Supreme Court No. (to be set)
Court of Appeals No. 40152-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

AUSTIN JAMES BUTLER,
Appellant.

PETITION FOR REVIEW BY THE APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY
THE HONORABLE KEVIN NAUGHT, JUDGE

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I. IDENTITY OF PETITIONER

Austin Butler, Appellant, asks this Court to accept review of the decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Butler seeks review of the published opinion of the Court of Appeals, Division III, issued on June 10, 2025. Appendix (App.) at 1-20. Division III declined to reconsider this opinion. App. at 21.

III. ISSUE PRESENTED FOR REVIEW

Should this Court grant review and reverse when Division III misapplied the constitutional harmless error test?

IV. STATEMENT OF THE CASE

This case arises from the shooting of Angel Lopez. Mr. Lopez and Austin Butler were, at different times, romantically involved with Jasmin Bailon. Mr. Butler was convicted of shooting Mr. Lopez, who survived.

A. The Shooting.

On March 4, 2022, Angel Lopez exchanged flirtatious Facebook messages with a person who he believed was Jasmin Bailon. RP at 573-74; Ex 26. Mr. Lopez and Ms. Bailon met a few years earlier and had a brief, casual dating relationship. RP at 571, 575. Mr. Lopez arranged to meet Ms. Bailon outside of his house. RP at 574. He received a message from her account saying "Outside" and responded "Omw [on my way]". Ex. 26 at 10.

According to Mr. Lopez, he saw Ms. Bailon's black Jeep parked on the street outside his house. RP at 593. He walked up, but Ms. Bailon was not in the car. *Id.* Instead, a man got out and identified himself as Ms. Bailon's boyfriend. Ex. 1 at 01:37-01:43; Ex. 2A at 06:00-06:05. The man drew a gun and shot Mr. Lopez. RP at 229, 597-98; Ex.s 42-44.

The man got back in the vehicle and drove away quickly. RP at 597. Mr. Lopez was sure that the vehicle was Ms. Bailon's black Jeep because he recognized it from dates they

went on previously. RP at 593, 602-03. However, his neighbor, Ryan Moore, testified that he saw the car drive away. RP at 365. Mr. Moore said that it was a "lighter color" silver or gold SUV. RP at 378.

B. The Police Investigation.

Mr. Lopez called 911 and reported the shooting. RP at 597. Officer John Oliveri responded and talked with Mr. Lopez about what happened. RP at 251. Mr. Lopez showed him the Facebook messages. *Id.*

Officer Oliveri found a black 2000 Jeep Wrangler registered to Ms. Bailon. RP at 254. He found that her address was 1103 Browne Avenue, apartment 3, in Yakima. *Id.* Police impounded Ms. Bailon's black Jeep. RP at 292.

Meanwhile, Mr. Lopez was transported to Yakima Memorial Hospital for treatment. RP at 195. He was given fentanyl. RP at 614. While at the hospital, police created the first photomontage. RP at 190; Ex. 6B. This photomontage did not include Mr. Butler. RP at 287.

Mr. Lopez positively identified the first photo as the shooter. RP at 198. This photo was a person unrelated to these events who did not resemble Mr. Butler. RP at 196; Ex. 6B. Mr. Lopez later testified that he did not remember much about the first photomontage. RP at 614-17. He said that this was not the person who shot him. RP at 617.

After he was discharged from the hospital, Mr. Lopez began looking through Ms. Bailon's social media. RP at 594-95. He found pictures of Ms. Bailon with Austin Butler, including a post where Mr. Butler said something like, "'this is my girl. She's 5 months pregnant.'" RP at 623-24, 655.

On March 7, 2022, Mr. Lopez provided a new detail to the police. For the first time, he said that the shooter told him that Ms. Bailon "was pregnant with his kid and to stop talking to her." RP at 595-96. Mr. Lopez did not mention anything about pregnancy on the 911 call, to first responders, or to police until after he saw Mr. Butler's social media posts. Ex.s 1, 2A; RP at 632, 655, 1062, 1066.

Soon after, the social media posts started disappearing. RP at 623-25. Mr. Lopez could not tell whether the posts were deleted, the accounts were made private, or the accounts blocked him. RP at 626.

Police created a second photomontage, this time including Mr. Butler. RP at 456; Ex. 34. Officer Lukas Hinton showed this second photomontage to Mr. Lopez on March 10, 2022. RP at 456. Officer Hinton knew that Mr. Butler was the suspect. *Id.*

Mr. Lopez viewed the second photomontage three times. RP at 462-65. Each time he paused at the third photo, which was of Mr. Butler. *Id.* However, despite viewing photos of Mr. Butler on social media, Mr. Lopez was unable to identify the shooter. *Id.*

Police left the house. RP at 467. They received a call asking them to come back. *Id.* Mr. Lopez viewed the photomontage a fourth time. RP at 468. He still did not make a selection, but he said he thought it was the third photo (Mr. Butler). RP at 469.

Mr. Lopez was "9 out of 10" and "90 to 95 percent sure", stating "I swear that's him". *Id.*

On April 7, 2022, Officer Oliveri pulled over a white Toyota Camry. RP at 294-95. The car belonged to Ms. Bailon and was driven by Mr. Butler. *Id.* Officer Oliveri arrested Mr. Butler, who asserted his right to remain silent. RP at 295, 322. Officer Oliveri said that Mr. Butler provided Ms. Bailon's Browne Avenue apartment as his mailing address on the jail booking form. RP at 352; Ex. 9C.

Police searched the Camry. RP at 713. They found letters addressed to Mr. Butler. Ex.s 45A, 46A. The letters listed his address as 206 S 32nd Avenue in Yakima; they did not list the Browne Avenue address. *Id.*

Police also seized Mr. Butler's cell phone. RP at 295-96. The phone contained photos of Mr. Butler and Ms. Bailon, as well as credit card information for them both. Ex. 32D-F. The autofill download showed that shortly after the shooting, Mr.

Butler searched for one passenger from Yakima to Albany, Georgia. Ex. 32G.

Police also obtained a warrant for Mr. Butler's Google account. RP at 856; Ex.s 30A-E. The return showed that Mr. Butler visited Greyhound.com several times on March 5, 2022. RP at 861, 864. He downloaded a police scanner application early in the morning on March 4, 2022. RP at 866-67. Mr. Butler visited the Yakima Herald website in the days after the shooting. RP at 869-70.

Law enforcement also swabbed Ms. Bailon's Jeep. RP at 389. They found DNA from a mix of three or four individuals on each spot. RP at 760-64. Mr. Butler was one of these individuals. *Id.* Police could not determine when the DNA was left on the vehicle. RP at 784.

Police also obtained surveillance video from the church across the street from Ms. Bailon's apartment. RP at 689-704; Ex. 12A. The video shows a man leaving Ms. Bailon's apartment and driving away in a black Jeep shortly before the

shooting, then returning about 20 minutes later. RP at 698-99, 701. The man goes inside Ms. Bailon's apartment, then drives away in a white car. RP at 702. The video is too blurry to identify the man. Ex. 12A.

C. The Trial.

The State charged Mr. Butler with attempted first degree murder, first degree assault, drive-by shooting, and first degree unlawful possession of a firearm. CP 1-2. The first two offenses included firearm enhancements. *Id.*

This case proceeded to trial in November and December 2023. Mr. Lopez testified that he was sure Mr. Butler was the shooter. RP at 593-94, 657. He said that Mr. Butler got close, within a few feet of him. RP at 596. This contradicted what he told police in March 2022: that the shooter was 10 to 15 feet away. RP at 650-51, 1063.

During trial, the State sought to admit the booking form filled out by Officer Oliveri the night he arrested Mr. Butler, April 7, 2022. RP at 331. Mr. Butler objected, but the court

admitted the form, concluding that asking for Mr. Butler's mailing address was not an interrogation. RP at 334-36; CP at 247-50.

Jaqueline Mora, Mr. Butler's Department of Corrections (DOC) community corrections officer, testified that in June 2021, Mr. Butler filled out a form updating his address to Ms. Bailon's Browne Avenue apartment. Ex. 27; RP at 929. Ms. Mora's last contact with Mr. Butler was January 25, 2022. RP at 930. Mr. Butler never told her that he moved out, and he had an obligation to report a move. RP at 929-30.

Ms. Bailon testified about her friendship with Mr. Butler. She said they were romantically involved off and on, but they also dated other people. RP at 985. In March 2022, Ms. Bailon was about five months pregnant. RP at 1000. She testified that was not sure who the father was. RP at 942. Ms. Bailon gave her baby the last name "Butler", but she did not list a father on the birth certificate. RP at 942, 1005.

The jury convicted Mr. Butler as charged. RP at 1303-06. He was sentenced to a total of 408 months incarceration, including enhancements. CP 254. Mr. Butler appeals.

On June 10, 2025, Division III issued a published opinion. App. at 1. The Court held that the trial court erred by admitting the booking form containing Mr. Butler's address because Officer Oliveri interrogated Mr. Butler in violation of *Miranda*.[1] *Id.* But the Court affirmed, concluding that this error was "harmless beyond a reasonable doubt". *Id.* Mr. Butler seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Butler respectfully asks this Court to grant review and reverse the Court of Appeals, Division III. This Court grants review under four circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

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

> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, review is appropriate under all four subsections. *Id.*

At trial, the court erred by admitting a booking form obtained by police in violation of Mr. Butler's *Miranda* rights. App. at 1, 10. Division III acknowledged this constitutional error but considered it harmless due to "overwhelming untainted evidence" supporting Mr. Butler's guilt. *Id.*

Respectfully, the evidence here was far from overwhelming. The victim twice viewed photomontages and twice failed to identify Mr. Butler as the shooter with certainty. He initially misidentified the shooter as a person unrelated to these events. Mr. Lopez only added that the shooter identified himself as the father of Ms. Bailon's unborn child *after* viewing social media

posts where Mr. Butler discussed Ms. Bailon's pregnancy. The State presented no physical evidence connecting Mr. Butler to the scene. DNA evidence showed that Mr. Butler—and three other people—touched Ms. Bailon's Jeep, but eyewitness testimony conflicted about whether her Jeep was even used in this crime.

Evidence this contradictory cannot be overwhelming. Division III erred by effectively treating the test for constitutional harmless error as a test for whether sufficient evidence supported the jury's verdict. Its decision conflicts with precedent from this Court and the Court of Appeals, violates Mr. Butler's constitutional rights, and contravenes public policy. RAP 13.4(b)(1)-(4). This Court should grant review, reverse, and clarify the "overwhelming untainted evidence" test. *Id.*

A. Weak and Conflicting Evidence Cannot be "Overwhelming".

Admitting evidence obtained in violation of *Miranda* infringes on the defendant's Fifth Amendment right against self-

incrimination. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). This error is presumed to be prejudicial, and the State bears the burden of proving it was harmless beyond a reasonable doubt. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997).

In *State v. Guloy*, this Court adopted the "overwhelming untainted evidence" test for constitutional harmless error. 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Under this test, "the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id*. This test "allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is *any reasonable possibility* that the use of inadmissible evidence was necessary to reach a guilty verdict." *Id*. at 426 (emphasis added).

This is a high burden. "Unless we apply the overwhelming untainted evidence test carefully and strictly, it will not perform

its function." *State v. Whelchel*, 115 Wn.2d 708, 731, 801 P.2d 948 (1990) (Utter, J., dissenting) (discussing *Guloy*, 104 Wn.2d at 426). If courts "fail to reverse when evidence at the heart of the prosecution's case is admitted" in violation of the constitution, "we risk making a defendant's constitutionally guaranteed right to a fair trial meaningless." *Id.*

Importantly, the "overwhelming untainted evidence" test is not a test for sufficiency of the evidence. *State v. Monday*, 171 Wn.2d 667, 680 n.4, 257 P.3d 551 (2011) (question of whether "overwhelming evidence" supported guilt was not the same as "whether there was sufficient evidence to sustain the jury's verdict"). These tests differ in their burdens of proof, the inferences courts make, and whether courts evaluate credibility and conflicting testimony.

"In a challenge to the sufficiency of the evidence, the test 'is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.' " *In re Pers. Restaint of Arntsen*, 2

Wn.3d 716, 724, 543 P.3d 821 (2024) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Courts "draw all reasonable inferences from the evidence in favor of the State and against the defendant." *Id*. This test "is highly deferential to the jury's decision, and we do not consider 'questions of credibility, persuasiveness, and conflicting testimony.' " *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (plurality opinion) (quoting *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011)).

Conflicting evidence can support a conviction under the sufficiency of the evidence test. *See Arntsen*, 2 Wn.3d at 724. But precedent from this Court and the Court of Appeals shows that conflicting or weak evidence cannot meet the "overwhelming untainted evidence" standard. *See, e.g.*, *Easter*, 130 Wn.2d at 231-32 (evidence was not "overwhelming" where witnesses presented "different versions" of the events and "experts' conclusions were contradictory"); *Monday*, 171 Wn.2d at 680 n.4 (evidence was not "overwhelming" where videotape of the

shooting "does not by itself establish premeditation, nor does it rule out some defenses"); *State v. Romero*, 113 Wn. App. 779, 795, 54 P.3d 1255 (2002) ("State's evidence was not overwhelming" where verdict "turned on the testimony of one eyewitness" whose "testimony was subject to challenge"); *State v. Wilson*, 31 Wn. App. 2d 836, 855-62, 553 P.3d 678 (2024) (untainted evidence of premeditation was not "overwhelming" where parties presented "conflicting expert testimony" of defendant's capacity).

By contrast, where there is strong evidence of guilt and no significant conflict in the untainted evidence, courts hold that the evidence was overwhelming. *See, e.g.*, *State v. Frost*, 160 Wn.2d 765, 769-70, 782-83, 161 P.3d 361 (2007) ("overwhelming" evidence of guilt included defendant's "three taped confessions and his trial testimony" admitting to the robberies); *Guloy*, 104 Wn.2d at 426 ("overwhelming" evidence of guilt where the victim repeatedly and consistently identified the defendants as his shooters, and two other witnesses saw the

defendants near the scene before and after the crime); *State v. Mayer*, 184 Wn.2d 548, 567-68, 362 P.3d 745 (2015) ("overwhelming untainted evidence" supported defendant's guilt when his accomplices, his girlfriend, and multiple other witnesses all testified that he was one of the robbers).

Here, Division III misapplied the "overwhelming untainted evidence" test. From its opening sentence, the Court interpreted the evidence in the light most favorable to the State, resolved conflicts in the State's favor, and refused to examine witness credibility. App. at 1 ("The person who shot Angel Lopez was the father of Jasmin Bailon's then unborn child, had access to two of Bailon's cars, and likely lived with her."). This Court should grant review because Division III failed to hold the State to its burden.

B. The Untainted Evidence in this Case was Not Overwhelming.

Division III found that the following evidence was "overwhelming" proof of Mr. Butler's guilt:

The State's proof of Butler's guilt was overwhelming, and included:

- The shooter identified himself as the father of Bailon's unborn child;
- Bailon was five months pregnant at the time of the shooting;
- Bailon gave the child Butler's last name;
- Bailon twice wrote to the trial court, referring to Butler as the father of the child;
- Butler posted a picture of himself and Bailon, saying something like, "'[T]his is my girl. She's 5 months pregnant.'" RP at 655.
- The shooter drove Bailon's black Jeep back to Bailon's apartment minutes after the shooting, went inside the apartment, and later left in Bailon's 1997 white Toyota Camry;
- A little over an hour after the 3:40 a.m. shooting, Butler did a Google search for a police scanner;
- The morning of the shooting, Butler did a Google search for Greyhound bus schedules from Yakima to Georgia;
- That afternoon, someone with access to Bailon's Facebook settings changed her settings to hide Bailon and Butler's relationship;
- Butler likely had Bailon's 1997 white Toyota Camry the day after the shooting because at 5:00 p.m. that day, Butler did a Google search for how to deactivate an alarm on a 1997 Toyota Camry;

- Butler was stopped by police one month after the shooting while driving Bailon's Toyota Camry;
- A Department of Corrections (DOC) form completed by Butler in June 2021 gave his address as Bailon's Browne Avenue address;
- Butler was required to inform his DOC officer of any change in address. January 25, 2022 was when he last met with his DOC officer, and he did not inform the officer that his address had changed from the Browne Avenue address;
- Butler's Google profile showed he and Bailon shared the Browne Avenue address for billing purposes;
- Butler's DNA was found on the Jeep's exterior driver's handle, interior door controls and handle, and steering wheel.

We conclude there is overwhelming untainted evidence of Butler's guilt, and the State has proved beyond a reasonable doubt that any reasonable jury would have reached the same result, absent admission of the booking form.

App. at 10-12.

The Court erred and misapplied the test for constitutional harmless error. Although the Court accurately quoted the "overwhelming untainted evidence" test, the standard it

actually applied more closely resembled the test for sufficiency of the evidence. *Id.*

First, Division III interpreted the evidence in the light most favorable to the State. The Court assumed—despite conflicting evidence—that Ms. Bailon's Jeep was used in this shooting. App. at 11. This was far from clear. The victim said that he recognized Ms. Bailon's black Jeep, but a detached eyewitness testified that he saw a "lighter color" silver or gold SUV leaving the scene. RP at 378, 593. Ms. Bailon's Jeep is unmistakably black—it has no lighter-colored panels, and its windows are darkly tinted. Ex.s 5A-F.

Division III resolved this discrepancy in favor of the State, assuming that, "The shooter drove Bailon's black Jeep back to Bailon's apartment minutes after the shooting". App. at 11. The Court failed to hold the State to its burden of proving harmless error beyond a reasonable doubt by interpreting this conflicting evidence in the State's favor.

Second, Division III refused to consider evidence and circumstances that undermined the victim's credibility. The Court assumed that the shooter identified himself as the father of Ms. Bailon's unborn child despite serious reasons to doubt the veracity of this statement. App. at 10. Much of the other evidence relied upon by the Court built upon this assumption. *See id.* at 10-11 (discussing Ms. Bailon's pregnancy, Mr. Butler's social media post about her pregnancy, and the child's last name).

This evidence came from the victim, Angel Lopez. RP at 632. Mr. Lopez testified at trial that the shooter said that Ms. Bailon was pregnant with the shooter's child. *Id.* But Mr. Lopez only reported this *after* he searched social media and found Mr. Butler's post stating that Ms. Bailon was five months pregnant. RP at 632, 655, 1062, 1066.

On March 4, 2022, the night of the shooting, Mr. Lopez did not mention anything about pregnancy on the 911 call, to first responders, or to police. Ex.s 1, 2A; RP at 632, 655, 1062,

1066. That night, he identified the shooter as Ms. Bailon's boyfriend, not the father of her unborn child. *See* Ex. 1 at 01:37-01:43 (911 call, "it was her [Jasmin Bailon's] boyfriend . . . I don't know his name"); Ex. 2A at 06:00-06:05 ("I just know it's her [Jasmin's] boyfriend").

Mr. Lopez only added that the shooter said Ms. Bailon was pregnant on March 7, 2022, after finding Mr. Butler's social media post about Ms. Bailon's pregnancy. RP at 1062-66. This was after he misidentified the perpetrator at the hospital. RP at 198. Even after combing through social media, Mr. Lopez could not identify Mr. Butler as the shooter with certainty. RP at 469.

Division III did not take this context into account. The Court assumed Mr. Lopez's credibility and concluded that the shooter identified himself as the father of Ms. Bailon's unborn child despite serious reasons to doubt this evidence. App. at 1, 10-11. By doing so, the Court made an impermissible inference

in the State's favor, then used that inference to conclude that overwhelming evidence supported Mr. Butler's guilt.

Applying the constitutional harmless error test correctly, the untainted evidence was not overwhelming. The strongest evidence at trial was the eyewitness identification by the victim. But Mr. Lopez had significant problems with his credibility. Twice police showed him photomontages, and twice he failed to identify Mr. Butler with certainty. RP at 198, 468-69. Police showed him the first photomontage at the hospital shortly after the shooting, when Mr. Lopez's memory was arguably the freshest and before it became tainted by his social media searching. RP at 198. Mr. Lopez identified an unrelated person as the shooter, someone with no connection to this crime and little resemblance to Mr. Butler. *Id.*; *compare* Ex. 6B, photo 1, *with* Ex. 34, photo 3.

Mr. Lopez was even less certain the second time. Police showed him the second photomontage about a week later, on March 10, 2022. In the intervening days, Mr. Lopez scoured

social media for pictures of men associated with Ms. Bailon. RP at 594-95. He settled on Mr. Butler, who he believed was Ms. Bailon's boyfriend. RP at 623-24, 632.

Despite this, Mr. Lopez could not select Mr. Butler from the second photomontage with certainty. RP at 469. He viewed this photomontage a total of four times and never made a selection. RP at 462-69. The last time, Mr. Lopez was only "9 out of 10" or "90 to 95 percent sure" that Mr. Butler was the shooter. RP at 469. There were also procedural issues with the second photomontage: Officer Hinton presented it despite knowing that Mr. Butler was the suspect. RP at 456.

When he testified at trial nearly two years later, Mr. Lopez was sure that Mr. Butler was the shooter. RP at 593-94, 657. The prosecutor argued that seeing Mr. Butler in person, as opposed to in photographs, made Mr. Lopez certain of his choice. RP at 1218. This is possible. But it is also possible that once a case proceeds to trial, the victim can convince himself that the accused is the person who harmed him.

For constitutional harmless error, the test is not whether any rational jury could find the defendant guilty. The test is whether *every* rational jury would necessarily find the defendant guilty beyond a reasonable doubt. *Guloy*, 104 Wn.2d at 426. A reasonable jury could look at Mr. Lopez's uncertainty, contradicting identifications in the days after the crime, and inconsistent stories and question whether he really could identify the shooter at trial.

The remaining evidence against Mr. Butler was also not strong enough to lead every reasonable jury to convict beyond a reasonable doubt. The State proved that Mr. Butler—and three other people—left DNA in Ms. Bailon's Jeep. RP at 760-64. But as discussed above, the evidence conflicted about whether Ms. Bailon's Jeep was even used in this shooting. RP at 378, 593.

Police also obtained footage of the outside of Ms. Bailon's apartment from the night of the shooting. Ex. 12A. The video shows a man leaving her apartment in the black Jeep around

the time of the shooting and returning about 20 minutes later. RP at 698-99, 701. But the video is blurry and does not show the man's identity. Ex. 12A. This does not prove that Mr. Butler was the shooter, or even that Ms. Bailon's Jeep was used in this crime; at most it shows that a man drove her Jeep that night.

Mr. Lopez testified that he was lured outside his home after exchanging Facebook messages with who he believed to be Ms. Bailon. RP at 573-74; Ex. 26. It certainly appears that the shooter sent at least the last message, telling Mr. Lopez that they were "[o]utside" his house. Ex. 26 at 10. But the State did not connect these messages to Mr. Butler.

Police searched the phone found with Mr. Butler when he was arrested. RP at 295-96. They found other internet accounts connected to Mr. Butler, including Google and YouTube, but they did not find access or account information for Ms. Bailon's Facebook profile. RP at 856, 892; Ex.s 30A-E, 32C-G. The electronic evidence did not link Mr. Butler to this crime—Mr.

Butler downloaded apps and visited websites that any number of people access every day. Ex.s 30C-D, 32G.

To make its case, the State needed to connect Mr. Butler to Ms. Bailon's Browne Avenue apartment around the time of the shooting. It was undisputed that Mr. Butler and Ms. Bailon had a relationship at one point in time. The question was whether that relationship existed around March 2022, and whether Mr. Butler frequented the Browne Avenue address at that time.

The booking form, exhibit 9, was critical to making that connection. The State presented evidence that about a year earlier, in June 2021, Mr. Butler told his DOC supervisor that he moved in with Ms. Bailon at the Browne Avenue address. RP at 929; Ex. 27. The DOC supervisor testified that Mr. Butler did not inform her of a move from then until the last time she saw him, in January 2022. RP at 930. But January 2022 was still over a month before the shooting.

In closing, the prosecutor argued that the January 2022 DOC form, coupled with the April 2022 booking form,

"bookend[ed]" Mr. Butler's connection to the Browne Avenue address before and after the shooting:

> [W]e have the bookends of the address from Mr. Butler . . . we have the testimony through Ms. Mora-Zambrano [the DOC supervisor] about him saying he lived at 1103 Brown Avenue, number three, before the shooting. And then we have him telling Officer Oliveri when he's arrested in Ms. Bailon's car that that's the mailing address for him at the same time.

RP at 1238. This "bookends" argument was only available to the prosecutor because the booking form was admitted.

The April 2022 booking form strengthened Mr. Butler's connection to the Browne Avenue address. It helped establish his connection to the address before and after the shooting, strongly suggesting that he frequented this address during the period of the shooting itself. The evidence from the DOC officer alone, from January 2022 at the latest, would not have this persuasive bookend effect. Additionally, Mr. Butler presented other letters found in the Camry addressed to him at a different address. Ex.s 45A, 46A.

The other evidence connecting Mr. Butler to the Browne Avenue address was similarly weak. Mr. Butler and Ms. Bailon were seeing other people from at least December 2021 onward. RP at 985, 1144-46. Mr. Butler was arrested driving Ms. Bailon's Camry, but people lend cars to friends as well as to significant others. Mr. Butler borrowing Ms. Bailon's car does not suggest he stayed overnight at her apartment a month earlier.

Police never found the firearm used in this shooting. They did not find any direct physical evidence connecting Mr. Butler to the crime, such as his fingerprints or DNA at the scene. Police did not find evidence in the black Jeep proving it was used in a shooting, such as gunshot residue or blood. They had Mr. Lopez, but until trial he could not identify the shooter with certainty.

The jury was able to infer Mr. Butler's connection to the Browne Avenue address based on the booking form and Officer Oliveri's testimony about Mr. Butler's mailing address. Without

this evidence, the State cannot prove "beyond a reasonable doubt that any reasonable jury would reach the same result absent the error". *Easter*, 130 Wn.2d at 242.

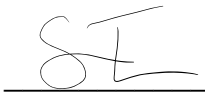
Division III erred by concluding that the State presented overwhelming untainted evidence of Mr. Butler's guilt. To reach this conclusion, the Court misapplied the constitutional harmless error test. This Court should grant review, clarify the test, and reverse.

VI. CONCLUSION

Mr. Butler respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

This document contains 4,961 words, not counting the portions excluded under RAP 18.17.

RESPECTFULLY SUBMITTED on August 7, 2025.



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VII. APPENDIX

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. AUSTIN JAMES BUTLER, Appellant.	)))))))))	No. 40152-9-III PUBLISHED OPINION

LAWRENCE-BERREY, C.J. — The person who shot Angel Lopez was the father of Jasmin Bailon's then unborn child, had access to two of Bailon's cars, and likely lived with her. The State presented compelling evidence that this person was Austin Butler.

Butler appeals his convictions for attempted first degree murder, drive-by shooting, and unlawful possession of a firearm in the first degree. He argues the trial court erred by admitting the booking form that asked for and contained his mailing address, the same address as Bailon's. He argues the arresting officer should have known that a request for his address was reasonably likely to elicit an incriminating response. We agree but conclude that this error is harmless beyond a reasonable doubt.

Butler also argues his constitutional right against self-incrimination was violated by the State asking the jury to draw negative inferences from *Bailon's* silence, i.e., not

wanting to talk with the detective. We disagree. Bailon testified at trial, and the prosecutor did not comment or reference, directly or indirectly, Butler's invocation of his right to remain silent. The State was entitled to argue the reasonable inference that Bailon avoided talking to the detective so as not to implicate Butler, who she testified she loved.

We affirm.

FACTS

A. The Shooting

Angel Lopez and Jasmin Bailon were once romantically involved. Their relationship ended, and they stopped communicating with each other about one year before the shooting.

Around 1:30 a.m. on March 4, 2022, someone with access to Bailon's Facebook account began sending messages to Lopez. Lopez woke up shortly before 2:30 a.m. and responded. After a lengthy exchange of messages, Lopez agreed to meet the person, who he believed was Bailon, outside his house. At 3:38 a.m., Lopez received a text from Bailon's Facebook account reading, "Outside." Clerk's Papers (CP) at 155.

Lopez recognized Bailon's black Jeep parked on the street and walked toward it. As he approached, Lopez assumed Bailon was inside but could not tell because of the Jeep's tinted glass. As Lopez walked around to the passenger side, he saw a man he did

not know step out of the driver's side. The driver walked around the front of the Jeep, glared at Lopez, said that Bailon was pregnant with his child, and demanded that Lopez stop talking to her. Lopez responded that he did not know that Bailon was involved with someone, and he then turned to walk back to his house. The driver fired six shots at Lopez, hitting him once in the thigh and once in the upper glute. Lopez turned and saw his attacker tuck the weapon away and drive off. Lopez called 911 to report he had been shot and to ask for medical assistance.

Police officers arrived before the ambulance. Lopez spoke with Officer John Oliveri and confirmed that Bailon was the owner of the black Jeep. Officer Oliveri obtained Bailon's address from the police database and headed to her apartment on Browne Avenue in Yakima.

Surveillance video from a church across from Bailon's apartment showed the activity outside Bailon's apartment around the time of the shooting. The video showed the black Jeep returning at 3:48 a.m., and the Jeep's driver entering Bailon's apartment. At 3:59 a.m., the driver left in Bailon's white 1997 Toyota Camry. Two minutes later, Officer Oliveri arrived at the apartment and additional officers arrived soon after.

Officers confirmed that the black Jeep's hood was warm and seized it as evidence. Officers knocked on Bailon's apartment door, but she did not answer. The surveillance

video, which was later obtained, confirmed that Bailon was inside her apartment at the time the officers knocked on her door.

B. The Investigation

On March 4, while Lopez was recovering at the hospital, he searched Bailon's Facebook page in an effort to identify his shooter. He found posts on her page depicting Austin Butler, who Lopez identified as the shooter. Lopez called the police tip line and informed law enforcement that Austin Butler was the person who shot him. Later that day, the Facebook posts linking Bailon with Butler either became restricted from public view or were deleted from the platform. An arrest warrant was issued for Butler.

Detective Kevin Cays began investigating the case on March 7. After a couple of failed attempts to meet with Bailon, Detective Cays met her at her apartment on March 9. The detective asked Bailon if Austin was driving her Jeep the early morning hours of the shooting, and she responded, "Whose [sic] Austin." Rep. of Proc. (RP) at 1090.

C. The Arrest

One month after the shooting, Officer Oliveri was on patrol and stopped a white 1997 Toyota Camry for a defective brake light. Before the stop, Officer Oliveri had received an e-mail from Detective Cays to be on the lookout for Bailon's white Toyota Camry. Officer Oliveri obtained the driver's identification and learned that the driver was Butler and that the Camry belonged to Bailon. Officer Oliveri arrested Butler and

read him his *Miranda*[1] rights. Butler stated he understood his rights and invoked his right to remain silent. Officer Oliveri then transported Butler to the local jail for booking.

Once at the jail,[2] Officer Oliveri completed a standard booking form. One question asked for Butler's mailing address. Officer Oliveri asked Butler for his address, and Butler responded with Bailon's Browne Avenue address.

D. Trial

The State charged Butler with attempted murder in the first degree, assault in the first degree, drive-by shooting, and unlawful possession of a firearm in the first degree. At trial, Lopez testified about the shooting, having no doubt that Butler was the person who shot him, how he identified Butler as the shooter from Bailon's Facebook page, and how someone with access to her account soon after changed its settings.

The State introduced the booking form as evidence that Butler lived at the Browne address at the time of the shooting. It also introduced the surveillance video that tied the shooter to the black Jeep, the white Toyota Camry, and Bailon's apartment. But because it was dark, the driver could not be identified in the video. Nevertheless, as discussed

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[1] *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] When questioned during the motion to suppress the booking form, Officer Oliveri could not recall if he was sitting inside his car in the jail's sally port or at a desk when he asked Butler the questions. During a break in the trial, the parties learned that the officer asked Butler his address at the scene of the stop and once again inside the sally port, where, both times, his patrol car's COBAN audio/video unit recorded the pertinent portions of the conversation. The COBAN recording is not part of our record.

later, the State used several pieces of evidence to tie Butler to the black Jeep, to the white Toyota Camry, to Bailon's apartment, and to being the father of Bailon's then unborn child.

The State called Bailon and had her testify about her relationship with Butler. Bailon testified that she met Butler in early 2021. She described their relationship as an on-and-off romantic relationship. She said she loved Butler. She testified she was five months pregnant at the time of the shooting, did not know who the father was, but gave her baby the last name "Butler." RP at 942. The State, through her, offered photos found on Butler's phone, showing the couple hugging and kissing less than two days before the shooting.

The State also presented evidence that Bailon tried to protect Butler throughout the investigation. She failed to appear for her first meeting with the detective, failed to return the detective's telephone calls, and testified she did not give Butler permission to drive her black Jeep or know whether he was staying at her apartment at the time of the shooting.

The jury convicted Butler of all charges,[3] and the trial court sentenced Butler to 408 months of incarceration.

[3] The trial court properly vacated the assault conviction because that conviction merged into attempted murder, the greater charge.

Butler appeals to this court.

ANALYSIS

HARMLESS ERROR ADMITTING BOOKING FORM

Butler argues the trial court erred by admitting the booking form. We agree but conclude that the error was harmless beyond a reasonable doubt.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To counter the inherent compulsion of custodial interrogations, police must administer *Miranda* warnings. *Miranda* warnings are required when the questioning of a defendant is a custodial interrogation by an agent of the State. *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). Once a suspect invokes his right to remain silent, the interrogation must cease. *Miranda*, 384 U.S. at 473-74.

Here, Officer Oliveri questioned Butler one month after the shooting. There is no question that Butler was in custody, was questioned by an agent of the State, and had invoked his right to remain silent. The issue is whether the booking question of Butler's address was an interrogation.

An "interrogation," for Fifth Amendment purposes,

> "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police."

Sargent, 111 Wn.2d at 650 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)).

Generally, routine booking questions do not violate the prohibition against interrogations because such questions rarely elicit an incriminating response. *State v. DeLeon*, 185 Wn. App. 171, 199, 341 P.3d 315 (2014), *rev'd on other grounds*, 185 Wn.2d 478, 374 P.3d 95 (2016). Nevertheless, simply because booking questions typically are nonincriminating does not shield incriminating questions from *Miranda* protections. *State v. Denney*, 152 Wn. App. 665, 670, 218 P.3d 633 (2009). The focus is not on the nature of the question but whether the question was reasonably likely to elicit an incriminating response. *Id.*

This is an objective test where the subjective intent of the questioner is relevant but not conclusive. *Id.* at 671. This will turn on the particular facts of each case, and questions that "relate, even tangentially, to criminal activity" are interrogations. *United States v. Avery*, 717 F.2d 1020, 1024 (6th Cir. 1983). Courts "should carefully scrutinize the factual setting of each encounter of this type" because even a "relatively innocuous series of questions may, in light of the factual circumstances and the susceptibility of a

particular suspect, be reasonably likely to elicit an incriminating response." *Id.* at 1025. Even answers in response to standard booking questions are subject to Fifth Amendment protections. *DeLeon*, 185 Wn.2d at 487.

Officer Oliveri knew, at the time he was booking Butler, that the person who drove the black Jeep and took the white Camry in the early morning hours of March 4 was the person who shot Lopez. He knew that Bailon owned both vehicles and likely allowed the shooter to use one or both vehicles.[4] Therefore, any fact that more closely tied Butler to Bailon was likely to elicit an incriminating response.

During the motion to suppress the booking form, Officer Oliveri testified he had no reason to believe Butler lived at the Browne Avenue address. Although Officer Oliveri's purpose for asking Butler for his address is relevant, it is not dispositive. Officer Oliveri had early responsibility for investigating this case and spoke with Lopez before the ambulance arrived to take him to the hospital. After this, Officer Oliveri was the first officer to arrive at Bailon's apartment. In addition, he had received an e-mail from the detective to be on the lookout for Bailon's white Toyota Camry. Given the nature of his involvement with the investigation, Officer Oliveri should have known that questioning Butler about his address was reasonably likely to elicit an incriminating

[4] Officer Oliveri did not arrest Butler for possession of a stolen vehicle. We may infer from this that Bailon did not report the Camry as stolen.

response tying Butler to Bailon. We conclude that the booking question in this particular case was an interrogation and that the trial court erred by admitting the booking form.

"'[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt.'" *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013) (alteration in original) (quoting *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013)). Our State has adopted the "overwhelming untainted evidence" test as the proper standard for constitutional harmless error analysis. *State v. Frost*, 160 Wn.2d 765, 782, 161 P.3d 361 (2007). Under this standard, an appellate court looks only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* This requires proof beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Id.*

The State's proof of Butler's guilt was overwhelming, and included:

- The shooter identified himself as the father of Bailon's unborn child;
- Bailon was five months pregnant at the time of the shooting;
- Bailon gave the child Butler's last name;
- Bailon twice wrote to the trial court, referring to Butler as the father of the child;

- Butler posted a picture of himself and Bailon, saying something like, "'[T]his is my girl. She's 5 months pregnant.'" RP at 655.
- The shooter drove Bailon's black Jeep back to Bailon's apartment minutes after the shooting, went inside the apartment, and later left in Bailon's 1997 white Toyota Camry;
- A little over an hour after the 3:40 a.m. shooting, Butler did a Google search for a police scanner;
- The morning of the shooting, Butler did a Google search for Greyhound bus schedules from Yakima to Georgia;
- That afternoon, someone with access to Bailon's Facebook settings changed her settings to hide Bailon and Butler's relationship;
- Butler likely had Bailon's 1997 white Toyota Camry the day after the shooting because at 5:00 p.m. that day, Butler did a Google search for how to deactivate an alarm on a 1997 Toyota Camry;
- Butler was stopped by police one month after the shooting while driving Bailon's Toyota Camry;
- A Department of Corrections (DOC) form completed by Butler in June 2021 gave his address as Bailon's Browne Avenue address;

- Butler was required to inform his DOC officer of any change in address. January 25, 2022 was when he last met with his DOC officer, and he did not inform the officer that his address had changed from the Browne Avenue address;
- Butler's Google profile showed he and Bailon shared the Browne Avenue address for billing purposes;
- Butler's DNA was found on the Jeep's exterior driver's handle, interior door controls and handle, and steering wheel.

We conclude there is overwhelming untainted evidence of Butler's guilt, and the State has proved beyond a reasonable doubt that any reasonable jury would have reached the same result, absent admission of the booking form.[5]

[5] In his statement of additional grounds for review (SAG), Butler argues he received ineffective assistance of counsel due to trial counsel's failure to recall Officer Oliveri and confront him with the late-discovered COBAN recording in which Butler gave multiple addresses, not just the Browne Avenue address. The COBAN recording was not admitted at trial, is not part of our record, and we are unable to confidently measure the prejudice, if any, caused by counsel's failure to recall Officer Oliveri. Rather than rule that the error, if any, could not satisfy the ineffective assistance of counsel prejudice prong (because of overwhelming evidence of Butler's guilt), we leave the SAG issue open so Butler might file a timely personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

NO VIOLATION OF BUTLER'S RIGHT TO REMAIN SILENT

Butler argues the State violated his Fifth Amendment right to remain silent by arguing negative inferences from Bailon's unwillingness to talk with the detective, or as Butler terms it, Bailon's "silence." We disagree. As discussed below, the State neither commented on nor referred to Butler's silence, either directly or indirectly.

The Fifth Amendment prevents individuals from being "compelled in any criminal case to be a witness against himself." The Washington Constitution also states that "[n]o person shall be compelled in any criminal case to give evidence against himself." WASH. CONST. art. I, § 9. Courts interpret these two provisions equivalently. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). "The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

"[T]he State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence." *Easter*, 130 Wn.2d at 236. Testimony about the defendant's silence may be permissible for impeachment purposes after the defendant has taken the stand. *Id.* at 236-37. However, the defendant's silence may not be used as substantive evidence of guilt when the defendant has not testified. *Id.* at 236.

Courts distinguish between comments and mere references to the defendant's right to remain silent. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). Subtle and brief references do not "'naturally and necessarily'" emphasize the defendant's testimonial silence. *Id.* (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). A comment, on the other hand, "occurs 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." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

A comment impermissibly refers to the defendant's silence when "(1) it was the prosecutor's manifest intention to refer to the defendant's silence, or (2) the remark was of such a character that the jury would 'naturally and necessarily' take it to be a comment on the defendant's silence." *United States ex rel. Smith v. Rowe*, 618 F.2d 1204, 1210 (7th Cir. 1980) (citing *United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978)) *vacated and remanded on other grounds sub nom. Franzen v. Smith*, 449 U.S. 810, 101 S. Ct. 57, 66 L. Ed. 2d 13 (1980).

We now set forth the various comments complained of by Butler. In opening remarks, the prosecutor told the jury:

> You'll also see evidence or hear evidence that Detective Cays multiple times tried to get Ms. Bailon to make a statement. Her car was seized. Will you talk to us about that? Will you come down to the station? She missed her appointment. Never made contact.

> You'll hear evidence that they went out to her apartment to contact her and she was hostile. She didn't want to give any information. She didn't want to say what she knew. When asked the question, did you let Austin drive your jeep? She said, who is Austin?
>
> Evidence will show that later when she's interviewed she agrees that she'd been in a relationship since 2021.

RP at 87.

Later, the prosecutor asked Bailon what her reaction was to learning that her friend, Lopez, had been shot. Butler objected to the question as irrelevant, and the prosecutor answered it was relevant as to why "she would withhold information and not help law enforcement." RP at 998. The court sustained the objection and instructed the jury to disregard the prosecutor's comments.

Soon after, the deputy prosecutor asked Bailon why she would not talk to the detective and why she would not return his phone calls. She responded that she did not want to talk to the detective because he tried to trick her into talking with him.

Later, the prosecutor questioned Detective Cays about Bailon's reluctance to talk with him:

> Q. . . . When somebody avoids you or doesn't give a statement, does that tend to heighten your suspicion or decrease it in a criminal investigation?
>
> [DEFENSE COUNSEL]: Your Honor, . . .—[ER] 403.
>
> THE COURT: So on [ER] 403 I find that the probative value outweighs the prejudicial [effect]. Go ahead.
>
> A. Can you repeat the question?
>
> (The Court Reporter read back the requested testimony)

A. It would heighten my suspicion.
Q. So when Ms. Bailon refused to talk to you, did that heighten your suspicion or decrease it regarding Mr. Butler?
A. It heightened it.
Q. Did you give her the opportunity to talk to you and decrease it?
A. Yes.

RP at 1094-95.

Butler next focuses on an argument made by the prosecutor during closing. We first provide the context before quoting the complained-of argument.

During closing, defense counsel argued that the State did not prove beyond a reasonable doubt who drove the black Jeep and shot Lopez, and remarked that Bailon had several male friends, including relatives, who may have driven the black Jeep and shot Lopez. In response, the prosecutor argued:

> That's the problem with that argument because the one person that sat up here and knows the answer . . . and could have given it to law enforcement did not because there's only one answer that she could have given. Austin Butler.

RP at 1264. Defense counsel objected and asserted that the argument infringed on his client's right to remain silent. The court overruled the objection.

The prosecutor continued:

> What's the first thing you're going to do? You're going to say this is who was here [at the apartment immediately after the shooting]. I had nothing to do with this. That's what you do.

> When somebody, as Detective Cays said, is silent in the face of somebody that should be hoping to absolve themselves from participating—

RP at 1264-65. Defense counsel objected to the prosecutor's use of the word "absolving," and the court overruled the objection. RP at 1265. The prosecutor then explained:

> [Bailon] holds the keys to who was there and who had access to her car. There's only one answer. That's why she's not going to give it. Mr. Butler. Because why? We talked about the bias, motive. She loves him. Remember when she [testified.] She has lots of amnesia. . . . She's very selective in remembering. . . . Well, she remembered all those details [when defense counsel questioned her] but she can't remember, like, who was at your [apartment] the night your car is seized by law enforcement.
>
> . . . .
>
> . . . And, in fact, when asked, did you let Austin drive your jeep? Well, whose [sic] Austin? She's done everything to cover for Mr. Butler.

RP at 1264-65.

Butler argues that the above comments and argument exceed the bounds of impeachment and amount to an improper comment on *his* right to remain silent. Butler claims that a jury would naturally and necessarily take the repeated references to Bailon's silence[6] as a comment on his own silence.

To support his argument, Butler relies on *Burke*. In *Burke*, the defendant was charged with rape of a child in the third degree. 163 Wn.2d at 208. The defendant

[6] We note that Bailon was not "silent" about who drove her Jeep that night and stayed over at her apartment. She testified she did not remember.

asserted the defense that he reasonably believed the girl was 16, and, if he decided to testify, he would testify the girl "told him she was 16, about to turn 17." *Id.* If he reasonably believed the girl was 16, this would be a defense to the charge. *Id.*

The State sought to undermine the defense with evidence that the defendant, prior to his arrest, spoke to the detective but did not tell the detective about what the girl supposedly told him. *Id.* In its case in chief, the State asked the detective about an interview between the defendant and the detective. *Id.* The detective explained that the defendant's father attended the interview and, at one point, asked if his son was going to be charged. *Id.* at 208-09. The detective said it was possible. *Id.* at 209. The father then instructed his son not to make any further statements until the son spoke to an attorney. *Id.* The detective explained that the defendant soon after terminated the interview. *Id.* During cross-examination of the defendant, the prosecutor asked why he did not tell the detective that the girl told him she was 16. *Id.* The prosecutor commented on this point in closing, and the jury convicted the defendant. *Id.* The *Burke* court reversed the conviction because the State "intentionally invited the jury to infer guilt from [the defendant's] termination of his interview." *Id.* at 222.

In its decision, the *Burke* court explained that "when the defendant testifies at trial, use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt." *Id.* at 217. Further, "[i]n circumstances where silence is protected, a

mere reference to the defendant's silence by the government is not necessarily a violation of this principle; however, when the State invites the jury to infer guilt from the invocation of the right of silence, [the United States and our state's constitutional protections against self-incrimination] are violated." *Id.* For this reason, there are different rules that apply to how the State may impeach a *defendant* who testifies and how it may impeach a *nondefendant* who testifies. In short, constitutional protections apply to the former but not to the latter.

Butler argues that *Burke* requires his conviction to be reversed. In making this argument, he takes several quotes from *Burke* out of context. In *Burke*, the defendant testified, so the *Burke* court set forth limitations on how the State could permissibly cross-examine a defendant who testifies. As noted above, these rules do not apply to how the State may permissibly cross-examine a nondefendant who testifies, such as Bailon.

This case bears no resemblance to *Burke*. There, the prosecutor impermissibly used the *defendant's* own silence as substantive evidence of the defendant's guilt. Here, the prosecutor used a *nondefendant* witness's reluctance to talk with a detective as substantive evidence of the defendant's guilt. There is no constitutional right implicated here. The Fifth Amendment protects the accused from *self*-incrimination. It does not protect the accused from being incriminated by a nondefendant witness, even if the incriminating evidence is that witness's reluctance to speak with a detective.

Affirmed.

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Murphy, J.

FILED
JULY 8, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. AUSTIN JAMES BUTLER, Appellant.	)	No. 40152-9-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant Austin Butler's motion for reconsideration of this court's June 10, 2025, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Lawrence-Berrey, Fearing, and Murphy

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

No. 40152-9-III

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On August 7, 2025, I filed a true and correct copy of the Petition for Review by the Appellant via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

Jill Shumaker Reuter, John-Philip Joseph Schroeder, Yakima County Prosecutor's Office	(X) via email to: jill.reuter@co.yakima.wa.us, john.schroeder.84@gmail.com, JP.Schroeder@co.yakima.wa.us

SIGNED in Tacoma, WA, on August 7, 2025.

STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, Austin Butler

HARRIS TAPLIN LAW OFFICE

August 07, 2025 - 11:59 AM

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