Supreme Court No. ____
COA No. 59410-2-II

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER GAKING,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jennifer Gaking, the petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' decision termination review. RAP 13.3, 13.4.

B. COURT OF APPEALS DECISION

Ms. Gaking seeks review of the Court of Appeals' decision dated April 8, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. People have an absolute right to silence during custodial interrogation, and their silence cannot be used against them as evidence of guilt. This applies even if a person does not explicitly invoke their right to silence. Likewise, a person's demeanor accompanying their silence may not be used as evidence of guilt. During custodial interrogation, police asked if Ms. Gaking sold drugs. Ms. Gaking remained silent, looked away, and smirked. The trial court admitted Ms. Gaking's silent response at trial, in

violation of due process, the Fifth Amendment, and Article I, Section 9 of the Washington Constitution.

Without explicitly finding a violation, the Court of Appeals suggested Ms. Gaking's reaction was similar to a "communicative expression." It also implied the court properly admitted her silence because she did not invoke her right to silence. As this case demonstrates, courts continue to misconstrue this Court's precedent and improperly admit evidence of a person's constitutionally protected silence. This Court should grant review. RAP 13.4(b)(1), (b)(2), (b)(3).

2. The Court of Appeals resolved this case by finding the admission of Ms. Gaking's silence was harmless beyond a reasonable doubt. It used the "overwhelming evidence" test. It focused on the "untainted" evidence in the record, without addressing the nature of the error or how the error contributed to the jury's verdict. This Court is currently considering what standard courts must use when

determining whether an error is harmless beyond a reasonable doubt. This Court should either stay this case or grant review to resolve whether the improper admission of Ms. Gaking's silence was harmless beyond a reasonable doubt.

D. STATEMENT OF THE CASE

Jennifer Gaking owned and operated a resale business, J.G. Resalz. RP 465–66. She stored her merchandise at her house in Tacoma. RP 466. She sold various items, such as custom jewelry, clothing, and shoes. RP 466–67. Ms. Gaking used electronic scales to weigh the jewelry and small plastic bags to package the merchandise. RP 467–68.

Ms. Gaking lived with eight other people. RP 472. Several of these people struggled with substance use issues. RP 475. These housemates had full access to Ms. Gaking's room, including storage compartments in her closet and dresser. RP 475–76.

The house had several surveillance cameras mounted on its exterior. RP 199. Ms. Gaking said the cameras were there "for theft purposes. I had some vehicles and I had people trying to do damage on my vehicles, stealing gas, flattening tires, stuff like that. It wasn't the best area we lived in." RP 471.

20 SWAT officers executed a search warrant for the Tacoma home. RP 193, 195–96, 271, 337–38. Sergeant Kevin Clarke pulled Ms. Gaking aside and started questioning her. RP 48–50, 206–07, 272. At the outset, he informed Ms. Gaking that she had "the right to remain silent. . . . You can decide at any time to exercise these rights and not answer my questions or make any statements." RP 50. Ms. Gaking answered some questions, revealing her room may contain narcotics. RP 51–52. She denied selling a large amount of drugs. RP 51–52.

Sergeant Clarke then asked her if she sold any drugs. RP 52. Ms. Gaking did not respond. RP 52–53. Instead, she

looked away, "kind of smiled and didn't answer." RP 53, 209. Sergeant Clarke stopped asking questions at that point and ended the interview. RP 53, 55.

Officers found a safe in Ms. Gaking's room. RP 272. The safe contained 40.2 grams of methamphetamine and 61.9 grams of heroin. RP 171, 174, 209, 295–97. Officers also found scales, money, finger covers, cell phones, and packaging in other areas of Ms. Gaking's room. RP 209, 276. There was also a large amount of brand-new clothing, shoes, and purses inside her room. RP 210. In addition, law enforcement found a tax report of Ms. Gaking's casino winnings, her business license for J.G. Resalz, and custom jewelry. RP 277, 324–25, 379.

After law enforcement discovered these items, Sergeant Clarke reinterviewed Ms. Gaking. He asked if she owned the items in her room, and she said yes. RP 211. As a result, the State charged Ms. Gaking with possession with

intent to deliver heroin and possession with intent to deliver methamphetamine. CP 3–4.

Before trial, Ms. Gaking moved under the Fifth Amendment to exclude her silent response to Sergeant Clarke's question about whether she sold narcotics. CP 56. The State conceded Ms. Gaking was in custody, "so *Miranda* does apply." RP 58. The State nevertheless contended her silence was admissible because she did not make an "unequivocal invocation" of her right to silence. RP 59.

The trial court agreed with the State. RP 63. It first concluded Ms. Gaking's silence did not constitute an "unequivocal invocation of her *Miranda* rights." CP 66. The court reasoned Ms. Gaking "could have denied [selling drugs] or made clear that that's not what she was doing, but she gave this smirk or a smile and then looked away." RP 63. As a result, the court held Ms. Gaking's "smile [and] look away is admissible as an admission by silence." CP 67.

The State's evidence at trial came entirely from law enforcement. Sergeant Clarke testified about his interview with Ms. Gaking, specifically focusing on her lack of a response to his question about selling drugs. RP 209.

No law enforcement officers saw Ms. Gaking conduct a drug transaction. Instead, the evidence against Ms. Gaking focused on the drugs found in her room, the instruments (i.e., the scales, plastic bags, cash, and finger coverings), and Ms. Gaking's statements. E.g., RP 156–60, 209. There was no evidence Ms. Gaking had a ledger book, receipts, or crib notes. RP 218–22, 330, 382

In closing argument, the State emphasized Ms. Gaking's statements. RP 500. The prosecutor highlighted that, when the officer asked Ms. Gaking if she sold drugs, she "looked away and smiled or smirked." RP 509. The prosecutor argued that this "shows [Ms. Gaking] intended to sell" the drugs in her room. RP 509. The prosecutor repeated this argument later in closing and rebuttal argument. RP

512, 528. At the end of her rebuttal, the prosecutor again focused on Ms. Gaking's silence: "The defendant told Sergeant Clark *in not so many words* what she was intending to do; that these drugs were hers and evidence shows she was intending to deliver them." RP 531 (emphasis added).

The jury convicted Ms. Gaking as charged. CP 96. The trial court sentenced Ms. Gaking to 72 months in prison with 12 months of community custody. CP 200–01.

On appeal, Ms. Gaking argued the court violated her right to silence by admitting Sergeant Clarke's testimony that she looked away, "kind of smiled and didn't answer." She argued the prosecutor compounded this error by commenting on Ms. Gaking's silence in closing argument.

The Court of Appeals affirmed. It did not expressly hold the testimony and argument violated Ms. Gaking's right to silence. Slip Op. at 8–10. Rather, it resolved the case by holding "any error in admitting this evidence was harmless beyond a reasonable doubt." Slip Op. at 10.

E. LAW AND ARGUMENT

1. This Court should grant review to confirm that postarrest silence is inadmissible even without an invocation, and to clarify when a person's demeanor accompanying their silence is admissible.

Ms. Gaking had a constitutional right to remain silent during her custodial interrogation. She exercised that right when Sergeant Clarke asked her if she sold drugs. The State was thus barred from using Ms. Gaking's reaction—remaining silent, looking away, and smiling—as evidence of guilt. The trial court improperly allowed the State to freely use this evidence at trial, in violation of Ms. Gaking's constitutional rights to silence and due process.

The Court of Appeals did not explicitly resolve this issue. Instead, in passing, the court characterized Ms. Gaking's silence and her accompanying demeanor as "more akin to a communicative response than an assertion of silence." Slip Op. at 10. Like the trial court, the Court of Appeals seemed to believe Ms. Gaking's silence was

admissible because she did not expressly invoke her right to silence. This incorrect understanding of the law contravenes this Court's holding in *State v. Barry*, 183 Wn.2d 297, 352 P.3d 161 (2015) and the Court of Appeals' holding in *State v. Fuller*, 169 Wn. App. 797, 282 P.3d 126 (2012). This Court should grant review. RAP 13.4(b)(1), (b)(2), (b)(3).

a. The rights to due process and silence prohibit the State from using a defendant's postarrest silence at trial.

People have "'a constitutional right to say nothing at all'" when subjected to police interrogation. *State v. Easter*, 130 Wn.2d 228, 239, 922 P.2d 1285 (1996) (quoting *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987)). If an interrogation occurs postarrest, a person's "silence cannot be used as substantive evidence of guilt." *State v. Slone*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006). This prohibition closely circumscribes what evidence the State may present at trial.

"The prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda v. Arizona*, 384 U.S. 436, 468 n.37, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Accordingly, "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. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Likewise, the State may not "make closing arguments relating to a defendant's silence to infer guilt from such silence." *Easter*, 130 Wn.2d at 236.

"The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State 'just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.'" *Id*. (quoting *State v. Fricks*, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979)). Eliciting testimony or making argument about a defendant's silence constitutes a clear violation of the Fifth Amendment and Article I,

Section 9 of the Washington Constitution. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

But this violation is not confined solely to the Fifth Amendment and Article I, Section 9. "Commenting on postarrest silence raises a second constitutional concern, grounded in due process." *State v. Terry*, 181 Wn. App. 880, 889, 328 P.3d 932 (2014). In this context, "it is well-settled 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." *State v. Romero*, 113 Wn. App. 779, 786–87, 54 P.3d 1255 (2002). The reasoning for this is again plain.

"Warnings under *Miranda* given upon arrest 'constitute an implicit assurance to the defendant that silence in the face of the State's accusations carries no penalty,' making it fundamentally unfair to then penalize the defendant by offering his silence as evidence of guilt." *Terry*, 181 Wn. App. at 889 (quoting *Easter*, 130 Wn.2d at 236).

"For the government to comment on post-*Miranda* silence is to 'break its promises given in the *Miranda* warnings and violate due process of law.'" *Id*. (cleaned up) (quoting *Burke*, 163 Wn.2d at 213).

The trial court and the State violated Ms. Gaking's constitutional rights to silence and due process here.

b. The court erroneously admitted evidence of Ms. Gaking's silence.

During Ms. Gaking's postarrest interrogation, she answered several questions before Sergeant Clarke asked if she sold drugs. RP 50–53. In response, Ms. Gaking remained silent, looked away, and smiled. RP 53. The State repeatedly used Ms. Gaking's silence and reaction to this question as evidence of guilt, in violation of her rights to due process and silence.

Even though Ms. Gaking answered several questions beforehand, her subsequent silence could not be used as substantive evidence at trial. After all, "'the right to silence is

not an all or nothing proposition.'" *State v. Fuller*, 169 Wn. App. 797, 814, 282 P.3d 126 (2012) (quoting *Hurd v. Terhune*, 619 F.3d 1080, 1087 (9th Cir. 2010)).

Here, Ms. Gaking was restrained in handcuffs and subjected to custodial interrogation when Sergeant Clarke began speaking to her. CP 66. Sergeant Clarke informed Ms. Gaking that she could remain silent during the interrogation, and she could exercise her right to silence at any point. RP 50. She relied on that advisement by refusing to answer the question about whether she sold drugs.

"[A]fter a person receives *Miranda* warnings, even if he or she elects to speak with law enforcement, he or she may invoke the right to silence in response to any question posed by law enforcement." *Fuller*, 169 Wn. App. at 814. "'A suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial.'" *Id.* at 814–15 (quoting *Hurd*, 619 F.3d at 1087).

Because the Fifth Amendment "grants suspects the right to silence, it is 'fundamentally unfair and a deprivation of due process to allow [the State to use] a suspect's silence . . . against him at trial.'" *Id*. at 815 (quoting *Hurd*, 619 F.3d at 1088). Thus, under no circumstances can the State use a defendant's postarrest partial silence against them at trial. *Id*. at 815, 815 n.7.

The State did just that here. It elicited testimony that Ms. Gaking, when asked if she sold drugs, "just kind of smiled and *didn't answer*, smiled or smirked and *didn't answer*." RP 209 (emphasis added). In closing, it argued this response—her silence and facial expression—demonstrated Ms. Gaking's intent to deliver narcotics. RP 509. It repeated this argument three more times during closing and rebuttal. RP 512, 528, 531.

The use of her silence to suggest she possessed criminal intent, i.e., as evidence that she was guilty, violated Ms. Gaking's rights to silence and due process. Whether Ms.

Gaking unequivocally invoked her right to silence does not change this conclusion.

Again, "'the right to silence is not an all or nothing proposition.'" *Fuller*, 169 Wn. App. at 814 (quoting *Hurd*, 619 F.3d at 1087). "The notion that a suspect has only two choices (remain completely silent or invoke) overlooks what 'invocation' commonly means in the context of custodial interrogation." *State v. Melendez*, 535 P.3d 16, 30 (Ariz. Ct. App. 2023).

When a person unequivocally invokes their right to silence, police must immediately cease questioning. *State v. Piatnitsky*, 180 Wn.2d 407, 413, 325 P.3d 167 (2014). "Unlike invoking the right to cut off questioning and the right to speak with counsel, the privilege related to the due process right recognized in *Doyle*[1] requires no affirmative

[1] *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

communication; it is essentially self-executing." *Melendez*, 535 P.3d at 30.

"While law enforcement may not be required to cease an interview if the suspect responds to certain questions but 'remains largely silent in response to [police] officers' questions,' a suspect's silence or refusal to respond is inadmissible at trial." *Fuller*, 169 Wn. App. at 815 (quoting *Hurd*, 619 F.3d at 1089).

The lower courts' focus on whether Ms. Gaking invoked her right to silence thus misses the point. *See* CP 66; Slip Op. 10. The actual issue is whether she remained silent and whether the State used that silence as evidence of guilt at trial. The answer to both questions is yes.

True, when Ms. Gaking was silent, she also turned her head away from Sergeant Clarke and smiled. But mischaracterizing her reaction as either her "demeanor" or a "communicative response" does not change the equation here. *See Barry*, 183 Wn.2d at 308–09 (observing demeanor

evidence is improper when it is intertwined with a defendant's exercise of the right to remain silent); *id*. at 311 (noting facial expressions and body language do not communicate factual assertions and are thus not communicative).

Despite this Court's holding in *Barry*, courts still fail to realize demeanor evidence can be an impermissible comment on a person's silence. Indeed, the Court of Appeals here did not cite *Barry* at all. Slip. Op. at 9–10. And the Court of Appeals completely ignored that Sergeant Clarke explicitly testified that Ms. Gaking "didn't answer" his question. RP 209. The Court of Appeals' suggestion that Ms. Gaking's silent reaction constituted her demeanor or was communicative belies the facts in the record and this Court's precedent.

Likewise, as the lower courts did here, courts continue to misconstrue the admissibility of silence by focusing on whether someone invoked their right to silence. Even if

someone does not invoke, evidence of their silence remains inadmissible. *Fuller*, 169 Wn. App. at 815.

Further guidance is needed on these topics of Fifth Amendment, Article I, Section 9, and due process jurisprudence. Without this Court's direction, courts will continue to misread this Court's precedent and admit constitutionally impermissible evidence. This Court should grant review. RAP 13.4(b)(1), (b)(2), (b)(3).

2. The Court of Appeals resolved this case under the "overwhelming evidence" test, which this Court is currently considering. This Court should either stay this case or grant review and properly determine harmlessness.

The violation of Ms. Gaking's right to silence was not harmless beyond a reasonable doubt. "Eliciting testimony about and commenting on a suspect's postarrest silence or partial silence is constitutional error and subject to our stringent constitutional harmless error standard." *Fuller*, 169 Wn. App. at 813. "[P]rejudice is presumed and the State bears the burden of proving it was harmless beyond a

reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

A constitutional error is harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (internal quotation marks omitted) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). This test focuses on "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

The erroneous admission of Ms. Gaking's silence had an immense effect at trial. As the prosecutor acknowledged in her closing argument, the ultimate issue was whether Ms. Gaking possessed narcotics with the intent to deliver. RP 506. There was no direct evidence of her intent, however. No one witnessed Ms. Gaking sell or try to sell drugs, and

there was no evidence about her communications with supposed buyers. There was also no ledger of completed drug sales.

Instead, the primary evidence of Ms. Gaking's intent came from her reaction to Sergeant Clarke's question. The State argued this reaction was tantamount to an admission—i.e., a confession—to selling drugs. RP 509, 512, 528, 532. This confession did not have a minimal impact at trial.

"A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)). Especially since there was no other direct evidence of Ms. Gaking's intent to sell drugs, this confession cannot be considered harmless beyond a

reasonable doubt. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1099 (6th Cir. 1990) (finding the improper admission of a confession was not harmless beyond a reasonable doubt because it was the only direct evidence of the defendant's intent, irrespective of other overwhelming evidence).

But the Court of Appeals did not properly consider the impact of Ms. Gaking's erroneously admitted silence at trial. Instead, it affirmed her conviction because it found "the untainted evidence overwhelmingly supports the jury's guilty verdict." Slip Op. at 11. It focused on two aspects of the record to reach this holding.

First, the court stressed the quantity of narcotics: 40.2 grams of methamphetamine and 61.9 grams of heroin. Slip Op. at 11. Second, it emphasized the other items discovered in the house—particularly the scales, finger covers, and small plastic bags. Slip Op. at 11–12.

It did not consider that Ms. Gaking had plausible reasons as to why she had the equipment. She asserted she

used this equipment to weigh, package, and sell jewelry as a part of her resale business, J.G. Resalz. RP 465–68. Law enforcement found the business license for J.G. Resalz in Ms. Gaking's room. RP 294.

Further, law enforcement never confirmed whether any of the scales or baggies contained narcotics. RP 219, 256, 278, 325–27, 368, 386. Instead, law enforcement only found the narcotics in two separate bags—one for the heroin and the other for the methamphetamine. RP 386; *see State v. Brown*, 68 Wn. App. 480, 484–85, 843 P.2d 1098 (1993) (finding insufficient evidence of intent to deliver where the narcotics were not separately packaged in small amounts); *State v. Hutchins*, 73 Wn. App. 211, 218, 868 P.2d 196 (1994) (same). Further, no one saw Ms. Gaking sell drugs, try to sell drugs, or talk about selling drugs. *See Brown*, 68 Wn. App. at 484 (finding insufficient evidence in part because officers "observed no actions suggesting sales or delivery or

even any conversations which could be interpreted as constituting solicitation").

The Court did not consider the significant impact of Ms. Gaking's erroneously admitted silence against this backdrop of equivocal evidence. Instead, again, it solely focused on what it perceived as "overwhelming" evidence. Slip Op. at 11–12.

This Court is currently considering whether courts must apply the "contribution" or "overwhelming evidence" tests when determining whether an error is harmless beyond a reasonable doubt. *State v. Cristian Magaña Arévalo*, Case No. 103586-1; *State v. Ahmed Wasuge*, Case No. 103530-6. This Court should stay this case pending a resolution in those two cases. Alternatively, this Court should grant review and determine whether the improperly admitted evidence of Ms. Gaking's right to silence was harmless beyond a reasonable doubt. RAP 13.4(b)(1), (b)(3).

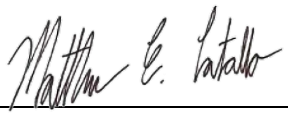
F. CONCLUSION

Ms. Gaking respectfully asks this Court to accept discretionary review. RAP 13.4(b).

This petition is 3,777 words long and complies with RAP 18.7.

DATED this 6th day of May 2025.

Respectfully Submitted



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JENNIFER GHAKING, aka JENNIFER GEAKING, JENNIFER MARIE GAKING, JENNIFER MARIE GAKING-SAENZ, JENNIFER MARIE SAENZ, JENNIFER M. GAKING, Appellant.	No. 59410-2-II UNPUBLISHED OPINION

CRUSER, C.J.—Jennifer Gaking appeals her convictions for two counts of unlawful possession of a controlled substance with intent to deliver. Gaking asserts that the trial court erred in ruling that evidence that Gaking smirked or smiled in response to a question by the police was admissible, and that this error allowed the police witness to comment on her silence in violation of her right to due process. She argues that the State also violated her right to due process by following the trial court's ruling and soliciting this evidence in its questioning of the officer as well as remarking on it during closing argument. The State responds that the trial court did not err in its ruling and that the State, likewise, did not err in either its questions or its argument because Gaking's smirk or smile was not silence, but instead was an affirmative response to the question. The State also argues that even if the trial court's ruling (and its subsequent actions that were allowed by that ruling) were error, the error was harmless beyond a reasonable doubt.

We affirm Gaking's conviction because, even assuming that the trial court erred in allowing the State to introduce this evidence, the error was harmless. Likewise, the State's actions in eliciting this evidence and discussing this evidence during closing argument, even if it followed an erroneous trial court ruling, were harmless. There was overwhelming untainted evidence of Gaking's guilt, and the references to Gaking's nonverbal smirk or smile were passing at best.

FACTS

I. Background Incident

Officers detained Gaking while executing a warrant to search her residence for drugs. The lead investigator, Sergeant Clark, advised Gaking of her *Miranda* rights.[1] Gaking acknowledged that she understood her rights, and answered a series of questions posed by Sergeant Clark. He asked Gaking if he would find any illegal material in her room, and she said that he would find a pipe and drug scrapings, but no other illegal materials. Gaking informed Sergeant Clark that she was unemployed. Sergeant Clark asked if she was selling large quantities of narcotics. She responded that "she doesn't sell like that." Clerk's Papers (CP) at 65. When Sergeant Clark asked if she was selling, Gaking smirked or smiled and looked away. Gaking did not make an unequivocal invocation of her *Miranda* rights, but Sergeant Clark stopped the interrogation and began interrogating Gaking's housemates.

Meanwhile, officers conducted a search of the residence, including Gaking's bedroom. They discovered a hidden shelf compartment on Gaking's bedroom wall containing 60 grams of heroin and 40 grams of methamphetamine. They also found multiple scales, money, a counterfeit bill detector, finger covers, cell phones, and packaging materials including small baggies in

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Gaking's bedroom. Gaking did not have any drug paraphernalia for personal use in her bedroom. Officers documented a large quantity of new clothing with tags still attached, shoes, costume jewelry, name-brand purses, and more than 25 containers of laundry detergent in the laundry room. Gaking also had a monitor in her bedroom with live surveillance feed from cameras posted on the exterior of the home.

Approximately 30 minutes after the initial interrogation, Sergeant Clark returned to interrogate Gaking about what officers found in her bedroom. Sergeant Clark asked Gaking about the quantities of what officers suspected to be heroin and methamphetamine; Gaking responded that the narcotics were hers. The State charged Gaking with two counts of unlawful possession of a controlled substance with intent to deliver, one for heroin and one for methamphetamine. The case proceeded to a jury trial.

II. Pretrial

Before trial, Gaking moved the court to exclude Sergeant Clark's testimony regarding her nonverbal response to whether she sold narcotics. The court conducted a CrR 3.5 hearing and Sergeant Clark testified regarding his exchange with Gaking, including the interactions detailed above. The State argued Gaking's silence was admissible because she did not unequivocally invoke her right to silence. The State further argued that Gaking's silence and physical response was an adoptive admission. Gaking did not dispute that she had been properly read her *Miranda* rights, nor that she made a voluntary, knowing, and intelligent waiver of those rights. Gaking argued that admitting her silence and physical response as an adoptive admission violated her right to silence and rejected that the circumstances were such that a reasonable person would have responded if there was no intention to acquiesce.

The trial court rejected this argument. The trial court found that Gaking was in custody when she spoke with police; was correctly advised of her constitutional rights; and made a knowing and intelligent wavier of those rights. The trial court concluded that Gaking never unequivocally invoked her right to remain silent and consequently concluded her nonverbal response was admissible at trial as an adoptive admission. The trial court reasoned that (1) Gaking heard Sergeant Clark's question about whether she was dealing; (2) she was able to respond, as was evident from her responses to prior questions; and (3) she would have responded in the negative if there was no intention to acquiesce to the statement.

III. Trial

During trial, the State again called Sergeant Clark as a witness. Sergeant Clark's trial testimony was consistent with his testimony from the pretrial hearing, but he made a specific reference to the fact that Gaking did not answer his question:

> Q: . . . Did you ask her if she was selling a large amount of narcotics?
> A. Yes.
> Q. What was her response?
> A. She said "I don't sell like that."
> Q: Did you ask her if she was selling?
> A. Yes.
> Q. What was her response to that?
> A. She kind of just smiled and didn't answer, smiled or smirked and didn't answer.
> Q: At that point, did you stop speaking to Ms. Gaking for a time?
> A. Yes.
> Q. What did you do at that point?
> A. I went and interviewed everyone else that was in the residence.

3 Verbatim Rep. of Proc. (VRP) at 209. Sergeant Clark did not make any additional references to Gaking's silence, but instead detailed what officers found in Gaking's room and his impressions of the evidence. He testified that in the context of finding heroin, methamphetamine, scales, and packaging, finding several cell phones in Gaking's room was not odd; in his experience, narcotics

dealers at all levels use multiple phones to separate their dealing with their personal line. The State asked Sergeant Clark whether Gaking's statement about being unemployed seemed inconsistent with what was in her bedroom. Sergeant Clark stated that, in his experience, street-level dealers will exchange narcotics for items that are commonly shoplifted or stolen from places, including detergent and clothing. Sergeant Clark affirmed that all the evidence was consistent with someone selling narcotics.

Other officers supported Sergeant Clark's conclusions. Officer Anderson attested "it is very common for there to be extensive surveillance systems" in homes where drugs are being sold. 4 VRP at 276. Officer Anderson also shared that finding wads of $20 bills was significant because "those purchasing small quantities use small bills." *Id.* at 277. Officer Martin attested that it is common for dealers to sell but not use heroin and methamphetamine at the same time.

Gaking testified in her defense. She urged there was a legitimate excuse for the circumstantial evidence found in her bedroom. Gaking asserted that she purchased foreclosed storage units and ran a legitimate resale business to sell the contents. Police found the business license in her room. She stored some of the items she purchased in her bedroom and others in an off-site storage unit. The clothing, shoes, accessories, scales, and packaging materials were contents from these purchases that she intended to resell. The defense also implied that the small denomination money found in her drawers was from lottery winnings at a casino, not evidence of street-level dealing. The defense attempted to minimized the significance of the live-feed surveillance feed in her bedroom and cited prior property damage as the motive for installing the cameras and monitor. The defense noted that police didn't find a ledger or crib notes in Gaking's room, nor did they test for any drug residue on the scales or inside one of the small baggies found

in Gaking's dresser with a sticky substance inside. Officers did not check to see if the scales functioned. Furthermore, it challenged whether the quantities of narcotics were consistent with that of a dealer, noting that "some people buy [drugs] in bulk." *Id.* at 327.

Additionally, the defense challenged Gaking's admission of guilt, asserting she was unaware a housemate's narcotics were stored in her shelf. Gaking stated all of her seven housemates had access her room, though she only knew three of them. According to Gaking, she believed a housemate stored the heroin and methamphetamine in her hidden shelf for safekeeping. She had given permission to this housemate to put something in the shelf shortly before police arrived to search the premises, but Gaking did not inquire about what they wanted to store. Gaking alleged that Sergeant Clark presented her with the bag of marijuana in the shelf, and only inquired about whether the marijuana was hers. She admitted that it was.

During closing arguments, the State reviewed evidence that it had presented during trial including testimony from officers. The State identified inconsistencies between Gaking's testimony and other evidence in the record. The State highlighted that the only issue facing the jury was whether there was intent to deliver. To determine if the State had met this requirement, the State encouraged jurors to think broadly:

> You don't think of each of these items in a vacuum, you step back and get all of them, the finger coverings, the number of baggies, the amount of drugs that were there, the different type of drugs that were there. These, when you take a step back, provided with her statement, her own statement when asked if she didn't sell like that, her response was -- or sorry. When asked if she sells large amounts of narcotics, her response to Sergeant Clark was "I don't sell like that."
>
> Combined with her next question by Sergeant Clark, "Well, do you sell?" And *she looked away and smiled or smirked*.
>
> Ladies and gentlemen, that statement and that conduct, that movement, shows that she intended to sell those items. So the State has proven beyond a

> reasonable doubt, Count I, that the defendant possessed heroin with intent to deliver.

6 VRP at 509 (emphasis added).

The State reiterated its closing argument for the second charge of possession with intent to distribute methamphetamine. The State referenced Gaking's nonverbal response:

> The fact that we have two different types of drugs, each at a dealer's amount and far beyond a user's amount, that we have multiple different sizes and types of bags, we have scales, we have finger coverings, it all goes to the fact that the defendant -- the defendant's *smirk to Sergeant Clark* was because she was possessing those drugs and she knew she was possessing them with intent to deliver, and I'm asking you to find her guilty of both counts. Thank you.

Id. at 512 (emphasis added). During its closing rebuttal statement, the State again made passing reference to Gaking's nonverbal response:

> Fact, when asked if she sells large sums of drugs, her response was, "I don't sell like that" in fact, when asked if she sells, *she smiled and looked away*.
>
> . . . .
>
> [ ] You saw evidence of what was considered a user amount [of controlled substances]. We don't know what the substance is, but it was considered a user amount. Compare that to State's Exhibit 44 and State's Exhibit 45. These two products combined with all of the other evidence that you have here, the photos, the bags, the scales, the finger coverings show you what the defendant was intending to do. The defendant *told Sergeant Clark in not so many words what she was intending to do*; that these drugs were hers and evidence shows she was intending to deliver them.

Id. at 528, 530-31 (emphasis added).

The jury convicted Gaking for two counts of unlawful possession of a controlled substance with intent to deliver, one for heroin and one for methamphetamine. Gaking appeals.

DISCUSSION

I. TRIAL COURT'S RULING[2]

Gaking asserts that the trial court erred by admitting Gaking's nonverbal gestures in response to Sergeant Clark's question as an adoptive admission under ER 801(d)(2)(ii). Although the State argued below that Gaking's action in smiling or smirking and turning her head in response to Sergeant Clark's question about whether she sells drugs was an adoptive admission, the State now argues that Gaking's gestures were admissible as a communicative expression that was inconsistent with silence. The State also argues that even if the trial court erred, any error was harmless beyond a reasonable doubt.

We conclude that, although Gaking's nonverbal response was more akin to a communicative expression than silence, even if error occurred it was harmless beyond a reasonable doubt.

A. *Standard of Review*

We review a trial court's decision as to admissibility of any statements under an abuse of discretion standard. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). The trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). A decision is

[2] As an initial matter, the State contends that Gaking's failure to assign error to any factual finding or conclusion of law is a procedural default that precludes our review of her assignments of error. But as Gaking notes in her reply, she does not take issue with the trial court's findings of fact about what occurred, but rather challenges the trial court's legal conclusions stemming from those factual findings. Although Gaking does not expressly assign error to this conclusion of law, the nature of the appeal is clear and Gaking has sufficiently briefed the issue. The State, moreover, does not allege any prejudice from our consideration of Gaking's assignments of error, nor can we discern any. We exercise our discretion to consider the merits of the case.

manifestly unreasonable if the court applies the correct legal standard but reaches a decision that no reasonable person would. *Id.* at 76. A decision is based on untenable grounds if the trial court relies on an incorrect legal standard or facts unsupported by the record. *Id.* The burden is on the appellant to demonstrate abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). A trial court's evidentiary rulings can be affirmed on any grounds supported by the record and the law. *State v. Grier*, 168 Wn. App. 635, 644, 278 P.3d 225 (2012). We review the question of whether a defendant invoked their right to remain silent as a mixed question of law and fact, and our review is de novo. *State v. I.B.*, 187 Wn. App. 315, 319-20, 348 P.3d 1250 (2015).

B. *Communicative Expression*[3]

The State no longer contends that Gaking's gestures were adoptive admissions. Instead, the State now argues that we should affirm the trial court's admission of Gaking's nonverbal gestures as an affirmative response through a communicative expression. Stated another way, the State contends there was no comment on Gaking's silence because she was not silent. Gaking responds that her actions of turning her head and smiling or smirking were not the sort of actions that qualify as nonverbal responses. Gaking argues that only gestures like head shaking or nodding, or pointing a finger at something constitute nonverbal assertions, but mere facial expressions and body language do not communicate a specific response.

The State relies on our unpublished decision in *State v. Larisch*, No. 46850-6-II, (Wash. Ct. App. Mar. 15, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2046850-6-II%20Unpublished%20Opinion.pdf. In *Larisch*, the trial court stated that Larisch " 'made a gesture

[3] Because the State no longer contends that Gaking's gestures were an adoptive admission, we need not address that argument as a basis to affirm the trial court.

in which he sagged his body and looked down at the ground, which [the deputy] understood as an indication that Larisch knew he had been caught.' " *Id.* at 8 (quoting CP at 104-05). We observed that an invocation of the right to remain silent must be unequivocal, and held that a reasonable officer under the circumstances would not necessarily have understood Larisch's conduct as an invocation of silence. *Id.* Rather, we held, Larisch's gesture was "an answer to a question, not [ ] an invocation of silence." *Id.*

Although the gestures in this case are less definitive than those in *Larisch*, they are more akin to a communicative response than an assertion of silence. Furthermore, any error in admitting this evidence was harmless beyond a reasonable doubt.[4]

C. *Harmless Error*

If the trial court's admission of this evidence was error, the error was harmless. Because the claim of error in this case involves the question of Gaking's exercise of her right to silence, we treat this as a claim of constitutional error and apply the constitutional harmless error test.[5] "Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that

[4] The State also argues in the alternative that Gaking's gesture was admissible as demeanor evidence, but the import of the State's argument in this section of its brief is not meaningfully different than its argument that Gaking's gesture was a communicative expression. To wit, the State argues that Gaking's demeanor "was an affirmative physical response and reaction." Br. of Resp't at 28.

[5] Gaking argues that only her claim of error against the State requires the constitutional harmless error test and that the trial court's ruling should be reviewed under the nonconstitutional harmless error test. Throughout her brief, Gaking singles out the actions of the State as somehow more odious than that of the trial court. This is peculiar. The State sought permission, prior to the trial, to introduce this evidence and the trial court held a hearing on the matter. The State did not, sua sponte and without permission, introduce this testimony. If there was error, it originated with the trial court's ruling on the motion in limine. The State's conduct was in line with the trial court's ruling. In any event, we review this case under the constitutional harmless error test.

the error was harmless." *State v. Nysta*, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012). In determining whether a constitutional error warrants a new trial, we ask whether the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425-426, 705 P.2d 1182 (1985). Error is harmless beyond a reasonable doubt when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.*

Here, the untainted evidence overwhelmingly supports the jury's guilty verdict for both counts of unlawful possession of controlled substances with the intent to deliver. Although more must be shown than mere possession to demonstrate an intent to deliver, evidence showing possession coupled with additional facts suggestive of a sale permit an inference of intent to deliver. *State v. Cobelli*, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989); *State v. O'Connor*, 155 Wn. App. 282, 290-91, 229 P.3d 880 (2010). Even the possession of a large amount of drugs must be accompanied by additional indicia of intent to deliver. *State v. Zunker*, 112 Wn. App. 130, 135-36, 48 P.3d 344 (2002).

The evidence found in Gaking's bedroom demonstrates far more than mere possession of a controlled substance. As we detailed above, officers found a hidden shelf compartment on Gaking's bedroom wall containing 60 grams of heroin and 40 grams of methamphetamine. They also found multiple scales, money, a counterfeit bill detector, finger covers, cell phones, and packaging materials including small baggies in Gaking's bedroom. Gaking had a monitor in her bedroom with live surveillance feed from cameras posted on the exterior of the home. Gaking did not have any drug paraphernalia that would indicate her personal use of the large quantity of drugs found in her bedroom.

Officers also documented a large quantity of new clothing with tags still attached, shoes, costume jewelry, and name-brand purses, and more than 25 containers of laundry detergent in the laundry room. Sergeant Clark, Officer Anderson, and Officer Martin testified about the significance of this evidence and why it was indicative of narcotics distribution. Against this backdrop, the testimony and reference to Gaking's smile or smirk and head turn when asked if she sells drugs was of minor moment in the trial. Little could be gleaned from Gaking's gestures that Gaking had not already shared in responses to other questions. When asked if she sold large quantities of controlled substances, Gaking informed Sergeant Clark that she "doesn't sell *like that*" and admitted the narcotics, packaging, scales, and money were hers. CP at 65 (emphasis added).

The error from the trial court's admission of this evidence, if any, was harmless.

II. THE STATE'S QUESTIONS AND ARGUMENT

Gaking separately argues that the State violated her constitutional rights against self-incrimination and to due process by eliciting testimony from Sergeant Clark about Gaking's gestures in response to the question about whether she sold drugs, and its remarks in closing argument about that testimony. But as we noted above, the State's elicitation and use of this evidence was in keeping with the trial court's ruling allowing this evidence. Thus, the error, if any, lies in the trial court's ruling on the motion in limine. We therefore decline to separately analyze this claim.

For the reasons we set forth above, any error resulting from the trial court's ruling admitting this evidence or the State's elicitation and use of this evidence is harmless beyond a reasonable doubt.

CONCLUSION

Even assuming the trial court abused its discretion by admitting Gaking's nonverbal gestures and the State improperly commented on the gestures, the error was harmless. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, C.J.

We concur:

LEE, J.

CHE, J.

WASHINGTON APPELLATE PROJECT

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