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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34092-9-III

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STATE OF WASHINGTON, Respondent,

v.

JAMES MICHAEL COMBS, Appellant.

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

James Combs was convicted of second degree assault arising from an altercation with a Comcast representative who came onto his property. At trial, Combs argued that defense of property justified his actions. Because the State failed to disprove that Combs lawfully defended his property beyond a reasonable doubt when it failed to present any evidence establishing the right of Comcast or its representatives to enter Combs' property, insufficient evidence supports the conviction. Furthermore, the prosecuting attorney committed flagrant misconduct by repeatedly questioning Combs about why he did not speak to police and arguing to the jury that Combs' refusal to speak to the police evidenced his guilt. These errors warrant a new trial.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** Insufficient evidence supports the conviction for second degree assault.

**ASSIGNMENT OF ERROR 2:** The prosecuting attorney committed flagrant misconduct by commenting on Combs' exercise of his right to remain silent throughout his cross-examination of Combs and during his closing rebuttal argument.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** When the State alleges but does not prove that a Comcast representative has the right to go onto another's property, has it failed to establish that the representative's entry was lawful?

**ISSUE 2:** When an accused refuses to leave his house to speak to police that arrive to investigate a criminal accusation, does questioning the accused about why he did not speak to the police and arguing that the accused's refusal to speak to the police evidenced consciousness of guilt in closing argument constitute an improper comment on the exercise of a constitutional right?

### **IV. STATEMENT OF THE CASE**

On March 2, 2013, James Doherty, whose occupation was to install and disconnect cable connections for Comcast, went to James Combs's property to disconnect his cable. I RP 82, 84, 167. Doherty and Combs disputed what transpired next. Doherty claimed that he knocked on the back door and got no answer, so he went around to the side of the house to disconnect the cable line. I RP 87-88. He hear the TV inside go off and alleged that Combs then came outside with a bat and swung it several times at his head, yelling that Doherty was trespassing. I RP 90-91. Doherty shouted that he was with Comcast, and then Combs stopped

swinging. I RP 92. Combs followed him to his truck, where Doherty called 911. I RP 95. Doherty testified that he never pays attention to “no trespassing” signs when he does disconnects because he could access any yard he needed to in order to disconnect cable. I RP 108-09.

Combs, who testified at trial, alleged that on the date in question, he was lying in bed when the wall of his house began shaking like somebody was pounding on it. I RP 167. Thinking somebody was going to rob the house, he grabbed a bat and went to investigate. I RP 167. When he came around the corner of the house, he saw somebody he did not recognize, and the man did not identify himself. I RP 168. Combs yelled several times that the man was trespassing and to get off his property. I RP 168. The man initially looked at the bat and took a step toward Combs like he was going to take it, but Combs retreated a step and at that point the man said he was from Comcast. I RP 169-70. Combs followed Doherty back to the truck, which Combs had not seen before. I RP 170, 171. He denied swinging the bat or intending to assault Doherty and, upon going back into the house, called 911 as well. I RP 168, 172.

During cross-examination, the prosecuting attorney questioned Combs at length about why he had not come out of the house to speak to police. I RP 179-82. He also questioned Combs about whether he had

discussed his testimony and the trial process with his attorney, and the trial court overruled his objection. I RP 182-83. During his rebuttal argument, the prosecuting attorney told the jury:

He didn't want to get arrested that night so he stayed in the house. He wouldn't come out, his girlfriend came out, he wouldn't come out, there was no way he was going to come out of that house because he knew and that's what that shows. He knew what he did was wrong and there was no way he was going to step outside of that home.

II RP 231.

The jury convicted Combs and the trial court sentenced him to a low-end standard range sentence. CP 209, 236-37, II RP 237, 259, 265.

Combs now timely appeals. CP 249.

## **V. ARGUMENT**

A. Insufficient evidence supports the conviction when Combs alleged defense of property and the State failed to prove that Doherty had a right to enter onto the property.

Due process requires proof of every element of a criminal charge beyond a reasonable doubt. *State v. Nicholson*, 119 Wn. App. 855, 859, 84 P.3d 877 (2003), *disapproved on other grounds in State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of

the evidence, the court considers whether the evidence, viewed in the light most favorable to the prosecution, permits a rational trier of fact to find the essential elements beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Under this standard, the State's evidence and all inferences that can reasonably be drawn from it are presumed to be true. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Consistent with due process requirements, the State cannot require a defendant to disprove any fact that constitutes the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Thus, when a defense negates an element of the crime charged, the State cannot place the burden of proving the defense on the defendant. *Id.*

To prove that Combs committed second degree assault, it was required to prove that he assaulted Doherty with a deadly weapon. CP 1; RCW 9A.36.021(c). Washington courts define "assault" in one of three ways: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (battery); and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm (common law assault). *Nicholson*, 119 Wn. App. at 860 (*quoting State v.*

*Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988), *disapproved on other grounds in State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007)). At issue in this case is the first definition.

Use of force is lawful when used by a party attempting to prevent a malicious trespass, when the force used is not more than is necessary. RCW 9A.16.020(3); *State v. Bland*, 128 Wn. App. 511, 116 P.3d 428 (2005). As such, when a defense alleges a lawful use of force, it negates the element of unlawful force comprising the assault and the State is accordingly required to disprove the defense beyond a reasonable doubt. *See State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1068 (1984); *State v. Redwine*, 72 Wn. App. 625, 629-30, 865 P.2d 552 (1994).

Although deadly force may not be used to expel a non-violent trespasser, under some circumstances, “necessary force may include putting a trespasser in fear of physical harm.” *Bland*, 128 Wn. App. at 517. Moreover, deadly force may be used if the circumstances present a reasonable fear of death or great bodily injury, which can include the threat of a simple battery. *State v. Walden*, 131 Wn.2d 469, 474-75, 932 P.2d 1237 (1997). Combs’ testimony established sufficient grounds to find these requirements were met, such that the State had the burden to disprove them beyond a reasonable doubt.

However, the State failed to present any evidence to rebut Combs' evidence that he acted to repel a malicious trespasser. In its instructions to the jury, the court defined acting maliciously as acting with "an evil intent, wish, or design to vex, annoy or injure another person." CP 205. The State argued that Doherty was not committing a malicious trespass because he was just doing his job and had a right to be on the property. II RP 230-31. But the State never introduced any evidence or presented any legal authority substantiating Doherty's right to enter onto Combs's property. It is a fundamental principle of property ownership that the owner, or any person holding an interest derived from the owner, has the right to exclude others. *See Guimont v. Clarke*, 121 Wn.2d 586, 608, 854 P.2d 1 (1993). The State at no point presented any grounds to overcome this principle, and accordingly, failed to disprove beyond a reasonable doubt that Doherty was not trespassing on Combs' property.

Accordingly, the State failed to meet its burden to disprove Combs's claim of defense of property beyond a reasonable doubt and insufficient evidence supports the conviction.

B. By repeatedly confronting Combs about the fact that he refused to leave his house to talk to the police when they arrived, and arguing in closing that Combs exercised his right of silence because he knew he was guilty, the prosecuting attorney committed flagrant misconduct that probably affected the trial.

Even if not objected to at trial, prosecutorial misconduct that is flagrant and ill-intentioned may warrant a new trial. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). The court determines whether a new trial is warranted by examining the record and determining whether there is a substantial likelihood that the improper comments affected the verdict. *Id.* at 664.

The State may not use a defendant's pre-arrest silence to infer guilt, either through testimony or in closing argument. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). Merely commenting on the exercise of silence without implying guilt is not improper. *State v. Lewis*, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996). Similarly, a testifying defendant may be impeached with pre-arrest silence to argue the testimony is not credible. *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S. Ct. 2124, 65 L.Ed.2d 86 (1980). But arguments that characterize the silence as an admission, or

otherwise rely upon the silence to imply guilt, are improper. *State v. Belgarde*, 110 Wn.2d 504, 511-12, 755 P.2d 174 (1988).

Here, the prosecuting attorney went beyond the permissible scope of impeachment by, rather than simply arguing Combs' testimony was not credible in light of his earlier silence, directly implying the silence reflected consciousness of guilt, stating, "because he knew and that's what that shows. He knew what he did was wrong and there was no way he was going to step outside of that home." II RP 231. The argument was inflammatory and improper, and violated Mr. Combs' due process rights.

Moreover, the error was not harmless. Combs and Doherty were the only two witnesses to the incident, so the jury's credibility determinations were critical. The State spent a substantial portion of its cross-examination and its rebuttal argument, immediately before the case was submitted to the jury, emphasizing the improper inferences. Under these facts, there is a substantial likelihood that the argument that Combs refused to speak to police because he knew he was guilty affected the jury's verdict.

## VI. CONCLUSION

For the foregoing reasons, Combs' conviction should be reversed and dismissed with prejudice or, in the alternative, remanded for a new trial.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of July, 2016.



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## DECLARATION OF SERVICE

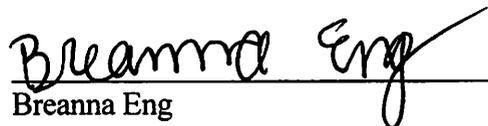
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 5th day of July, 2016 in Walla Walla, Washington.

  
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