

NO. 45351-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TAMALA SUMMERHILL,

Appellant.

STATE OF WASHINGTON
BY _____
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2014 FEB 24 AM 9:14

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Richard Brosey Judges

BRIEF OF APPELLANT

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RM 2/26/14

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A. ASSIGNMENTS OF ERROR

1. The state impermissibly commented on appellant's right to silence by repeatedly questioning the officer in a manner designed to elicit Summerhill's refusal to answer questions.
2. The state impermissibly commented on appellant's right to silence by implying during closing that appellant would have called 911 if she was innocent.
3. The state violated appellant's U.S. constitutional Fifth and Fourteenth Amendment right to silence by asking questions of the officer designed to infer guilt by silence.
4. The state violated appellant's Wash. Const. Art. 1 section 9 right to silence by asking questions of the officer designed to infer guilt by silence.
5. The state violated appellant's U.S. constitutional Fifth and Fourteenth Amendment right to silence by arguing during closing that only a guilty person would not call 911.
6. The state violated appellant's Wash. Const. Art. 1 section 9 right to silence by arguing during closing that only a guilty person would not call 911.
7. The state committed reversible error by arguing to the court in manner designed to infer guilt by silence.
8. Appellant assigns error to the trial courts findings of fact 8.
9. Appellant assigns error to finding of fact 9.

10. Appellant assigns error to finding of fact 10.
11. Appellant assigns error to finding of fact 11.
12. Appellant assigns error to finding of fact 13.
13. Appellant assigns error to finding of fact 14.
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16. Appellant assigns error to finding of fact 20.
17. Appellant assigns error to finding of fact 21.
18. Appellant assigns error to conclusion of law 2.
19. Appellant assigns error to conclusion of law 3.
20. Appellant assigns error to conclusion of law 4.
21. Appellant assigns error to conclusion of law 5.

Issues Pertaining to Assignments of Error

1. The Fifth Amendment and Wash. Art. 1 Section 9 prohibit comments on a defendant's right to remain silent. Did the state impermissibly comment on Summerhill's right to silence by repeatedly questioning the officer in a manner designed to elicit Summerhill's refusal to answer questions?
2. The Fifth Amendment and Wash. Art. 1 Section 9 prohibit comments on a defendant's right to remain silent. Did the state impermissibly comment on Summrehill's's right to

silence by implying during closing that she would have called 911 if she was innocent?

3. Did the state violate appellant's U.S. constitutional Fifth and Fourteenth Amendment right to silence by asking questions of the officer designed to infer guilt by silence?
4. Did the state violate appellant's Wash. Const. Art. 1 section 9 right to silence by asking questions of the officer designed to infer guilt by silence?
5. Did the state violate appellant's U.S. constitutional Fifth and Fourteenth Amendment right to silence by arguing during closing that only a guilty person would not call 911?
6. Did the state violate appellant's Wash. Const. Art. 1 section 9 right to silence by arguing during closing that only a guilty person would not call 911?
7. Did the trial court impermissibly rely on the officer's improper testimony in finding Summerhill guilty?
8. Did the trial court improperly rely on the prosecutor's improper closing remarks in finding Summerhill guilty?
9. Was there sufficient independent evidence without the offending testimony and remarks to determine beyond a reasonable doubt that the trial court did not rely on the improper testimony and remarks in finding guilt.

10 Was the trial court improperly influenced by the improper comment and testimony in finding Summerhill not credible?

B. STATEMENT OF THE CASE

a. Summary

Following a bench trial, Tamala Summerhill was convicted as charged on two counsels of assault of a child in the third degree and one count of assault in the fourth degree. CP 5-24. The charges arose from a dispute between Summerhill's son and Corey Lenneker at a Nike Outlet store in a shopping mall. RP 11, 24-25, 60-63. Both men believed that the other was rude and aggressive. RP 121-125, 134-136; 212-213, 219.

The testimony differs as to what occurred after the men left the Nike store. Id. Each cast blame on the other for beginning the physical fight. RP 132, 219. Summerhill's testimony indicated that Lenneker rushed her son and began the physical fight. RP 260. Summerhill testified that she was upset that Lenneker was assaulting her son and physically pulled Lenneker off of her son and used pepper spray to stop the fight. R261-263 A witness, Nathan Karl, testified that Summerhill sprayed Lenneker in a wide pattern after the

fight stopped, and the spray came into contact with the children near Leneker. RP 105-106.

b. Substantive Facts

Summerhill and her son Jessie went to the Nike Outlet to look for clothes because the store was having a sale. RP 208. The store was extremely crowded and Summerhill and Jessie stood in line for 30 minutes to purchase their selected items. RP 211. Corey Leneker, his son and a friend of his son's also went to the Nike store to make purchases. RP 120. Leneker and the boys stood in line behind Summerhill and her son for the entire 30 minute wait to check out. RP 121.

Leneker testified that Jessie was agitated and used the "f" word several times while waiting in line. RP 121. When Leneker's turn came to check out he did not proceed to the checker, so Jessie tapped his shoulder and said "Hey bro, you are up next" and Leneker turned and said "Yeah, I can see that" then said "watch your mouth". RP 212-213.

After both parties exited the store, Leneker testified that Jessie was swearing at him as he walked to his car and that Jessie just ran towards. RP 131-132. Leneker testified that Jessie put his hands up and so Leneker grabbed Jessie under the arms and

threw him to the ground. RP 134-136. Jessie testified that he was walking to his car and Lenneker turned and approached him, bashed him in the chest, wrestled him to the ground, ripped his shirt, grabbed his privates and smashed his face into the ground. RP 219-229.

Summerhill witnessed Lenneker rush at her son in the parking lot and tell Jessie t" You asked for it. You are going to get it now". RP 260. Summerhill and Jessie both testified that Summerhill tried to grab Lenneker off of Jessie after he was pushed to the ground, and followed by using pepper spray to stop the fight. RP 229, 361-263. Lenneker was not treated for exposure to pepper spray, but the boys were. RP33-34. 185. Lenneker received a band aid for a scrape on his knees. RP 14. Jessie was treated for cuts and scrapes on his head and face. RP 206.

Officer Lowrey interviewed Summerhill at the scene and testified as follows during direct examination and again during the state's rebuttal case.

c. Questioning Regarding Summerhill's
Right to Remain Silent

The following are officer Lowrey's responses to the prosecutor's questions about his interrogation of Summerhill.

Yes, and she stated that she had sprayed him because they were involved in a dispute to get him off of her son. I then asked if she had continued spraying him and asked why she would run all the way back following him back to his car and spray him as the independent witness stated? **She made no comments.**

Q She didn't respond?

A **She didn't respond in any way.**

Q Did you ask her how many times she had sprayed him?

A **She told me she couldn't remember.**

Q Did you ask her where she had sprayed him?

A. Again **she couldn't remember.** I did. Afterward I said you sprayed him there, did you spray him any place else? She said, "**I can't remember.**"

Q When you said "you sprayed him there," where were you talking about?

A The original dispute circle you have marked up there.

Q Did you ask her about the kids?

A I asked her if she had sprayed the kids.

Q What did she say?

A **She didn't remember. It almost was like she was blank at one point. She didn't remember anything that happened at that point.** She knew that there were kids.

Q So after speaking with all the individuals there, did you make a decision with regard to what you were going to do?

A I did.

Q What did you do?

A She was placed in custody for assault of a child times two.

RP 191-192 (Emphasis added). State's rebuttal case.

Yes, because when I started asking certain questions she suddenly forgot a lot, so there wasn't a lot to say

Q Suddenly forgot: That's speculation on your part; correct?

A No. **She was very adamant about certain parts, remembered it clearly, then, when we got to a certain couple of questions she couldn't remember** so, no, that would be your client's.

Q You used the term when you first testified, it was like she **blanked** out or blacked out?

A Yes, sir, I agree with that.

RP 294

During closing argument the prosecutor made the following remarks about Summerhills' silence.

Keeping in mind that Corey Leneker is the one who called 911 -- we heard the 911 tape -- we know why he approached their car, he was talking to 911 at the time. **Neither the defendant or her son called 911. Why? Her son apparently had been assaulted according to her, and she was fearful of Corey approaching her car, why wouldn't she call 911?** She knew she did something wrong, and they needed to be able to stay and explain it away as best they could. Unfortunately their stories make absolutely no sense.

RP 300 (emphasis added).

b. Relevant Findings and Conclusions On Bench Trial _____ to Which Summerhill Has Assigned Error.

8. Leneker could hear Jessie swearing at him in the parking lot.
9. Jessie turned to Leneker and Leneker did not provoke Jessie.
10. Jessie challenged Leneker to a fight.
11. Summerhill sprayed Leneker after she removed him from the fight.....
13. With no threat Summerhill approached Leneker and the children and sprayed them with pepper spray.
14. Summerhill sprayed Leneker and the children a second time.....
17. "The defendant and Jessie both testified at the bench trial and the court finds their testimony not credible."....
19. The defendant was not justified in using force to protect her son...
20. The defendant intentionally pepper-sprayed Leneker and the two children.
21. The defendant intentionally assaulted Leneker and the two children.

CONCLUSIONS OF LAW

2. Summerhill was not justified in using pepper-spray in defense of her son.
3. The state disproved self-defense.
4. Summerhill committed the assaults charged
5. Summerhill is guilty as charged.

This timely appeal follows. CP 26-27.

C. ARGUMENT

SUMMERHILL'S PRE-ARREST SILENCE WAS IMPERMISSIBLY USED AS SUBSTANTIVE EVIDENCE OF GUILT IN VIOLATION OF THE FIFTH AMENDMENT AND WASHINGTON CONSTITUTION ARTICLE 1 SECTION 9 RIGHT TO SILENCE.

The state repeatedly made direct comments on Ms. Summerhill's right to silence during direct and rebuttal examination of Officer Lowrey and during the prosecutor's closing remarks. Lowrey responded to the prosecutor's questions about his pre-arrest questioning of Summerhill by stating that Summerhill "made no comments", "She didn't respond in any way", "She told me she couldn't remember", "She said, "I can't remember", "She didn't remember. It almost was like she was blank at one point. She didn't remember anything that happened at that point. She knew that there were kids." RP 191-192.

"[W]hen I started asking certain questions she suddenly forgot a lot, so there wasn't a lot to say". "You used the term when you first testified, it was like she blanked out or blacked out? A Yes, sir, I agree with that. RP 294. During closing argument the prosecutor asked the jury why Ms. Summerhill did not call 911. RP 300.

These responses and remarks were intended to provide substantive evidence of guilt which violated Summerhill's' U.S. CONST. amend. V, XIV; Wash. Const. art. 1, § 9 right to remain silent. "Both 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 (2009); U.S. CONST. amend. V; Wash. Const. art. 1, § 9. “The right against self-incrimination is liberally construed.” *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). “The Fifth Amendment right to silence extends to situations prior to the arrest of the accused.” *Easter*, 130 Wn.2d at 243.

“[A] defendant’s pre-arrest silence, in answer to the inquiries of a police officer, may not be used by the State in its case in chief as substantive evidence of defendant’s guilt.” *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). When defendants take the stand, their pre-arrest silence may however be used to impeach their testimony, but their silence may not be used as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). “Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true.” *Burke*, 163 Wn.2d at 219. “A comment on an accused’s silence occurs when the State uses the evidence to suggest guilt.” *State v. Keene*, 86 Wn.App. 589, 594, 938 P.2d 839

(1997).

It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. *Easter*, 130 Wn.2d at 241. Similarly, it is constitutional error for the State to purposefully elicit testimony as to the defendant's silence. *Easter*, 130 Wn.2d at 236; *State v. Curtis*, 110 Wn.App. 6,13, 37 P.3d 1274 (2002). It is constitutional error also for the State to inject the defendant's silence into its closing argument. *Easter*, 130 Wn.2d at 236. More generally, it is also constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt. *Lewis*, 130 Wn.2d at 705.

It is not a constitutional error for a state witness to make an indirect reference to the defendant's silence absent further comment from either the witness or the State. *Lewis*, 130 Wn.2d at 706–707. Such a reference is reversible error when the defendant can show resulting prejudice. *State v. Sweet*, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999); *Lewis*, 130 Wn.2d at 706–07.

The Supreme Court held in *Easter*, that *any* direct police testimony as to the defendant's refusal to answer questions is a violation of the defendant's right to silence. *Easter*, 130 Wn.2d at 241-242.

a. Standard of Review

Here the comments on Summerhill's silence implicated manifest constitutional rights, which may be raised for the first time on appeal. *State v. Romero*, 113 Wn. App.779, 792, 54 P.3d 1255 (2002). The standard of review requires a constitutional harmless error analysis where this Court must decide if the error was harmless error beyond a reasonable doubt. *Burke*, 163 Wn.2d at 222; *Easter*, 130 Wn.2d at 241-242.¹

¹ Indirect comment cases require answers to three to decide whether the comment rises to constitutional proportions. First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? *State v. Curtis*, 110 Wn.App. 6, 13–14, 37 P.3d 1274 (2002). Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? *Douglas*, 578 F.2d at 267. Third, was the indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant? *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). An affirmative answer to any of these three questions means the indirect comment is an error of constitutional proportions meriting review using the constitutional harmless error standard, whether or not objection is first made at the trial court. See *Easter*, 130 Wn.2d at 241–42. *Romero*, 113 Wn.App. at 790-791.

b. Cases in Support of Violation of Constitutional Rights

Washington case law supports Summerhill's argument that the state impermissibly commented on her right to silence. For example, in *Burke*, the defendant was charged with rape of a child in the third degree. *Burke*, 163 Wn.2d at 206 1. During a pre-arrest interview, the defendant stated that he had consensual sexual intercourse with a high school girl, but he did not know her age. *Burke*, 163 Wn.2d at 206. At that point, the defendant's father advised his son not to talk to the police until counsel had been consulted. *Burke*, 163 Wn.2d at 208. At trial, the defendant argued that he reasonably believed the alleged victim to be 16 years old. *Burke*, 163 Wn.2d at 208.

During its opening statement, case in chief, cross of the defendant, and closing argument, the State emphasized that the defendant's father terminated the interview and that the defendant failed to report the victim's age to the police. *Burke*, 163 Wn.2d at 209. The Court held that the State impermissibly commented on the defendant's right to silence by inviting the jury to infer guilt from his

termination of the interview. *Burke*, 163 Wn.2d 222. Reversal was required. *Burke*, 163 Wn.2d at 222–23.

Here, the prosecutor used Lowrey's testimony to indicate her unwillingness to talk to the police to infer guilt. This was the same tactic held impermissible in *Burke*.

In *Easter*, the prosecutor elicited testimony from a police officer that the defendant refused to answer questions and looked away without speaking. *Easter*, 130 Wn.2d at 241. The prosecutor, referring to this testimony, repeatedly characterized the defendant as a "smart drunk" during closing arguments. *Easter*, 130 Wn.2d at 242. The Court concluded that the prosecutor impermissibly commented on the defendant's right to silence by eliciting the police officer's testimony and inviting the jury to infer guilt from the defendant's silence. *Easter*, 130 Wn.2d at 242–43. The error was prejudicial, necessitating a new trial. *Easter*, 130 Wn.2d at 243.

Here the prosecutor did precisely what the Supreme Court in *Easter* prohibited by eliciting Lowrey's testimony and inviting the court to infer guilt from Summerhill's failure to remember, comment or recall; and then making additional comments during closing argument designed to imply guilt based on Summerhill's decision not to call 911.

In *State v. Thomas*, 142 Wn.App. 589, 594, 174 P.3d 1264 (2008), the defendant argued that the prosecutor violated his right to remain silent by eliciting testimony from a police officer that the defendant refused to talk to her and then emphasizing during closing argument that the defendant refused to talk to the police even though he had been accused of a crime.

Officer Peterson testified that after she identified herself on the cell phone, Thomas responded, "What do you want," and "I don't want to talk to you." RP at 179–80. She testified that "[t]hat was pretty much the conversation." RP at 180.

Thomas, 142 Wn.App. at 593, 596. This Court held that the police officer's testimony was no more than a passing reference to the defendant's silence, but that the prosecutor improperly used it to argue that if the defendant were not guilty, he would have talked to the police. *Thomas*, 142 Wn.App. at 596. The Court also held that the prosecutor's argument went beyond impeaching the defendant's story because it plainly invited the jury to infer guilt from the defendant's refusal to talk to police. *Thomas*, 142 Wn.App. at 597. The error was not harmless. *Thomas*, 142 Wn.App. at 597–98.

Here, unlike in *Thomas*, Summerhill was being questioned by Lowrey and Lowrey did not merely describe a single statement

in response to the specific question whether Thomas wanted to talk to police on the phone. Rather, Lowrey was interrogating Summerhill at the scene and at least nine times stated that Summerhill did not want to talk by describing various types of evasive behavior. This conduct cannot be described as a passing reference to Summerhill's silence because of the number of references, the fact that Summerhill was being questioned by the police about the incident, and because the prosecutor used Summerhill's silence to argue guilt.

In *Keene*, a police detective testified that she called the defendant several times to discuss child abuse allegations. *Keene*, 86 Wn.App. at 591. The detective scheduled an appointment, but the defendant called later to say that he missed it. *Keene*, 86 Wn.App. at 592. The detective testified that she exchanged phone messages with the defendant, informing him "that if I hadn't heard from him by the 22nd I would need to turn it over to the prosecuting attorney's office." *Keene*, 86 Wn.App. at 592. The detective then testified that she did not hear from the defendant again. *Keene*, 86 Wn.App. at 592.

In closing the prosecutor argued, "It's your decision if those are the actions of a person who did not commit these acts." *Keene*,

86 Wn.App. at 592. The Court held that the detective's testimony and the prosecutor's closing arguments constituted an impermissible comment on the defendant's right to remain silent because the State used this evidence to suggest guilt. *Keene*, 86 Wn.App. at 594. Because the error was not harmless, reversal was required. *Keene*, 86 Wn.App. at 595.

The detective threatened Keene with prosecution if he failed to come in for an interview, effectively creating the dynamic for the jury to infer that only a guilty person would not come in for the interview; which the prosecutor then used to ask the jury to infer guilt on this basis. *Keene*, 86 Wn.App. at 592, 594. While Lowrey did not threaten Summerhill, the entire purpose of the prosecutor repeatedly asking about Summerhill's failure to answer questions about the incident was designed to imply that only a guilty person would not respond. While the prosecutor did not use this testimony to argue an inference of guilt based on Summerhill's silence, he chose instead to use the same tactic as the prosecutor in *Thomas*, by arguing that only a guilty person would not call 911.

In each of these cases, the Courts focused their findings of constitutional error on the state's use of silence as evidence of guilt. There is no meaningful distinction between using a defendant's

decision not to speak to police, failing to show for a meeting, or not looking at the officer, and Summerhill's not remembering, not commenting, forgetting, and blanking. All of these statements were designed to comment on Summerhill's silence.

Any one of these Courts confronted with the facts in this case would necessarily find that the repeat reference to not responding, not remembering, not commenting and blanking out were comments designed to convince the fact finder that Summerhill's silence was evidence of her guilt .191-194. The prosecutor's remarks about Sumerhill not calling 911 had no other purpose than to invite the fact finder to find guilt based on Summerhill's silence. RP 300.

The state may attempt to argue that this case is like *Lewis* where a detective testified "I told him—my only other conversation was that if he was innocent he should just come in and talk to me about it." *Lewis*, 130 Wn.2d at 703.

The only thing the detective told the jury is that the defendant told him that "those women were just at my apartment and nothing happened, and they were both just cokeheads," and that "[Lewis] was trying to help them is what he said."

Lewis, 130 Wn.2d at 706.. In *Lewis* the officer did not discuss

Lewis's statements or responses other than to indicate that Lewis said he was innocent. The Court held that the statement was not a comment on Lewis' silence intended to infer guilt because the detective did not say that the defendant refused to talk to him, did not reveal the fact that defendant failed to keep appointments, and did not tell the jury that the defendant's silence was proof of guilt. Furthermore, the prosecutor did not argue that the defendant refused to talk with the police or suggest that silence implies guilt. *Lewis*, 130 Wn.2d at 706.

Here, in contrast, the State elicited repeated testimony that Summerhill refused to answer questions during the interrogation. Unlike in *Lewis*, where the Court characterized the detective's statement as "brief and ambiguous" Lowery's testimony was relentless. It cannot be considered innocuous when there was no identifiable purpose other than to infer guilt. *Lewis*, 130 Wn.2d at 707. Further distinguishing *Lewis*, in this case the prosecutor's reference to failing to call 911 was a direct invitation to find guilt based on silence. *Lewis*, 130 Wn.2d at 700.

c. This is Not an Indirect Comment Case

"When a defendant does not remain silent and instead talks to police, the state may comment on what he does *not* say." *State*

v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006 (2001) (Emphasis in original.) In *Clark*, the defendant spoke with police on two occasions prior to his arrest and gave **conflicting** accounts of why he had failed to meet with the officers at the crime scene as he had promised. The Supreme Court held that that the defendant's statements were not "a matter of pre-arrest silence because the state's comments were aimed at the false information Clark gave the police. *Clark*, 143 Wn.2d at 756.

The Court in *Clark* cited to *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978) and *State v. Allen*, 57 Wn.App. 134, 143, 787 P.2d 566, 788 P.2d 1084 (2009) to clarify that the state may comment on a defendant's "[f]alse information given to the police [because it is] considered admissible as evidence relevant to defendant's consciousness of guilt. *Clark*, 143 Wn.2d at 756. The Court's decision was based on the fact that the officer did not comment on Clark's exercise of his right to remain silent; rather, the State was merely highlighted conflicting versions of what Clark told police. *Clark*, 143 Wn. 2d at 765.

Similarly, in *State v. Hager*, 171 Wn.2d 151, 248 P.3d 512 (2011), the defendant like Clark chose to speak with the police and denied the rape and attempted to cast blame on someone else.

Hager, 171 Wn.2d at 157-158. The officer on the witness stand made a single characterization of Hager's responses as "evasive" referring to the statements Hager made. Citing to *Clark*, the Supreme Court held that the comment was permissible because it was not a comment on Hager's silence, but seemingly a comment on his attempt to shift blame away from himself. *Hager*, 171 Wn.2d at 158.

Here by contrast, although Summerhill decided to speak to Lowrey, she did not provide conflicting statements, she did not attempt to cast blame elsewhere, and she did not fail to meet with Lowrey as promised. If Summerhill had provided conflicting statements and if Lowrey simply mentioned that Summerhill was "evasive", perhaps this Court could find that like *Clark*, and *Hager*, the statement was not a comment on her right to silence. But Lowrey did not merely testify that she was "evasive". He stated at least nine times that she did not answer his questions. RP 191-194. These nine comments on Summerhill's silence were not for impeachment purposes but rather were designed to suggest that Summerhill's silence was an admission of guilt. *Lewis*, 130 Wn.2d at 707.

The prosecutor's closing remarks also distinguish this case

from *Lewis*, *Clark* and *Hager*. In these three cases, none of the prosecutors used the offending testimony during closing argument to infer guilt. *Lewis*, 130 Wn.2d at 704; *Clark*, 143 Wn.2d at 765; *Hager*, 171 Wn.2d at 158.

The sole purpose of Lowrey's comments was to infer substantive evidence of guilt, prohibited under the Federal and State constitutions. *Easter*, 130 Wn.2d at 238-239 This was irrevocably prejudicial because a "bell once rung cannot be unrung." *Easter*, 130 Wn.2d at 238-39.

d. Not Harmless Error

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; *Easter*, 130 Wn.2d at 242. When the testimony and argument constitutes an impermissible comment on the right to remain silent, the state bears the burden of showing that the error was harmless. *Keene*, 86 Wn.App. at 594. "Where the error is not harmless, a defendant is entitled to a new trial." *Keene*, 86 W..App. at 594, 938 P.2d 839.

The evidence in Summerhill's case was not so overwhelming

that it necessarily led to a finding of guilt. Summerhill raised self-defense and presented testimony that Lenneker was the aggressor and out of control. RP 219-230, 260-261. Summerhill presented testimony that she was trying to end the fight and had no intention of committing an assault. RP229-231, 261-262. While the state presented evidence that Summerhill committed the assaults after the fight ended, the untainted evidence was not overwhelming, but rather conflicting. RP 101, 219-230-, 261-262.

The conflicting evidence was over-shadowed by at least nine comments on Summerhill's silence, and the prosecutor's closing remarks asking the fact finder to infer guilt based on silence. RP 191-194, 300. Given the repeated hamming comments on Summerhill's silence and the ambiguity of the evidence, this Court cannot find that the impact was harmless beyond a reasonable doubt. *Easter*, 130 Wn.2d at 242. The remedy for a violation of the right to silence is reversal and remand for a new trial.

e. A Bench Trial Did Not Safeguard Against Unfair Conviction.

Generally, courts assume that a trial court judge will recognize and disregard any improper material presented in reaching its decision. *State v. Gower*, 172 Wn.App. 31, 38-39, 288

P.3d 665 (2012), *review granted* 177 Wn.2d 1007, 300 P.3d 416 (2013);² *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978). “[A] trial court commits reversible error only when it considers inadmissible evidence and the defendant can show that the verdict is not supported by sufficient admissible evidence, **or that the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made.**” *Gower*, 172 Wn.2d at 39 (emphasis added).

In *Gower*, the defendant did not assign error the trial courts findings of fact and conclusions of law or to the evidence in support of those findings, thus rendering them verities on appeal. *Gower*, 172 Wn.2d at 36 n. 6, 37. Without the opportunity to review the evidence in *Gower*, this Court ruled in favor of upholding the convictions in reliance on its determination that the court was the trier of fact and “[n]one of these findings of fact reference or rely in any way on the inadmissible evidence.” *Gower*, 172 Wn.2d at 39.

The Supreme Court accepted review in *Gower* on the issue of : “[w]hether the trial court in a bench trial on incest and indecent

² The Supreme Court accepted review of this case on the following issue: Whether the trial court in a bench trial on incest and indecent liberties committed reversible error in improperly admitting evidence of the defendant’s prior molestation convictions. No. 88207-0, *State* (respondent) *v. Gower* (petitioner). (9/12/13) 288 P.3d 665 (2012).

liberties committed reversible error in improperly admitting evidence of the defendant's prior molestation convictions." No. 88207-0, *State* (respondent) v. *Gower* (petitioner). (9/12/13) 288 P.3d 665 (2012).

Here as previously stated, the evidence was not overwhelming but the trial court in its finding of fact 17, specifically found Summerhill's testimony to be not credible. Because of the extensive nature of the impermissible testimony from Lowrey and the prosecutor's comments, it appears that the trial could easily have impermissibly relied on both Lowrey's repeated testimony as well as the prosecutor improper remarks. Because this Court cannot determine that the trial court did not rely on the improper testimony and remarks, it cannot rely on a presumption that the trial court made its findings without any reliance on the impermissible testimony and comments. This must therefore analyze this case under the facts presented.

D. CONCLUSION

Tamala Summerhill respectfully requests this Court reverse her convictions and remand for a new trial for violation of her federal and state due process right to silence.

DATED this 7th day of February 2014

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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I, Lise Ellner, a person over the age of 18 years of age, served Lewis County Prosecutor Appeals appeals@lewiscountywa.gov and Tamala Summerhill 402 North G street #22 Tacoma, WA 98403 a true copy of the document to which this certificate is affixed, On February 7, 2014. Service was electronically and via U.S. Postal Service..



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