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Court of Appeals
Division III
State of Washington NO. 32872-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

MARK CAVAZOS, SR.,

Appellant.

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

The Honorable Kathleen M. O'Connor, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	4
C. <u>ARGUMENTS</u>	17
1. ALLOWING THE PROSECUTION TO ELICIT TESTIMONY ABOUT CAVAZOS'S SILENCE IMPROPERLY INVITED THE JURY TO INFER GUILT FROM THE EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.	17
a. <u>The Fifth Amendment prohibits the prosecution from commenting on an individual's pre or post-arrest silence.</u>	20
b. <u>The State purposefully elicited testimony from its police witnesses to emphasize Cavazo's pre and post-arrest silence.</u>	22
e. <u>The error was prejudicial.</u>	29
2. COUNSEL WAS INEFFECTIVE IN FAILING TO ASSERT CAVAZOS'S FIFTH AMENDMENT RIGHT TO SILENCE.....	31
D. <u>CONCLUSION</u>	33

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Burke</u> 163 Wn.2d 204, 181 P.3d 1 (2008).....	17, 20, 21, 22, 28, 29, 31
<u>State v. Crane</u> 116 Wn.2d 315, 804 P.2d 10 (1991).....	22
<u>State v. Curtis</u> 110 Wn. App. 6, 37 P.3d 1274 (2002).....	19, 23, 24, 28, 29
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1285 (1996).....	17, 18, 20, 21, 23, 29, 31
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	32
<u>State v. Fricks</u> 91 Wn.2d 391, 588 P.2d 1328 (1979);.....	18
<u>State v. Gauthier</u> 174 Wn. App. 257, 298 P.3d 126 (2013).....	19, 21, 28
<u>State v. Keene</u> 86 Wn. App. 589, 938 P.2d 839 (1997).....	19
<u>State v. Knapp</u> 148 Wn. App. 414, 199 P.3d 505 (2009).....	29
<u>State v. Lewis</u> 130 Wn.2d 700, 927 P.2d 235 (1996).....	18, 22
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007).....	31
<u>State v. Perrett</u> 86 Wn. App. 312, 936 P.2d 426 (1997).....	18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Romero</u> 113 Wn. App. 779, 54 P.3d 1255 (2002).....	23, 24, 25, 29
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003).....	32
<u>State v. Terry</u> 181 Wn. App. 880, 328 P.3d 932 (2014).....	18
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	31, 32
 <u>FEDERAL CASES</u>	
<u>Douglas v. Cupp</u> 578 F.2d 266 (9th Cir. 1978),	24
<u>Doyle v. Ohio</u> 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976).....	18
<u>Griffin v. California</u> 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).....	21
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	31
<u>United States v. Hale</u> 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975).....	20, 29
<u>United States v. Prescott</u> 581 F.2d 1343 (9th Cir. 1978)	21
 <u>OTHER JURISDICTIONS</u>	
<u>People v. De George</u> 73 N.Y.2d 614, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989).....	21

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RAP 2.5.....	19
U.S. Const. amend. V	1, 17, 19, 20, 31, 33
U.S. CONST. amend. VI.....	31
WASH. CONST. art. I, § 9.....	1, 17
WASH. CONST. art. I, § 22.....	31

A. ASSIGNMENTS OF ERROR

1. The State violated appellant's constitutional right to due process and right to remain silent by purposefully eliciting testimony from its police witnesses that appellant refused to talk with them after his arrest.

2. The trial court erred in concluding appellant had opened the door to testimony about his pre and post-arrest silence.

3. Appellant was denied his constitutional right to the effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. The Fifth Amendment and article I, section 9 of the Washington Constitution guarantee the right to remain silent. The State is prohibited from commenting on the exercise of this right. Did the prosecution impermissibly penalize appellant for exercising his right to silence by eliciting testimony from police witnesses that appellant would not talk to police after his arrest?

2. Did the trial court err in concluding the defense cross examination of an investigating detective about what information he had available to help identify things of evidentiary value at the scene opened the door to admission of evidence about his pre and post-arrest silence, when the defense inquiry never implicated the appellant as a potential source for that type of information, and instead focused on whether the

lack of information prevented the investigators for collecting evidence that would help confirm or disprove a particular scenario leading to commission of the offense?

3. Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington State Constitution. Was appellant denied this right when counsel failed to object to the prosecution introducing evidence constituting an improper comment on appellant's exercise of his right to remain silent?

B. STATEMENT OF THE CASE

1. Procedural Facts

On January 16, 2013, the Spokane County Prosecutor charged appellant Mark Cavazos, Sr. (Cavazos), with second degree murder. The prosecutor alleged Cavazos caused the death of his adult son, James Cavazos (James), either intentionally or by committing a second degree assault that resulted in James' death. CP 1. An amended information was filed November 2013, which set out two distinct counts; intentional second degree murder (Count I) and second degree felony murder predicated on assault (Count II). CP 127-28.

A CrR 3.5 hearing was held September 10, 2013, before the Honorable Kathleen M. O'Connor, to determine the admissibility of

Cavazos' statements to law enforcement. RP 14-93.¹ On October 10, 2013, the court entered written findings of fact and conclusions of law. CP 129-32. It concluded Cavazos' statement to the 911 operator and to responding officers prior to being taken into custody were non-custodial voluntary statements and were admissible in the prosecution's case-in-chief. CP 131 (Conclusions of Law 1 & 2). The court also concluded, however, that Cavazos' custodial statements to law enforcement were inadmissible because officers failed to timely advise him of his Miranda rights. CP 131-32 (Conclusions of Law 3 & 4).

A jury trial was held April 14-24, 2014. The jury deadlocked, however, and a mistrial was declared. CP 210; RP 427-1202, 2239-2473.

Thereafter the prosecution filed a second amended information, this time charging second degree felony murder predicated on assault (Count I) and first degree manslaughter (Count II). CP 211-12; RP 2479-80. A second jury trial was held, again before Judge O'Connor, August 11-20, 2014. RP 1247-2144. This jury found Cavazos guilty on both counts, and that he was armed with a firearm during their commission. CP 312-13, 315-16; RP 2141-44.

¹ There are sixteen consecutively paginated volumes of verbatim report of proceedings referred to herein as "RP."

Sentencing on the murder conviction was held September 24, 2014. RP 2169-2230. The prosecution sought a mid-standard-range sentence of 230 months. RP 2187. Judge O'Connor, however, granted Cavazos's request for a mitigated exceptional sentence, imposing 24 months for the offense, plus an additional 60-month firearm enhancement, for total sentence of 84 months. CP 345-58; RP 2219. Findings of fact and conclusions of law in support of the mitigated exceptional sentence were filed November 5, 2014. CP 379-82. Both Cavazos and the prosecution appeal. CP 361-76, **383-84** (State's Notice of Cross-Appeal).²

2. Substantive Facts³

In January 2013, then 52-year old appellant Mark Cavazos, Sr. lived with his girlfriend Shelley Sumner in a rural secluded home west of the city of Spokane. RP 1854, 1873, 1881; Exs. 1 & 2. Sumner managed the records department for the VA medical center. RP 1854. Cavazos, however, had not worked since 2011 when he became completely disabled from injuries sustained working in saw mills. RP 1874-76.

Cavazos has "multiple fusions" in his back that have caused nerve damage and pronounced atrophy of his lower legs, with the right leg being

² Counsel anticipates the superior court clerk to assign this two-page document the index numbers in **bold**.

³ Unless otherwise noted, the facts and associated citations are from the second trial.

the weakest. RP 1874, 1877. Cavazos has a variety of assistive devices to help him ambulate, including back braces, knee braces, elbow braces, corset-like braces, and various canes. RP 1877. Consequently, Cavazos' balance is compromised and he is limited as to what types of physical activities he can engage in. RP 1878.

Also living with Cavazos and Sumner were Cavazos' two teenage granddaughters, for whom they became the guardians of in 2012. RP 1396. The granddaughters are the product of a relationship between Cavazos' son, Mark Cavazos, Jr. (Junior), and Misty Beaumont. RP 1394.

In December 2012, Beaumont was in Spokane to visit her daughters and finalize establishment of the guardianship with Cavazos. RP 1396. While she was there a secret romantic relationship blossomed between her and Junior's brother, James. RP 1397.

On Friday, January 11, 2013, Sumner left for the weekend to attend a dog show in Seattle. RP 1866. Although no testimony at the second trial states the whereabouts of Cavazos' granddaughters that weekend, it is apparent they were not at home, and Sumner testified during the first trial that they were spending the weekend with friends. RP 984; see RP 1401 (Beaumont states during the second trial that her daughters were not at Cavazos' when she went there the evening of January 12, 2013).

On Saturday morning, January 12, 2013, James, Beaumont and a friend of James', Kyle Dietterle, went to Cavazos's place to look at a car Cavazos and Sumner were selling. RP 1397-98. According to Dietterle, Cavazos was surprised when Beaumont showed up with them, and was not particularly happy to learn Beaumont was now in a relationship with James. RP 1345-46. Dietterle recalled that after looking at the car and deciding to put off the sale until Sumner returned, they shared a meal of spaghetti, smoked some marijuana, drank some beers and talked for an hour or two before leaving. RP 1346. Dietterle also recalled Cavazos put together a care package for James before he left, which included clothes, some recyclables, a shelf and some liquor. RP 1347.

According to Beaumont, Cavazos was "shocked" to see her with James. RP 1398. She recalled a fairly light-hearted encounter, however, for the two hours they were there, and did not get the impression Cavazos was upset by her presence. RP 1398-99. Like Dietterle, Beaumont recalled they all smoked marijuana together, but denied any alcohol was consumed. And like Dietterle, Beaumont recalled Cavazos giving James recycle items and some cash before they left. Beaumont also recalled Cavazos inviting them all back for dinner that evening. RP 1399-1400.

Dietterle did not take Cavazos up on his dinner offer, but James and Beaumont did. RP 1400. According to Beaumont, Cavazos picked

them up at Dietterle's home at about 10 p.m. and drove them back to his place, stopping at Wal-Mart to purchase beer on the way. RP 1401. Beaumont and James planned to spend the night. RP 1402.

Once they arrived at Cavazos' place, they drank, played a dice game and smoked marijuana. RP 1402. Beaumont recalled everyone was having fun, at least until Cavazos started reminiscing about James' past life, bringing up things she was pretty sure James was unwilling to discuss and was making him agitated. RP 1403-04.

When the dice game ended, they all got into Cavazos' hot tub. RP 1404. Beaumont recalled Cavazos continuing to bring up James' past while in the hot tub, despite her and James' request that he drop it. RP 1405. According to Beaumont, she told Cavazos' that he "was killing my buzz" so she was leaving them in the tub to go sledding on a nearby hill. RP 1406. This prompted them all to get out. RP 1429.

Beaumont recalled that just before she left to go sledding, the three of them had a "group hug." During the hug Cavazos was told to "go ahead and get this last whatever it was out," and then Beaumont left to go sledding. RP 1406-07.

Once up on the sledding hill Beaumont heard Cavazos and James arguing and screaming at each other, so she decided to go back down to see what was happening. When she approached the house she saw James

outside under a carport "completely covered in blood." RP 1407. James allegedly said to her, "This is what happens when you leave me alone - - this is what happened when you left me alone." RP 1407.

Beaumont said she led James back inside to clean the blood off, where they encountered Cavazos in the dining/living room area. RP 1407-08. She could tell Cavazos was upset, and as they entered and James went to the kitchen sink to wash off, she saw Cavazos go into his bedroom and come out with a small handgun and point it at James as they yelled and screamed back and forth at each other. RP 1409-10. She claims that when they ignored her pleas to stop, she grabbed her bag and fled outside, and a few moments later heard a gunshot, followed by Cavazos saying, "Oh, I shot him." RP 1411. Beaumont ran to the nearest neighbor in search of help. RP 1411-12.

Cavazos had a similar but slightly difference recollection of events. Generally speaking, Cavazos' recollection was the same as Beaumont up until they began playing dice. According to Cavazos, however, it became obvious to him that James was on some type of drug that evening that was preventing him from thinking straight, as shown by his inability to play a relatively simple game of dice. RP 1902. Autopsy results later confirmed Cavazos's suspicion, when they revealed James had methamphetamine in him that evening. RP 1619.

Cavazos agreed with Beaumont that he was giving James a hard time about his past while they sat in the hot tub, and that James did not want to talk about it. RP 1904-05. But he also recalled telling James that he was glad he was still alive, which was what prompted Beaumont to respond, "It's getting mushy in here, I'm gonna [sic] get up and go out. I'm gonna [sic] go sledding." RP 1905-06. At that point everyone got out of the hot tub and went inside to change clothes. RP 1907-08.

After changing into shorts, a t-shirt, a robe and some slippers, Cavazos started "shutting down the house" so he could go to bed, which included closing windows, turning off lights and putting the dogs in their cages. RP 1908, 1954. He briefly saw Beaumont in her sledding outfit, and then she must have gone outside. Id. He also encountered James in the pantry, apparently looking for something to eat. RP 1909. In an effort to close out the evening on a positive note, Cavazos told James he was "happy he was alive" and approached him to give him a hug before going to bed. RP 1910.

As Cavazos went in for the hug, however, James threw a punch that connected with less than full force on Cavazos' chin, but enough to knock his glasses off. RP 1910, 1915. To prevent more punches Cavazos drew James toward him and held him close. RP 1910. James' attempt to throw three more punches failed, so instead he started slamming the two

of them around the kitchen and pantry trying to break Cavazos' grip and knocking things off shelves in the process. RP 1912-13. Cavazos recalled a jar of spaghetti sauce being broken during the struggle that covered them in glass shards and spaghetti sauce. RP 1913. Cavazos recalled yelling out, "James, what's wrong with you? It's me. What's wrong? James." RP 1916.

Eventually James had forced them out of the kitchen/pantry area and then grabbed Cavazos around the waist and made a "spin move" that flung Cavazos into the air. RP 1917. The next thing Cavazos remembers is coming to and seeing James on the front porch talking to someone, presumably Beaumont. RP 1917-19. As Cavazos got up off the floor he could see James was cupping blood in his hands and saying he was covered in blood. RP 1919.

Although Cavazos had never been in a physical altercation with James in the past, he had taken very seriously a past threat by James to slit his throat, and was well aware of James' violent tendencies, reflected by his history of committing multiple acts of domestic violence over the years, once injuring his brother so badly a metal plate had to be put in Junior's head. RP 1883-88. Consequently, Cavazos feared what James might do if he came back in the house, so he went to his bedroom to get some protection. RP 1922. Cavazos first grabbed his shotgun, but

decided it was too dangerous, so he hid it under his bed and then got his revolver off the side table next to the bed. RP 1922-24; Ex. 92. Cavazos' plan was to lock James out of the house. RP 1926. But when he came out of his room, James was back inside standing at the kitchen sink. Id.

Cavazos recalled being "muddled" and scared and physically off balance as he came out of his bedroom with the revolver yelling at James to get out. Id. Cavazos, having lost his glasses in the prior struggle, could not tell what James was doing. RP 1965. Cavazos also recalled pulling the revolver from its case and cocking it as he made his way out of the bedroom, then showing it to James and saying, "Do you see this?" RP 1927. It was at that point, Cavazos testified, that the gun "jumped" in his hand and went off, and then Cavazos heard his son's body hit the floor. RP 1927, 1932. Cavazos immediately set the revolver down on the pony wall that separates the kitchen from the entry and living room, and went to see what happened to James. RP 1932. James was dead. Id.

An autopsy showed a bullet penetrated just to the right of the centerline of James' nose with a slight downward and left to right trajectory so that it lodged at the base of the skull. RP 1610, 1613-14, 1626-27; Exs. 46 & 51. It was calculated that the shot was fired from within ten inches of James' face. RP 1579.

After discovering he had shot his son, Cavazos cradled him and cried before finally calling Sumner. RP 1933. Sumner recalled Cavazos calling at about 4 am. He was almost undecipherable he was crying so hard. When she asked him what was wrong, he just kept saying over and over, "James was crazy. I was so scared. James was crazy. I was so scared." RP 1868. He eventually told her James was dead. Id. When she asked if he had called 911 yet, Cavazos replied, "Yes. No. I don't know." She told him to call 911, and he did. RP 1869, 1933; Ex. 290.

After hearing the shot, Beaumont made her way to the nearby home of Judy Alexander, who allowed her to call 911. RP 1412. Alexander in turn, contacted another neighbor, George Compton, to alert him about the events Beaumont was reporting. RP 1449.

Compton decided to go to Cavazos' home to see what was happening. RP 1450. When he arrived he found James's body on the floor and Cavazos very distraught and on the phone with a 911 operator. RP 1451. Compton took over the call from Cavazos and told him to get dressed. RP 1453. Cavazos told Compton James' death was an accident, and pointed out the revolver he had left on the pony wall. RP 1453-54.

Several law enforcement officers eventually arrived at Cavazos' place. Two of the first on the scene were Spokane County Sheriff Deputies Beau Vucinich and Ian Hays. RP 1301. No one was outside as

they approached the house, but Compton and Cavazos came out when the deputies announced their presence. RP 1301-02. As Cavazos came out he told the deputies, "I will cooperate. I just shot my son." RP 1302.

Vucinich noted Cavazos was "very upset, hysterically crying, to the point where he was getting sick, eventually, and vomiting." RP 1304. There was also a smell of alcohol on Cavazos, and he kept repeating that he had killed his son. Cavazos did not appear to Vucinich to need any medical treatment at the time, nor did Cavazos request any. RP 1305.

Vucinich replied, "No" when asked by the prosecutor whether Cavazos made "any statements as to whether or not it had been an accident that occurred that night?" RP 1305. There was no defense objection.

Spokane County Sheriff's Detective Lyle Johnston was called out to the scene to help execute a search warrant. RP 1466. At trial, Johnston testified on direct examination regarding a number of photographs taken to document the scene, several of which had evidence placards placed by investigators prior to the photographs being taken. RP 1469-92. At the conclusion of direct examination, the prosecutor noted the presence of the placards in the photographs and then asked Johnston "how do you decide what to mark with a placard and what not to mark with a placard?" RP 1493. Johnston explained,

Items that look as though they are going to be evidentiary in value, they're gonna [sic] have some probative value to determining what happened, what took place here, are gonna [sic] be collected. And those items are placard -- they have placards sitting next to them so that we can inventory them, and basically, during the photographs, have a recollection of what it is that we collected. As we remove items of evidence, we often discover additional items of evidence underneath things, and we have to make those decisions based on the information provided to us at the time that we respond, either by witnesses or whoever may point us in any particular direction.

RP 1493.

On cross-examination, Cavazos's counsel asked Johnston who decides what has "evidentiary value." RP 1494. Johnston replied that it was typically the lead detective and forensic specialists. RP 1494-95. Cavazos' counsel also asked Johnston what information is relied on to make those decisions, to which he replied it was training and experience from having processed similar crime scenes and based on the information provided by witnesses to the incident. RP 1495.

When asked by defense counsel what information they had to inform their decision making about evidence collection at the scene of James' death, Johnston noted they "a sketchy description of what took place" based on information provided by Misty Beaumont, George Compton and whatever was provided to the 911 operators by those who called. RP 1496. Johnston admitted they had no information about

precisely what transpired to cause James' death, such as where they were standing when the incident occurred, or what led up the shooting other than they were arguing beforehand. RP 1496-97.

Johnston agreed that the more information available to them about what happened the better for determining what evidence to collect at the scene. RP 1497. Johnston disagreed, however, with defense counsel's suggestion that the lack of information about what exactly transpired somehow hampered their ability to collect the relevant evidence. RP 1497-98.

Prior to redirect, the prosecutor asked the court permission to elicit from Johnston that Cavazos never provided law enforcement with a description of what happened leading to his son's death, claiming the defense cross of Johnston opened the door. According to the prosecution, defense counsel asked Johnston, "Well, shouldn't you have investigated and found out where everybody was standing and when the shot was fired? And wouldn't that have been a benefit if you determined this before you did your investigation?" RP 1510. The prosecutor argued he should be allowed to ask whether Cavazos provided them with any information about what transpired, which would elicit a negative response. Id.

Defense counsel objected, claiming such questioning would violate Cavazos' right to remain silent. RP 1511-12.

The court agreed with the prosecutor:

So, the real issue is whether or not the - - leaving the jury with the implication that the officer had the opportunity to talk to the alleged perpetrator, or somebody had an opportunity to talk to him and they didn't do so, and/or they didn't use that information that they had from the alleged perpetrator in reviewing the crime scene. Leaving the jury with that implication is wrong. It is inaccurate because, number one[,]⁴ [t]he defendant does not have to talk if he does not want to. And he has a right to remain silent. But by the same token, it is not fair to accuse the investigator, who has to work with the information that they have[,] [t]hat somehow or another their job - - they are not doing their job properly.

So trying to balance . . . both of those issues, it seemed to me that I would allow the [prosecution] to ask directly to Detective Johnston, . . . did you have any information from Mr. Cavazos, and he can answer no. Period. Because that is true, he didn't.

RP 1513-14.

As such, the following exchange occurred between the prosecutor and Johnston on redirect:

[Prosecutor:] You were asked [on cross-examination] wouldn't it have been beneficial if you got all the information about what had happened from witnesses prior to gathering evidence. When you collected the evidence, did you have any information from Mr. Cavazos, Mark Cavazos, Sr., about what had happened that morning in the kitchen or in the house?

[Johnston:] I did not.

⁴ The modifications to this quote are based on undersigned counsel's determination that the punctuation for this portion of the verbatim report of proceedings is incorrect because it terminates sentences before they are complete.

[Prosecutor:] About anywhere what had happened that day?

[Johnston:] No.

RP 1523.

C. ARGUMENTS

1. ALLOWING THE PROSECUTION TO ELICIT TESTIMONY ABOUT CAVAZOS'S SILENCE IMPROPERLY INVITED THE JURY TO INFER GUILT FROM THE EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

Twice during the second trial (once through Deputy Vucinich, RP 1305, and once through Detective Johnston, RP 1523), the jury heard testimony that Cavazos remained silent about the incident after his arrest. Because this improperly invited the jury to infer guilt from Cavazos' exercise of his constitutional right to remain silent, his conviction should be reversed.

Criminal defendants have the right to remain silent under the Fifth Amendment to the United States Constitution and article I, § 9 of our State Constitution. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). “[W]hen 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.” State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)). The same interpretation applies to both clauses and the right is liberally construed. Easter, 130 Wn.2d at 235–36.

The State may not use a defendant's pre or post-arrest silence as substantive evidence of guilt. Easter, 130 Wn.2d at 238. In the post-arrest context, it is well-established that it is a violation of due process for the State to comment upon or otherwise exploit a defendant's exercise of his right to remain silent. See, e.g., Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Fricks, 91 Wn.2d 391, 395–96, 588 P.2d 1328 (1979); State v. Terry, 181 Wn. App. 880, 889, 328 P.3d 932, 937 (2014).

Testimony that the defendant failed to protest his guilt or claim innocence when facing arrest can be an improper comment on the defendant's right to silence. See e.g., Terry, 181 Wn. App. at 890-94 (testimony defendant failed to inquire why he was being arrested constituted a improper comment on the right to remain silent). State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996) (“A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions.”); State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997) (statement that defendant “had nothing to say” was an improper comment on the right to silence). Testimony referencing a defendant's decision not to answer a question by the police amounts to an improper comment on the right to silence “when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” Lewis, 130 Wn.2d at 707.

This court should reverse Cavazos's conviction for three reasons. First, using silence as evidence of guilt violates the Fifth Amendment right against self-incrimination by burdening the exercise of that right. Second, the testimony commenting on Cavazos' silence was not a mere passing reference, but instead occurred twice, both as concluding remarks by the officer during their testimony. In fact, the prosecution elicited Vucinich's and Johnston's testimony specifically to call attention to Cavazos's silence in the face of a police investigation. Finally, the State cannot show the error was harmless beyond a reasonable doubt because the case hinged on the credibility of Cavazos' self-defense/accident claims.

Defense counsel objected on Fifth Amendment and article 1, section 9 grounds with regard to Johnston's offending testimony. RP 1511-12. There was no objection to Vucinich's offending testimony. But, even if this court concludes defense counsel failed to properly object, improper comment on a criminal defendant's right to remain silent amounts to manifest constitutional error and is reviewable for the first time on appeal. RAP 2.5(a)(3); State v. Curtis, 110 Wn. App. 6, 11, 14-15, 37 P.3d 1274 (2002); State v. Keene, 86 Wn. App. 589, 592, 594, 938 P.2d 839 (1997); see also State v. Gauthier, 174 Wn. App. 257, 263, 267, 298 P.3d 126 (2013).

- a. The Fifth Amendment prohibits the prosecution from commenting on an individual's pre or post-arrest silence.

The Fifth Amendment right against self-incrimination prohibits the State from using an individual's pre or post arrest silence as substantive evidence of guilt. Easter, 130 Wn.2d at 237-41. When a defendant testifies at trial, his pre-arrest silence can be used only for impeachment. Burke, 163 Wn.2d at 219. Thus, "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." Id. at 215.

One reason for this rule is "silence is so ambiguous that it is of little probative force." United States v. Hale, 422 U.S. 171, 176, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975). For this reason, Washington courts vigorously bar comment on pre-arrest silence:

Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person's awareness that he is under no obligation to speak or the natural caution that arises from his knowledge that anything he says might be later used against him at trial, a belief that efforts at exoneration would be futile under the circumstances or because of explicit instructions not to speak from an attorney. Moreover, there are individuals who mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because they are simply fearful of coming into contact with those whom they regard as antagonists.

Burke, 163 Wn.2d at 218-19 (quoting People v. De George, 73 N.Y.2d 614, 618-19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989)) (internal quotation marks omitted); see also Easter, 130 Wn.2d at 239 (noting that silence is “insolubly ambiguous”).

Furthermore, the right to silence “exists for both the innocent and the guilty.” Gauthier, 174 Wn. App. at 264. In most cases, it is impossible to conclude that refusal to speak is more consistent with guilt than innocence. Burke, 163 Wn.2d at 219. But such evidence can be readily misinterpreted by the jury, rendering “any curative or protective instruction of dubious value.” Gauthier, 174 Wn. App. at 265 (quoting United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978)).

Another reason for the rule is, if the State could comment on an individual’s silence, “it would place an unfair and impermissible burden upon the assertion of a constitutional right.” Id. “Courts are appropriately reluctant to penalize anyone for the exercise of any constitutional right.” Burke, 163 Wn.2d. at 221; see also Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (noting that penalizing individuals for exercising a constitutional privilege “cuts down on the privilege by making its assertion costly”).

- b. The State purposefully elicited testimony from its police witnesses to emphasize Cavazos' pre and post-arrest silence.

If the State improperly remarks on a defendant's silence, the reviewing court must determine whether the prosecutor manifestly intended the remark to be a comment on the pre-arrest right to silence. Burke, 163 Wn.2d at 216. Washington courts distinguish between a "comment" on and "mere reference" to silence. Id. A prosecutor's statement is not considered a comment on the right to silence if, standing alone, it was "so subtle and so brief" that it did not "naturally and necessarily" emphasize the defendant's silence. Id. (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Such a remark constitutes a "mere reference" and is not reversible error absent a showing of prejudice. Id.

In Lewis, the defendant was accused of demanding sex from women in exchange for drugs. 130 Wn.2d at 702. An investigating officer testified that he called Lewis and Lewis admitted the women had been in his apartment, but insisted nothing happened. Id. at 702-03. The officer then testified that "my only other conversation was that if he was innocent he should just come in and talk to me about it." Id. at 703. The court held this was not a comment on Lewis's silence, because the officer did not say Lewis refused to talk to him, did not imply silence meant guilt, and did not reveal the fact that Lewis failed to keep appointments to speak with him. Id. at 706.

By contrast, in Easter the State violated the defendant's right to pre-arrest silence when an officer testified that he questioned the defendant at the scene, but he would not answer and looked away without speaking. 130 Wn.2d at 241. It also violated the defendant's right to silence when the officer described him a “smart drunk,” based on his silence and evasive behavior. Id. at 241-42. This testimony embodied the officer’s opinion that the defendant was hiding his guilt. Id. at 242. The Supreme Court concluded this “may well have swayed the jury” and reversed. Id.

In Keene, the court reversed when a detective testified Keene did not contact her after being warned she would turn the case over to the prosecutor’s office if she did not hear from Keene again. 86 Wn. App. at 594. “[T]he detective’s comment violated the defendant’s right to silence.” Id.

In State v. Romero, a police officer testified to Romero’s post-arrest silence: “I read him his Miranda warnings, which he chose not to waive, would not talk to me.” 113 Wn. App. 779, 793, 54 P.3d 1255 (2002) (quoting the report of proceedings). The court concluded this was a “direct comment about Mr. Romero’s election to remain silent” and reversed his conviction. Id.

Similarly, in Curtis, the prosecutor asked a police witness whether Curtis said anything in response to receiving Miranda warnings. 110 Wn.

App. at 13. The officer responded that Curtis refused to talk and wanted an attorney. Id. at 13. The court reversed Curtis's conviction, because although the State did not "harp" on the officer's testimony, the "question and answer were injected into the trial for no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer." Id. at 13-14.

The decision in Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), has also been cited with approval by Washington courts. See, e.g., Romero, 113 Wn. App. at 789; Curtis, 110 Wn. App. at 14. There, the following colloquy took place between the prosecutor and the arresting officer:

Q. Who arrested Mr. Douglas?

A. I did.

Q. Did he make any statements to you?

A. No.

Prosecutor: That's all the questions I have.

Douglas, 578 F.2d at 267. The Ninth Circuit reversed Douglas's conviction, because the prosecutor "purposefully elicited the fact of silence in the face of arrest. The introduction of such testimony acted as an impermissible penalty on the exercise of the petitioner's right to remain silent." Id.

The Douglas court further noted that, "[w]hile perhaps inadvertent, the placement of the suspect question at the end of the arresting officer's

testimony gave it a prominence which it would not have had, had it simply been recounted as part of a description of the events culminating in the petitioner's arrest." Id. Therefore, the court concluded, "it is plausible to suppose that a juror might have inferred from the offending testimony that the petitioner was guilty of the crime charged, and that his alibi was a later fabrication and without foundation." Id.

The Romero court summarized several core rules from these cases. 113 Wn. App. at 790. First, "it is constitutional error for a police witness to testify that a defendant refused to speak to him or her." Id. Second, "it is constitutional error for the State to purposefully elicit testimony as to the defendant's silence." Id. And, third, "it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt." Id. These rules require reversal here.

During its case-in-chief, the State concluded its direct examination of Deputy Vucinich (one of the first two officers on the scene), by asking if Cavazos ever made any claim that the shooting of his son was an accident, to which the deputy replied. "No." RP 1305. As in Douglas, the question coming at the end of the deputy's examination "gave it a prominence which it would not have had, had it simply been recounted as part of a description of the events culminating in the petitioner's arrest." 578 F.2d at 267. And also as in Douglas, "it is plausible to suppose that a juror might have inferred

from the offending testimony that" Cavazos was guilty of the crimes charged, and that his claims of accident and self-defense were later fabrications and without foundation. Id.

Later, over defense objection, the prosecution employed a strategy similar to that used to conclude Deputy Vucinich's examination. At the conclusion of its redirect examination of Detective Johnston, the prosecutor asked whether he had any information directly from Cavazos explaining the events that led to his son's death, to which detective replied, "I did not." RP 1523. This inquiry by the prosecutor was specifically authorized by the court based on a finding the defense had opened the door. RP 1513-14. The court erred in so finding.

Despite the prosecution's contrary claim, defense counsel never asked Johnston if it would have been better to find out where everyone was standing when the shot was fired before proceeding with his investigation. Nor did defense counsel insinuate through his questioning of Johnston that "the detectives weren't doing their job because they didn't determine from the witnesses where people were standing, did not collect appropriate evidence based on where Mr. Cavazos said everyone was standing." RP 1510. A close review of the relevant portion of defense counsel's cross examination of Johnston is all that is needed to dispense with these claims.

The entirety of defense counsel's cross-examination of Johnston focused on the collection of evidence at the scene. Counsel began by asking generally about who decided what to collect at a crime scene and what information is relied on to make those decisions. RP 1494-95. Counsel then asked what specific information Johnston had for purposes of deciding what to collect at the scene of James' death. RP 1495-96. Johnston replied it included Beaumont's conversation with another detective, statements by Compton, and whatever information 911 operators could provide based on the various 911 calls received in relation to the incident, including one from Cavazos. Id. Counsel next inquired whether Johnston had any information regarding the position of Cavazos and James when the shooting occurred, to which Johnston stated he did not. RP 1496. Johnston then agreed having such information would have been helpful, noting "the more information the better." RP 1497. Johnston also agreed that such information would have been useful for collecting evidence that might confirm or dispel the truth of the claimed sequence of events, but he insisted they were still able to properly process the scene for evidence even without such specific information available. RP 1497-98. Thereafter, nothing about counsel's cross-examination of Johnston touched on the issue of deciding what evidence to collect. See RP 1498-1509.

Cavazos's counsel cross-examination of Johnston did not open the door to evidence Cavazos exercised his right to silence. In fact, defense counsel's examination of Johnston was similar in content and subject matter to the prosecutor's direct examination, which also went into how and why certain evidence was collected. See RP 1493 (quoted on page 13, supra). Defense counsel's cross-examination cannot reasonably be view as leaving the jury with the impression "that the officer had the opportunity to talk to the alleged perpetrator, or somebody had an opportunity to talk to him and they didn't do so, and/or they didn't use that information that they had from the alleged perpetrator in reviewing the crime scene[,]" as the trial court found. RP 1513. The record does not support the trial court's finding and should be rejected by this Court.

Allowing the prosecution to reveal Cavazos exercised his right to silence implied he had something to hide. But Cavazos was entitled to exercise his constitutional right to silence without penalty. Burke, 163 Wn.2d. at 221; Gauthier, 174 Wn. App. at 267. There was no legitimate purpose for the prosecution's questions of both Vucinich and Johnston other than to reveal to the jury that Cavazos refused to talk to police. See Curtis, 110 Wn. App. at 13-14. The prosecution not only revealed Cavazos's silence, but also invited the jury to infer guilt from it. At the very least, it gave the jury fodder from which to speculate that Cavazos's trial testimony

claiming accident was fabricated to try to hide his guilt. Douglas, 578 F.2d at 267.

e. The error was prejudicial.

Constitutional error is presumed prejudicial. Curtis, 110 Wn. App. at 15. To overcome this presumption, the State must prove beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242. Where the error is not harmless, a new trial is required. Id.

The courts in Douglas, Burke, Easter, Knapp, Romero, Keene, and Curtis all held that the State impermissibly commented on the defendant's silence. In each case, the error required reversal. Douglas, 578 F.2d at 267; Burke, 163 Wn.2d at 222-23; Easter, 130 Wn.2d at 242-43; State v. Knapp, 148 Wn. App. 414, 424-25, 199 P.3d 505 (2009); Romero, 113 Wn. App. at 795; Curtis, 110 Wn. App. at 15-16; Keene, 86 Wn. App. at 595. The U.S. Supreme Court has recognized the "intolerably prejudicial impact" of commenting on silence. Hale, 422 U.S. at 180; see also Easter, 130 Wn.2d at 235 n.5 (noting the "high potential for undue prejudice").

Prejudice was especially apparent in the cases where witness credibility—particularly the defendant's credibility—was a key issue. See, e.g., Burke, 163 Wn.2d at 222-23; Knapp, 148 Wn. App. at 424-25; Romero,

113 Wn. App. at 795; Keene, 86 Wn. App. at 595. For instance, in Burke, the trial boiled down to whether the jury believed or disbelieved Burke's story that the victim told him she was 16. 163 Wn.2d at 222. "Repeated references to Burke's silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury's consideration." Id. at 222-23. Likewise, in Romero, the jury was presented with a "credibility contest" between Romero and one eyewitness. 113 Wn. App. at 795. The jury could have been swayed by the officer's testimony, "which insinuated Mr. Romero was hiding his guilt." Id.

The same is true here. The case boiled down to Cavazos's credibility. If the jury believed Cavazos's claim that he got the gun only to protect himself and not to assault James, and that it went off by accident, then the jury may well have acquitted altogether based on excusable homicide (see CP ___ Instruction ___ on "excusable homicide"), or at least convicted him only of manslaughter (see CP ___, to-convict instruction for first & second degree manslaughter).

Notably, the jury in the first trial never heard testimony similar to Vucinich's and Johnston's at the second trial, and, unable to reach a verdict, a mistrial was declared. CP 210. At the very least this shows the prosecution's evidence was not overwhelming. But it may also reflect the powerful

prejudice that arises when juries wrongly learn a criminal defendant has remained silent in the face of serious allegations.

The testimony on Cavazos's silence presented the jury with improper substantive evidence of guilt, prejudicing the outcome of his trial. See Burke, 163 Wn.2d at 222-23. Because the State cannot show the error was harmless, this court should reverse Cavazos's conviction and remand for a new trial. Easter, 130 Wn.2d at 243.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO ASSERT CAVAZOS'S FIFTH AMENDMENT RIGHT TO SILENCE.

If this court concludes the constitutional error was not preserved because counsel failed to object to the first mention of Cavazos's silence during Vucinich's testimony, then that failing deprived Cavazos of his right to effective assistance of counsel. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687;

Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance of counsel claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Counsel's failure to object to Vucinich's offending testimony was unreasonably deficient in light of the copious case law holding that comments on silence violates the Fifth Amendment. See argument section C.1., supra; see also State v. Ermert, 94 Wn.2d 839, 848, 850-51, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance). Counsel clearly understood this evidence was damaging and tried to keep it from the jury, when the prosecution made its open-door argument in regard to the cross-examination of Johnston. RP 1510-11. It was unreasonably deficient to fail to also object during Vucinich's testimony. RP 1305. And, given counsel's later objections, there is no apparent strategic reason for failing to object.

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice from deficient performance requires reversal whenever the error undermines confidence in the outcome. Id. That confidence is undermined here. As discussed above, this case hinged largely on Cavazos's credibility. There is a reasonable probability the improper evidence of his silence was a deciding

factor, particularly in light of the hung jury in the first trial, where Cavazos's exercise of his Fifth Amendment rights was not revealed. Cavazos's conviction should be reversed because he was denied his constitutional right to effective assistance of counsel.

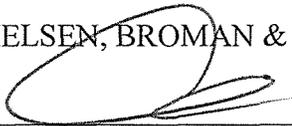
D. CONCLUSION

For the reasons stated, this Court should reverse and remand for a new trial.

DATED this 10th day of November 2015

Respectfully submitted,

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State v. Mark Cavazos

No. 32872-4-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30th day of November, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 30th day of November, 2015.

X  _____