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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CAMERON EDDY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 08-1-03482-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the deputy prosecutor's closing arguments and cross-examination of the defendant concerning the defendant's pre-arrest silence were proper impeachment of the defendant.
2. Whether, assuming *arguendo* that the deputy prosecutor's closing arguments and/or cross-examination were improper, any constitutional error resulting therefrom was harmless.

B. STATEMENT OF THE CASE.

1. Procedure

On July 29, 2008, Appellant Cameron Eddy, hereinafter referred to as "defendant," was charged by information with second-degree burglary in count I and making or having burglar tools in count II. CP 1-2. Two co-defendants were listed in the information: Joshua Keith Johnson and Charles Stephen Smith. *Id.*

On February 17, 2009, a joint trial of this matter and that involving co-defendant Smith began.¹ RP 02/17/2009 4-13. The State filed an amended information on February 18, 2009, which charged only count I, burglary in the second degree, CP 8, and the defendants were arraigned on that amended information. RP 02/18/2009 4-6.

¹ Co-defendant Johnson was subpoenaed to testify in the trial of this matter. *See* RP 10-14.

Jury selection then began. RP 02/18/2009 12-125. The deputy prosecutor gave his opening statement, RP 02/18/2009 130-33. The defendant's attorney reserved opening statement, RP 02/18/2009 133, and co-defendant Smith presented his opening. RP 02/18/2009 133-37.

The State subsequently took the testimony of Mark Ugland, RP 02/19/2009 5-33, John Moses, RP 02/19/2009 34-83, Wendy Haddow-Brunk, RP 02/19/2009 85-111, RP 02/24/09 113-140, 144-49, and rested RP 02/24/09 149.

Co-defendant Smith's attorney took the testimony of Margaret Murphy, RP 02/24/09 182-89, and co-defendant Smith. RP 02/24/09 189-242, and rested on February 25, 2009. RP 02/25/2009 265.

The defendant's attorney then gave an opening statement, RP 02/25/2009 265, and called the defendant to testify on his own behalf. RP 02/25/2009 266-91, 313-45, before resting. RP 02/25/2009 345.

The court discussed jury instructions with the parties, RP 02/25/2009 345-77, and then instructed the jury on February 26, 2009. RP 02/26/2009 377-78.

The deputy prosecutor gave his closing argument, RP 02/26/2009 378-407, 441-54, and defense counsel gave their arguments the same day. RP 02/26/2009 408-420; RP 02/26/2009 420-39.

On February 27, 2009, the jury returned verdicts finding both defendants guilty as charged of second-degree burglary. RP 02/27/2009 459-61; CP 73-74.

On March 13, 2009, the defendant was sentenced under the first-time offender waiver to 30 days in total confinement and these days were converted to 240 hours of community service. RP 02/27/2009 468-69; CP 77-87; 95-105.

The defendant timely filed notice of appeal. CP 94-105.

2. Facts

Just before midnight on July 27, 2008, Tacoma School District security patrol officer Mark Ugland responded to an alarm at Foss High School. RP 02/19/2009 11. Personnel from the alarm company monitoring the school indicated that there were “definitely people” involved and that the alarm company could “hear voices” and “glass breaking, something banging on something” from an audio detector in the school’s weight room. RP 02/19/2009 12. Ugland and his partner, security patrol officer Mike McCarthy, responded, and arrived at the school about five minutes later. RP 02/19/2009 12-13.

Once there, Ugland opened the gate and allowed Tacoma Police Officer Wendy Haddow-Brunk and her dog, Gero, to enter the premises. RP 02/19/2009 15. Ugland heard Haddow-Brunk announce, “Tacoma

Police K-9” and saw her go into the door. He said that he heard her on the radio running north through the weight room and then through the school and that he ran alongside the building. RP 02/19/2009 15-16

Officer Haddow-Brunk testified that after she passed through the gate at the school and approached the building, “three suspects walked out of the door of the gym.” RP 02/19/2009 92. Haddow-Brink, holding onto her canine partner, informed the men that she was a police officer and ordered them to stop, saying they might otherwise be bitten by the dog. RP 02/19/2009 92, 95. The three men disregarded her order, ran back into the building, and shut the door. RP 02/19/2009 92; RP 02/24/09 116.

Haddow-Brink noticed that the glass of the window of the door had been “busted through.” RP 02/19/2009 93. Uglan later found that the glass of an exterior door to the weight room had been “totally smashed out” and that there was an overturned garbage can nearby. RP 02/19/2009 21. Uglan indicated that this door was not visible to the general public. RP 02/19/2009 25.

Haddow-Brunk opened this door for the dog, and noticed that it opened into a weight room, which had another door on the opposite side. RP 02/19/2009 96. Haddow-Brink indicated that the suspects went through this second door and that the dog followed them. RP 02/19/2009 96. When she got through the second door, she noticed that one of the suspects, who she identified as co-defendant Smith, had stopped. RP 02/19/2009 96. The dog stopped for Smith, but then saw that the other

two were still running and followed them. RP 02/19/2009 96. Co-defendant Smith then bolted through a side door. RP 02/19/2009 96.

While Ugland was running alongside the building, he saw Smith come out the east double doors, and run right at him. RP 02/19/2009 16. Ugland drew his gun, ordered Smith to the ground, and he and his partner, took Smith into custody. RP 02/19/2009 16-18. Smith had a backpack in his possession at the time. RP 02/19/2009 20. He was wearing a dark sweatshirt and jeans and did not look like he was going out for a run on the track. RP 02/19/2009 25.

While Ugland and McCarthy took Smith into custody, Haddow-Brunk and her dog followed the remaining two suspects out of the school. RP 02/19/2009 97. She ran down the steps outside the building until she heard the dog barking. She then saw that Tacoma Police Officer Moses, who had also responded to the call, had a suspect at gunpoint. RP 02/19/2009 97. The suspect, later identified as co-defendant Johnson, was “up on a cement retaining wall”. RP 02/19/2009 98-99. Haddow-Brunk recalled the dog and officers ordered Johnson to come down, where he was taken into custody. RP 02/19/2009 98-99.

Tacoma Police Sergeant Martin, who was on the west side of the building advised Haddow-Brunk that he had seen a third suspect, later identified as the defendant, running towards the Cheney Stadium fence. RP 02/19/2009 99. Haddow-Brunk then used her dog to track the defendant through “very thick brush” and “down an embankment” until

she heard him say, "Okay. I am here. Please don't let the dog bit me." RP 02/24/2009 124. *See* RP 02/19/2009 99-100. She then recalled the dog, talked the defendant out of the bushes, and took the defendant into custody. RP 02/19/2009 100.

The defendant testified that on July 27, 2008, he and the co-defendants had been playing video games all day at his parents' house when they became involved in a discussion of whether a video game "could be biased because of different character movements" and "whether or not it would judge the person racially." RP 02/25/2009 269. The defendant said that the men decided to settle this dispute regarding the game's programming by holding a footrace race in the real world. RP 02/25/2009 269-70. Then, in his very next sentence, the defendant admitted that such a race would not resolve the dispute. RP 02/25/2009 270. Despite this, the defendant stated that the men decided to go to Foss High School at about 11:40 at night to hold their race because the high school "had a pretty track". RP 02/25/2009 271-72. The defendant indicated that he wore jeans and sandals to the track to race. RP 02/25/2009 289-90, 313-17. He said that when they arrived, they had to climb over a fence to get to the track, but that he "just figured that, like, it was okay." RP 02/25/2009 272.

The defendant testified that when they got to the track, they decided not to hold their race after all because there were "a few scattered puddles along the track". RP 02/25/2009 274. Co-defendant Smith,

however, had already testified that the men decided not to hold their race because the track was dark. RP 02/24/2009 194.

The defendant said that one of them then noticed broken glass from the weight room window, that they walked over to the area of the glass, and that co-defendant Johnson “elbowed the glass to make it fall.” RP 02/25/2009 275-77. The defendant indicated that Johnson then reached in and opened the door, stating that it looked liked somebody tried to break in. RP 02/25/2009 277. The defendant said that after Johnson opened the door, Johnson took a couple steps inside the room and then emerged with a crowbar. RP 02/25/2009 277. The defendant then testified that while he and Smith were talking about how to “explain this to the police”, Johnson walked back inside the building. RP 02/25/2009 278-79.

The defendant testified that he and Smith then followed Johnson inside the building. RP 02/25/2009 279. The defendant explained that because of the tools they said they found, it was possible that the burglary “was still in progress and that we could actually see the guy.” RP 02/25/2009 279. The defendant testified that “it seemed like if we could provide a description of the character that was inside the building, it would seem as if we had the best intentions at the moment.” RP 02/25/2009 279.

The defendant noted that while he and Smith were talking about what they should say to the police, they picked up the crowbar and piano wire and placed them in Smith’s backpack. RP 02/25/2009 280-81. He

said that they picked up a glass cutter and put it in the backpack because he thought “that was relative to the thing”. RP 02/25/2009 281.

The defendant said that he was looking at the broken glass when he saw the light from Haddow-Brunk’s flashlight and “heard the police K-9 unit actually say, Police, stop.” RP 02/25/2009 282-83. Although the defendant claimed that he heard someone say “sic ‘em,” RP 02/25/2009 283, Officer Haddow-Brunk testified that she never said anything of the sort. RP 02/19/2009 92-95. Although the defendant indicated that he and Smith had been discussing what they should say to the police and indicated that they had been collecting evidence at the scene, he testified that he ran from the police when they arrived. RP 02/25/2009 278-83. Nevertheless, the defendant testified that he was not trying to avoid the police, but was only worried about the dog biting him. RP 02/25/2009 284. The defendant testified that he ran through the school, then out of it, down a set of stairs, outside the building, along “the entranceway to Cheney Stadium”, jumped over a fence, and waited in “some bushes” until the police arrived. RP 02/25/2009 284-87.

On cross-examination, the deputy prosecutor clarified that the defendant knew that Haddow-Brunk was a police officer when he saw her. RP 02/25/2009 325. The deputy prosecutor then asked the defendant a series of questions regarding whether the defendant, as he claimed was his intent on direct, *see* RP 02/25/2009 278-79, 281, actually explained the burglary he said that he had discovered to the police. *See* RP 02/25/2009

325-26. The defendant denied doing so. *Id.* The deputy prosecutor also asked a series of questions concerning the defendant's claim that he was only running from the dog, not the police, RP 02/25/2009 329-31, and about the defendant's claim that he ran into the bushes not to avoid, but to wait for the police. *See* RP 02/25/2009 287, 331-32.

C. ARGUMENT.

1. THE DEPUTY PROSECUTOR'S CLOSING ARGUMENTS AND CROSS-EXAMINATION OF THE DEFENDANT CONCERNING THE DEFENDANT'S PREARREST SILENCE WERE PROPER IMPEACHMENT OF THE DEFENDANT BECAUSE THE DEFENDANT TESTIFIED AT TRIAL.

“A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial.” *State v. Knapp*, 148 Wn. App. 414, 419, 199 P.3d 505, 508 (2009). “Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict.” *Id.* If a defendant does not object or request a curative instruction, he has waived the error unless the remark is “so fragrant and ill-intentioned’ that no instruction could have cured the resulting prejudice.” *Id.* (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

“The Fifth Amendment to the United States Constitution states, in part, no person ‘shall... be compelled in any criminal case to be a witness against himself’ and applies to the states through the Fourteenth Amendment. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285, 1289 (1996)(citing *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). Article I, section 9 of the Washington State Constitution guarantees that “[n]o person shall be compelled in any criminal case to give evidence against himself.” Thus, “[b]oth the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence.” *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505, 508 (2009)(citing U.S. Const. amend. V; Wn. Const. art. I, sec. 9). A suspect who wants to invoke his or her right to remain silent must do so unambiguously, such as by saying that he or she wants to remain silent or does not want to talk with the police. *Berghuis v. Thompkins*, __ S. Ct. __, 2010 WL 2160784 (U.S. June 1, 2010)(No. 08-1470). *But see Quinn v. United States*, 349 U.S. 155, 164, 75 S. Ct. 668, 99 L. Ed. 964 (1955)(Fifth Amendment right to silence is asserted by conduct “sufficiently definite to apprise” the listener that the claim is being made), *Easter*, 130 Wn.2d at 239, 922 P.2d 1285(noting that “[n]o special set of words is necessary to invoke the right,” and that “silence in the face of police questioning is quite

expressive as to the person's intent to invoke the right."). The Washington State Supreme Court has stated that it "interpret[s] the two provisions equivalently." *Easter*, 130 Wn.2d at 235.

The U.S. and Washington State Supreme Courts, however, have distinguished between "prearrest silence", which is "based upon the Fifth Amendment right to remain silent before *Miranda* warnings are given" and "postarrest silence", which is "based upon due process under the Fourteenth Amendment when the State issues *Miranda* warnings." *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1, 9 (2008).

"Courts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda* constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty" such that the subsequent use of post-arrest silence "after the *Miranda* warnings is fundamentally unfair and violates due process." *Easter*, 130 Wn.2d 228 at 236(citing *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716-17, 123 L.Ed.2d 353 (1993); *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976)). "Due process under the Fourteenth Amendment prohibits impeachment based on a defendant's silence after he receives *Miranda* warnings, even if the defendant testifies at trial." *Knapp*, 148 Wn. App. at 420.

The Fifth Amendment, however, prohibits impeachment based upon the exercise of prearrest silence only “where the accused does not waive the right and does not testify at trial.” *Burke*, 163 Wn.2d at 217. *But see Purtuondo v. Agard*, 529 U.S. 61, 69-70, 120 S. Ct. 1119, 146 L.Ed.2d 47 (2000)(citing *Jenkins v. Anderson*, 447 U.S. 231, 236, n.2, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), which noted that it was not clear whether the Fifth Amendment even protects “prearrest silence”). Because prearrest silence “lacks such ‘implicit assurance’ from the State about its punitive effect in future proceedings”, it does not implicate due process principles. *Easter*, 130 Wn.2d at 236-37. Therefore, “no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State’s issuance of *Miranda* warnings.” *Burke*, 163 Wn.2d at 217.

The Washington State Supreme Court has determined that “even when the defendant testifies at trial, use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt.” *Id.* (citing *State v. Lewis*, 130 Wn.2d 700, 705-06, 927 P.2d 235). The Court noted that “[i]mpeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful.” *Id.* at 219.

“In circumstances where silence is protected, a mere reference to the defendant’s silence by the government is not necessarily a violation of this principle”. *Id.* at 217. Rather, it is only “when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth

Amendment and article I, section 9 of the Washington Constitution are violated.” *Id.*

Although, the defendant now challenges several of the deputy prosecutor’s questions as improper comments on the defendant’s rights to pre-arrest silence, Appellant’s Opening Brief, p. 16, 14-24, he only objected to one of these questions at trial and all were proper impeachment under *Burke*, 163 Wn.2d at 217.

a. Question Asked Over Objection.

At trial, the defendant objected to only one of the questions he now challenges on appeal as misconduct. That question was asked as part of the following exchange:

Q You get outside of Foss High School and run for some ways, and at some point you scale an eight-foot fence that surrounds the track and all the other things, correct?
A Yes.
Q Do you stop on top of the chain link fence, yell out to the police, Hey, I’m on top of the eight foot-fence and, say, Stop, come get me?
A No.
Q It might have been a good idea, correct?
A No.
Q It wouldn’t have been a good idea to stay eight feet above the ground, saying, Police, I’m right here; I’m not trying to elude you guys?
MR. DOHERTY: Objection, Your honor; argumentative.
THE COURT: Overruled. You may answer that.

Q Did that seem like a good idea?
A No.

RP 02/25/2009 331.

On direct examination, the defendant had said that he ran only because he was afraid of being attacked by the dog, not because he was trying to elude the police:

Q Okay. Why did you run?
A Because the only thing that was going through my mind at that moment was stop the dog from biting me.
Q You weren't trying to avoid the police?
A No.

RP 02/25/2009 284.

Therefore, in eliciting testimony from the defendant, that when he was eight feet in the air and safe from the canine, he not only did not call out to the police, but did not think that doing so was a good idea, the deputy prosecutor elicited testimony that undercut the defendant's direct-examination testimony that he was running only to avoid the dog and not the police. Had the defendant's direct-examination assertions been true, it is likely that he would have called out to the police once he was safe from the dog, or at least that he might have considered it a good strategy. The fact that he chose not to do so, demonstrates that he was more interested in avoiding the police than the dog. Hence, this line of questioning, because it was offered solely to show the defendant was not truthful in his former

testimony, was proper impeachment and did not run afoul of constitutional provisions. If it was not misconduct, it could not have been so fragrant and ill-intentioned that no instruction could have cured any resulting prejudice. Therefore, the trial court should be affirmed.

b. Questions Asked Without Objection.

The defendant did not object in trial to any of the other questions of the deputy prosecutor that he now challenges.

On direct examination, the defendant testified that he and his co-defendants essentially stumbled upon a burglary scene at Foss High School. RP 02/25/2009 275-77. He testified that they noticed that the window in the weight-room door “was actually broken” and that co-defendant Johnson found a crowbar inside. RP 02/25/2009 275-77. The defendant testified that they decided to put the crowbar in co-defendant Smith’s “bag and go home and call the police” but that they “noticed that there was more stuff on the ground”, including an overturned trash can, “piano wire”, and a “glass cutter”. RP 02/25/2009 278-81. The defendant testified that he and co-defendant Smith put the items in Smith’s backpack and talked about “what we should say to the police.” RP 02/25/2009 280-81. The defendant stated that he then followed co-defendant Johnson into the building because it seemed like there was a burglary “in progress” and they wanted to “provide a description of the character that was inside the building.” RP 02/25/2009 279. In other words, the defendant indicated

that he and the co-defendants conducted an impromptu investigation of the burglary with the ultimate intention of reporting it to the police. In fact, the defendant testified about his intention or plan to speak to the police at least three separate times on direct examination. *See* RP 02/25/2009 278; RP 02/25/2009 279; RP 02/25/2009 281.

It was in this context that the deputy prosecutor began by asking the defendant on cross-examination if he knew, when Officer Haddow-Brunk showed up on scene and identified herself, that she was a police officer and the defendant said yes. RP 02/25/2009 325. The following challenged exchange, to which the defendant did not object at trial, then took place:

- Q And your response at that moment was to say, Hey we are right here; we were just wondering what's going on, correct? That's what you told us?
- A That's not what I told them.

RP 02/25/2009 325.

In other words, the deputy prosecutor, after clarifying that the defendant knew that he was being confronted by a police officer, asked the defendant if he had actually carried through with his stated intention of explaining the situation to that officer. RP 02/25/2009 279. When the defendant admitted that he did not, the deputy prosecutor succeeded in eliciting testimony which indicated that the defendant's actions upon being confronted by a police officer were not consistent with his claim on direct that he was investigating the burglary with the intent of reporting it

to the police. If he had been so investigating, the logical response would have been to report it to the police officer who showed up on scene in front of him. Thus, this first challenged question elicited testimony offered solely to show the defendant was not being truthful in his direct examination. As such, it was proper impeachment under *Burke* and not violative of any constitutional provision. *Burke*, 163 Wn.2d at 219. Therefore, the deputy prosecutor committed no misconduct.

This second challenged exchange, to which the defendant did not object at trial, then took place:

- Q Right. What you did instead was run, correct? Yes or no?
- A No.
- Q You didn't run?
- A Not at that time, no.
- Q What did you do at that point?
- A I stopped my retreat into the door.
- Q Did you put your hands in the air?
- A No.
- Q Did you say anything to them to make it clear that you were stopping? Yes or no?
- A No.
- Q Did you lie down on the ground?
- A No.
- Q Did you put your hands anywhere that might look like you were being handcuffed?
- A No.

RP 02/25/2009 325-26.

In this exchange, the deputy prosecutor did ask the defendant if he said anything to the police to make it clear that he was stopping, but this question was clearly meant to impeach his testimony that he had "stopped

his retreat” upon learning that Haddow-Brunk was a police officer. This is particularly evident given the surrounding questions concerning the defendant putting his hands in the air, lying down on the ground, or preparing to be handcuffed. If the defendant did none of these things, then it appears less likely that he truly “stopped his retreat” as he testified and more likely that he simply ran from the police until caught, as Officer Haddow-Brunk had testified. RP 02/19/2009 91-101. In other words, the question, “Did you say anything to them to make it clear that you were stopping?” elicited testimony offered to show the defendant was not truthful in his testimony that he had stopped retreating. Therefore, it was constitutionally sound impeachment under *Burke*, 163 Wn.2d at 219, and the deputy prosecutor committed no misconduct.

The third challenged exchange occurred immediately after the second:

Q Did you tell them anything to indicate that you were the good guys?
A No.

RP 02/25/2009 326.

This question, to which the defense did not object at trial, served to impeach the defendant’s direct-examination testimony that he intended to speak with the police about the burglary he said that he discovered. On direct examination, the defendant testified that he entered the building hoping to get a glimpse of the burglar so that he might “provide a

description of the character that was inside the building” so that “it would seem as if we had the best intentions at the moment.” RP 02/25/2009 279. When the prosecutor elicited testimony that the defendant did not say anything to the police to indicate that he was the good guy, he highlighted the fact that the defendant was not acting in a manner consistent with his stated intent and thereby cast doubt on the truthfulness of the defendant’s testimony. Therefore, this exchange was constitutionally sound impeachment under *Burke*, 163 Wn.2d at 219, and the deputy prosecutor committed no misconduct.

The next exchange challenged by the defendant, to which the defendant did not object at trial, occurred as follows:

- Q Okay. So you are inside the weight room, the door is shut, the K-9 is outside of the weight room, outside. You at that point, presumably say, Stop. We’ll stop. Just don’t let the K-9 in to bite us. Correct; did you say that?
- A No.
- Q. No, you don’t, correct?
- A I did not say that, correct.
- Q Thank you. You don’t say, We give up, correct?
- A No.
- Q You don’t say anything that we are the good guys, correct?
- A No.
- Q Okay.
- A Wait.
- Q Do you say something that you are the good guys?
- A No. I’m sorry.

- Q. As you are running through Foss High School, do you at any point explain to the people chasing after you – because you are aware that a K-9 is chasing you, correct?
- A I am aware of that.
- Q Did you know at some point it was a police officer inside of Foss High School?
- A Yes.
- Q You are aware that a K-9 and a police officer were following you, correct?
- A Yes.
- Q Do you at any point you are in Foss High School call to the police officer, Stop. I give up. Just don't let the dog bite me?
- A No I did not.

RP 02/25/2009 329-31.

In asking these questions, the deputy prosecutor elicited testimony designed to impeach the defendant's direct-examination claim that he ran only to "stop the dog from biting [him]" and that he was not "trying to avoid the police." RP 02/25/2009 284. If the defendant had been running only from the dog, then it is likely that, once he was safely behind a closed door in the weight room, he would have called out to the police officer in control of the dog, "Stop. We'll stop. Just don't let the K-9 in to bite us." RP 02/25/2009 329. The fact that he did not, the fact that he chose instead to keep running, illustrates that he was more interested in avoiding the police than a dog bite. The defendant admitted repeatedly in this exchange that he knew that he was being chased by the police. Nevertheless, he also conceded that he never "call[ed out] to the police

officer, Stop. I give up. Just don't let the dog bite me.” RP 02/25/2009 330. As a result, this line of questioning indicated that the defendant was not being truthful in his direct-examination testimony that he ran only to stop the dog from biting him and that he was not trying to avoid the police. Therefore, these questions were valid impeachment and constitutionally sound and the deputy prosecutor committed no misconduct.

The final exchange now challenged by the defendant, which was also not subject to objection at trial, occurred immediately afterwards:

Q While you are kindly waiting in the bushes, not trying to hide, but actually waiting for the police to come find you, do you yell out to the police, Hey, I'm here, I'm just waiting for you guys, or some variation of that?

A No.

RP 02/25/2009 331-32.

On direct examination, not only did the defendant assert that he was not trying to avoid the police, but he actually indicated at least three times that, after crossing the fence, he “waited” for them to arrive “in some bushes.” RP 02/25/2009 287. The defendant even testified during direct-examination that he “waited for what seemed to be an excruc—a very long time.” *Id.*

In eliciting testimony from the defendant that, while he was supposedly waiting, he never yelled out to the police, even after a “very long time,” the deputy prosecutor elicited testimony that undercut the

defendant's direct-examination assertion that he was simply waiting for the police, rather than hiding from them. If the defendant were truly waiting for police arrival and felt that it was an excruciatingly long wait, it would have been reasonable for him to try to communicate with them and lessen the time. The fact that he did not illustrates that he was not being truthful in his direct-examination testimony that he was only waiting, not hiding from police. Because this exchange was offered solely to show the defendant was not truthful in his former testimony, it was proper impeachment and did not run afoul of constitutional provisions. Therefore, there was no misconduct.

c. Closing Arguments.

The defendant also contends that the deputy prosecutor, in his closing and rebuttal arguments, committed misconduct by violating the defendant's Fifth Amendment right to silence. *See* Appellant's Opening Brief, p. 17-19. However, the context of the deputy prosecutor's challenged argument, makes it clear that he was offering the defendant's pre-arrest silence not as substantive evidence of guilt, but as impeachment evidence that rendered the defendant's direct-examination version of events incredible.

Again, in his direct-examination testimony, the defendant had testified that he had planned on talking to the police about the burglary he said he found, RP 02/25/2009 278-79, 281, but that when the police arrived, he ran, not to avoid them, but only to stop the dog from biting him. RP 02/25/2009 284.

In his closing argument, the deputy prosecutor properly addressed the defendant's credibility by stating that there were questions about the defendant's story and that

[a]t that point you realize you have asked yourself 25 different questions, you have 25 different doubts and thoughts about this story. That means it's not credible. It's not true.

RP 02/25/2009 389.

The deputy prosecutor then discussed some of these questions, RP 02/25/2009 389-99, and based on that discussion, argued that the defendant was "not credible." RP 02/25/2009 389-90.

It was within his discussion of the many questions about the defendant's version of events, that the deputy prosecutor stated:

Cameron Eddy runs from the weight room through the gym, through the school, through the field, over a fence, and at no point does he say to anyone, Hey, I'll stop; I'm not trying to flee from you guys. Hey, I'm the good guy. Hey, I'm going to be cooperative. Please don't let the dog bite me. He could at any point say that to the police, but he is not interested in doing that.

RP 398.

Then in rebuttal argument, the deputy prosecutor said, “As he is running away, he has every opportunity to yell back, Please stop. I’ll stop. Don’t let the dog bite me.” RP 02/26/2009 449.

In so arguing, the prosecutor demonstrated the incredible nature of the defendant’s direct-examination testimony that he was the good guy who happened upon a burglary and intended to report it, but ran only to keep the dog from biting him. If the defendant had actually intended to report the matter, it would be reasonable to expect him to report the burglary to the police officer who confronted him at the scene. If he had actually run only from the dog and not the police, it would be reasonable to expect that he would have communicated this at some point to the police officer in control of that dog. The fact that he did neither of these things, makes his testimony look less credible. Because the deputy prosecutor offered the defendant’s cross-examination testimony solely to show that his direct-examination testimony was not credible, and not as substantive evidence of guilt in and of itself, his argument was proper and did not run afoul of constitutional provisions. Therefore, the deputy prosecutor committed no misconduct.

Although the defendant argues, based on *State v. Thomas*, 142 Wn. App. 589, 174 P.3d 1264 (2008), *Burke*, 163 Wn.2d 204, 181 P.3d 1, and *State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997), that the

deputy prosecutor was “not using Eddy’s pre-arrest silence to somehow impeach his truthfulness but rather as evidence of Eddy’s guilt”, he does not articulate why this is the case. Appellant’s Opening Brief, p. 24. Although the defendant discusses *Thomas*, *Burke*, and *Keene*, for the proposition that the deputy prosecutor used the defendant’s pre-arrest silence as substantive rather than impeachment evidence, he does not indicate why those cases are apposite to this case. Indeed, they are all distinguishable and all indicate that the deputy prosecutor’s use of the defendant’s pre-arrest silence here was as constitutionally sound impeachment evidence.

In *Thomas*, when the defendant was confronted with a police officer on the telephone, he told her, “I don’t want to talk to you.” *Thomas*, 142 Wn. App. at 593. In closing argument, the deputy prosecutor there “emphasized that although he had been accused of a crime, Thomas would not return to tell his story.” *Id.* at 596. This Court noted that in determining whether the State used this “evidence of pre-arrest silence” as substantive or impeachment evidence, “[t]he critical distinction is whether the State use[d] the accused’s silence to its advantage, either as evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Thomas*, 142 Wn. App. at 595. It found that “the prosecutor’s argument plainly invited the jury to infer Thomas’s guilt from his refusal to talk with Officer Peterson and to return to the scene to tell the police his story.” *Id.* at 597.

In *Burke*, the defendant was charged with third-degree child rape. *Burke*, 163 Wn.2d at 206. Although he partially submitted to a police interview, he stopped that interview when his father intervened to ask the police if his son would be charged and then recommended that Burke not speak until counsel was consulted. *Id.* at 207. The Court in *Burke* found that the prosecutor “attempted to penalize Burke for terminating the interview and suggested Burke did so because he had done something wrong.” *Burke*, 163 Wn.2d at 222. It held that the State violated Burke’s right to silence by implying that “suspects who invoke their right to silence do so because they know they have done something wrong.” *Id.*

In *Keene*, the defendant was charged with child rape. *Keene*, 86 Wn. App. at 590. While investigating the case, the detective called the defendant several times and left messages indicating that if he didn’t hear from the defendant, he would turn the matter over to the prosecuting attorney’s office. *Id.* at 592. The detective testified that she did not hear from the defendant again. *Id.* In closing argument, the prosecutor noted the telephone messages and the fact that the defendant did not contact the detective and stated, “It’s your decision if those are the actions of a person who did not commit these acts.” *Id.* This Court found that this statement “was a comment on the defendant’s silence, suggesting that it was an admission of guilt,” and was, therefore, constitutional error. *Id.* at 594.

In the present case, unlike in *Thomas*, *Burke*, or *Keene*, the defendant testified on direct examination that he had planned on talking to the police. RP 02/25/2009 278-79, 281. He went on to say that when the police arrived, he ran, not to avoid them, but only to stop the dog from biting him. RP 02/25/2009 284. The defendant concluded by saying that after running, he “waited” for police to arrive “in some bushes.” RP 02/25/2009 287. Therefore, when the deputy prosecutor here addressed the defendant’s silence when the police arrived, he did so solely to show that the defendant was not truthful on direct examination. In other words, he offered this testimony as impeachment evidence. Unlike in *Thomas*, *Burke*, or *Keene*, at no point did the deputy prosecutor here use the defendant’s pre-arrest silence as evidence of his guilt or suggest that it was an admission of guilt. Indeed, in his closing argument, the deputy prosecutor listed such pre-arrest silence among the “questions” that should lead the jury to conclude that the defendant’s testimony was “not credible.” 02/25/2009 389-99. Therefore, the deputy prosecutor’s use of such pre-arrest silence evidence was solely for impeachment.

Because “no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State’s issuance of *Miranda* warnings,” *Burke*, 163 Wn.2d at 217, the deputy prosecutor here violated no constitutional provision, and the trial court should be affirmed.

2. ASSUMING ARGUENDO THAT THE DEPUTY PROSECUTOR'S ARGUMENTS AND/OR CROSS-EXAMINATION WERE IMPROPER, ANY CONSTITUTIONAL ERROR RESULTING THEREFROM WAS HARMLESS.

“An impermissible comment on the defendant’s silence is a constitutional error.” *State v. Thomas*, 142 Wn. App. 589, 597, 174 P.3d 1264, 1269 (2008). If such error occurs, “the State bears the burden of showing the error was harmless.” *Knapp*, 148 Wn. App. at 421. “A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Burke*, 163 Wn.2d at 222 (citing *Easter*, 130 Wn.2d at 242, 922 P.2d 1285).

In the present case, the evidence is so overwhelming that any reasonable jury would have found the defendant guilty, even in the absence of any testimony and argument concerning the defendant’s pre-arrest silence. The defendant was found, with his two friends, exiting a building which had been entered unlawfully just five minutes earlier. RP 02/19/2009 92; RP 02/19/2009 12. The alarm company reported hearing voices within the building, such as would be made by the defendant and his companions. RP 02/19/2009 12. The defendant was seen exiting that

building through an open door which had a window smashed out of it. RP 02/19/2009 93, 23. His friend was carrying a crowbar and a glass cutter in his backpack, which could have been used to shatter that window or commit additional crimes inside the building. *See* RP 02/25/2009 280-81. A garbage can was found lying on the ground near the smashed out window and could have been used to break it as well. RP 02/19/2009 21. When confronted by Tacoma Police Officer Haddow-Brunk, the defendant admitted that he knew that Haddow-Brunk was a police officer. RP 02/25/2009 325. He also admitted that he heard that officer “actually say, Police, stop.” RP 02/25/2009 282-83. Nevertheless, the defendant ran through the building, out the other side, across a field, over a fence, down an embankment, and into thick brush, before Officer Haddow-Brunk’s canine partner was able to locate him. RP 02/19/2009 92-100. In short, the defendant was walking out of a building that was being burglarized, in the company of a man who was carrying burglary tools, and although he was told to stop by the police, ran from them until he was tracked down by a police dog. Regardless of anything he did or did not say, running from the police after being found at the scene of a crime clearly evidences a consciousness of guilt which, when combined with the other evidence, would be more than sufficient for any reasonable jury to find him guilty.

While the defendant did testify, his testimony was so riddled with internal and logical inconsistencies as to be facially unbelievable. He stated that he and his friends decided to settle a dispute about a video

game's programming by running a real-world race, but then in the next sentence denied that this would actually settle the dispute. RP 02/25/2009 269-70. He said that he decided to do this while wearing jeans and sandals. RP 02/25/2009 289-90, 313-17. He claimed that they decided to go to a closed high school in the middle of summer, in the middle of the night to do so simply because it had a "pretty track." RP 02/25/2009 271-72. The defendant stated that he had to climb over a fence to get to the track, but claimed he "just figured that like it was okay." RP 02/25/2009 272. The defendant said that when, after all of that, they got to the track, they decided not to run the race because the track had some water on it. RP 02/25/2009 274. The defendant said this despite the fact that his co-defendant Smith had already testified that the men decided not to run the track because there were no lights on. RP 02/24/2009 194. The defendant then said that they noticed the broken glass on the weight room door and that, apparently as part of an impromptu investigation, his friend decided to completely break the glass out of the door and go into the school himself. RP 02/25/2009 275-77. He said that he and Smith then went into the school as well, to try to get a physical description of the "character that was inside the building". RP 02/25/2009 279. In fact the defendant claimed that he and Smith discussed what they were going to tell the police about what he said they found at the scene. RP 02/25/2009 278-79, 281. However, the defendant testified that he ran from the first police officer he met, right out of the school, over a fence, down an

embankment, and into thick brush. RP 02/25/2009 284-87. This is a version of events too inconsistent to be credible.

Therefore, the jury was left with the facts: 1) that the defendant was walking out of a building that was, according to the alarm company being burglarized at that time, 2) with a man who was carrying burglary tools, and 3) although he was told to stop by the police, he ran from them until he was tracked down by a police dog. Regardless of anything he did or did not say, when he ran from the police after being found at an active crime scene, he demonstrated a consciousness of guilt which, when combined with the other evidence, was more than sufficient for any reasonable jury to find him guilty. Therefore, any error which could have been committed was harmless and the trial court should be affirmed.

D. CONCLUSION.

The deputy prosecutor's arguments and cross-examination of the defendant concerning the defendant's pre-arrest silence were proper impeachment of the defendant because the defendant testified at trial, *inter alia*, that he intended on speaking to the police.

Even assuming *arguendo* that the deputy prosecutor's arguments and/or cross-examination were improper, any constitutional error resulting therefrom was harmless.

Therefore, the trial court should be affirmed.

DATED: June 8, 2010.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/8/10 Therese Kahn
Date Signature

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