the pat-down search of appellant was unlawful.

2. The State improperly commented on appellant's constitutional right to remain silent.

3. There was insufficient evidence to convict appellant of assault in the second degree as charged in count VI.

4. The trial court erred in imposing an indeterminate sentence, in violation of the Sentencing Reform Act.

Issues Pertaining to Assignments of Error

1. Did the search of the vehicle in which appellant was a passenger constitute an unreasonable and unlawful search where appellant and the driver of the vehicle was not within reaching distance of the vehicle after their arrest and it was not reasonable to believe that the car contained evidence of the offense of arrest?

2. Did the State improperly comment on appellant's constitutional right to remain silent when a detective testified that during an interview, appellant refused to talk to the detective?

3. Was there insufficient evidence to convict appellant of assault in the second degree where the complaining witness testified about

a drive-by shooting but never said that shots were fired at him or that he was placed in apprehension and imminent fear of bodily injury?

4. Did the trial court err by failing to limit the total of Abuan's sentence to the statutory maximum thus imposing an indeterminate sentence, in violation of the SRA?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On August 20, 2007, the State charged appellant, Kevin Michael Abuan with one count of drive-by shooting with an aggravating factor of committing the offense to obtain, maintain, or advance his position in a gang and one count of unlawful possession of a firearm in the second degree. CP 97-98. The State filed an amended information on June 2, 2008 and a second amended information on June 9, 2008, adding two counts of assault in the second degree with an aggravating factor of committing the offenses to obtain, maintain, or advance his position in a gang. CP 125-27, 155-57.

On June 2, 2008, Abuan stood trial with co-defendants, Raymond Mitchell Howell and Timothy Jean Bluehorse, before the Honorable Bryan

¹ There are 19 verbatim report of proceedings: 1RP - 08/20/07; 2RP - 06/02/08; 3RP - 06/03/08; 4RP - 06/04/08; 5RP - 06/05/08; 6RP - 06/09/08; 7RP - 06/10/08; 8RP - 06/11/08; 9RP - 06/12/08; 10RP - 06/16/08; 11RP - 06/17/08; 12RP - 06/18/08; 13RP - 06/19/08; 14RP - 08/04/08; 15RP - 08/05/08; 16RP - 08/18/08; 17RP - 08/19/08; 18RP - 08/20/08; 19RP - 09/12/08.

E. Chushcoff. 2RP 4. Howell pled guilty to one count of drive-by shooting and one count of unlawful possession of a firearm on June 4, 2008. 4RP 192-98. On June 19, 2008, the court recessed the trial until August 18, 2008. 13RP 1686-87. At a status conference on August 5, 2008, the court heard halftime motions and dismissed the charge of unlawful possession of a firearm against Abuan. 15RP 1774. On August 20, 2008, a jury found Abuan guilty of one count of drive-by shooting and two counts of assault in the second degree while armed with a firearm but found that he did not commit the offenses to obtain, maintain, or advance his position in a gang. 18RP 7-9; CP 212-19.

On September 12, 2008, the court sentenced Abuan to 108 months in confinement and 18 to 36 months of community custody. 19RP 1802-04; CP 58-59. Abuan filed this timely appeal. CP 266.

2. Substantive Facts

On August 15, 2007, at around 10:30 p.m., Officer Don Rose and his partner responded to a dispatch call of a drive-by shooting at 3589 East J Street in Tacoma. 5RP 300-01. When Rose arrived at the scene, he saw about six people standing along the sidewalk, "It was pretty dark. There is not a lot of streetlights in that specific area." 5RP 301, 303, 6RP 332-33. A man flagged him down so he stopped and got out of his patrol car. 5RP 304. The man, named Brandon Stafford, said he lived across the street

and a bullet hit his house. 5RP 303-06. Rose inspected the house and discovered a bullet in the exterior wall of the living room. 5RP 307. Stafford said that he heard gunshots and looked out his window and saw a “four-door orange Dodge Neon” with no headlights on rounding the corner of the street. Then he heard more shots and thought his house was hit. 5RP 310-11.

Rose went to the house that was the target of the drive-by shooting and spoke with a woman who lived there. 5RP 314-16. He noticed some gang graffiti on the door of the garage which was attached to the house. 5RP 316. Two bullets were lodged in the garage door and 9 mm shell casings were laying on the street in front of the house. 5RP 303, 317-18, 6RP 333-34. Rose also spoke to two neighbors who lived across the street. After hearing gunshots, Josephine Dennis saw a red “Metro-looking vehicle” and Regina Burnette saw a red vehicle driving away. 5RP 321-23. Larry Davis, who was taking a walk in the neighborhood, reported hearing gunshots and seeing a red sports car speeding away and a Cadillac chasing after it. 6RP 450-52.

Officer Christopher Shipp and his partner reported to the scene and searched the area for two vehicles described as a “red Geo Metro-type hatchback” and an older Cadillac. 12RP 1372-74. They caught up to the Cadillac and when they activated their emergency lights and sirens, the car

pulled over. 12RP 1375. Shipp did not know if the occupants “were suspects or victims or what the deal was.” 12RP 1376. As they approached the car, Shipp ordered the occupants to show their hands and they complied, putting up their hands. 12RP 1376. Shipp became concerned when he noticed a large kitchen knife on the floorboard so they had the driver and passenger step out of the car and detained them in wrist restraints. 12RP 1376-77. Shipp advised them of their *Miranda* rights and they acknowledged and waived their rights. 12RP 1377. The driver of the car, was identified as Fomai Leoso and his brother Francis Leoso was the passenger. 12RP 1377-78.

Fomai said they lived at 3589 East J Street, and he was inside the house when he heard five gunshots. 12RP 1378. He ran outside and saw a “red older hatchback” speeding away so he and Francis got in the Cadillac and chased after the car. 12RP 1378. Francis said he was standing on the front porch when he saw a red “older Geo Metro” approach the house and fire four or five shots at them. 12RP 1379. Francis ran to the Cadillac and pulled out a pistol and fired four or five shots at the car and ran back toward the house. He jumped in the Cadillac with Fomai and they chased after the car. Francis said that he saw Timmy Bluehorse in the suspect car. 12RP 1379-80.

Shipp looked in the Cadillac that had both doors open and he saw the butt of a pistol sticking out from under the front passenger seat. 12RP 1380. Shipp removed and secured the weapon and checked Fomai and Francis for felony convictions. They had none but Francis was under the age of 21 so Shipp arrested him for unlawful possession of a firearm in the second degree. 12RP 1380. Shipp released Fomai and transported Francis to Remann Hall. 12RP 1380. Shipp had the Cadillac impounded and he placed the gun and .45 caliber rifle rounds found in the car into property as evidence. 12RP 1381-85. Francis told Shipp that he was a gang member and that he found the pistol in a wooded area about two weeks earlier. 12RP 1383-84. Forensics later determined that the nine shell casings found on the street in front of the Leoso's house came from the gun found in the Cadillac. 8RP 747, 750-51.

Francis Leoso testified that he lived at 3589 East J Street with his family. 9RP 1003-04. He is a member of a Samoan gang called the Outlaw Crip Killers, OLCK. 9RP 1005. On the night of August 15, 2007, he was in the garage playing video games with his little brother. Suddenly, a car came by and he heard someone say, "N-G-C, cuz," and they opened fire. 9RP 1016. Francis ducked down on the floor and he told his little brother to get down. His uncle who was also in the garage went down on

the floor. 9RP 1016-17. The shots hit part of the house and the garage which was open. 9RP 1017.

Francis grabbed a P85 Ruger 9mm gun, ran after the car, and shot at it. 9RP 1019, 1030. He saw the little four-door car but because it was dark so he could not tell if it was red or maroon. 9RP 1019. He saw Timmy Bluehorse sticking his head out of the back window and "Lucas" on the other side. 9RP 1020. They were wearing blue bandannas around their necks, covering their chins. 9RP 1028-29. It was "too dark" to see anyone else in the car. 9RP 1024.

Francis and his brother Fomai got in their Cadillac and chased after the car but were pulled over by the police. 9RP 1031-32, 1036. After questioning them, the police arrested Francis and booked him into Remann Hall. During an interview with a detective, he identified Bluehorse, a member of a rival Crip gang, as the shooter. 9RP 1039-41. Francis pled guilty to second degree assault and a felon in possession of a firearm for his involvement in the incident and served one year in custody. 9RP 1038-39. Francis recalled seeing Abuan once before but he did not know who Abuan was and never saw him shooting at his house. 9RP 1051-52, 10RP 1135-36, 1205-06.

Fomai Leoso testified that he was on the phone in the house when he heard five or six gunshots and ran outside. 11RP 1286-87, 1296-97.

He could not see who was shooting but saw Francis and his uncle outside. 11RP 1287-88, 1316. Fomai and Francis got in the Cadillac and chased after a car but were pulled over by the police. 11RP 1288-90. The police questioned them and arrested Francis, but they let him leave in his car. 11RP 1290-92. Fomai denied telling the police that he saw a dark red-colored hatchback speeding away after the shooting and did not recall saying that shots were fired at the house. 11RP 1302, 1317. Shots were fired at the garage but he did not know how many bullets ended up in the wall of the garage. 11RP 1317. Fomai is a member of the OLCK and there is no bad blood between them and the Native Gangster Bloods but they have had problems with the Native Gangster Crips. 11RP 1302-04.

On August 17, 2007, Officer Randall Frisbie and his partner Officer Betts made a traffic stop at around 1 a.m. in Tacoma. 6RP 362-63. They pulled over a red four-door Chevy Corsica for expired registration tabs. 6RP 363, 384, 400. Frisbie approached the driver who said he was Raymond Howell but he did not have a driver's license or any identification. 6RP 365. Frisbie took Howell out of the car and put him the back of the patrol car. 6RP 365. After running a check on Howell, Frisbie learned that his license was suspended so he told Howell he was under arrest. 6RP 365. Meanwhile, Betts had asked Abuan, the passenger, to get out of the car because they were going to search the car. Abuan

provided Betts with identification. 6RP 366. When Betts told Abuan that he was going to pat him down for weapons, Abuan admitted that he had a small amount of marijuana in his pocket. Betts recovered the marijuana and Frisbie advised Abuan of his rights. They placed Abuan in the back of the patrol car with Howell. 6RP 366-67, 385.

During the stop, Howell and Abuan were cooperative and cordial and did not appear impaired by drugs or alcohol. 6RP 368. After placing them in the patrol car, Betts conducted a search of the car. He found a Bryco Arms 9 mm handgun underneath the driver's seat. 6RP 370, 403. Once Betts located the gun, they recalled that 9 mm casings were recovered at a drive-by shooting two days earlier so they began inspecting the exterior of the car and saw that "one of the taillights was busted out." 6RP 374-75. Abuan told them that someone shot at the car when he was driving around with his cousin four days earlier. He said he was a gang member of NGB, Native Gangster Blood. 6RP 376-77, 399.

Officer Henry Betts testified that he and Officer Frisbie pulled over a "boxy four-door, 80's, either like a Buick Century or maybe a Chevy Crosica" that had expired registration tabs. 6RP 466-67. He did not recall any furtive movements by Howell or Abuan when they made the stop. 6RP 460-70. After Howell was placed under arrest, he asked Abuan, the passenger, to step out because they were going to search the car. 6RP 468.

Abuan did not exhibit any suspicious behavior but Betts told him that he wanted to check him for weapons and when he started to pat him down, Abuan said “he didn’t want to lie to me,” and admitted that he had a little marijuana on him. 6RP 469-70. At that point, Betts detained Abuan. 6RP 469. Betts searched the car and found an unloaded 9 mm handgun underneath the driver’s seat. 6RP 471-72. Betts secured the handgun and later placed it into property and the car was impounded. 6RP 472-73, 7RP 531-32.

Unrelated to the traffic stop made by Frisbie and Betts, in the early morning of August 17, 2007, Officer Don Williams responded to a dispatch call of a stolen vehicle. 10RP 1105. He found an abandoned “red Neon” in an alley with the motor running. 10RP 1106-07. Williams inspected the car and discovered a bullet hole in the passenger door. 10RP 1107-08. A latent fingerprint examiner compared 11 latent impressions found on the vehicle but none of the prints matched those of Abuan, Howell, or Bluehorse. 12RP 1422, 1425.

Detective John Bair was assigned to the case on August 16, 2007. 7RP 632-33. He spoke with Abuan at 10:30 a.m. on August 17, 2007, after advising him of his *Miranda* rights. 7RP 644-45. Abuan initially denied that he was involved in the shooting but after Bair “told him that some other people had implicated him,” Abuan admitted that he was the

driver and that Howell was a passenger in the front seat. 7RP 646. He said that “Marquez and a Little Bear” were in the back seat. 7RP 647. Abuan expressed that he did not want to tell on his friends and that he thought they were going to the house to flash gang signs. 7RP 649-50. Bair investigated Marquez and excluded him as a suspect but did not conduct an investigation of Little Bear. 7RP 652.

On August 20, 2007, Bair returned to the jail to talk to Abuan again at around 8:30 a.m. 7RP 654. After Abuan waived his *Miranda* rights, Bair accused him of lying about Marquez. Abuan admitted that he lied and said that he was high when he initially talked to Bair. 7RP 655. He said that he was not involved in the shooting and that Jeremy James was the actual shooter. 7RP 655-57. Abuan disclosed that he talked to Howell after his previous interview with Bair. When Bair confronted Abuan about getting together with Howell and conveniently getting their story straight, Abuan said “he didn’t want to talk about it anymore.” 7RP 655-56, 660. Bair made no effort to locate James and essentially concluded his investigation of the case on August 22, 2007. 7RP 784.

Jimmy John, Abuan’s cousin, and Tara Foulkes, John’s girlfriend, both testified that they received a phone call from Abuan that he was in town visiting family. On the morning of August 15, 2007, they picked up Abuan and they spent the day swimming and playing at Five Mile Lake.

Then they went to John's house, ate a late dinner, watched television, and Abuan spent the night at their home. 12RP 1430-33, 16RP 27-30.

C. ARGUMENT

1. THE SEARCH OF THE VEHICLE IN WHICH ABUAN WAS A PASSENGER CONSTITUTES AN UNREASONABLE AND UNLAWFUL SEARCH AND CONSEQUENTLY THE EVIDENCE SEIZED FROM THE VEHICLE AND ABUAN'S ALLEGED CONFESSION MUST BE SUPPRESSED.

Reversal and dismissal is required because the search of the vehicle in which Abuan was a passenger constitutes an unreasonable and unlawful search and consequently the evidence seized from the vehicle and Abuan's alleged confession must be suppressed.

The United States and Washington State constitutions guard against unreasonable searches. U. S. Const. amend IV; Const. art. 1, section 7. Warrantless searches are per se unreasonable and exceptions to the warrant requirement have been "narrowly and jealously drawn." State v. Stroud, 106 Wn.2d. 144, 147, 720 P.2d 436 (1986). One of these exceptions is the search of an automobile pursuant to a lawful custodial arrest. State v. Adams, 146 Wn. App. 595, 600, 191 P.3d 93 (2008). The policy underlying a vehicle incident to arrest is to prevent the destruction of evidence and protect police from danger. State v. Rathbun, 124 Wn. App. 372, 380, 101 P.3d 119 (2004)(citing Chimel v. California, 395 U.S.

752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)). “[T]he ability to search a vehicle incident to the arrest of a vehicle occupant is not a police entitlement justifying a rule that police may search a vehicle incident to arrest regardless of how far a suspect is from the vehicle.” Rathbun, 124 Wn. App. at 380.

The United States Supreme Court held in Arizona v. Gant, 129 S. Ct. 1710, _____, _____ (2009),² that the police “may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Id.* at 1723. The Court concluded that “[w]hen these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant applies.” *Id.* at 1723-24.

After Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered a bag of cocaine in the pocket of a jacket on the

² Gant applies to Abuan’s case because it is not yet final. State v. Hanson, 151 Wn.2d 783, 791-92, 91 P.3d 888 (2004)(citing In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992)).

backseat. Gant was charged and convicted of possession of a narcotic drug for sale and possession of drug paraphernalia. Id. at 1714-15. On appeal, the Arizona Supreme Court held that because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the search was unreasonable. Id. at 1714-16. The Court concluded that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in Chimel v. California and applied to vehicle searches in New York v. Belton, did not justify the search. Id. at 1714.

The United States Supreme Court affirmed, emphasizing that Gant was arrested for driving with a suspended license, an offense for which police could not expect to find evidence in the car. The Court concluded that because police could not have reasonably believed that either Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search was unreasonable. Id. at 1719. The Court rejected the State's argument to read Belton broadly, observing that the State "seriously undervalues the privacy interests at stake." Id. at 1720. Recognizing that a motorist's privacy interest in his vehicle is "important and deserving of constitutional protection," the Court concluded that giving police the power to conduct a search whenever an individual is caught committing a

traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, “creates a serious and recurring threat to the privacy of countless individuals.” Id. Furthermore, “the character of that threat implicates the central concern underlying the Fourth Amendment - the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.” Id.

Similar to Gant, Howell and Abuan were stopped for expiration of registration tabs by Officers Frisbie and Betts. 6RP 362-63, 384, 400, 466-67. The officers observed no furtive movements and Howell and Abuan were cooperative during the stop. 6RP 368, 469-70. Howell did not have a driver’s license so Frisbie took Howell out of the car and put him in the back of the patrol car. 6RP 365. After learning that Howell’s license had been suspended, Frisbie placed Howell under arrest. Meanwhile, Betts had asked Abuan, the passenger, to get out of the car because they were going to search the car. 6RP 366. Abuan did not exhibit any suspicious behavior but Betts told him that he wanted to check him for weapons and when he started to pat him down, Abuan admitted that he had a little marijuana in his pocket. 6RP 469-70. Betts recovered the marijuana and Frisbie advised him of his rights and they put Abuan in the back of the patrol car with Howell. 6RP 366-67, 385. Thereafter,

Betts searched the car and found a gun under the driver's seat. 6RP 471-72.

As in Gant, the search of the car was unreasonable because Howell and Abuan were secured in the patrol car and could not have reached for a weapon and the car could not reasonably contain evidence of the offense of arrest. Furthermore, Betts unlawfully searched Abuan because the arrest or detention of one or more of a vehicle's occupants, without more, does not provide the "authority of law" under the Washington Constitution to search the nonarrested individuals. State v. Horace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). A generalized concern for officer safety does not justify a pat down for weapons. State v. Jones, 146 Wn.2d 328, 338, 45 P.3d 1062 (2002). By Betts' own admission, he had no reason to be concerned for his safety and consequently he had no lawful authority to search Abuan. According to Frisbie, it was only after Betts searched the car and found the gun that they made the connection between the car and the drive-by shooting. 6RP 374-75. It is therefore evident that but for the unlawful search, the officers would not have linked Howell and Abuan to the shooting.

Under the United States Supreme Court's holding in Gant, because the search of the vehicle was unreasonable and unlawful, evidence of the gun and Abuan's alleged confession must be suppressed. Reversal and

dismissal is required because without evidence that the car and gun connected Abuan to the shooting and that Abuan confessed to being the driver in the shooting, there was insufficient evidence to convict Abuan of the crimes.

2. THE STATE IMPROPERLY COMMENTED ON ABUAN'S CONSTITUTIONAL RIGHT TO REMAIN SILENT AND THE ERROR WAS NOT HARMLESS.

Reversal is required because the State improperly commented on Abuan's constitutional right to remain silent and the error was not harmless beyond a reasonable doubt.

Our State and Federal Constitutions guarantee a right against self-incrimination. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); U. S. Const. amend. V; Const., art. I, sec. 9. This right against self-incrimination is intended to prohibit the inquisitional method of investigation in which the accused is forced to disclose the contents of his mind or speak his guilt. Id. at 36 (citing Doe v. United States, 487 U.S. 201, 210-12, 108 S. Ct. 2341, 2347-49, 101 L. Ed. 2d 184 (1988)). To enforce this principle, upon arrest, an accused must be advised that he can remain silent. Miranda v. Arizona, 384 U.S. 436, 483-85, 86 S. Ct. 1602, 1633, 16 L. Ed. 2d 694 (1966). Once the accused is arrested and *Miranda* rights are read, the State violates his Fifth and Fourteenth Amendment

rights by introducing evidence of his silence as substantive evidence of guilt. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); Easter, 130 Wn.2d at 236; State v. Curtis, 110 Wn. App. 6, 11-12, 37 P.3d 1274 (2002). The reason for this is that the government, in reading the accused his rights, implicitly assures him that he may assert his rights without penalty. Curtis, 110 Wn. App. at 12 (citing Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)).

If a police witness directly testifies that a defendant refused to talk to him, constitutional error exists that requires a constitutional harmless error analysis. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). The State bears the burden of showing a constitutional error was harmless. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). An appellate court will find a constitutional error harmless only if convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995), and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Whelchel, 115 Wn.2d at 728. Where the error was not harmless, the defendant must have a new trial. Easter, 130 Wn.2d at 242.

Here, Detective Bair testified that Abuan confessed to being the driver of the car in the drive-by shooting when he talked to Abuan on

August 17, 2007, the morning of Abuan's arrest. 7RP 644-46. Bair interviewed Abuan again on August 20, 2007, and he said he was high when he initially spoke to Bair and denied being involved in the shooting. 7RP 655-57. When Abuan told Bair that he talked to Howell after their previous interview, he confronted Abuan about getting together with Howell and conveniently getting their story straight. 7RP 655-56. The prosecutor asked Bair if Abuan admitted to collaborating with Howell:

Q. Did he admit to that?

A. He didn't say that he had gotten his story straight. He didn't come out and tell me that, yeah, we've got our story straight. He implied that. And then he didn't want to talk about it anymore after that once I confronted him that I believe that's what took place.

7RP 660. (Emphasis added.)

Bair's comment that Abuan refused to talk to him after he accused him of concocting a new story clearly violated Abuan's constitutional right to remain silent. Furthermore, the improper comment implied guilt, undoubtedly leading the jury to believe that Abuan's confession was true. The record reflects that the jury was concerned about Abuan's confession because during deliberations they asked to see a written confession. CP 211. Without the confession, the scant evidence against Abuan was merely circumstantial. Consequently, because the case turned on whether

the jury believed Abuan's confession, the error was not harmless beyond a reasonable doubt.

Reversal is required because the violation of Abuan's constitutional right to remain silent did not constitute harmless error.

Easter, 130 Wn.2d at 242.

3. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT ABUAN ASSAULTED FOMAI LEOSO AS CHARGED IN COUNT VI.

Reversal and dismissal is required because there was insufficient evidence that Abuan assaulted Fomai Leoso as charged in count VI.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, sec. 3. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' " State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970));³ Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

³ The United States Supreme Court noted, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

To convict Abuan of assault in the second degree as charged in Count VI, the State had to prove beyond a reasonable doubt that on or about the 15th day of August, 2007, the defendant or an accomplice

every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty." In re Winship, 397 U.S. at 364.

assaulted Fomai Leoso with a deadly weapon. CP 243. The court provided a jury instruction defining assault:

An assault is an act done with the intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 240.

Fomai Leoso testified that he was in the house when the shooting occurred:

Q. What brought your attention to the shooting?

A. I heard gunshots.

Q. How many did you hear?

A. I don't know.

Q. Can you estimate?

A. At least seven or six gunshots.

Q. And when you heard the gunshots, were you still inside?

A. Yeah. I was on the phone, though.

Q. Were you able to see who was shooting?

A. No.

Q. Were you able to see any part of where it was coming from, that kind of thing?

A. No. I can't see when it started.

Q. It was outside is when the shooting was happening?

A. Yes.

Q. What did you do after you heard the gunfire?

A. I run outside.

11RP 1287-88.

Fomai further testified that the shots only hit the garage:

Q. . . . As far as this arrest that happened on the 15th of August, do you remember telling the officer that arrested you or had contact with you that whoever was shooting at – that whoever was firing shot into the house?

A. Shot into the house?

Q. Yes.

A. What do you mean by that? Who shot at the house or the drive-by?

Q. The drive-by.

A. Yes.

Q. Now, do you remember whether any bullets went into the house?

A. On the wall outside of the garage.

Q. How many bullets ended up on the wall outside of the garage?

A. I don't know. It would be in the police report, though. They are the ones taking pictures of it.

11RP 1317.

It is evident from Fomai's testimony that there were no shots fired at the house where he was located which created reasonable apprehension and imminent fear of bodily injury. The record reflects that throughout Fomai's entire testimony, he never said that shots were fired at him or that he was apprehensive or fearful. 11RP 1255-1319, 1340-52. Furthermore, Officer Betts testified that he interviewed Fomai and "[i]n the August 15th shooting, it was clear that he was inside and didn't see it at all and could not identify anybody." 6RP 497. Significantly, the crime scene technician only detected bullet damage to the garage frame and door. 8RP 717-18.

The record substantiates that even when viewing the evidence in the light most favorable to the State, no trier of fact could have found all the elements of the crime beyond a reasonable doubt. Consequently, Abuan's conviction for assault in the second degree as charged in Count VI must be reversed and dismissed.

4. REVERSAL IS REQUIRED BECAUSE ABUAN'S SENTENCE IS INDETERMINATE, IN VIOLATION OF THE SENTENCING REFORM ACT.

Abuan's sentence must be reversed because the court imposed an indeterminate sentence, in violation of the Sentencing Reform Act (SRA).

In State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008), the trial court sentenced Linerud to a standard range sentence and term of community custody which exceeds the statutory maximum but included a notation to the DOC that the total time served could not exceed the statutory maximum. *Id.* at 949. Division One of this Court determined that requiring the Department of Corrections to calculate an inmate's total time served and ensure that it does not exceed the statutory maximum for the offense is not authorized by the SRA:

The SRA allows the DOC to determine when an inmate earns early release time and when, within the community custody range imposed by the court, to release an inmate from community custody. But the SRA does not authorize the DOC to determine how long the sentence *imposed* will be. Rather, the SRA mandates that *courts impose* a determinate sentence—a sentence that states, with exactitude, the total time of confinement and community supervision. Because a court may not impose a sentence that exceeds the statutory maximum and must impose a determinate sentence, it may not sentence a defendant to a term that, on its face, exceeds the statutory maximum and leave to the DOC the responsibility for assuring that the sentence is lawful.

Id. at 949-50 (emphasis added by the court).

Accordingly, the Court concluded that Linerud's sentence was indeterminate, in violation of the SRA. Id. at 946. The Court reversed Linerud's sentence, holding that in light of the determinate sentencing requirement and the risks of requiring the DOC to ensure the inmate does not serve in excess of his or her maximum sentence, courts must limit the total sentence they impose to the statutory maximum. Id. at 951.

As in Linerud, the trial court sentenced Abuan to 108 months in confinement and 18 to 36 months of community custody, noting that defendant "is to serve no more than 108 months in custody and no more than 120 months total time, including comm. custody time." CP 258-59. Abuan's sentence must therefore be reversed because the court imposed an indeterminate sentence, in violation of the SRA.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Abuan's convictions.

DATED this 5th day of June, 2009.

Respectfully submitted,

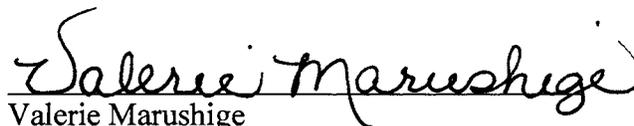

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Kevin Michael Abuan

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Kevin Michael Abuan, DOC # 322853, Coyote Ridge Correction Center, 1301 N Ephrata, Connell, Washington 99326.

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

DATED this 5th day of June, 2009 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

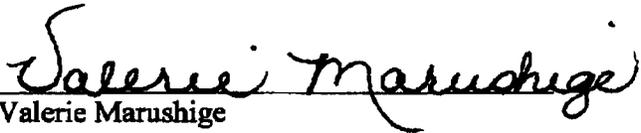
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DEPUTY
COURT REPORTER
EXHIBIT

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Valerie Marushige
Attorney at Law
WSBA No. 25851

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BY  DEPUTY

COURT OF APPEALS
DISTRICT II