No. 38844-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN O. BEAL,

Appellant

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

The Honorable Maryann C. Moreno

APPELLANT'S OPENING BRIEF

Laura M. Chuang, WSBA #36707
Of Counsel
Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

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A. SUMMARY OF THE ARGUMENT

Silence is golden. Under both the federal and state constitutions, it is paramount that a defendant's right to remain silent be protected. Comments in front of a jury about a defendant's choice to invoke his rights are improper. Otherwise, a jury may impermissibly rely upon a defendant's invocation of his right to remain silent as evidence of guilt, depriving a defendant of the presumption of innocence.

Nathan Beal was charged with the murder of Mary Schaffer, and was convicted of first-degree murder. Yet in front of the jury the State elicited testimony that directly commented on Mr. Beal's invocation of his right to remain silent. Because this error was a constitutional one, the State has the burden of proving it was harmless beyond a reasonable doubt. Given the evidence presented, the error was not harmless and the case should be reversed and remanded for a new trial.

At sentencing the trial court imposed a lifetime no contact order between Mr. Beal and Ms. Schaffer's family, which includes his two children. The children were not victims of the crime and Mr. Beal has a fundamental right to parent, but these factors were not considered. The trial court abused its discretion in applying the wrong legal standard in determining whether to impose this crime-related prohibition. The case should be remanded for the trial court to reconsider this condition under the correct legal standard.

Finally, the trial court failed to conduct an adequate inquiry into Mr. Beal's ability to pay, and he is indigent. The trial court should not have imposed a $200 criminal filing fee. This discretionary cost should be stricken from the judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The State improperly elicited testimony regarding the defendant's invocation of the right to remain silent.

2. The trial court erred by denying a mistrial.

3. The trial court abused its discretion by entering the crime-related prohibition of a lifetime no contact order with the defendant's children.

4. The trial court erred in imposing a criminal filing fee of $200.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Beal's conviction should be reversed and remanded for a new trial when evidence of his invocation of the Fifth Amendment right to remain silent was presented at trial.

a. Whether the State elicited a comment on Mr. Beal's silence during trial testimony, requiring reversal and remand for a new trial.

b. Whether the trial court abused its discretion by denying a motion for mistrial when the State elicited a comment on Mr. Beal's silence during trial testimony

Issue 2: Whether the trial court erred in imposing a lifetime protection order between Mr. Beal and his children.

Issue 3: Whether the trial court erred in imposing a $200 criminal filing fee.

D. STATEMENT OF THE CASE

On August 8, 2020, around 2:40 pm, law enforcement received a call about a woman who was found slumped over in a white vehicle in the Browne's Addition neighborhood in Spokane. (RP[1] 306-307, 309, 310, 317-318; State's Exs. 11, 12, 16). When law enforcement arrived, it was determined the woman, Mary Schaffer, was deceased. (RP 314). It appeared she had been there for several hours. (RP 320).

A nearby neighbor heard what sounded like a gunshot between 12:00 p.m. and 12:40 p.m. earlier that afternoon. (RP 352). She went around the corner to check out the source of the sound, and did not notice anything out of the ordinary, except for a taller gentleman with curly hair walking very quickly. (RP 353). Though the neighbor later claimed she saw Nathan Beal standing behind a white car, she did not tell any investigating officers at the scene about him and only mentioned the curly-headed man. (RP 359-360, 365-368, 373).

[1] "RP" refers to Volumes I and II transcribed by T. Cochran.

Mr. Beal was Ms. Schaffer's ex-husband, and Ms. Schaffer planned to pick up the children earlier that afternoon on August 8, 2020, from his apartment in Spokane. (RP 325, 333, 754-755). As part of a parenting arrangement, H.B. and N.B. were to spend five weeks in the summer with Mr. Beal, while spending the remainder of the year with Ms. Schaffer. (RP 646, 706). Ms. Schaffer never picked up her children that day. (RP 652).

The State charged Mr. Beal with the murder of Ms. Shaffer in the first degree with a firearm enhancement, and alleged Ms. Shaffer was an intimate partner. (CP 11).

Mr. Beal was interviewed by law enforcement and prior to trial, a CrR 3.5 hearing was held to determine which statements of Mr. Beal's were admissible. (RP 15-59). The trial court found all statements were admissible, with the exception that any statements Mr. Beal made after he invoked his right to silence would not come into evidence. (CP 491; RP 33, 59). Specifically, the court noted the line of questioning

about whether Mr. Beal had a firearm in his apartment would not be admissible after the point where Mr. Beal invoked his right to remain silent by stating he did not want to answer any more questions about it. (CP 491; RP 53, 59).

A jury trial was held in February of 2022, and witnesses testified consistent with the facts above. (RP 305-786).

Justin Sharp testified he and Ms. Schaffer were in a relationship at the time she passed away. (RP 324-325). He stated Ms. Schaffer had two children from a prior relationship with Mr. Beal, H.B. and N.B. (RP 325). Mr. Sharp noted the children spent most of their time with Ms. Schaffer and she had primary custody. (RP 326-328). A parenting arrangement existed, and in August of 2019 Ms. Schaffer and Mr. Beal met up in Spokane to return the children to Ms. Schaffer. (RP 328-329). Mr. Beal requested a one-on-one conversation with Ms. Schaffer in a park before the exchange. (RP 329-330). Mr. Sharp stated Mr. Beal was frustrated because he could not speak with Ms. Schaffer alone.

(RP 330-331). Eventually law enforcement was called to facilitate the exchange, though no physical altercation occurred, and no arrest was made. (RP 329-332, 344-346).

Mr. Sharp testified the next time Ms. Schaffer was supposed to pick up the children from Mr. Beal was on August 8, 2020. (RP 333). Ms. Schaffer was to fly from their home in Oregon to Spokane, rent a car, and drive back with the children. (RP 334). Ms. Schaffer was to keep in touch with Mr. Sharp the entire trip, and she did so throughout the morning by sending him text messages. (RP 333, 339-341). But when text messages from Ms. Schaffer stopped that day, he became concerned, believing something was wrong. (RP 335). Mr. Sharp also called H.B., but she did not pick up her phone. (RP 335-336). Mr. Sharp contacted the police out of concern for Ms. Schaffer. (RP 335-336).

Sandra Young testified she lived next door to Mr. Beal at the time Ms. Schaffer was killed. (RP 350-351). Prior to Ms. Schaffer's death, Ms. Young overheard Mr. Beal outside the

apartment, talking on the phone in an angry manner, expressing unhappiness, and stating something along the lines of "[h]ow am I going to get my F-ing kids, then?" (RP 361-362, 370-372). Ms. Young did not know with whom Mr. Beal was speaking. (RP 372, 374).

Ms. Young also testified she returned home from work on the day of the incident around 12:00 p.m. and 12:40 p.m. (RP 352). She was unloading her car when she heard a gunshot. (RP 352). The sound prompted her to come out of the apartment's parking area and look around. (RP 353). She looked down the street and "saw one gentleman with curly hair walking very quickly" towards her. (RP 353). Ms. Young also saw Mr. Beal in between two cars, standing behind a white car. (RP 353-355). Ms. Young said Mr. Beal walked down two streets and back to the apartment complex. (RP 357). It was a warm day and Mr. Beal was wearing a jacket with his hands in his pockets. (RP 358). Ms. Young, seeing nothing of note or evidence that anyone had been hurt, went out for a few hours.

(RP 356, 358-359). Ms. Young testified when she returned several hours later, she saw law enforcement and the area was taped off. (RP 359). She was not able to return to her apartment at first. (RP 359).

Ms. Young testified she spoke to several officers—at least four—about what she had seen earlier that day, and while the information was still fresh in her mind. (RP 359, 363-364). She went into detail describing the tall thin man with curly hair she had seen leaving the area in a suspicious manner—walking very quickly and wearing dark clothing or a gray sweatshirt. (RP 359-360, 367, 369-370). She noted the curly hair looked like a wig to her. (RP 359). Ms. Young never mentioned Mr. Beal being near the white car during any of those interviews in the hours immediately following the incident. (RP 359-360, 365-368, 373). Rather, Ms. Young repeatedly told the officers about the curly-headed man. (RP 360).

Christina Brewer testified she dated Mr. Beal in 2019 for about six months. (RP 380-381). She said she was present in

August 2019 when Ms. Schaffer came to retrieve the children after the visit with their father. (RP 382).

Ms. Brewer stated she bought a handgun with Mr. Beal—he paid for it and she purchased it with his money in October of 2019. (RP 383-384; State's Exs. 120-121). She testified Mr. Beal wanted the handgun for protection, and because of what happened during the child exchange and concerns it would become physical. (RP 383-384, 388). Mr. Beal kept the handgun when they broke up, but she never saw Mr. Beal handle the gun or go shooting with it. (RP 385, 386). He stored it in a closet in the main bedroom. (RP 385). Ms. Brewer noted she was present when Mr. Beal saw his children in December of 2019, and nothing eventful occurred. (RP 383).

Michael Williamson testified. (RP 390-396). He said he was on his way to the grocery store when he noticed a white car with a person inside kind of slumped over. (RP 391-392). Thinking it was kind of odd, he returned later on his way back from the store to check on the person. (RP 392-393). He noted

the car door was slightly ajar. (RP 393). Mr. Williamson attempted to get the attention of the women inside but received no response, and he called 911. (RP 393-395). He noted the woman in the car had her purse in her lap. (RP 396).

Detective Downing was called to the scene around 3:00 p.m. that day. (RP 398-399). He testified the white car Ms. Schaffer was found in was a rental car, and it was found about 20 yards from Mr. Beal's apartment. (RP 402-404). A single, Winchester 9-millimeter Luger shell casing was found on the ground outside of the white car on the driver's side. (RP 404-405). Detective Downing described that Ms. Schaffer's body was in a position that made it appear she was about to pull herself out of the car. (RP 406-409, 412). There was a hole in her skull with stippling, indicating a gun was shot within 30 inches of her head. (RP 410-411, 416, 455). The detective collected a bullet from inside the car. (RP 444). Lividity indicated the body had been there for some time. (RP 414). No items in the vehicle appeared to be missing and the scene did

not appear to the detective to be a robbery. (RP 420). The detective testified the white car was within view of Mr. Beal's apartment. (RP 423).

A search warrant was executed on Mr. Beal's apartment, Detective Downing testified. (RP 428, 441). A backpack found inside the apartment's bedroom closet contained a loaded firearm, a Ruger 9-millimeter. (RP 434-436, 438). The magazine contained bullets with a headstamp of Winchester 9-millimeter Luger. (RP 440-441). Additional matching bullets were found in the backpack, as well as a gray short-sleeved t-shirt. (RP 441-443, 457).

Detective Downing stated he learned Mr. Beal purchased coffee at a local shop about one block away earlier that day at 12:30 p.m. (RP 449-452).

Detective Downing interviewed Mr. Beal the day of the incident, and Mr. Beal agreed to speak with him after being read his *Miranda* rights. (RP 452). The detective testified as follows:

[The State]: . . . And did you read the defendant his rights?
[Witness]: Yes, I did.
[The State]: Okay. Did he agree to speak with you?
[Witness]: Yes, he did.
[The State]: Okay. Now, did you ask the defendant if he in fact owned a firearm?
[Witness]: Yes, I did.
[The State]: And what was his initial response to that question?
…
[Witness]: He told me he doesn't own a firearm but he knows—he knows how to use them.
[The State]: Okay. Did you ask the defendant if there was a firearm in his apartment, in his—in his house?
[Witness]: Yes, I did.
[The State]: And what was his initial response to that?
[Witness]: He shrugged his shoulders and didn't answer.
[The State]: Okay. And did you ask him a clarifying question, "Is there a firearm in your apartment?"
[Witness]: Yes, I did.
[The State]: And what was his response to that?
[Witness]: He said, "I don't want to answer that."
[The State]: Okay. Did he—what was his demeanor like when he initially responded to that?
[Witness]: He was calm.
…
[The State]: At some point in this interview with the defendant, did you ask him, "Is the gun still in your backpack?"

> [Witness]: Yes, I did.
> [The State]: What was his reaction and what was his response to that question?
> [Witness]: His reaction was his body language totally changed. He slumped down in his chair, looked down at the ground, and his lower lip began to quiver.
> [The State]: And what was his response?
> [Witness]: *His response is done—is he's done talking.*

(RP 452-454) (emphasis added). The detective noted Mr. Beal smiled off and on during the interview, but he had not yet been informed by law enforcement that Ms. Schaffer was dead. (RP 453, 465-466).

Detective Cestnik testified. (RP 474-492). He searched portions of Mr. Beal's apartment, finding a notebook with handwritten notes, including: "qualified immunity, had kept children away from me previously, then took children away, damages, compensatory affordable damages, general, punitive—punish, go after a bond as well." (RP 478-479; State's Ex. 67). The detective admitted these words could have different meanings. (RP 489). In the kitchen, the detective

found coffee cups from the coffee shop down the street. (RP 480).

Detective Cestnik testified a gray long-sleeved sweatshirt was found in a dumpster nearby. (RP 483-484).

Detective Cestnik acknowledged he previously interviewed Ms. Young. (RP 489-492). Ms. Young was aware of who Mr. Beal was as a neighbor, though she did not know his name. (RP 490-491). During her interview with the detective Ms. Young stated she only saw one man at the scene—someone she had never seen before—leaving the area after she heard the gunshot. (RP 490-492).

Midway through trial, defense counsel moved for a mistrial based on Detective Downing's testimony. (RP 499-500, 512-521). Defense counsel pointed out that Detective Downing testified directly about Mr. Beal's right to remain silent. (RP 499-500). Specifically, Detective Downing testified in front of the jury that when he asked Mr. Beal about the firearm in his backpack, Mr. Beal stated he did not want to

answer that question. (RP 499-500, 453). The State responded, expressing frustration the video-taped interview was not allowed to be shown to the jury due to a prior court ruling. (RP 500, 512-513). The State noted it would not argue the comment on the defendant's silence in closing arguments. (RP 513). The State also argued it did not comment on Mr. Beal's assertion of his rights and added defense counsel did not object at the time the statements were made by Detective Downing. (RP 513-514). Defense counsel responded:

> I—I didn't object yesterday, and I didn't want to draw attention to that last statement. That's the reason I didn't do that. I think that this doesn't have anything to do with me objecting to him reading something. The—the Court was very clear, I thought, in the statements that he was allowed to say. I think those statements should have been relayed to Detective Downing. And those were—when he was asked questions by the state, the state was eliciting those responses and they didn't obviously tell him what this court ruled. And so I think that's a big problem.

(RP 515).

The State disagreed, stating it had informed the witness of the limitations of his testimony when it came to the CrR 3.5 pretrial ruling by the trial court. (RP 515).

The trial court shared with the parties that it, too, was concerned about Detective Downing's testimony. (RP 515). The court intended to bring up the issue, as well, and spent time researching it the night prior. (RP 515). The trial court reiterated its prior ruling as to which of Mr. Beal's statements were to come in from his interview with the detective:

> … I can't recall which video was which here, but there was a discussion about "Do you own a firearm?" "No, I don't." And eventually when the detective got to the point where he mentioned the firearm in the backpack, what Mr. Beal actually said was "Next question, please." After that, I believe there was a questions about "Do you want to answer any other questions?" and he said, "No, I don't want to answer that."
>
> So in my ruling, I said that everything could come in, including the "Next question please"' and I was very clear to say that anything after that does not come in, because in my mind that is Mr. Beal invoking his right to remain silent. And I was very clear on that, although I don't think we have any findings that I've signed yet on that 3.5.

I then ruled that the video would not come in but the statements, of course, would come in. So when the detective testified, he asked Mr. Beal if he owned a firearm; Mr. Beal said he doesn't own a firearm "but I know how to use them or I know how to—I'm familiar with them." He asked Mr. Beal if he had a firearm in the house, to which Mr. Beal shrugged his shoulders and did not give an answer. And then "Is there a firearm in your apartment?" Mr. Beal said, "I don't want to answer that." And he was then questioned, the detective was questions as to whether Mr. Beal was smiling. "Yes, he was smiling on and off during the interview." He asked Mr. Beal if the gun was still in the backpack. "His body—Mr. Beal's body language changed; he slumped in his chair; he looked down at the ground and basically said, 'I'm done talking.'"

So that, to me, was a red flag of an area that I did not believe the detective should have gone into. It's basically Criminal Law 101; you don't comment on a defendant's invocation of their right to remain silent.

….

The case law seems to suggest that testimony—testimony with regard to a defendant not wanting to answer a question or not answering a question does not violate a defendant's right to remain silent.

…. what I intended to do this morning if no one raised it was to come out and have this discussion and to indicate that basically in my mind it's—it's a reference to Mr. Beal's desire not to answer further questions. And I would instruct the state to certainly not infer to the jury that they should infer,

> because of his right to remain silent, that this is some kind of indication of his consciousness of guilt or his guilt.
>
> So I'm not going to grant a mistrial. I'm going to deny the request for a mistrial.

(RP 516-518).

Despite denying the motion for mistrial, the trial court and the parties discussed ways to ameliorate the concerns that Detective Downing's comments created. (RP 518). The court offered a curative instruction, but noted it "rings the bell again." (RP 518). Defense counsel agreed. (RP 518-519). Given the court would not grant a mistrial, defense counsel suggested Detective Downing be called to testify again, allowing the opportunity to correct his prior improper statements and also offer the possibility of impeachment. (RP 519-520).

Trial testimony resumed with John Howard, the medical examiner who conducted the autopsy. (RP 524-537). Dr. Howard determined the cause of death was by gunshot wound to the head, and noted there was stippling on the forehead, indicating the gun was fired around 3 feet or less away. (RP

529-530, 534). The bullet broke in pieces and some of those were recovered during autopsy. (RP 531-533).

Emily Goodwin testified she dated Mr. Beal in early 2020. (RP 538). Ms. Goodwin stated Mr. Beal did not like Ms. Schaffer or Mr. Sharp, and that Ms. Schaffer accused Mr. Beal of awful things. (RP 539-540). Mr. Beal told Ms. Goodwin his children would be visiting for the summer and would not be going back. (RP 540). She did see Mr. Beal with a handgun, but never saw him use it or threaten anyone with it. (RP 540-542). Ms. Goodwin also never felt threatened by Mr. Beal, nor did she hear him threaten Ms. Schaffer. (RP 542).

Riley Armstrong testified he was working at Caffe Capri on August 8, 2020, when law enforcement came into the shop to find a receipt for the purchase of three mochas. (RP 544-545). The man who purchased them was Caucasian and had dark hair. (RP 546). Mr. Armstrong identified the paper coffee cups found in Mr. Beal's kitchen as the same ones used in their cafe. (RP 546; State's Ex. 122). The receipt stated the mochas

were purchased at 12:30 p.m. on August 8, 2020. (State's Ex. 127).

The lead detective assigned to the case was Detective Green. (RP 558). He testified Mr. Beal's apartment was located at 1904 West Second Avenue. (RP 561). Detective Green stated a phone was found in Ms. Schaffer's purse. (RP 569). He also noted H.B.'s cell phone was seized. (RP 569). According to Ms. Schaffer's phone, the last text message she sent was at 12:36 p.m. to H.B. (RP 572-573, 747).

Detective Green also obtained surveillance footage from near the scene. (RP 572-581; State's Exs. 104 & 105). A male in these videos is seen in the distance with dark shoes, a gray sweatshirt, a mask, and dark hair. (RP 581; State's Exs. 104 & 105). Detective Green thought the video showed Mr. Beal walking through the neighborhood around midday. (RP 582). No mask was recovered from Mr. Beal's apartment. (RP 731-732).

Detective Green also testified as to text messages between Ms. Schaffer's phone and others. (RP 723-724). Mr. Beal text messaged Ms. Schaffer a few times on August 8 after she did not show up when she said she would. (RP 724-725).

A forensic scientist testified. (RP 599-611). He stated he found one latent fingerprint matching Mr. Beal on the magazine of the gun. (RP 603, 605-606). The scientist did not note any blood present on the gun at the time of his examination. (RP 609-610).

Another forensic scientist testified, and she noted Mr. Beal's DNA was found on the gun but was not found on the gray sweatshirt found in the dumpster or the driver's door to Ms. Schaffer's car. (RP 627-629, 631, 634-635, 637).

H.B. testified at trial. (RP 643-656). On occasion, she and her brother N.B. would visit Mr. Beal. (RP 646). She stated Mr. Beal wanted her and her brother to stay longer for visits, which upset him. (RP 647). She stated on the day her mother was to pick her up at the apartment, she got a text

message from that her mother was 20 minutes away from picking them up. (RP 651). Mr. Beal was not home at that time—he had said he was going to get mochas for them. (RP 651). When H.B.'s mother finally texted that she had arrived, Mr. Beal was not home. (RP 652). H.B. knew Mr. Beal had a gun in his backpack in the closet, which she accidentally found. (RP 653).

Ms. Schaffer's brother Joseph Schaffer testified. (RP 657-663). He stated Mr. Beal and Ms. Schaffer married and later separated and divorced. (RP 658). After the relationship had broken down over time, Mr. Beal told Mr. Schaffer that his sister was brain-damaged. (RP 658). Mr. Beal told Mr. Schaffer that she needed to be shot and he was going to do it. (RP 660).

Brett Bromberg-Martin testified as a supervising forensic scientist for the firearm and toolmark section. (RP 664). Mr. Bromberg-Martin noted random imperfections inside a firearm lead to markings on cartridge cases and bullets, like ballistic

fingerprints. (RP 667). He testified that in his opinion the bullet fragment from the crime matched the Ruger firearm. (RP 675). The witness admitted he had a full narrative from law enforcement as to what the detective thought happened prior to testing the bullet fragment and coming to his own conclusion. (RP 678-680). He admitted there is "no qualitative sureness percentage or confidence interval or something like that on any crime laboratory report, because that's not typically something we associate with this type of conclusion." (RP 683-684). Mr. Bromberg-Martin also agreed that the type of testing involved was subjective, and there was no machine to run any processes on for identification at this time. (RP 686-687).

Next, the parties agreed to allow Detective Downing to read from a script during trial. (RP 691-692, 699-701).

Detective Downing was recalled to the stand. (RP 699-701). There he testified to interview questions and answers he had in a prior exchange with Mr. Beal. (RP 699-701). He once

again testified to questions he asked Mr. Beal about whether he owned a firearm. (RP 700-701).

Mr. Beal testified after the State rested. (RP 752-786). Mr. Beal told the jury he did not shoot Ms. Shaffer on August 8, 2022. (RP 762).

Mr. Beal stated he and Ms. Schaffer were together in 2006 and separated in 2015. (RP 754). He only text messaged Ms. Schaffer and never called her so he could keep a record of what was being said. (RP 768-769, 782). Mr. Beal was unable to purchase a handgun on his own, so he asked Ms. Brewer to do it for him. (RP 755-756). Mr. Beal stated he never said anything to Ms. Goodwin, his former girlfriend, about custodial interference. (RP 757). Mr. Beal agreed he did tell Detective Downing he did not own a gun, because he did not own one. (RP 757-758, 780). Mr. Beal noted he was not wearing a shirt on August 8 because it was very hot that day. (RP 751). He put on bright blue pants and shirt with a purple hat when he

later went to get coffee. (RP 762). Mr. Beal did not own a gray sweatshirt. (RP 762).

Mr. Beal stated he was somewhat concerned when Ms. Schaffer did not show up. (RP 768, 777). When Ms. Schaffer appeared to be late, he went to the coffee shop. (RP 775). He watched movies and waited for Ms. Schaffer to arrive. (RP 786).

The jury found Mr. Beal guilty of murder in the first degree. (CP 405-407; RP 849). The jury also found Mr. Beal was armed with a firearm at the time of the commission of the crime and that he and Ms. Schaffer were intimate partners. (CP 405-407; RP 849).

At sentencing, the trial court imposed a lifetime no contact order with Ms. Schaffer's family as part of a crime-related prohibition. (RP 860-862, 864-865; CP 507). Defense counsel objected to the lifetime imposition, stating Mr. Beal would like contact with his children. (RP 860). The State pointed out H.B. was a critical witness in another case against

Mr. Beal, and wished no contact. (RP 862). It was unclear what N.B. wanted. (RP 862). The trial court imposed the lifetime prohibition with little inquiry, stating merely: "I will impose no contact provisions with regard to [Ms. Schaffer's] family, but I do want [the State] to look into the—the wishes of the son…. In case we need to have another hearing on this, we can bring him back to do that." (RP 864).

Sentencing occurred on March 25, 2022. (RP 854-867). Defense counsel did not object to imposition of the proposed LFOs, which included a $200 criminal filing fee. (RP 860). The court ordered Mr. Beal to pay the $200 criminal filing fee. (CP 505; RP 864). However, the trial court did not conduct an individualized inquiry into Mr. Beal's indigency status at the time of sentencing. (RP 854-867).

On April 4, 2022, defense counsel filed a motion and declaration in support of review at public expense. (CP 521-524). Therein, Mr. Beal indicated he owned no property of value and earned no income. (CP 522-523). The court found

Mr. Beal indigent for the purposes of this appeal. (CP 525-526).

Mr. Beal timely appealed. (CP 527-543).

E. ARGUMENT

Issue 1: Whether Mr. Beal's conviction should be reversed and remanded for a new trial when evidence of his invocation of the Fifth Amendment right to remain silent was presented at trial.

During trial, the State elicited testimony from an officer witness about Mr. Beal's refusal to answer any further questions during an interview. The comments were a violation of his constitutional right to remain silent and should not have been presented at trial. The defense moved for a mistrial on this basis, which was denied. The case should be reversed and remanded for a new trial.

a. Whether the State elicited a comment on Mr. Beal's silence during trial testimony, requiring reversal and remand for a new trial.

The Fifth Amendment to the United States Constitution and Article I, section 9, of the Washington State Constitution

both state that a person shall not be compelled in any criminal case to give evidence against himself. U.S. Const. amend. V; Const. art. I, sec. 9; *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996)). Both constitutions protect the right to remain silent. *Easter*, 130 Wn. 2d at 235. A comment on the right to remain silent is a constitutional issue, and as such may be raised for the first time on appeal. *State v. Romero*, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002).

It is a violation of due process for the State to comment on or exploit a defendant's exercise of the right to remain silent. *Romero*, 113 Wn. App. at 786-787. "[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. This is because a defendant'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 the defendant himself." *Id*. at 236 (citation omitted).

It is constitutional error for an officer to testify that a defendant refused to talk to him, as well as for the State to purposefully elicit testimony as to the defendant's silence. *Romero*, 113 Wn. App at 790. If the comment on silence is a direct one, constitutional harmless error applies. *Romero*, 113 Wn. App. at 790.

If the comment on silence is indirect, the court asks three questions to determine whether the comment rises to constitutional proportions:

> First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Third, was the indirect comment exploited by the State during the course of the trial

> including argument, in an apparent attempt to prejudice the defense offered by the defendant?

Romero, 113 Wn. App. at 790-791 (citations omitted). If any of the questions is answered in the affirmative, the indirect comment is an error of constitutional proportions, requiring review under the constitutional harmless error standard. *Id*. at 791 (citation omitted).

The State bears the burden of proving a constitutional error was harmless. *Romero*, 113 Wn. App. at 794; *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002). Constitutional error is harmless if the appellate court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Romero*, 113 Wn. App. at 794-795. The State must persuade the appellate court the untainted evidence overwhelmingly supports a guilty verdict. *Curtis*, 110 Wn. App. at 15. "Otherwise, what may or may not have influenced

the jury remains a mystery beyond the capacity of three appellate judges." *Curtis*, 110 Wn. App. at 15. If the error was not harmless, the remedy is a new trial. 113 Wn. App. at 795.

In *Romero*, an officer testified at trial about the defendant's refusal to speak with him. 113 Wn. App. at 793. The officer told the jury: "I read [the defendant] his Miranda warnings, which he chose not to waive, would not talk to me." *Romero*, 113 Wn. App. at 793. The Court found this was a direct comment on the defendant's election to remain silent and constitutional review was warranted. *Romero*, 113 Wn. App. at 793.

In *Curtis*, an officer testified at trial the defendant was read his *Miranda* rights, but then "refused to speak to [the officer] at the time and wanted an attorney present." *Curtis*, 110 Wn. App. at 9. The court determined these facts were egregious because Mr. Curtis's silence was mentioned in response to being informed of his *Miranda* rights. *Curtis*, 110 Wn. App. at 14-15.

Here, a direct comment on Mr. Beal's invocation of his right to remain silent occurred during Detective Downing's testimony. (RP 452-454). Detective Downing told the jury he advised Mr. Beal of his *Miranda* rights and that Mr. Beal agreed to speak with him. (RP 452). The State asked the detective a series of questions surrounding Mr. Beal's knowledge of a firearm in his apartment. (RP 453). But the State went too far during testimony:

> [The State]: At some point in this interview with the defendant, did you ask him, "Is the gun still in your backpack?"
> [Detective]: Yes, I did.
> [The State]: What was his reaction and what was his response to that question?
> [Detective]: His reaction was his body language totally changed. He slumped down in his chair, looked down at the ground, and his lower lip began to quiver.
> [The State]: And what was his response?
> [Detective]: *His response is done—is he's done talking.*

(RP 453-454) (emphasis added). The detective's statement that Mr. Beal was "done talking" was a direct comment on silence. (RP 454). Here, though perhaps unintentional, the State elicited

a direct comment from a witness that inferred guilt. *Easter*, 130 Wn.2d at 236. The comment from the detective was improper because it allowed the jury to assume Mr. Beal was refusing to answer any more questions because of a guilty conscience. (RP 454). The State should have taken more care, as well, because it was on notice. (RP 59). The trial court previously instructed the parties that Mr. Beal's invocation of silence during the interview was not admissible. (RP 59). Both defense counsel and the trial court were alarmed about the error. (RP 499-500, 512-521). Defense counsel moved for a mistrial, and the trial court noted if defense counsel did not raise the issue, the trial court planned to make a record. (RP 515). This was a direct comment on Mr. Beal's invocation of the right to remain silent and is on point with what happened in *Romero*. *Romero*, 113 Wn. App. at 793.

Even if this Court were to find the comment was not a direct one, however, it is an improper reference to silence. *Romero*, 113 Wn. App. at 790-791. First, the comment can

reasonably be considered purposeful and responsive to the State's questioning since the State knew of the trial court's 3.5 ruling on the record. *Romero*, 113 Wn. App. at 790-791; (RP 59). There was also at the very least a slight inferable prejudice to the defendant's claim of silence given the trial court's reaction to the improper testimony. (RP 515). Since this comment is also an improper reference to silence through indirect means, the error is still one of constitutional proportions and requires review under the constitutional harmless error standard. *Romero*, 113 Wn. App. at 791.

The comment by Detective Downing and elicited from the State was a comment on silence under both the direct and indirect standard. The case must be reversed because this Court cannot be convinced beyond a reasonable doubt that a reasonable jury would have reached the same result absent the error. *Romero*, 113 Wn. App. at 794-795. The untainted evidence is not overwhelming.

Ms. Young heard the gunshot and saw a man—who was not Mr. Beal—leaving the area quickly. (RP 353, 359-360, 367, 369-370). She did not mention Mr. Beal's presence once during her interviews with several officers the day of the shooting. (RP 360). The evidence showed Mr. Beal was purchasing coffee at a shop at 12:30 p.m., a few minutes before Ms. Shaffer sent her last text message at 12:36 p.m. (RP 449-452; 572-573, 747). Coffee cups were found in Mr. Beal's apartment, supporting the evidence he purchased them. (RP 546; State's Ex. 122). If Mr. Beal were intending to shoot someone, it seems strange he would also be able to carry three mochas back to his apartment in time to meet up with Ms. Shaffer and shoot her before she exited her vehicle. (RP 449-452, 480).

Moreover, a gray long-sleeved sweatshirt was found in a dumpster nearby, perhaps matching the video of a man walking through the neighborhood. (State's Ex. 104 & 105). But Mr. Beal's DNA was not found on the sweatshirt—in fact,

the DNA of four other individuals was found instead. (RP 627-628). The forensic scientist who conducted ballistics analysis admitted the testing he does is subjective, and he read a narrative of law enforcement's theory of the case prior to conducting his analysis on the bullet. (RP 678-680, 686-687). Finally, Mr. Beal denied shooting Ms. Shaffer. (RP 762). All of these factors show the evidence against Mr. Beal was not overwhelming. The case should be reversed. *Romero*, 113 Wn. App. at 794-795; *Curtis*, 110 Wn.

Moreover, it is difficult to cure the error of commenting on silence. "[E]liciting such testimony puts the defense in a difficult position [as c]ounsel must gamble on whether to object and as for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone." *State v. Curtis*, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002). Improper evidence of postarrest silence "may also impermissibly pressure the defendant to testify and explain that silence . . . a further erosion of the right to remain silent." *Id*. at

15 (citation omitted). The "curative value of an instruction must be weighed against the possibility of additional damage by further impressing upon the jury's attention the defendant's decision not to talk without a lawyer." *Id*. at 15 (citation omitted).

In this case, while the court and parties attempted to cure the comment on silence error, the second attempt by the detective to clarify the testimony did not help. *See Curtis*, 110 Wn. App. at 15 (recognizing the juxtaposition of defense counsel as to whether objection and request for a curative instruction would do more harm than good); (RP 699-701). Rather, it placed more emphasis on Mr. Beal's comments, giving the State another advantage and making it appear as though the State was emphasizing one witness's testimony over other testimony. *See State v. Koontz*, 145 Wn. 2d 650, 654, 41 P.3d 475 (2002) (acknowledging a repeat presentation to the jury of videotaped testimony placed undue emphasis on such testimony, which was not harmless).

The case should be reversed and remanded for a new trial. The evidence was not overwhelming.

b. Whether the trial court abused its discretion by denying a motion for mistrial when the State elicited a comment on Mr. Beal's silence during trial testimony.

As noted under *Issue 1(a)* above, the State cannot elicit comments on a defendant's silence during trial testimony. Under the circumstances presented here, the trial court abused its discretion by denying Mr. Beal's motion for mistrial. *See also Issue 1(a).* The case should be reversed and remanded.

A trial court's denial of a motion for mistrial is reviewed under an abuse of discretion standard. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); *see also Curtis*, 110 Wn. App. at 12 (recognizing this standard of review). A trial court abuses its discretion when no reasonable judge would have reached the same conclusion. *State v. Elkins*, 188 Wn. App. 386, 407, 353 P.3d 648 (2015). A mistrial is warranted "only when the defendant has been so prejudiced that nothing short of

a new trial can [e]nsure that the defendant will be tried fairly." *Lewis*, 130 Wn.2d at 707. The trial court is in the best position to judge the prejudice caused by a statement. *Lewis*, 130 Wn.2d at 707.

In Mr. Beal's case the trial court abused its discretion by failing to grant a mistrial. First, the trial court recognized the gravity of the matter. (RP 515). After Detective Downing's testimony, the trial court agreed with defense counsel that the testimony presented the day prior was an issue. (RP 515). The trial court thought the prior day's testimony was so egregious that it conducted independent research and stated it intended to bring forth the issue sua sponte. (RP 515).

The trial court then went on to recite an incorrect legal standard, stating: "The case law seems to suggest that testimony—testimony with regard to a defendant not wanting to answer a question or not answering a question does not violate a defendant's right to remain silent." (RP 517). For this reason, the court denied the motion for mistrial. But the court's

recited legal standard is incorrect. Because the court applied the incorrect legal standard, the denial for mistrial must be reversed. *Elkins*, 188 Wn. App. at 407. No reasonable judge would have applied that standard because, as pointed out in *Romero*, it is constitutional error for an officer to testify a defendant refused to speak with him, and also for the State to elicit testimony as to the defendant's silence. *Romero*, 113 Wn. App. at 790.

The trial court erred by not granting the mistrial. No reasonable judge would have reached the same conclusion and the defendant's right to a fair trial was so prejudiced only a new trial could have ensured Mr. Beal would be tried fairly. *Lewis*, 130 Wn.2d at 707. The trial court's attempts to cure the comment on silence did not work, but rather, emphasized one witness's testimony over others. *See Koontz*, 145 Wn. 2d 650; (RP 699-701); *Issue 1(a)*. The case should be reversed and remanded for a new trial.

Issue 2: Whether the trial court erred in imposing a lifetime protection order between Mr. Beal and his children.

At sentencing, the trial court imposed a lifetime protection order between Mr. Beal the family of Ms. Schaffer, which includes Mr. Beal's children. (CP 507; RP 860-862, 864-865). The trial court failed to conduct an adequate inquiry into this lifetime prohibition and as such abused its discretion. The case must be remanded for reconsideration.

Pursuant to RCW 9.94A.505(9), the trial court may impose "crime-related prohibitions" as a sentencing condition. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A trial court's decision to impose sentencing conditions is reviewed for an abuse of discretion. *State v. Torres*, 198 Wn. App. 685, 689, 393 P.3d 894 (2017). Discretion is abused if the trial court employs the incorrect legal standard. *Torres*, 198 Wn. App. at 689. "Conditions interfering with fundamental rights, such as the right to a parent-child relationship, must be 'sensitively imposed' so they

are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *Torres*, 198 Wn. App. at 689 (citing to *Rainey*, 168 Wn.2d at 374-75, 382 (remanding because the sentencing court did not consider whether the lifetime duration of the no contact order was reasonably necessary to serve the State's interests)).

In *Torres*, the trial court imposed a five-year prohibition on contact between a father and son. 198 Wn. App. at 689. However, in so doing the court failed to acknowledge or address the defendant's fundamental right to parent his child nor why the length of time was necessary to further the State's interests. *Id*. at 689. Division III criticized the trial court's process, stating: "[w]hile the trial court certainly can impose a no-contact order to advance the State's fundamental interests in protecting children, it must do so in a nuanced manner that is sensitive to the changing needs and interests of the parent." *Id*. at 689-90. This Court remanded, noting the following factors

must be considered by the trial court in imposing its prohibition:

> On remand, the trial court shall first address whether a no-contact order remains reasonably necessary in light of the State's interests in protecting [the son] from harm. If it is, then the court shall endeavor to narrowly tailor the order, both in terms of scope and duration. When it comes to the order's scope, the court shall consider less restrictive alternatives, such as supervised visitation, prior to restricting all personal contact between [the defendant] and his child . . . . In addition, the court's order should recognize that what is reasonably necessary to protect the State's interests may change over time. Accordingly, the court shall consider whether the scope of the no-contact order should change over time. The court shall also reconsider whether the ultimate length of the no-contact order remains appropriate.
>
> On remand, the trial court should keep in mind that a sentencing proceeding is not the ideal forum for addressing parenting issues. Our juvenile and family courts are better equipped to resolve custody questions, including whether restrictions should be placed on parent-child contact. Outside the context of the procedural protections provided in dependency and child custody cases, our legislature has directed that a parent-child no-contact order should not last longer than one year, unless specifically renewed. This legislative context should be taken into account

> when determining the necessity of a no-contact order on remand.

State v. Torres, 198 Wn. App. at 690-91 (internal quotations and citations omitted).

Here, the trial court failed to take into consideration the appropriate factors when it blanketly prohibited Mr. Beal from contact with Ms. Schaffer's family, which includes his two children, H.B. and N.B. (RP 860-862, 864-865; CP 507). Mr. Beal objected to the prohibition. (RP 860). While the trial court considered that H.B. did not want contact with her father at the time of sentencing, and that H.B. was a potential witness in another case against her father, there was no consideration for the appropriate length of time the no-contact prohibition would be necessary. *Torres*, 198 Wn. App. at 690-91. Moreover, H.B. and N.B. are not victims of the crime alleged in this case, and "Washington courts have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime." *See State v. Warren*, 165 Wn. 2d 17, 33,

195 P.3d 940 (2008); *also cf. State v. Peters*, 10 Wn. App. 2d 574, 585, 455 P.3d 141 (2019) (lifetime prohibition on contact with children was warranted where children were victims of father's crime).

The trial court should have addressed the factors set forth in *Torres*. 198 Wn. App. at 690. The court did not address whether a no-contact order was reasonably necessary in light of the State's interests in protecting H.B. and N.B. from harm. (RP 860-862, 864-865). *Torres*, 198 Wn. App. at 690. The trial court should have considered the least restrictive alternatives, such as supervised visitation. *Torres*, 198 Wn. App. at 690; (RP 860-862, 864-865). And the court should have considered that the State interests may change over time, as well as the length of the order. *Torres*, 198 Wn. App. at 690; (RP 860-862, 864-865).

Here, the trial court abused its discretion by failing to consider the multiple factors involved in interfering with Mr. Beal's fundamental right to parent. For these reasons, the case

must be remanded for the trial court to reconsider the imposition of a lifetime no-contact order between Mr. Beal and his children.

Issue 3: Whether the trial court erred in imposing a $200 criminal filing fee.

The trial court erred in imposing a $200 criminal filing fee. The criminal filing fees are discretionary LFOs based on indigency status, and the trial court failed to adequately inquire as to Mr. Beal's status. Evidence in the record indicates Mr. Beal was indigent pursuant to RCW 10.101.010(3)(c).

A trial court may not impose discretionary costs on indigent defendants. RCW 10.01.160(3). In particular, a criminal filing fee may not be imposed on a defendant who is indigent pursuant to RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h). A defendant is indigent pursuant to RCW 10.101.010(3)(c) if he is "[r]eceiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level." RCW 10.101.010(3)(c).

Whether a trial court made an adequate individualized inquiry into a defendant's ability to pay discretionary legal financial obligations is reviewed de novo. *State v. Ramirez*, 191 Wn.2d 732, 740, 426 P.3d 714 (2018). The abuse of discretion standard applies to the broad question of whether discretionary LFOs were legally imposed, but de novo review applies when there is a failure to make an adequate inquiry. *Ramirez*, 191 Wn.2d at 741-742.

Although defense counsel did state there were no objections to the LFOs before they were imposed, the trial court should have conducted an independent inquiry into Mr. Beal's financial status. (RP 859-867). Only a few days after sentencing, the record indicates Mr. Beal did not own any property of value and did not have any earned income. (CP 522-523). And the trial court found Mr. Beal indigent for purposes of this appeal. (CP 524-525). Had the trial court inquired of Mr. Beal's indigency status, it would have realized Mr. Beal met the indigency requirements under RCW

10.101.010(3)(c), as he was receiving no income. RCW 10.101.010(3)(c).

The trial court erred in imposing a $200 criminal filing fee without making an adequate inquiry into Mr. Beal's ability to pay. The discretionary criminal filing fee should be stricken from the judgment and sentence.

F. CONCLUSION

Mr. Beal's case should be reversed and remanded for a new trial due to the improper comment on the invocation of his right to remain silent.

The case should also be remanded for the trial court to reconsider the crime-related prohibition that Mr. Beal not have contact with his children for life. The trial court abused its discretion by applying the wrong standard.

Finally, the trial court erred in imposing the $200 criminal filing fee and the case should be remanded to strike the fee.

I certify this document contains 8,650 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 29th day of November, 2022.

Laura M. Chuang, WSBA #36707
Of Counsel

Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent	)	
vs.	)	COA No. 38844-1-III
NATHAN O. BEAL	)	PROOF OF SERVICE
Defendant/Appellant	)	

I, Laura M. Chuang, of counsel to the assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 29, 2022, having obtained prior permission, I served a copy of the Appellant's opening brief on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 29th day of November, 2022.

/s/ Laura M. Chuang
Laura M. Chuang, WSBA #36707
Of Counsel
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com