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State v. Ozuna Appellant's Reply Brief Dckt. 46318

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 46318-2018**
	)	
v.	)	**CANYON COUNTY NO. CR-2017-15858**
	)	
JANELL OZUNA,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE BRADLY S. FORD
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Janell Ozuna raised two fundamental errors to challenge the jury's guilty verdict for possession of a controlled substance and possession of drug paraphernalia. Both errors were claims of prosecutorial misconduct. First, she argued that the prosecutor committed misconduct by repeatedly commenting and eliciting testimony on her silence to infer guilt. Second, she argued that the prosecutor committed misconduct by eliciting testimony that had been ruled inadmissible by the district court. She argued that these errors violated her unwaived constitutional rights, were clear from the record, and were not harmless. The State responded and disputed each prong of the fundamental error standard for both misconduct claims. This Reply Brief addresses some, but not all, of the State's arguments.

Statement of Facts and Course of Proceedings

Ms. Ozuna outlined the facts and proceedings in her Appellant's Brief. (App. Br., pp.1–5.) They are not repeated here, but are incorporated by reference.

ISSUES

I. Did the prosecutor violate Ms. Ozuna's constitutional rights to remain silent and to a fair trial by repeatedly using evidence of Ms. Ozuna's silence to imply guilt?

II. Did the prosecutor violate Ms. Ozuna's constitutional right to a fair trial by eliciting testimony previously deemed inadmissible on Ms. Ozuna's prior police contact?

ARGUMENT

I.

The Prosecutor Violated Ms. Ozuna's Constitutional Rights To Remain Silent And To A Fair Trial By Repeatedly Using Evidence Of Ms. Ozuna's Silence To Imply Guilt

On Ms. Ozuna's first claim of prosecutorial misconduct, she argued that the prosecutor violated her constitutional rights to remain silent and to a fair trial by eliciting testimony and commenting on her silence to imply guilt. (App. Br., pp.7–18.) The State responded that the U.S. Supreme Court's holding in *Salinas v. Texas*, 570 U.S. 178 (2013), allowed the prosecutor's use of Ms. Ozuna's silence at trial. The State's reliance on *Salinas* is entirely misplaced.

Before examining *Salinas*, it is critical to recognize "when and how" the prosecutor used Ms. Ozuna's silence in this case. (*See* App. Br., pp.8–9.) *See State v. Ellington*, 151 Idaho 53, 60 (2011) ("In the case of post-arrest silence, the U.S. Supreme Court has provided guidance as to when and how that silence can and cannot be used by the State at trial."). Ms. Ozuna identified four instances of misconduct. (App. Br., pp.10–15.) First, the prosecutor informed the jury in opening statements that Ms. Ozuna did not "adamantly deny" that the pipe was not hers after Officer Parsons told her that she was under arrest. (App. Br., p.10; *see also* Tr. Vol. I,[1] p.122, L.25–p.123, L.4.) Second, the prosecutor elicited testimony from Officer Parsons that Ms. Ozuna did not "say anything" or "adamantly" deny ownership of the pipe either during or after he

[1] The appellate record contains one .PDF document with three separate transcripts, each with its own pagination. For ease of reference, citations to the three transcripts will refer to the separate transcripts by volume and its internal pagination. Citations to "Tr. Vol. I" will refer to the first transcript in the document (pages 1–55 of total document), containing day one of the jury trial, held on February 15, 2018. Citations to "Tr. Vol. II" will refer to the second transcript in the document (pages 56–59 of total document), containing the pre-trial conference, held on February 13, 2018. Citations to "Tr. Vol. III" will refer to the third and final transcript in the document (pages 60–88 of total document), containing day two of the jury trial, held on February 16, 2018, and multiple sentencing proceedings.

arrested her. (App. Br., pp.10–11; *see also* Tr. Vol. I, p.134, L.1–p.135, L.4.) Third, the prosecutor elicited testimony from Ms. Ozuna on cross-examination that she failed to "offer any other explanation" or "adamantly deny" that the pipe was hers during or after Officer Parsons arrested her. (App. Br., pp.11–13; *see also* Tr. Vol. I, p.205, L.1–p.206, L.12, p.207, L.23–p.208, L.8.) Fourth, the prosecutor argued in closing that Ms. Ozuna did not say anything or deny that the pipe was hers during or after her arrest. (App. Br., pp.14–15; *see also* Tr. Vol. III, p.15, L.24–p.17,[2] L.2, p.29, Ls.8–25.) In all, save for one comment in closing,[3] the prosecutor used Ms. Ozuna's silence *when* she was in custody—Ms. Ozuna remained silent during and after her arrest.

Turning to *how* the prosecutor used Ms. Ozuna's silence, the prosecutor clearly used it to infer guilt. (*See* App. Br., pp.10–15 & n.6.) In opening statements, Officer Parsons's direct examination, and closing argument, the prosecutor implied that the jury should find Ms. Ozuna guilty because her failure to assert her innocence meant she had knowledge. According to the prosecutor, an innocent person talks and a guilty person stays quiet. Moreover, the prosecutor did not use Ms. Ozuna's silence to prove her version of the events was not credible. In fact, Officer Parsons's and Ms. Ozuna's testimony was strikingly similar on her single denial after the pipe shattered, her arrest, and her decision to remain silent upon her arrest. There was nothing to impeach with respect to Ms. Ozuna's testimony on her arrest. The prosecutor's use of her silence was not for an impeachment purpose, such as challenging Ms. Ozuna's credibility or rebutting a new story, but to prove her guilt by staying silent upon her arrest. *See State v. Strouse*, 133 Idaho 709, 714 (1999) (prosecutor's "salvo" on cross-examination was a Fifth Amendment violation,

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[2] Ms. Ozuna's Appellant's Brief incorrectly cites to page 27, not 17. (*See* App. Br., p.14.)
[3] The prosecutor also argued that Ms. Ozuna's pre-arrest silence right after the pipe shattered was evidence of guilt. (Tr. Vol. III, p.15, L.24–p.16, L.4.)

and not harmless, because prosecutor went "far beyond" the use of defendant's silence for any legitimate purpose, such as to contradict defendant's new exculpatory version of events not told to police, and was used to establish guilt).

With this framework in mind, *Salinas* is completely inapplicable. In *Salinas*, the U.S. Supreme Court granted certiorari to resolve a federal circuit court split on "whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a *noncustodial police interview* as part of its case in chief." 570 U.S. at 183 (emphasis added) (plurality opinion). But the U.S. Supreme Court did not resolve the split. *Id.*; *see also id.* at 193 (Thomas, J., concurring in judgment). The U.S. Supreme Court declined to answer whether the prosecution may use a defendant's pre-custody silence as evidence of guilt because, in *Salinas*, the defendant never invoked his Fifth Amendment privilege during his voluntary interview at the police station. *Id.* at 182–83, 185–86 (plurality opinion). The defendant voluntarily answered the police's questions and did not assert the privilege when he was silent for one particular question, so he could not claim a Fifth Amendment violation. *Id.* at 182, 185–86. Thus, this narrow holding from *Salinas* has no bearing on the instant case. *Salinas* held a defendant must invoke his Fifth Amendment privilege during a non-custodial, voluntary interview in order to claim a subsequent violation of the privilege by the prosecutor at trial. *Salinas*'s holding does not extend in any way to custodial silence during an investigatory detention, that is, silence upon arrest.

Moreover, although *Salinas* did not resolve this question for the federal courts, this Court has resolved whether, in the State of Idaho, a prosecutor may use pre-arrest silence as substantive evidence of guilt. In *State v. Parker*, 157 Idaho 132 (2014), a post-*Salinas* decision, the Court held that the prosecutor may not use pre-arrest silence to imply guilt. *Parker*, 157 Idaho at 147; *see also State v. Parton*, 154 Idaho 558, 566 (2013) (same). Numerous state court (and several

federal circuit courts) have reached the same conclusion. *State v. Tsujimura*, 400 P.3d 500, 512 (Haw. 2017) (discussing cases). For example, in *Tsujimura*, the Hawaii Supreme Court agreed "with the federal circuit courts of appeals and the several States that have held as unconstitutional the use of prearrest silence as substantive evidence of guilt." *Id.* at 513 (agreeing with Idaho, as well as appellate courts in New Hampshire, New Jersey, Wyoming, Washington, Nebraska, Wisconsin, North Carolina, and Utah, and the First, Second, Sixth, Seventh and Tenth Circuit). The Hawaii Supreme Court reasoned that a contrary holding would incentivize police officers to delay interrogation or giving *Miranda*[4] warnings to create an intervening period of silence that could be used later to imply guilt. *Id.* at 514. As another basis to prohibit pre-arrest silence to prove guilt, the Hawaii Supreme Court explained that the prohibition is in line with an individual's right to remain silent during an investigatory stop:

> Proscribing the use of prearrest silence that occurs at least as of the time that a person has been detained is also consistent with the well-established tenet that a person being questioned by a law enforcement officer during an investigatory stop "is not obliged to respond." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). If the State were authorized to use a person's silence during an investigatory stop as substantive evidence of guilt, it would effectively punish a person for exercising a legal right, a result that is constitutionally unacceptable.

Tsujimura, 400 P.3d at 514. Finally, the Hawaii Supreme Court "emphasize[d]" that the prosecutor's use of the defendant's silence was not silence in response to a specific question, as in *Salinas*, but was simply the failure to volunteer information to the police officer. *Id.* Looking at this situation, the appellate court recognized:

> [P]ermitting silence to serve as an implication of guilt would mean that the State would always be able to use as substantive proof of guilt prearrest silence not made in response to a question by a police officer. The prosecutor need only identify a point in time during the defendant's interaction with the police officer when no question was posed and no verbal exchange was had (and, therefore, the defendant was expectedly silent) and use that silence as evidence to infer the

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> defendant's guilt. This would engender a result where, in any encounter between a law enforcement officer and a citizen, the State would be able to adduce evidence of prearrest silence in myriad ways . . . .

Id. at 514–15. For all of these reasons, the "better rule is that which holds that the defendants' Fifth Amendment right not to have their silence used against them in a court proceeding is applicable pre-arrest and pre-*Miranda* warnings. The constitutional right is always present." *State v. Moore*, 131 Idaho 814, 820 (1998).

Even though the Court's protection of pre-arrest silence does not directly apply here—because the prosecutor used Ms. Ozuna's post-arrest silence—this discussion demonstrates the Court's limitations on a prosecutor's use of silence and its protection of the privilege. A prosecutor cannot use pre- or post-arrest silence as evidence of guilt. *Parker*, 157 Idaho at 147. Moreover, the giving of *Miranda* warnings certainly does not lessen and, if anything, reinforces these pre- and post-arrest protections. *See Moore*, 131 Idaho at 820 ("While the presence of *Miranda* warnings might provide an additional reason for disallowing use of the defendant's silence, they are not a necessary condition to such a prohibition."); *State v. White*, 97 Idaho 708, 714–15 (1976) ("If a prosecutor is allowed to introduce evidence of silence, for any purpose, then the right to remain silent guaranteed in *Miranda* . . . becomes so diluted as to be rendered worthless."). Even the U.S. Supreme Court in *Salinas* acknowledged that "due process prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings . . . ." 570 U.S. at 188 n.3 (plurality opinion) (citing *Doyle v. Ohio*, 426 U.S. 610, 617–618 (1976)); *but see also id.* (distinguishing this protection in pre-*Miranda* situations). Indeed, the Court has ruled that the giving of *Miranda* warnings is immaterial to determine whether the prosecutor can use silence to infer guilt: "[T]his Court has held that a defendant's right to remain silent attaches upon custody, not arrest or interrogation, and thus a prosecutor may not use any

post-custody silence to infer guilt in its case-in-chief." *Ellington*, 151 Idaho at 60 (citing *Moore*, 131 Idaho at 820). As such, an arrested defendant is protected against the prosecutor's use of his silence even if it is "unclear" whether the police officer "Mirandized" him. *Id.* at 60–61. The only exception to the protections outlined by this Court is pre-*Miranda* silence, either pre- or post-arrest, for impeachment purposes. *Parker*, 157 Idaho at 147. The use of silence to prove guilt is still prohibited if it is pre- or post-arrest and pre- or post-*Miranda*. *Parker*, 157 Idaho at 147; *Ellington*, 151 Idaho at 60–61.

It is clear from the Court's precedent that a defendant need not invoke his right to remain silent before, during, and after an arrest to avoid having his silence used against him at trial to prove his guilt. In cases before and after *Salinas*, this Court has not required any invocation to assert this protection. *Compare Ellington*, 151 Idaho at 60–61 (pre-*Salinas*), *with State v. Johnson*, 163 Idaho 412, 421, 422–23 (2017) (post-*Salinas*); *State v. Skunkcap*, 157 Idaho 221, 232–35 (2014) (same); *Parker*, 157 Idaho at 147 (same). Invocation is not required due to the implied promise in *Miranda* warnings:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.

Doyle, 426 U.S. at 617–1 (citation and footnote committed). As such, a defendant is protected from a prosecutor's use of his silence to prove guilt pre- and post-arrest, even if the defendant did not invoke his right to silence.

This protection during an arrest is distinguishable from protection in a police interview, where the U.S. Supreme Court and the Idaho Court of Appeals have required invocation. Under *Salinas*, a defendant must unambiguously invoke his Fifth Amendment right if he chooses not to

answer a question in a noncustodial, voluntary interview with the police. 570 U.S. at 182–83, 185–86 (plurality opinion). As the State points out in its Respondent's brief, the Court of Appeals in *State v. Neyhart*, 160 Idaho 746, 752–55 (Ct. App. 2016), recognized the *Salinas* invocation requirement during a police interview. (Resp. Br., pp.13–15.) *But see Parker*, 157 Idaho at 147 (prosecutorial misconduct for commenting on defendant's silence during noncustodial police interview, without any invocation requirement, or any evidence in the record on whether defendant received *Miranda* warnings). Regardless, the *Salinas* analysis of a clear invocation has no bearing on an investigatory stop and arrest situation. This Court does not require the defendant to establish that he received *Miranda* warnings or that he invoked his *Miranda* rights to avoid the prosecutor's use of his pre- or post-arrest silence at trial. *See Johnson*, 163 Idaho at 421, 422–23 (prosecutorial misconduct for eliciting testimony on police's unsuccessful attempt to interview defendant pre-arrest, and no invocation requirement); *Skunkcap*, 157 Idaho at 235 (prosecutorial misconduct for using post-arrest silence in jail cell during police's attempted interview, and no invocation requirement); *Parton*, 154 Idaho at 565–568 (prosecutorial misconduct for using post-arrest and post-*Miranda* silence, and no invocation requirement); *Ellington*, 151 Idaho at 59–61 (prosecutorial misconduct for using on post-arrest silence, and no invocation requirement or evidence on issuance of *Miranda* warnings); *Moore*, 131 Idaho at 820–22 (prohibiting prosecutor's use of pre-arrest, pre-*Miranda* silence to prove guilt). *White*, 97 Idaho at 714–15 (prosecutor's comments on post-arrest silence constituted fundamental error). This use of silence, either by eliciting testimony or in argument, constitutes prosecutorial misconduct.

The improper use of Ms. Ozuna's silence occurred here. In opening statements, Officer Parsons's direct examination, Ms. Ozuna's cross-examination, and closing argument, the

prosecutor used Ms. Ozuna's silence at the moment of her arrest and right after to prove her guilt. (*See* App. Br., pp.10–15.) This was prosecutorial misconduct, in violation of Ms. Ozuna's Fifth Amendment and due process rights. (*See* App. Br., pp.8–9, 15.) The State's reliance on *Salinas* to dispute this misconduct, be it in opening statements, witness examination, or closing argument, is irrelevant. *Salinas* does not apply. Therefore, the State's arguments in opposition to prong one of the fundamental error standard fail. (*See* Resp. Br., pp.16–17, 19–21, 25–26, 28–29.)

The State's arguments on prong two and three of the fundamental error standard are equally unpersuasive.[5] For one, the State's assertion that Ms. Ozuna's counsel made a tactical decision not to object to any of this misconduct because, according to the State, this evidence and commentary on silence was permissible under *Salinas* is once again irrelevant. (Resp. Br., pp.18, 21–22, 27.) Further, Ms. Ozuna has provided more than appellate counsel's opinion that her trial counsel's failure to object was a tactical decision. Ms. Ozuna has supported her opinion—that "there is no conceivable strategy" for trial counsel "failing to object" to improper argument and inadmissible evidence that makes "it vastly easier" for the jury to find Ms. Ozuna guilty—with evidence in the record. *See State v. Medina*, Nos. 45117 & 45118, 2019 WL 4023555, at *7 (Aug. 27, 2019) (applying *Perry*[6] for prong two). The evidence is trial counsel's Idaho Criminal Rule 29 challenge to the sufficiency of the evidence on Ms. Ozuna's knowledge and trial counsel's closing argument reminding the jury that "this is still America" where Ms. Ozuna had the "right" to keep her "mouth shut."[7] (App. Br., pp.16–17; Tr. Vol. I, p.191, L.10–p.192, L.3;

[5] Ms. Ozuna recognizes that *State v. Miller*, 165 Idaho 115 (2019), became final on June 12, 2019. (*See* App. Br., pp.7–8 (noting the *Perry* and *Miller* standards for fundamental error).)
[6] *State v. Perry*, 150 Idaho 209 (2010).
[7] In trial counsel's "America" argument, he never expressly told the jury that this "right" could not be used against her by the prosecutor at trial. (Tr. Vol. III, p.20, L.18–p.21, L.5.) In other

Tr. Vol. III, p.20, L.18–p.21, L.5.) Trial counsel's actions show that it was not strategic or tactical not to object to the replete prosecutorial misconduct in this case. Clearly, if trial counsel had known that the prosecutor's comments and elicitation of testimony were improper and inadmissible, trial counsel would have objected, rather than making two arguments that did not address, or even acknowledge, the errors head-on. Finally, on prong three, the State has not shown how the prosecutor's use of Ms. Ozuna's silence to prove her guilt did not actually affect the jury's verdict when the key evidence used by the prosecutor on the contested element of Ms. Ozuna's knowledge was her silence. Without this evidence, the jury could have found Ms. Ozuna not guilty. Therefore, this misconduct actually affected the trial's outcome.

II.

The Prosecutor Violated Ms. Ozuna's Constitutional Right To A Fair Trial By Eliciting Testimony Previously Deemed Inadmissible On Ms. Ozuna's Prior Police Contact

On Ms. Ozuna's second claim of prosecutorial misconduct, she argued that the prosecutor violated her right to a fair trial by eliciting testimony from Officer Parsons on his "previous contact" with Ms. Ozuna, despite the district court's ruling not to elicit such testimony. (App. Br., pp.19–21.) The State responded that the prosecutor violated an evidentiary rule only and therefore this violation did not rise to the level of a constitutional error. (Resp. Br., pp.33–34.) Ms. Ozuna respectfully disagrees. Although in *State v. Lankford*, 162 Idaho 477 (2017), the Court held that the prosecutor's elicitation of testimony in violation of the district court's evidentiary ruling "did not affect" the defendant's "due process right to a fair trial," this holding is not a hard-and-fast rule for all prosecutorial misconduct premised on violations of court orders

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words, he never argued to the jury that it could not consider Ms. Ozuna's silence as evidence of guilt.

or rules of evidence. Whether or not the prosecutor committed misconduct that rises to the level of a due process violation depends on the facts of each case.

In *Perry*, for instance, the Court held that the prosecutor committed misconduct by eliciting testimony from witnesses that vouched for the victims' credibility. 150 Idaho at 228–29. The Court declined to grant relief not because there was no constitutional violation at all, but because the violation was not clear from the record. *Id.* at 229. The Court reasoned that additional factual findings were needed to determine whether trial counsel's failure to object was strategic or tactical. *Id.* Similarly, in *Parker*, the Court held that the prosecutor committed misconduct by eliciting testimony that the district court had ordered to be excluded from trial or that the prosecutor had represented that he would not present to the jury. 157 Idaho at 144–45. The Court further held, "The prosecutorial misconduct here may have impacted Parker's right to a fair trial, but Parker has not met his burden under the second prong" to show that his trial counsel's failure to object was not strategic or tactical. *Id.* at 145. Along the same lines, in *State v. Dunlap*, the Court held that the prosecutor committed misconduct by eliciting testimony from an expert witness on his opinion of the weight the jury should give to certain evidence. 155 Idaho 345, 370 (2013). The Court again declined to grant relief because the Court determined that the error was harmless. *Id.* at 371. The Court did not expressly hold that this misconduct did not violate the defendant's due process rights. *Id.* at 370–71. These cases indicate that prosecutorial misconduct for violating the district court's evidentiary ruling (and, consequently, presenting inadmissible evidence to the jury) can result in a violation of the defendant's right to a fair trial, even though the defendant may fail to establish other prongs of the fundamental error standard. Therefore, Ms. Ozuna submits that *Lankford*'s application of the fundamental error standard to a prosecutorial misconduct claim in that case does not dictate the outcome of this

case. She maintains that the prosecutor's misconduct here violated her right to a fair trial because the prosecutor presented irrelevant and prejudicial evidence of her prior contact with a police officer.

Ms. Ozuna does not respond to the State's arguments on prongs two and three of the fundamental error standard, and she respectfully refers this Court to her Appellant's Brief on these issues. (App. Br., pp.21–22.)

CONCLUSION

Ms. Ozuna respectfully requests that this Court vacate her judgment of conviction and remand her case for a new trial.

DATED this 10th day of September, 2019.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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JCS/eas