IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28130-2-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
APARICIO BERMUDEZ-ALFARO,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Aparicio Bermudez-Alfaro appeals his convictions for two counts of felony harassment and three counts of second degree assault. Mr. Bermudez-Alfaro threatened to kill his girl friend and two of her children. Mr. Bermudez-Alfaro makes several assertions of error.

We affirm the convictions and the challenges to the no-contact orders.

FACTS

Aparicio Bermudez-Alfaro lived with his girl friend, Maria S., her two children from a previous relationship—B.R., age 17, and C.R., age 12—and her child fathered by Mr. Bermudez-Alfaro, H.A., age 8, in Bridgeport. The couple had a tumultuous

relationship. Mr. Bermudez-Alfaro was convicted in California of misdemeanor battery for assaulting Ms. S. She had moved to Bridgeport from California in September 2008 to get away from him. He found her in Washington and moved in with her and the children in December 2008.

Mr. Bermudez-Alfaro was unemployed in Bridgeport, but Ms. S. had a job outside the home. On March 19, 2009, Mr. Bermudez-Alfaro accused Ms. S. of partying with friends rather than working the long hours she claimed to work. He slapped her and told her he was going to kill her and throw her in the river. C.R. and H.A. witnessed this exchange.

The next day, Mr. Bermudez-Alfaro drove Ms. S. to work, and she had a co-worker drive her home later that day. When Mr. Bermudez-Alfaro arrived home that night, he appeared to be very drunk. He confronted Ms. S. in the living room, told her she did not deserve to live, and said he was going to kill her and throw her in the river. H.A. and her older brother, C.R., witnessed these threats. Mr. Bermudez-Alfaro then repeated that he was going to kill Ms. S. and added that he was going to kill C.R. as well. He went to the kitchen, grabbed something in the sink, and held that item behind his back when he returned to the living room. Both Ms. S. and C.R. believed Mr. Bermudez-Alfaro was hiding a knife behind his back. When H.A. stepped between her parents and

asked them to stop fighting, Mr. Bermudez-Alfaro pushed her down.

Ms. S., H.A., and C.R. then left the house and began walking. Mr. Bermudez-Alfaro tried to run over them with his car, yelled that he was going to throw them in the river, turned the car around, and tried to hit them again. Ms. S. and her children eventually reached the town library, where they called the police.

The State charged Mr. Bermudez-Alfaro by amended information with one count of felony harassment (domestic violence) of Ms. S., one count of felony harassment of C.R., one count of second degree assault (domestic violence) of Ms. S., one count of second degree assault of C.R., and one count of second degree assault of H.A. The jury found him guilty as charged. The court sentenced him to the high end of the standard range on each count, running concurrently, for a total of 44 months with 18 to 36 months' community custody. The trial court also entered separate no-contact orders prohibiting contact with Ms. S., C.R., and H.A. for five years.

ANALYSIS

Mr. Bermudez-Alfaro asserts (1) he was denied due process when a police witness commented on Mr. Bermudez-Alfaro's initial refusal to speak, (2) defense counsel's failure to object to a police witness's comment constituted ineffective assistance of counsel, and (3) the imposition of the five-year no-contact order regarding H.A.

interfered with his fundamental liberty interest in the care of his child. Pro se, he also contends

(4) the trial court instructed the jury to be partial, (5) the interpreter and the prosecutor led the witnesses, (6) the prosecutor repeatedly made reference to past crimes, and (7) the trial court's imposition of the high end of a standard range sentence showed personal bias.

A. Comment on Right to Silence

At trial, the prosecutor asked investigating officer Deputy Curtis Flatray about his initial interview with Mr. Bermudez-Alfaro. The resulting testimony referred to Mr. Bermudez-Alfaro's reluctance to make a statement:

> Q: Okay. So eventually, though, you do take a statement from him, correct?
> A: Yes.
> Q: What did he have to say about this incident?
> A: At first he didn't want to answer any questions—After I read him his *Miranda*[1] rights he didn't want to answer any questions because he thought that he was already accused of it, and I asked him again, I told him that it was his opportunity to tell his side of the story, and he said that [Ms. S.] was lying and that she was just angry with him.
> Q: Alright.
> A: And then he decided he didn't want to answer anymore questions.
> Q: Alright. And that's the extent of your discussion with him?
> A: Yes.

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

Report of Proceedings (RP) (May 14, 2009) at 120-21. Defense counsel did not object to this testimony, and the prosecutor did not refer to the deputy's statement at any other time during the trial.

Mr. Bermudez-Alfaro now contends the deputy's testimony violated his constitutional right to silence and denied him due process. Our review of this claim of a denial of constitutional rights is de novo. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). Because Mr. Bermudez-Alfaro's contention asserts a manifest error affecting a constitutional right, he may raise it for the first time on appeal. *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); RAP 2.5(a)(3).

Due process under the Fourteenth Amendment to the United States Constitution prohibits the State's use of a defendant's post-arrest silence after *Miranda* warnings as substantive evidence of guilt.[2] *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). Specifically, "the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Reference to a defendant's right of silence may be a direct comment on or an

[2] Mr. Bermudez-Alfaro cites article I, section 3 of the Washington Constitution as the basis for his due process claim. It is now well-settled that article I, section 3 does not provide greater protection than the federal due process clause. *See State v. Turner*, 145 Wn. App. 899, 910-11, 187 P.3d 835 (2008), *review denied*, 165 Wn.2d 1016 (2009).

indirect reference to that right. *Burke*, 163 Wn.2d at 216; *State v. Lewis*, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996); *State v. Pottorff*, 138 Wn. App. 343, 346, 156 P.3d 955 (2007). A direct comment makes a clear reference to the defendant's invocation of his or her right to remain silent. *Id.* Such comments are used as substantive evidence of guilt or suggest to the jury that the silence was an admission of guilt. *Lewis*, 130 Wn.2d at 707. When a comment is direct, constitutional error occurs and we must engage in a constitutional harmless error analysis to determine whether the error was harmless beyond a reasonable doubt. *Romero*, 113 Wn. App. at 790. An indirect reference to the right to remain silent occurs when a witness refers to a comment or an action by the defendant that infers an attempt to exercise the right to remain silent. *Pottorff*, 138 Wn. App. at 347. Indirect references are so subtle and brief that they do not necessarily emphasize the defendant's testimonial silence. *Burke*, 163 Wn.2d at 216 (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Review of an indirect reference requires use of a nonconstitutional harmless error standard to determine whether the error probably affected the outcome of the trial. *Pottorff*, 138 Wn. App. at 347.

In this case, the State concedes that the deputy's testimony was improper, but asserts that the deputy's reference to Mr. Bermudez-Alfaro's silence was indirect. The record shows that on two occasions the deputy stated that Mr. Bermudez-Alfaro refused

to answer police questions. These direct references to his invocation of the right to remain silent raise the specter of a due process violation. *Id.* at 346-47. Although the record suggests that the reference was not used as substantive evidence of Mr. Bermudez-Alfaro's guilt, application of the constitutional harmless error analysis will ensure that the reference passes constitutional muster. *Romero*, 113 Wn. App. at 790. Under this analysis, we ask whether it is clear beyond a reasonable doubt that a reasonable jury would have reached the same verdict without the error and if the untainted evidence overwhelmingly leads to a finding of guilt. *Id.* at 794-95. If the error was not harmless, the judgment must be reversed and remanded for a new trial. *Easter*, 130 Wn.2d at 242.

We first examine whether the comments on Mr. Bermudez-Alfaro's silence were used to infer guilt. *Burke*, 163 Wn.2d at 222. In *Easter*, a prearrest silence case, a police officer testified that the defendant hid his intoxication by looking away and refusing to answer questions. The officer referred to these actions as being a "'smart drunk.'" *Easter*, 130 Wn.2d at 233. During closing argument, the prosecutor repeatedly referred to the defendant as a "'smart drunk.'" *Id.* at 234. Because the testimony and the closing argument were used to establish the defendant's guilt, the evidence of the defendant's prearrest silence was prejudicial. *Id.* at 242-43. A similar result was reached in *Romero*

when a police witness emphasized that the defendant was uncooperative and refused to talk, indicating that the witness was attempting to prejudice the jury. *Romero*, 113 Wn. App. at 793. Significantly here, the prosecutor did not refer to Mr. Bermudez-Alfaro's silence during testimony or closing argument. Because neither the prosecutor nor the deputy invited the jury to infer guilt from Mr. Bermudez-Alfaro's silence, any prejudice was limited. *See Lewis*, 130 Wn.2d at 706 ("Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence.").

Finally, we must consider whether the untainted evidence supports guilt beyond a reasonable doubt. *Burke*, 163 Wn.2d at 222. At trial, Ms. S., her son, C.R., and her daughter, H.A., testified consistently that Mr. Bermudez-Alfaro threatened to kill Ms. S. and C.R., pushed H.A. down, and tried to hit the three of them with his car. Mr. Bermudez-Alfaro testified that the entire incident was fabricated. The trial boiled down to whether the jury believed him or the three first-hand witnesses. In *Burke*, the Supreme Court held that repeated references to the defendant's silence undermined his credibility as a witness. *Id.* at 222-23. Here, however, the deputy's reference to Mr. Bermudez-Alfaro's refusal to speak was not mentioned again at trial, and even the deputy explained the refusal by guessing that Mr. Bermudez-Alfaro felt any protestations were pointless

because he was already arrested. The deputy also testified that Mr. Bermudez-Alfaro stated that Ms. S. was lying, and this statement was consistent with Mr. Bermudez-Alfaro's trial testimony.

On balance, the untainted evidence was overwhelming and the potential for prejudice was slight. Although the deputy impermissibly referred to Mr. Bermudez-Alfaro's exercise of the right to silence, the comment was not used as substantive evidence of guilt and was harmless beyond a reasonable doubt. *Lewis*, 130 Wn.2d at 706-07; *Romero*, 113 Wn. App. at 790.

B. Ineffective Assistance of Counsel

Deputy Flatray testified that after Mr. Bermudez-Alfaro said he did not want to answer any questions, the deputy asked him again to tell his story. In response, Mr. Bermudez-Alfaro stated that Ms. S. was lying and was just angry with him. Mr. Bermudez-Alfaro contends trial counsel was ineffective in failing to challenge the admissibility of this statement.

To prove ineffective assistance of counsel, Mr. Bermudez-Alfaro must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We strongly presume defense counsel's representation was effective.

Id. at 335. Counsel's failure to move for suppression of evidence is not per se deficient representation. *Id.* at 337. Mr. Bermudez-Alfaro must show from the record the absence of legitimate strategic or tactical reasons for failing to move for suppression. *Id.* at 336.

The State concedes that the deputy's continued questioning was impermissible after Mr. Bermudez-Alfaro indicated he did not want to make a statement. *See State v. Wilson*, 144 Wn. App. 166, 183-84, 181 P.3d 887 (2008) (quoting *Miranda*, 384 U.S. at 473-75, for the rule that continued questioning violates the Fifth Amendment privilege to remain silent). But the State correctly notes that defense counsel expressly waived a suppression hearing. Defense counsel stated to the court, "When questioned by law enforcement he simply indicated that the allegations were not true and that he was not guilty, and that's what he will be testifying to at trial." RP (May 4, 2009) at 2. Defense counsel's legitimate strategy was to allow Mr. Bermudez-Alfaro's consistent statement to come in through the deputy's testimony. And Mr. Bermudez-Alfaro fails to explain how this statement was in any way prejudicial. Accordingly, he does not show ineffective assistance of counsel. *See McFarland*, 127 Wn.2d at 334-35.

C. Five-Year No-Contact Orders

At sentencing, the court imposed three five-year no-contact orders to protect Ms. S., C.R., and H.A. Mr. Bermudez-Alfaro challenges the order that prevents him from

contacting his daughter H.A.

The trial court's imposition of crime-related prohibitions such as no-contact orders is fact-specific and is therefore reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). Mr. Bermudez-Alfaro contends the trial court abused its discretion because it did not narrowly tailor the no-contact orders.

Rainey does not set forth a bright-line rule requiring trial courts to expressly justify the conditions and duration of no-contact orders under the reasonably necessary standard. Rather, *Rainey* requires reviewing courts to analyze the scope and duration of no-contact orders independently in light of the facts in the record. Remand is only required when a reviewing court is unable to determine whether a specific provision or term is reasonably necessary. In *Rainey*, the Supreme Court was unable to determine whether, in the absence of any express justification by the trial court, a lifetime no-contact order was reasonably necessary to achieve the State's interest in protecting a child from her father. *Id.* at 381-82. Furthermore, the *Rainey* court concluded that the trial court should have addressed Mr. Rainey's argument that a no-contact order would be detrimental to his daughter's interests before pronouncing sentence. *Id.* at 382. Thus, the *Rainey* court had no choice but to remand for resentencing.

As in *Rainey*, the trial court in this case did not expressly justify how or why the five-year no-contact orders were reasonably necessary to achieve the State's interest. As discussed above, however, an appellate court need not remand for resentencing unless it is unable to discern a reasonable necessity from the facts in the record. The record in this case contains ample support for the five-year orders. Perhaps most importantly, the trial court observed that Mr. Bermudez-Alfaro had a history of persistent domestic violence involving the same victim, which frequently impacted H.A. and C.R.:

> You assaulted [Ms. S.] in California. When she moved up here to get away from you, you came up here and assaulted her in Washington. You intimidated her and your children (sic) and her children. . . . You won't learn. You will continue to intimidate.

RP (May 26, 2009) at 200-01.

While this observation was not specifically related to the duration of the no-contact orders, it nevertheless reflects the court's belief that Mr. Bermudez-Alfaro posed an ongoing danger to H.A. and C.R. Given Mr. Bermudez-Alfaro's repeated and persistent attempts to threaten and intimidate Ms. S., H.A., and C.R., five-year orders appear "reasonably necessary" to achieve the State's interest in protecting them from further violence and intimidation by Mr. Bermudez-Alfaro.

D. Pro Se Issues

Mr. Bermudez-Alfaro raises several issues in his statement of additional grounds

for review. But his arguments are not persuasive.

Juror partiality. Mr. Bermudez-Alfaro contends the trial court instructed the jury to be biased when advising the jurors to act as officers of the court. He asserts that by being officers of the court, the jurors are aligned with the interests of the State against him.

Jury instructions are sufficient if they correctly state the law, are not misleading, and allow each party to argue its theory of the case. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). In this case, the trial court instructed the jurors that they were officers of the court. This is a correct statement of the law because after jurors take an oath, they are officers of the court until discharged. *State v. Vega*, 144 Wn. App. 914, 917, 184 P.3d 677 (2008). Mr. Bermudez-Alfaro fails to show that the designation of the jurors as officers of the court biased them against him. In fact, the court also instructed the jurors that they must "act impartially with an earnest desire to reach a proper verdict," and to reach a decision based on the facts proved to them and the law, not based on "sympathy, prejudice, or personal preference." Clerk's Papers at 12.

Leading of witnesses by the interpreter and the prosecutor. Mr. Bermudez-Alfaro contends the State-provided interpreter improperly translated while the prosecutor examined Ms. S. and led her in giving answers favorable to the prosecution. He also

contends the prosecutor repeatedly supplied the answers he wanted from the witnesses.

A criminal defendant has a Sixth Amendment constitutional right to an interpreter so he may be fully present at his own trial and may confront witnesses. *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). The right to an interpreter is the right to a competent interpreter. *State v. Teshome*, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004). Inaccuracies in interpretation are reviewed to determine whether the trial was fundamentally unfair as a result. *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (quoting *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980)). Mr. Bermudez-Alfaro does not indicate how his trial court interpreter was inaccurate other than to say that the interpreter led the victims to say what the prosecution wanted them to say. He also notes that when the interpreter first addressed the court, he misspoke by saying "good afternoon"[3] when it was actually only a little after 11:00 a.m. This understandable error, immediately corrected by the interpreter by saying "good morning," is not proof of incompetence. Otherwise, Mr. Bermudez-Alfaro's conclusory allegations are insufficient to show inaccuracies or a fundamentally unfair trial.

To establish prosecutorial misconduct, Mr. Bermudez-Alfaro must show that the prosecutor's conduct was both improper and prejudicial. *State v. Gregory*, 158 Wn.2d

[3] RP (May 14, 2009) at 11.

759, 858, 147 P.3d 1201 (2006). When, as here, the defendant did not object to the prosecutor's conduct, the error is waived unless the conduct was so flagrant and ill intentioned that an instruction to the jury could not have cured the prejudice. *Id.* at 858-59. Again, as with the allegation of interpreter misconduct, Mr. Bermudez-Alfaro does not point to specific statements by the prosecutor that improperly led the witnesses to give the desired answers. Accordingly, he shows neither improper conduct nor prejudice.

References to past crimes. According to Mr. Bermudez-Alfaro, the prosecutor repeatedly referred to past crimes without explaining that he was not convicted of some of those crimes or had not admitted guilt. He also asserts that the trial court should have instructed the jury to disregard this evidence after an objection by defense counsel was sustained. Mr. Bermudez-Alfaro apparently misunderstands what happened at trial. Without the jury present, the prosecutor presented an offer of proof regarding the tumultuous relationship between Mr. Bermudez-Alfaro and Ms. S., evidenced by police reports and an assault conviction. The trial court ruled that the evidence was more prejudicial than it was probative and denied the prosecutor's request for admission. No reference to past crimes or misconduct otherwise appears in this record.

High end of the standard range sentence. Finally, Mr. Bermudez-Alfaro contends the trial judge showed bias when the judge imposed the high end of the standard range

for his sentence. A defendant generally cannot appeal a standard range sentence. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Appellate review is available solely for the trial court's legal errors or its abuse of discretion in deciding what sentence applies. *Id.* at 147. Mr. Bermudez-Alfaro shows no legal error in the determination of his standard range sentence. The trial court's decision to impose the high end of that standard range is not an abuse of discretion in itself. And Mr. Bermudez-Alfaro offers nothing more than conclusory allegations of the trial court's bias.

We affirm the convictions and the no-contact orders.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Brown, J.