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MAR 29 2011

King County Prosecutor  
Appellate Unit

NO. 65557-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MARCUS ZAMUDIO-OROZCO,

Appellant.

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

The Honorable Jay White, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural History</u> .....	1
2. <u>Substantive Facts</u> .....	2
C. <u>ARGUMENT</u> .....	6
DETECTIVE MELTON'S IMPROPER COMMENT ON ZAMUDIO'S EXERCISE OF HIS RIGHT TO REMAIN SILENT REQUIRES REVERSAL .....	6
D. <u>CONCLUSION</u> .....	11

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Burke</u> 163 Wn.2d 204, 181 P.3d 1 (2008) .....	7
<u>State v. Cunningham</u> 116 Wn. App. 219, 65 P.3d 325 (2003) .....	7
<u>State v. Curtis</u> 110 Wn. App. 6, 37 P.3d 1274 (2002) .....	7, 9
<u>State v. Earls</u> 116 Wn. 2d 364, 805 P.2d 211 (1991) .....	7
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1285 (1996) .....	7
<u>State v. Fricks</u> 91 Wn.2d 391, 588 P.2d 1328 (1979) .....	8
<u>State v. Lewis</u> 130 Wn.2d 700, 927 P.2d 235 (1996) .....	9, 10
<u>State v. Nemitz</u> 105 Wn. App. 205, 19 P.3d 480 (2001) .....	9
<u>State v. Stackhouse</u> 90 Wn. App. 344, 957 P.2d 218 (1998) .....	8
<u>State v. Swan</u> 114 Wn.2d 613, 790 P.2d 610 (1990) .....	8
<u>State v. Sweet</u> 138 Wn.2d 466, 980 P.2d 1223 (1999) .....	9
 <u>FEDERAL CASES</u>	
<u>Doyle v. Ohio</u> 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) .....	7

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>Griffin v. California</u>	
380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).....	7
 <b>RULES, STATUTES AND OTHER AUTHORITIES</b>	
RCW 9A.44.076.....	1
RCW 9A.44.079.....	1
RCW 9A.72.120.....	1
RCW 26.50.110.....	1
U.S. Const. Amend. V.....	7
Wash. Const. art. I, § 9.....	7

A. ASSIGNMENT OF ERROR.

Appellant was denied his due process right to a fair trial because the lead detective improperly commented that appellant invoked his right to remain silent.

Issue Pertaining to Assignment of Error

The state charged appellant with five counts of child rape. There was no physical evidence directly linking appellant to the alleged rapes, appellant's daughter, who made the allegations, had a motive to lie, and appellant denied the allegations to the arresting officers. At trial, a detective testified appellant exercised his right to remain silent. Did this testimony constitute an improper comment on appellant's invocation of his constitutional right to remain silent that, under the circumstances, warrants reversal?

B. STATEMENT OF THE CASE

1. Procedural History

The King County Prosecutor charged appellant Marcus A. Zamudio-Orozco (Zamudio) with one count of second degree child rape (Count I), four counts of third degree child rape (Counts II - V), one count of witness tampering (Count VI), and two counts of misdemeanor violation of a no-contact order (Counts VII and VIII). CP 23-26; RCW 9A.44.076, .079; RCW 9A.72.120; RCW 26.50.110(1). The prosecutor alleged Zamudio

repeatedly raped his oldest daughter, J.E.Z. (d.o.b. 4/4/95), between December 1, 2008 and November 22, 2009, when she was 13 and 14 years old, twice violated a pretrial no-contact order by phoning J.E.Z. in December 2009 and January or February 2010, and of attempting to induce a witness to withhold information relevant to the investigation into his alleged crimes. CP 23-26.

After trial, the jury acquitted Zamudio of counts I-III, VI & VIII, and convicted him of counts IV, V and VII. Supp CP \_\_ (sub nos. 53G-53N, Verdict Forms, 5/24/10); 7RP 15-16.<sup>1</sup> The trial court imposed concurrent, standard range 34-month sentences for counts IV and V, and a consecutive 12-month sentence for count VII. CP 33-45; 8RP 14-17.

## 2. Substantive Facts

In 2009, Zamudio and Lucero Epitacio were raising five girls. Four were Zamudio's biological children: J.E.Z. (d.o.b. 4/4/95); J.O.Z. (d.o.b. 1/27/96); J.A.Z. (d.o.b. 2/8/98); P.Z. (d.o.b. 9/26/08). A fifth girl, L.Z. (d.o.b. 1/21/07), was not. 2RP 231-34; 5RP 36-37. Zamudio and Epitacio had moved to California from Mexico in 1995 when Epitacio was pregnant with J.E.Z. 2RP 229-30; 5RP 7. In the fall of 2008, the family moved from California to Kent, Washington, and lived in a two-bedroom apartment. 2RP 236-37; 3RP 105.

On November 22, 2009, Kent police officer Travis Wilson and two other officers went to the Zamudio-Epitacio apartment in response to Epitacio's claim Zamudio had raped J.E.Z. 2RP 45-46; 3RP 126-27. After interviewing Epitacio and J.E.Z., Wilson arrested Zamudio. Zamudio immediately denied the allegations, and said J.E.Z. was fabricating the allegations to retaliate for his strictness as a parent. 3RP 136. Zamudio told Wilson he never inappropriately touched any of his daughters. 3RP 137.

At trial, Epitacio, J.E.Z., J.O.Z., and J.A.Z. testified for the prosecution. According to Epitacio, she did not suspect Zamudio sexually assaulted any of the children until J.E.Z.'s allegations. 3RP 21-22, 42-43, 67, 70. Epitacio admitted she allowed Zamudio to talk to J.E.Z. on the telephone after his arrest, despite a no-contact order. 3RP 48-49.

According to J.O.Z., Zamudio was strict with all the children, but especially J.E.Z. 3RP 79. J.O.Z. recalled that about four years before trial, when they still lived in California, Zamudio summoned J.E.Z. into a bedroom every other day, closed the door, and spent time with her until J.E.Z. came out crying. 3RP 79-81. At one point in 2007 or 2008, J.O.Z. claimed, J.E.Z. told her Zamudio had been raping her for years, but they decided not to tell anyone. 3RP 82-84.

J.O.Z. recalled that after the family moved to Kent the bedroom meetings between Zamudio and J.E.Z. continued and, in October 2009, she walked into the bedroom and saw Zamudio "on top of [J.E.Z.]." 3RP 84-85. J.O.Z. said Zamudio's pants and underwear were pulled down around his knees, and J.E.Z. was on the bed, but it was too dark to see what position her body was in. 3RP 86-88.

J.A.Z., like J.O.Z., recalled Zamudio regularly directing J.E.Z. into a bedroom, and that J.E.Z. eventually told her and J.O.Z. what he was doing. 3RP 107, 112. J.A.Z. also claimed to remember a time when Zamudio was sleeping in the same bed as she and J.E.Z., and that she could hear J.E.Z. trying to stifle a cry, Zamudio whispering to J.E.Z., and the bed moving and shaking for a long time. 3RP 108-110.

J.E.Z. initially testified there had been no inappropriate contact between her and her father. 3RP 152-54. She then changed her story, and claimed Zamudio made her have sex with him when she was 14 years old in order to prove she had not already had sex with a boy. 3RP 159. After further examination by the prosecutor, J.E.Z. said she was being truthful when she told others Zamudio started raping her when she was 10 years old, and that he would hit her if she refused. 3RP 165-66.

Interpreter Claudia A'Zar tried to interpret and translate a recorded jail call between Zamudio and Epitacio, which, according to A'Zar, included

speech in a "pig Latin" style of Spanish that was difficult to decipher. 4RP 99-113.

Nurse Mikael Catherine Hagberg-Heller found nothing unusual after examining J.E.Z. 4RP 128. .

Scientist Megan found sperm on J.E.Z.'s pants, but she could not establish the source, noting only that it could have come from "Frank," a boy J.E.Z. admitted having sex with in the past. 4RP 20-21, 57-58. Inslee also found J.E.Z.'s DNA on the inside of Zamudio's boxer shorts in an amount she considered unlikely to result from mere casual transfer, but agreed such a transfer could have been the source. 4RP 60-62.

Detective Lily Melton interviewed Epitacio, J.O.C. and J.E.Z. 4RP 158-59. Melton then went to a motel where J.E.Z. claimed some of the rapes occurred, but found no corroborating evidence. 4RP 160-61, 168.

The following colloquy then occurred:

Q [Prosecutor] And what else did you do on this case?

A [Melton] I then attempted to make contact with Mr. Zamudio at the jail, attempted to interview him there.

Q Let me stop you there for a second. Did you --

[Defense Counsel]: I'm going to object and move to strike.

[Prosecutor]: I'm going to move on.

THE COURT: Well, I understand the State was prepared to move on for the record. The court sustains the objection for the record. Please proceed.

4RP 161. Melton proceeded to explain that he then interviewed J.A.Z. and the boy J.E.Z. admitted having sex with, "Frank." 4RP 161.

Defense counsel later moved "for a mistrial and/or dismissal," arguing Melton's testimony about attempting to interview Zamudio constituted an improper comment on Zamudio's exercise of his right to remain silent. 4RP 174. The court ruled:

All right. Thank you. The motion is certainly appropriate. For the record, the court will deny the motion for a mistrial or dismissal. There was a proper objection, which the court sustained, and at the same time the prosecutor indicated the prosecutor had been interrupted and was going to other subjects. The jury did not hear anything at all that would constitute a comment on the defendant's right to remain silent, so the motion is denied.

4RP 175.

C. ARGUMENT

DETECTIVE MELTON'S IMPROPER COMMENT ON ZAMUDIO'S EXERCISE OF HIS RIGHT TO REMAIN SILENT REQUIRES REVERSAL.

Detective Melton's testimony that she "attempted to interview" Zamudio constitutes an improper comment on Zamudio's invocation of his constitutional right to remain silent. Commenting on a defendant's exercise of his right to remain silent is constitutional error. Because the error was not harmless, Zamudio's convictions should be reversed.

The Fifth Amendment guarantees a criminal defendant shall not be compelled to be a witness against himself. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). Nor may the State comment on a defendant's exercise of that right. Griffin v. California, 380 U.S. 609, 613-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). The Washington Constitution guarantees these same protections. Wash. Const., art. I, § 9; State v. Earls, 116 Wn. 2d 364, 374-75, 805 P.2d 211 (1991) (federal and state protections are coextensive).

The right against self-incrimination is liberally construed. Easter, 130 Wn.2d at 236. To protect this right, police must inform a suspect of his or her Miranda rights before a custodial interrogation. State v. Cunningham, 116 Wn. App. 219, 227-228, 65 P.3d 325 (2003).

The use of silence after Miranda warnings is fundamentally unfair and violates the constitutional right to due process. Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). This is because "[t]he exercise of constitutionally guaranteed Miranda rights must be without penalty." State v. Curtis, 110 Wn. App. 6, 8, 37 P.3d 1274 (2002). The State penalizes an accused for invoking his rights when it elicits as substantive evidence of guilt testimony that the accused invoked his Miranda protections. Easter, 130 Wn.2d at 236. This penalty exists whether the testimony is the

defendant's or that of a state's witness: "The highly prejudicial suggestion that defendant's post-arrest silence is consistent with guilt . . . can be made just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself." State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

These rules call for reversal of Zamudio's convictions. In response to the prosecutor's questions, Detective Melton informed the jury of her failed attempt to interview Zamudio in jail. The implication was that he exercised his right and refused to talk with her. Zamudio's counsel objected and moved to strike. The court sustained the objection, but failed to rule on the motion to strike. As a result, Melton's improper comments remained available for consideration during jury deliberations. State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990); State v. Stackhouse, 90 Wn. App. 344, 361, 957 P.2d 218 (1998).

The trial court later denied Zamudio's motion for a mistrial based on Melton's misconduct, erroneously concluding the jury heard nothing "that would constitute a comment on the defendant's right to remain silent[.]" 4RP 175.

Whether Zamudio's convictions should be reversed depends on whether Melton's remarks were a direct or indirect comment on Zamudio's invocation of his right to remain silent. Direct comments are reviewed

under a constitutional harmless error standard. Romero, 113 Wn. App. at 790; State v. Nemitz, 105 Wn. App. 205, 215, 19 P.3d 480 (2001). Prejudice resulting from an indirect comment is reviewed under the non-constitutional harmless error standard. Under either test, this Court should reverse Zamudio's convictions.

Direct comments occur when a witness or prosecutor specifically references invocation of a defendant's Miranda right. See e.g., Romero, 113 Wn. App. at 793 (officer directly commented on exercise of right when he testified, "I read him his Miranda warnings, which he chose not to waive, would not talk to me."); Curtis, 110 Wn. App. at 13 (officer testified Curtis asserted the right not to answer questions and to have a lawyer after he received the Miranda warnings).

Indirect comments, in contrast, occur when a witness or state agent refers to a comment or act by the defendant that could be inferred as an attempt to exercise the right to remain silent. See State v. Lewis, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996) (officer did not testify the defendant refused to talk, but rather that the defendant claimed he was innocent); State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999) (officer's testimony that defendant said he would take a polygraph test after discussing the matter with his attorney was an indirect reference to silence).

Melton's improper testimony constituted a direct comment on the

invocation by Zamudio of his rights to remain silent. By stating she "attempted to interview" Zamudio, Melton informed the jury she was unsuccessful. A reasonable inference from this statement is that Zamudio refused to talk to her, as he had a constitutional right to do. While one could come up with other reasons why Melton may have been unsuccessful -- such as got lost, denied access to Zamudio by jail staff, or forgot what she was doing -- none are reasonable under the circumstances. Rather, Melton signaled to the jury that Zamudio stopped talking to the police by the time Melton met with him.

This direct comment requires the State to prove Melton's remark was harmless beyond a reasonable doubt. The State cannot carry this burden.

A comment on the defendant's invocation of his right to remain silent implies guilt. *Lewis*, 130 Wn.2d at 705. Zamudio's defense hinged on the jury believing his testimony denying any inappropriate contact with J.E.Z. Commenting on Zamudio's refusal to submit to an interview unfairly undermined Zamudio's defense and implied he was guilty of at least some of the allegations.

The prosecution's case was weak. First, there was no physical evidence indicating rape. And importantly, Zamudio was a strict parent, rendering him vulnerable to false allegations of sexual misconduct. It therefore cannot be said Melton's remark was harmless beyond a reasonable

doubt.

For the same reasons, the same result obtains under a non-constitutional harmless error standard. Moreover, the prosecutor attacked Zamudio's credibility during closing argument by contrasting his testimony with what "all the other witnesses testified to[,]" including Melton. 6RP 42-43. The prosecutor presumably realized the State's case was weak, and therefore relied on impeachment to obtain any possible conviction. The prosecutor succeeded in part; this Court therefore cannot conclude there is no reasonable possibility Melton's misconduct affected the outcome of the trial.

D. CONCLUSION

This Court should reverse Zamudio's convictions.

Dated this 27 day of March 2011.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65557-4-I
	)	
MARCUS ZAMUDIO-OROZCO,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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 29<sup>TH</sup> DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]    MARCUS ZAMUDIO-OROZCO  
       DOC NO. 340708  
       AIRWAY HEIGHTS CORRECTIONS CENTER  
       P.O. BOX 2049  
       AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF MARCH, 2011.

x Patrick Mayovsky