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NO. 71562-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Appellant.

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

The Honorable Jean Rietschel, Judge

BRIEF OF APPELLANT

MARY T. SWIFT
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant for the first five counts of theft by color or aid of deception.

2. The trial court erred in ordering restitution for those theft counts for which there was insufficient evidence to convict.

3. The State violated appellant's constitutional right to remain silent by purposefully eliciting testimony from its police witness that appellant refused to talk with the police before arrest.

4. Counsel was ineffective for failing to cite the Fifth Amendment and article I, section 9 of the Washington Constitution when objecting to police testimony that Johnson exercised his constitutional right to prearrest silence.

5. Counsel was ineffective for failing to cite relevant case law justifying an exceptional sentence below the standard range.

Issues Pertaining to Assignments of Error

1. The State introduced evidence that appellant and his alleged accomplice committed theft by entering a secret agreement in October 2007 to steal from the Seattle School District. Where the first five alleged thefts occurred before this date, is the evidence insufficient to support those counts?

2. Should restitution be imposed only for charges for which there was sufficient evidence to convict?

3. The Fifth Amendment and article I, section 9 of the Washington Constitution guarantee the right to remain silent before arrest. The State is prohibited from commenting on the exercise of this right. Did the State impermissibly penalize appellant for exercising his right to prearrest silence by eliciting testimony from a police witness that appellant repeatedly refused to talk to police during their investigation?

4. The Sixth Amendment guarantees the right to effective assistance of counsel. During the officer's testimony, defense counsel objected on ER 403 grounds. Was counsel ineffective in failing to cite constitutional law that would have excluded the officer's testimony on appellant's prearrest silence?

5. Trial courts have authority to impose an exceptional sentence downward if the Sentencing Reform Act's multiple offense policy results in a presumptive sentence that is clearly excessive. Was counsel ineffective when he failed to cite relevant case law alerting the court to this authority?

B. STATEMENT OF THE CASE

The State charged David Johnson with 36 counts of first and second degree theft by color or aid of deception. CP 25-39. These charges arose

from what the State described as a phony vendor scheme. 6RP 8.[1] The State alleged that Johnson, together with Silas Potter, stole $168,275 from Seattle Public Schools between May 16, 2007 and June 14, 2010, through Johnson's non-profit, Grace of Mercy. CP 25-39.

Potter has a master's degree in communication, and worked for Microsoft and then the Seattle School District (SSD or the District) starting around 2001. 6RP 43-45. Potter was program manager for the District's Regional Small Business Development Program (RSBDP or the program). 6RP 44-46, 64. The RSBDP developed out of the District's historically underutilized business program, which aimed to increase the number of minority- and women-owned businesses contracting with the District. 6RP 44-46. The District recruited personal service contractors for the RSBDP to conduct outreach and teach classes in Seattle and Tacoma. 6RP 59-60, 69-70; Ex. 2. The goal was to help minority business owners learn about and successfully compete for government contracts. Ex. 2; 6RP 45-46, 69-70; 9RP 6-9.

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[1] This brief refers to the verbatim reports of proceedings as follows: 1RP – June 24, 2013; 2RP – June 25, 2013; 3RP – July 2, August 9, November 7, 2013, February 7, February 14, 2014; 4RP – October 21, 2013; 5RP – October 23, 2013; 6RP – October 28, 2013; 7RP – October 29, 2013; 8RP – October 30, 2013; 9RP – October 31, 2013; 10RP – November 4, 2013; 11RP – November 5, 2013; 12RP – November 6, 2013; 13RP – November 8, 2013.

Johnson completed the eighth grade and has difficulty with reading and comprehension. 11RP 102-04. Potter first met Johnson when Johnson installed security systems for the District through his business, Allstate Surveillance. 6RP 50-54. They became friends, and Potter encouraged Johnson to get involved with the RSBDP. 6RP 51-53. Johnson eventually approached Potter hoping to become a personal service contractor for the program through Grace of Mercy. 6RP 79-81. Johnson knew several small contractors in the Tacoma area he thought would be interested. 6RP 80-81.

Potter approved Johnson for an outreach contract from March 2007 until August 2007. 6RP 81; Ex. 4 (03/01/07 – 08/31/07). This contract required Johnson to assist with implementing the program, network and encourage participation in the program, and perform similar outreach work. Ex. 4 (03/01/07 – 08/31/07); see also Ex. 4. (08/08/07 – Modification).

Johnson was very active and brought in several contractors through his outreach work. 6RP 118, 123-14; 7RP 92-93; 8RP 165-66, 171. He described the work as "[b]ringing awareness to the people out there and in the city, bringing people to the classes, getting the information out to them." 11RP 105. Johnson created pamphlets about the program, which he distributed at home improvement stores where contractors frequented. 11RP 110-11, 119. Johnson also attended several RSBDP classes early on so he

could get familiar with the program and provide better information to contractors. 11RP 99.

Several contractors testified to Johnson's recruitment work. Thomas Roundtree, Jr., said Johnson helped walk him through the District's bidding process. 10RP 189-90. Roundtree believed that Johnson's outreach efforts were "quite significant" and Johnson was "like a hound dog" trying to convince him to attend RSBDP classes. 10RP 194-95. Likewise, Raymond Montgomery, Jr., attended several RSBDP classes at Johnson's urging. 11RP 17. Johnson also recruited Seven Hobbs for the program, who testified that Johnson was successful in his outreach work. 10RP 136-43. Potter, too, recognized Johnson was an integral part of the outreach program. 7RP 112.

However, in October 2007, the District began requiring its RSBDP contractors to perform not just outreach work but also teach classes. 6RP 85. As a result of this change, Potter said he and Johnson entered a secret agreement to split money for classes that Johnson would not teach. 6RP 84-85. Potter claimed they met at a Denny's and Johnson proposed that he pretend to teach classes, submit falsified invoices, and then split the proceeds with Potter. 6RP 84-85. Potter said this meeting took place in September or October 2007. 6RP 84-85.

Johnson's personal service contract for October 1, 2007 to August 31, 2008 specified he would "[d]evelop training methods to augment program designed by SSD," in addition to his outreach work. Ex. 4 (10/01/07 – 08/31/08). From October 1, 2007 onward, Johnson's invoices stated he conducted several training sessions for contractors. Ex. 5 (10/01/2007 – 6/14/2007). Potter testified that after the alleged meeting at Denny's, he began creating all the Grace of Mercy invoices and forged Johnson's signature on at least 15 subsequent invoices. 6RP 168-69, 175-76, 181-99; 7RP 32. Potter claimed he did so because Johnson was out of town and approved the forgeries. 6RP 181-82. However, Potter could not recall whether he received Johnson's approval on several occasions. 6RP 187-92.

Potter claimed that after their October 2007 agreement, Johnson began giving him a portion of the School District checks in cash. 6RP 201. The State showed that Johnson withdrew $89,000 in cash from his Grace of Mercy bank accounts. 10RP 53. The withdrawals were haphazard; there were no recurring dates or recurring amounts withdrawn. 10RP 119. The State's witness acknowledged there was no way to know how Johnson used the cash. 10RP 107-08. Potter could not recall the dates Johnson gave him cash or the amounts of cash he received. 7RP 46-47. Nor could he remember how he and Johnson agreed to divide the money. 6RP 86. Potter ultimately pleaded guilty to theft and testified against Johnson. 7RP 133.

Detective Keith Savas also testified. 9RP 128. Defense counsel objected several times to Savas's testimony, arguing it was irrelevant and prejudicial under ER 403. 9RP 128-32. The trial court noted counsel's continuing objection. 9RP 131-32. Savas then testified he interviewed Sorensen, who agreed to speak with him. 9RP 132-33. He also said he interviewed Potter, who confessed to the alleged conspiracy. 9RP 133. Savas then testified he attempted to contact Johnson several times, but Johnson continually refused to speak with him. 9RP 134. He explained he went to Johnson's house to investigate, but Johnson was not there and he "never got farther than the front living room." 9RP 134-35.

Lorrie Sorensen also testified. 8RP 207. She and Johnson dated during the time period that Johnson contracted with the District. 8RP 210, 221-23. She said Johnson told her he was getting checks from the District for teaching computer classes. 8RP 223. Sorensen believed Johnson "could not possibly teach a class," because he was "not computer literate." 6RP 223-24. She claimed Johnson told her, "I can't believe I am getting paid for something I don't even know how to do." 6RP 225.

Johnson agreed that he never taught any RSBDP classes. 11RP 123. Rather, he contracted with the District to perform outreach work. 11RP 99, 123. State and defense witnesses all agreed that Johnson brought contractors

to the program through his outreach efforts. 6RP 118, 123-14; 7RP 92-93, 157-58, 165-66; 8RP 165-66, 171, 226; 10RP 131, 136, 173, 189; 11RP 17.

Johnson denied suggesting to Potter that they split the Grace of Mercy earnings. 11RP 120. Nor did he agree to Potter forging his signature on the falsified invoices Potter created. 11RP 123. Several witnesses testified to Johnson's functional illiteracy and inability to comprehend complex information. 8RP 188; 10RP 138; 11RP 103. For instance, Potter's assistant, Cheryl Graves, helped Johnson complete his Allstate application and invoices, because he was unable to do so himself. 8RP 154, 188, 206.

By contrast, several witnesses testified to Potter's repeated dishonesty and deception. 8RP 127-28, 139-40, 182, 287; 9RP 38-39, 182. For instance, the District stopped funding the RSBDP in 2010. 7RP 49-50. Potter then set up a private program with the same name using the District's mailing address and solicited $35,000 from Tacoma Public Schools. 7RP 19, 72-74; 9RP 182; 11RP 43. Potter spent all the money and switched the bank account mailing address so the RSBDP treasurer would not discover it. 9RP 32-33, 38-40. When the District found out about the check, it demanded that Potter return the money. 9RP 199. Attempting to avoid blame, Potter accused his secretary of mistakenly depositing the check in his private RSBDP account. 8RP 139-40.

Given Johnson's significant limitations compared to Potter's sophistication, defense counsel emphasized it was highly unlikely that Johnson initiated or participated in such a complicated scheme to steal from the Seattle School District. 12RP 415-17.

Johnson received 36 checks totaling $168,275 from the District for his work though Grace of Mercy. 10RP 53; Ex. 5. These 36 checks formed the 36 counts of first and second degree theft by color or aid of deception as follows:

Count	Date	Amount	Charge
Count 1	May 16, 2007	$5,000	First Degree
Count 2	May 30, 2007	$5,000	First Degree
Count 3	June 27, 2007	$5,000	First Degree
Count 4	July 30, 2007	$5,000	First Degree
Count 5	September 5, 2007	$5,100	First Degree
Count 6	October 1, 2007	$4,900	First Degree
Count 7	November 28, 2007	$4,400	First Degree
Count 8	December 3, 2007	$5,100	First Degree
Count 9	December 19, 2007	$5,100	First Degree
Count 10	February 4, 2008	$4,800	First Degree
Count 11	February 20, 2008	$5,000	First Degree
Count 12	March 24, 2008	$6,100	First Degree
Count 13	April 21, 2008	$4,400	First Degree
Count 14	May 28, 2008	$3,650	First Degree
Count 15	June 30, 2008	$5,000	First Degree
Count 16	July 30, 2008	$4,800	First Degree
Count 17	August 27, 2008	$3,400	First Degree
Count 18	October 1, 2008	$5,000	First Degree
Count 19	November 19, 2008	$1,500	Second Degree
Count 20	November 24, 2008	$5,000	First Degree
Count 21	December 1, 2008	$5,000	First Degree
Count 22	January 5, 2009	$5,000	First Degree
Count 23	January 28, 2009	$4,800	First Degree

Count 24	March 4, 2009	$5,000	First Degree
Count 25	March 30, 2009	$4,800	First Degree
Count 26	April 29, 2009	$5,000	First Degree
Count 27	May 27, 2009	$5,600	First Degree
Count 28	July 1, 2009	$5,000	First Degree
Count 29	August 3, 2090	$2,800	First Degree
Count 30	September 14, 2009	$7,200	First Degree
Count 31	September 30, 2009	$5,000	Second Degree[2]
Count 32	October 28, 2009	$3,000	Second Degree
Count 33	December 7, 2009	$3,000	Second Degree
Count 34	December 29, 2009	$4,000	Second Degree
Count 35	January 27, 2010	$5,625	First Degree
Count 36	June 14, 2010	$4,200	Second Degree

Ex. 1; Ex. 5; CP 157-92.

During deliberations the jury asked, "Can we reduce any of the charges from 1st to 2nd degree? Or make the recommendation of such?" CP 132. The jury also asked, "Do jurors have any room to exercise leniency in our verdict based on witness' testimony(s)?" CP 128. In response, the court told the jury to refer to its instructions. CP 129, 133. The jury found Johnson guilty as charged on all 36 counts. CP 196-201.

At sentencing, defense counsel argued Johnson should be sentenced for only one theft conviction under double jeopardy principles. 3RP 51-53; CP 246-58. Relying on State v. Vining, 2 Wn. App. 802, 472 P.2d 564 (1970), he claimed that where multiple thefts are the result of one overarching scheme, there is only one crime. 3RP 51-52; CP 250-54.

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[2] In 2009, the legislature increased first degree theft from property exceeding $1,500 to that exceeding $5,000. Laws of 2009, ch. 431, § 7.

Defense counsel also requested a mitigated sentence based on Johnson's first-time offender status, as well as his educational and mental limitations. 3RP 53-56; CP 255-57. In a psychological report, Dr. Kenneth Muscatel explained that Johnson dropped out of the eighth grade and had a history of special education. CP 261. He found Johnson to be "functionally illiterate" and expressed concern over Johnson's "thinking skills, expressive and receptive verbal language skills, and intellectual and academic skills." CP 263-65. Dr. Muscatel believed the sophisticated thefts were "well beyond [Johnson's] intellectual and academic skill and development." CP 265. He also noted that Johnson could "be easily victimized in prison because of his intellectual and other limitations." CP 267.

The trial court ultimately rejected defense counsel's arguments and imposed a standard range sentence of 43 months, based on the State's recommendation. CP 304-08; 3RP 67-68. The court also imposed $168,275 in restitution for the total amount of the 36 checks. CP 307, 314.

Johnson filed a timely notice of appeal. CP 317.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS COUNTS 1-5.

The alleged agreement between Potter and Johnson formed the basis of the State's claim of theft by color or aid of deception. Potter testified the agreement arose in October 2007. However, the jury convicted Johnson of

five counts predating this agreement: May 16, May 30, June 27, June 30, and September 5, 2007 (Counts 1-5). CP 157-62, 197. Before October 2007, all evidence demonstrated that Johnson actually performed the outreach work specified in his personal service contracts. There was no deception. Convictions on the first five counts should be reversed and dismissed because the evidence is insufficient to support them.

In every criminal prosecution, due process requires the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. Such inferences must "logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

"Theft" means "by color or aid of deception, to obtain control over the property of another, or the value thereof, with intent to deprive that person of such property." CP 146; RCW 9A.56.020(1)(b). "By color or aid

of deception" means "the deception operated to bring about the obtaining of the property. It is not necessary that deception be the sole means of obtaining the property." CP 147; RCW 9A.56.010(4).

"Deception" occurs when the actor knowingly (1) "creates or confirms another's false impression which the actor knows to be false"; (2) "fails to correct another's impression which the actor previously has created or confirmed"; (3) "prevents another from acquiring information material to the disposition of property involved"; or (4) "promises performance which the actor does not intend to perform or knows will not be performed." CP 148; RCW 9A.56.010(5).

Here, the to-convict instruction for the first count of theft specified:

> To convict the defendant of the crime of Theft in the First Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 16, 2007, the defendant, together with another, obtained control over the property of Seattle Public Schools by color or aid of deception;
>
> (2) That the property exceeded $1,500 in value;
>
> (3) That the defendant intended to deprive Seattle Public Schools of the property;
>
> (4) That the acts occurred in the State of Washington.

CP 157. The to-convict instructions for the next four counts were identical except for the dates: May 30, 2007 (Count 2); June 27, 2007 (Count 3); June 30, 2007 (Count 4); and September 5, 2007 (Count 5). CP 158-62.

The State's claim of theft by color or aid of deception hinged on the illicit agreement between Potter and Johnson. The State opened its case by arguing that Johnson and Potter "managed to steal $168,000 from the . . . Seattle Public Schools, using what's called a phony vendor scheme." 6RP 8. The State argued in closing that "[t]he evidence in this case has shown that the payments to the defendant were the result of a secret agreement between Silas Potter and this defendant." 12RP 394. However, this "secret agreement" did not arise until September or October 2007.

Potter explained that Johnson first approached him about obtaining a contract for Grace of Mercy to do outreach through RSBDP. 6RP 79-83. Johnson was initially hired solely for outreach work. 6RP 81. This was reflected in his first personal service contract. Ex. 4 (03/01/07 – 08/31/07; 08/08/07 – Modification). Johnson's scope of work from March 2007 to October 2007 stated:

> ➢ Assist in the implementation of Seattle Public School's HUB program by developing a strategic partnership with existing organizations rendering any procurement or technical assistance to HUB firms over and above what SPS offers.

- Establish contact with elected/appointed officials in King, Pierce and Snohomish Counties, municipalities and school districts to present Seattle Public School's HUB program and encourage their participation in a regional effort.

- Utilize existing organizations to inform and encourage qualified firms to participate in the SPS HUB program.

- Participate in SPS's legislative agenda to promote policies and legislation which maximize the benefits for HUBs.

- Meet regularly with SPS's HUB Coordinator to assess the progress toward the goals and objectives of the program.

- Expand opportunities for firms on the SPS HUB Roster.

Ex. 4 (03/01/07 – 08/31/07; 08/08/07 – Modification). Johnson's invoices for May 16, May 30, June 27, July 30, and September 5, 2007, also listed only outreach work. Ex. 5. This included community outreach sessions, helping contractors with bids, handing out program information, and assessing potential contractors. Ex. 5.

The State's witnesses confirmed Johnson's early outreach work. For instance, RSBDP Classroom Facilitator Jacqueline Smith Armstrong testified she saw Johnson at several classes early on, explaining that he took notes, appeared "very interested in the information," and networked afterwards. 7RP 157-58, 165-66. Graves testified she saw Johnson at

classes and he recruited people early on. 8RP 165-66, 171. Sorensen likewise said Johnson networked to recruit small businesses for the program. 8RP 226. She explained that Johnson was "very interested in people taking the classes and thought it was a wonderful opportunity, and would speak to other people about it." 8RP 226-27. Potter also acknowledged Johnson brought in contractors through his outreach work. 6RP 118, 123-14; 7RP 92-93. He agreed that Johnson was an active participant and his outreach work was integral to the program. 7RP 112.

Defense witnesses corroborated this testimony. Hobbs, Roundtree, Montgomery, and Tommy Nicholson all testified Johnson recruited them. 10RP 131, 136, 173, 189, 194-99; 11RP 17. Hobbs said Johnson recruited many people and his outreach efforts were successful. 10RP 143-44. Roundtree testified that Johnson helped him with the School District's bidding process and found Johnson's efforts to be "[q]uite significant." 10RP 189, 195. Montgomery likewise said Johnson told him about the classes offered and gave him useful brochures. 11RP 17-21.

Johnson maintained that he contracted with the School District to do outreach work. 11RP 99-105. His goal was "to educate people as far as understanding what the program was about." 11RP 99, 105. He created informational booklets and distributed them to potential contractors. 11RP

107-14, 119. Johnson also explained that he attended several classes to get familiar with the program. 11RP 99.

As Potter explained, the program changed in October 2007 such that the District required its outreach contractors to also teach classes. 6RP 85. Potter claimed this led to his agreement with Johnson to submit falsified invoices for teaching and split the money. 6RP 84-85. Potter said this meeting took place in September or October 2007. 6RP 84-85.

This change was reflected in Johnson's personal service contract for October 1, 2007 to August 31, 2008. Ex. 4 (10/01/07 – 08/31/08). In addition to the original outreach work, the new contract required Johnson to "[d]evelop training methods to augment program designed by SSD." Ex. 4 (10/01/07 – 08/31/08). It was also reflected in Johnson's subsequent invoices. For the first time, Johnson's October 1, 2007 invoice stated that he conducted several training sessions on estimation, marketing, and business development. Ex. 5 (10/01/2007). Potter testified that the October 1, 2007 invoice was submitted after he and Johnson met at Denny's, because it stated that Johnson started teaching classes. 6RP 166-67, 202. From that point on, Potter, and not Johnson, created the Grace of Mercy invoices specifying that Johnson trained contractors. 6RP 168, 172-78; Ex. 5.

Potter also testified Johnson gave him cash pursuant to their agreement from "October of 2007 until 2009." 6RP 201-03. Potter said this

was "[b]ecause the first months, we had not had an agreement. That agreement didn't take effect until like November." 6RP 202.

The alleged deception that formed the basis of the State's charges was the secret agreement between Johnson and Potter that occurred in September or October 2007. The result of this purported agreement was that Johnson claimed he was teaching classes, when in fact he was not, and he then split the cash with Potter. Before the October 1, 2007 invoice, there was no deception. Johnson's prior contract and prior invoices were all based on his actual outreach work, as corroborated by both State and defense witnesses. As a result, the State failed to prove that Johnson used color or aid of deception to attain the first five checks from the District. Rather, the checks were for work Johnson contracted for and performed.

Furthermore, the to-convict instructions required the State to prove that "the defendant, together with another, obtained control over the property of Seattle Public Schools by color or aid of deception." CP 157-62 (emphasis added). The evidence showed that Johnson and Potter did not work together until the October 2007 agreement. The State therefore also failed to prove the required fact that Johnson "together with another" stole from the Seattle School District before the October 1, 2007 invoice.

In sum, the State failed to put forth sufficient evidence to sustain Johnson's convictions on Counts 1-5. This court should reverse these five

counts, and remand for dismissal of those charges and for resentencing on the remaining charges. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. RESTITUTION ORDERED ON THE FIVE COUNTS FOR WHICH THERE IS INSUFFICIENT EVIDENCE SHOULD BE VACATED.

A trial court's authority to impose restitution is controlled by statute. State v. Hiett, 154 Wn.2d 560, 563, 115 P.3d 274 (2005). Restitution "shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." RCW 9.94A.753(5).

The injuries for which restitution is ordered must be causally related to the crime. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). The court may not order restitution based on a general scheme or acts connected with the crimes charged "when those acts are not part of the charge." State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000). This court must vacate a restitution order if the State failed to establish a causal connection between the crime and the damages for which restitution was ordered. State v. Dennis, 101 Wn. App. 223, 229, 6 P.3d 1173 (2000).

The trial court ordered Johnson to pay $168,275 in restitution, for the 36 checks he received from the Seattle School District.[3] CP 307. But insufficient evidence supports the first five counts of theft. These five checks amounted to $25,100. Ex. 4. This amount must be stricken, because there is no casual connection between those losses and valid convictions. Dauenhauer, 103 Wn. App. at 378; Dennis, 101 Wn. App. at 229. Consequently, this court should also remand with instructions for the trial court to revise the restitution amount. Dauenhauer, 103 Wn. App. at 380.

3. THE STATE IMPROPERLY INVITED THE JURY TO INFER GUILT FROM JOHNSON'S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT.

The State deliberately elicited testimony from Detective Savas about Johnson's prearrest silence, in contrast to Potter and Sorenson. Because this improperly invited the jury to infer guilt from Johnson's exercise of his constitutional right to remain silent before arrest, Johnson's convictions should be reversed. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) ("[W]hen the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated.").

[3] The trial court also imposed a $500 mandatory victim penalty assessment and $100 mandatory DNA collection fee. This was added to the total restitution amount. CP 307.

This court should reverse for three main reasons. First, using silence as evidence of guilt violates the Fifth Amendment right against self-incrimination by burdening the exercise of that right. Second, Detective Savas's testimony was a comment on Johnson's silence, not a mere passing reference. The State elicited Savas's testimony for no other discernible reason than implying Johnson's guilt while bolstering Potter's and Sorensen's credibility. Finally, the State cannot show the error was harmless beyond a reasonable doubt because the case hinged on witness credibility.

Defense counsel objected on ER 403 grounds, arguing that Savas's testimony was both irrelevant and prejudicial. 9RP 128-32. This preserved the error. But, even if this court concludes that counsel's objection did not preserve the error, the State's comment on silence amounts to manifest constitutional error and is reviewable for the first time on appeal. RAP 2.5(a)(3); State v. Curtis, 110 Wn. App. 6, 11, 14-15, 37 P.3d 1274 (2002); State v. Keene, 86 Wn. App. 589, 592, 594, 938 P.2d 839 (1997); see also State v. Gauthier, 174 Wn. App. 257, 263, 267, 298 P.3d 126 (2013).

a. The Fifth Amendment prohibits the State from commenting on an individual's prearrest silence.

The Fifth Amendment right against self-incrimination prohibits the State from using an individual's prearrest silence as substantive evidence of guilt. State v. Easter, 130 Wn.2d 228, 237-41, 922 P.2d 1285 (1996). When

a defendant testifies at trial, his prearrest silence can be used only for impeachment. Burke, 163 Wn.2d at 219. Thus, "a defendant's pre-arrest silence, in answer to the inquiries of a police officer, may not be used by the State in its case in chief as substantive evidence of defendant's guilt." Id. at 215.

One reason for this rule is "silence is so ambiguous that it is of little probative force." United States v. Hale, 422 U.S. 171, 176, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975). For this reason, Washington courts vigorously bar comment on prearrest silence:

> Silence in these circumstances is ambiguous because an innocent person may have many reasons for not speaking. Among those identified are a person's awareness that he is under no obligation to speak or the natural caution that arises from his knowledge that anything he says might be later used against him at trial, a belief that efforts at exoneration would be futile under the circumstances or because of explicit instructions not to speak from an attorney. Moreover, there are individuals who mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because they are simply fearful of coming into contact with those whom they regard as antagonists.

Burke, 163 Wn.2d at 218-19 (quoting People v. De George, 73 N.Y.2d 614, 618-19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989)) (internal quotation marks omitted); see also Easter, 130 Wn.2d at 239 (noting that silence is "insolubly ambiguous").

Furthermore, the right to silence "exists for both the innocent and the guilty." Gauthier, 174 Wn. App. at 264. In most cases, it is impossible to conclude that refusal to speak is more consistent with guilt than innocence. Burke, 163 Wn.2d at 219. But such evidence can be readily misinterpreted by the jury, rendering "'any curative or protective instruction of dubious value.'" Gauthier, 174 Wn. App. at 265 (quoting United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978)).

Another reason for the rule is, if the State could comment on an individual's silence, "it would place an unfair and impermissible burden upon the assertion of a constitutional right." Id. "Courts are appropriately reluctant to penalize anyone for the exercise of any constitutional right." Burke, 163 Wn.2d. at 221; see also Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (noting that penalizing individuals for exercising a constitutional privilege "cuts down on the privilege by making its assertion costly").

b. The State purposefully elicited testimony from its police witness to emphasize Johnson's prearrest silence.

If the State improperly remarks on a defendant's silence, the reviewing court must determine whether the prosecutor manifestly intended the remark to be a comment on the prearrest right to silence. Burke, 163 Wn.2d at 216. Washington courts distinguish between a "comment" on and

"mere reference" to silence. Id. A prosecutor's statement is not considered a comment on the right to silence if, standing alone, it was "'so subtle and so brief'" that it did not "'naturally and necessarily'" emphasize the defendant's silence. Id. (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Such a remark constitutes a "mere reference" and is not reversible error absent a showing of prejudice. Id.

In State v. Lewis, the defendant was accused of demanding sex from women in exchange for drugs. 130 Wn.2d 700, 702, 927 P.2d 235 (1996). An investigating officer testified that he called Lewis and Lewis admitted the women had been in his apartment, but insisted nothing happened. Id. at 702-03. The officer then testified that "my only other conversation was that if he was innocent he should just come in and talk to me about it." Id. at 703. The court held this was not a comment on Lewis's silence, because the officer did not say Lewis refused to talk to him, did not imply silence meant guilt, and did not reveal the fact that Lewis failed to keep appointments to speak with him. Id. at 706.

By contrast, the State violated Easter's right to prearrest silence when an officer testified that he questioned Easter at the scene, but Easter did not answer and looked away without speaking. Easter, 130 Wn.2d at 241. It also violated Easter's right to silence when the officer said Easter was a "smart drunk," based on his silence and evasive behavior. Id. at 241-42.

This testimony embodied the officer's opinion that Easter was hiding his guilt. Id. at 242. The supreme court concluded this "may well have swayed the jury" and reversed. Id.

In Keene, the court reversed when a detective testified Keene did not contact her after being warned she would turn the case over to the prosecutor's office if she did not hear from Keene again. 86 Wn. App. at 594. "[T]he detective's comment violated the defendant's right to silence." Id.

In Romero, a police officer testified to Romero's postarrest silence: "'I read him his Miranda warnings, which he chose not to waive, would not talk to me.'" State v. Romero, 113 Wn. App. 779, 793, 54 P.3d 1255 (2002) (quoting the report of proceedings). The court concluded this was a "direct comment about Mr. Romero's election to remain silent" and reversed his conviction.[4] Id.

Similarly, in Curtis, the prosecutor asked a police witness whether Curtis said anything in response to receiving Miranda warnings. 110 Wn.

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[4] The State may argue that some of these cases are distinguishable because they involve the right to postarrest silence, which stems from due process under the Fourteenth Amendment once Miranda warnings are given. Burke, 163 Wn.2d at 217. However, comment on both prearrest silence and postarrest silence is forbidden. Id. Therefore, courts analyzing comments on prearrest silence look to postarrest silence cases by analogy. See, e.g., Burke, 163 Wn.2d at 216 n.7; State v. Knapp, 148 Wn. App. 414, 421-22, 199 P.3d 505 (2009).

App. at 13. The officer responded that Curtis refused to talk and wanted an attorney. Id. at 13. The court reversed Curtis's conviction, because although the State did not "harp" on the officer's testimony, the "question and answer were injected into the trial for no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer." Id. at 13-14.

The case Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), has also been cited with approval by Washington courts. See, e.g., Romero, 113 Wn. App. at 789; Curtis, 110 Wn. App. at 14. There, the following colloquy took place between the prosecutor and the arresting officer:

Q. Who arrested Mr. Douglas?

A. I did.

Q. Did he make any statements to you?

A. No.

Prosecutor: That's all the questions I have.

Douglas, 578 F.2d at 267. The Ninth Circuit reversed Douglas's conviction, because the prosecutor "purposefully elicited the fact of silence in the face of arrest. The introduction of such testimony acted as an impermissible penalty on the exercise of the petitioner's right to remain silent." Id.

The Douglas court further noted that, "[w]hile perhaps inadvertent, the placement of the suspect question at the end of the arresting officer's

testimony gave it a prominence which it would not have had, had it simply been recounted as part of a description of the events culminating in the petitioner's arrest." Id. Therefore, the court concluded, "it is plausible to suppose that a juror might have inferred from the offending testimony that the petitioner was guilty of the crime charged, and that his alibi was a later fabrication and without foundation." Id.

The Romero court summarized several core rules from these cases. 113 Wn. App. at 790. First, "it is constitutional error for a police witness to testify that a defendant refused to speak to him or her." Id. Second, "it is constitutional error for the State to purposefully elicit testimony as to the defendant's silence." Id. And, third, "it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt." Id.

These rules require reversal here. During the State's case in chief, Detective Savas explained that he worked for the fraud, forgery, and financial exploitation unit of the Seattle Police Department. 9RP 128. He said he was assigned to investigate "some improper financial dealings between Silas Potter, David Johnson, through Grace of Mercy." 9RP 131. Defense counsel renewed his objection to Savas's testimony. 9RP 131. The trial court noted counsel's continuing objection, but overruled it. 9RP 131-32.

The following dialogue then occurred between the prosecutor and Detective Savas:

Q. And I guess my question is what things did you do, just generally, to investigate this case?

A. I worked with your office to interview witnesses, also working with your office obtaining and reviewing evidence.

Q. All right. And did you interview a woman named Lorrie Sorensen?

A. Yes, I did.

Q. All right. And when did you do that?

A. That was in August of 2011. I believe it was August 4th.

Q. And where -- where, excuse me, did you interview Miss Sorensen?

A. At her home in Henderson, Nevada.

. . . .

Q. Did you also interview Mr. Potter?

A. Yes, I did.

Q. And can you recall when you interviewed him?

A. That was in August of 2011. I believe that was the 24th -- or the 23rd, rather.

Q. All right. And where was that interview conducted?

A. At his apartment in Tampa, Florida.

Q. And did you make a recording of his interview?

A. Yes, I did.

Q. And was there a transcript of that recording?

A. Yes.

Q. And during that course of that recording, did Mr. Potter confess to you these incidents?

A. Yes, he did.

Q. All right. Did you attempt to contact Mr. Johnson -- Oh, excuse me, do you know this gentleman sitting -- seated at counsel table here on the right (indicating) in the glasses?

A. Yes.

Q. All right. And how do you know that person?

A. I know him to be David Johnson, the subject of my investigation.

Q. Did you attempt to contact Mr. Johnson?

A. Yes, I did.

Q. And how many times did you do that?

A. At least six times.

Q. How did you go about attempting to contact Mr. Johnson?

A. I went to his house a couple times, I telephoned him at a couple different phone numbers, and e-mailed him.

Q. Did he respond to any of the telephone messages or e-mails?

A. No.

9RP 132-35. The prosecutor then briefly asked Savas about visiting Johnson's home when he was absent, and introduced Johnson's driver's license and the deed to his home through Savas's testimony. 9RP 134-36. That is the entire extent of Savas's testimony. See 9RP 128-36.

As this colloquy shows, the prosecutor deliberately elicited testimony regarding Johnson's silence. The questions could not be more direct: "Did you attempt to contact Mr. Johnson?" and "Did he respond to any of the telephone messages or e-mails?" 9RP 134. Not only did the prosecutor elicit comment on Johnson's silence, he emphasized the various times and ways Johnson refused to talk to Savas: "[a]t least six times," via home visits, phone calls, and e-mails. 9RP 134. With final emphasis, the prosecutor asked, "Did he respond to any of the telephone messages or e-mails?" 9RP 134. Savas answered, "No." 9RP 134. The only apparent purpose for these questions was to emphasize Johnson's prearrest silence.

The prosecutor's repeated emphasis on Johnson's silence implied Johnson had something to hide. But Johnson was entitled to exercise his constitutional right to prearrest silence without penalty. Burke, 163 Wn.2d. at 221; Gauthier, 174 Wn. App. at 267. There was no discernable purpose

for the questions and answers other than to inform the jury that Johnson repeatedly refused to talk to police. See Curtis, 110 Wn. App. at 13-14. The prosecutor and detective not only commented on Johnson's silence, they invited the jury to infer guilt from it.

Moreover, the prosecutor's questions were particularly egregious because they juxtaposed Johnson's silence with Potter's and Sorensen's cooperation. The prosecutor began by eliciting testimony from Savas that Sorensen agreed to speak with him. 9RP 132-33. The prosecutor then elicited testimony that Potter also agreed to speak with Savas, and even confessed. 9RP 133. Then, finally, the prosecutor asked Savas whether Johnson agreed to speak with him. 9RP 133-34. The purpose of this structure was to bolster Sorensen's and Potter's credibility by emphasizing to their candor and cooperation. This was then put in stark relief to Johnson's silence and evasiveness. The goal was plain: to invite the jury to infer Johnson's guilt by his silence and the State's witnesses' truthfulness by their cooperation. There can be no doubt that the jury made the comparison the prosecutor sought to make.

Detective Savas testified to little else. See 9RP 128-36. Though the State did not reemphasize Johnson's silence in closing, Savas's testimony was injected into the trial for no other purpose than to invite the jury to infer

guilt from Johnson's silence. Under clear and controlling case law, this violated Johnson's right to prearrest silence. Burke, 163 Wn.2d at 217.

c. The error was prejudicial.

Constitutional error is presumed prejudicial. Curtis, 110 Wn. App. at 15. To overcome this presumption, the State must prove beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242. Where the error is not harmless, a new trial is required. Id.

The courts in Douglas, Burke, Easter, Knapp, Romero, Keene, and Curtis all held that the State impermissibly commented on the defendant's silence. In each case, the error required reversal. Douglas, 578 F.2d at 267; Burke, 163 Wn.2d at 222-23; Easter, 130 Wn.2d at 242-43; State v. Knapp, 148 Wn. App. 414, 424-25, 199 P.3d 505 (2009); Romero, 113 Wn. App. at 795; Curtis, 110 Wn. App. at 15-16; Keene, 86 Wn. App. at 595. The U.S. Supreme Court has recognized the "intolerably prejudicial impact" of commenting on silence. Hale, 422 U.S. at 180; see also Easter, 130 Wn.2d at 235 n.5 (noting the "high potential for undue prejudice").

Prejudice was especially apparent in the cases where witness credibility—particularly the defendant's credibility—was a key issue. See, e.g., Burke, 163 Wn.2d at 222-23; Knapp, 148 Wn. App. at 424-25; Romero,

113 Wn. App. at 795; Keene, 86 Wn. App. at 595. For instance, in Burke, the trial boiled down to whether the jury believed or disbelieved Burke's story that the victim told him she was 16. 163 Wn.2d at 222. "Repeated references to Burke's silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury's consideration." Id. at 222-23. Likewise, in Romero, the jury was presented with a "credibility contest" between Romero and one eyewitness. 113 Wn. App. at 795. The jury could have been swayed by the officer's testimony, "which insinuated Mr. Romero was hiding his guilt." Id.

The same is true here. The case boiled down to Johnson's credibility on the one hand, and Potter's and Sorensen's on the other. The State theorized that Johnson and Potter cooked up a phony vendor scheme to defraud the District. 6RP 8; 12RP 393-95. Potter claimed he and Johnson met at Denny's and Johnson proposed they split the money from classes Johnson would never teach. 6RP 84-85. Sorensen testified Johnson told her he was receiving money for teaching classes, and claimed he said, "I can't believe I am getting paid for something I don't even know how to do." 8RP 223-25.

Johnson maintained he never entered a secret agreement with Potter. 11RP 118, 120-23. He agreed he never taught classes, because "[t]hat was not in my contract." 11RP 123. He did outreach work for the program, as

specified in his personal service contracts. 11RP 99, 107, 120-25. This was corroborated by several witnesses who Johnson recruited for the program. 10RP 136, 173, 188-89, 194-99; 11RP 17-21. It was also supported by Potter's admission that he forged several of Johnson's invoices and prepared false scope of work documents. 7RP 32-33.

The State also introduced evidence that Johnson withdrew $89,000 in cash from his Grace of Mercy bank accounts. 10RP 53. Potter testified Johnson gave him his cut in cash, but offered no amounts or dates when this allegedly occurred. 6RP 203; 7RP 46-47. The jury had to rely on Potter's credibility to establish what Johnson did with the cash.

Given Potter's credibility issues, like stealing $35,000 from Tacoma Public Schools,[5] overwhelming evidence did not establish Johnson's guilt. Instead, the conflicting evidence shows that Potter's, Sorensen's, and Johnson's credibility—or lack thereof—were essential to the State's case. Detective Savas's testimony unfairly bolstered Potter's and Sorensen's truthfulness, because he juxtaposed their cooperation with Johnson's silence. The State's comment on Johnson's silence tipped the scale.

The testimony on Johnson's silence presented the jury with improper substantive evidence of guilt, prejudicing the outcome of his trial. See Burke, 163 Wn.2d at 222-23. Because the State cannot show the error was

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[5] 8RP 127-28, 139-40, 182, 287; 9RP 38-39, 182.

harmless, this court should reverse Johnson's convictions and remand for a new trial. Easter, 130 Wn.2d at 243.

d. Even if this court finds the officer's testimony to be a "mere reference" to Johnson's right to silence, prejudice nevertheless resulted, necessitating reversal.

Even if this court finds Detective Savas's testimony to be a "mere reference" to Johnson's silence, reversal is required because it caused enduring prejudice. References to silence constitute reversible error if prejudice results. Burke, 163 Wn.2d at 216; see also id. at 225 (Madsen, J. dissenting). Remarking on Johnson's silence had the effect of undermining his credibility. As discussed above, this resulted in significant unfair prejudice. Even if Savas's remarks did not rise to the level of a "comment" on Johnson's silence, Johnson's convictions should be reversed.

e. Comment on Johnson's silence was not used for valid impeachment purposes.

The State may argue that Savas's comment on Johnson's silence constituted valid impeachment. This assertion should be rejected. Impeachment evidence may be offered solely to show the witness is not truthful, usually in the form of prior inconsistent statements. Burke, 163 Wn.2d at 219. Such evidence may not be used to argue that the witness is guilty. Id. The fact that a defendant later testifies does not transform commentary on his prearrest silence into impeachment. Id. at 215. Nor does

the defendant invite comment on his silence any time his version of events differs from the State's. Gauthier, 174 Wn. App. at 270.

The State here could not constitutionally use silence as impeachment evidence in its case in chief. The Burke court noted that anticipatory impeachment "may be proper upon the appropriate foundation and with the court's permission." Id. at 218 n.8. But the State did not lay a foundation or seek permission to anticipatorily impeach Johnson's testimony. See 9RP 128-36.

Furthermore, anticipatory impeachment conflicts with the right against self-incrimination. "[C]ases that have permitted testimony about the defendant's silence have done so only for the limited purpose of impeachment after the defendant has taken the stand." Easter, 130 Wn.2d at 237 (emphasis added). By contrast, "[i]f evidence of silence comes in to show guilt in the State's case in chief, then a defendant may be forced to testify to rebut such an inference." Lewis, 130 Wn.2d at 706 n.2; Burke, 163 Wn.2d at 218. This further erodes the defendant's right to silence. Curtis, 110 Wn. App. at 15.

This court should reject any claim of impeachment as a matter of law, because the State introduced Johnson's silence in its case in chief. This impermissibly burdened both Johnson's right to remain silent before arrest and his right to remain silent at trial.

Any claim of impeachment can also be rejected on the facts of this case. The Lewis court explained that "[o]nly if the prior silence were somehow inconsistent with the later offered defense would the prior silence have any relevance for impeachment purposes." 130 Wn.2d at 706 n.2. In Gauthier, the State commented on the defendant's refusal to consent to a warrantless DNA test. 174 Wn. App. at 268-69. This was not proper impeachment, because Gauthier did not make any false claims on direct examination about his cooperation with police or his refusal to turn over his DNA. Id. at 269-70.

At no time during direct examination did Johnson testify that he did not receive phone calls or e-mails from Savas. Nor did Johnson claim he spoke with Savas before he was arrested. See 11RP 98-191. Therefore, commenting on Johnson's prearrest silence did not impeach any inconsistent statement. The only purpose for the comment on Johnson's silence was to invite the jury to infer guilt. This is not impeachment and therefore cannot save the State from constitutional violation. Gauthier, 174 Wn. App. at 270.

4. COUNSEL WAS INEFFECTIVE IN FAILING TO ASSERT JOHNSON'S FIFTH AMENDMENT RIGHT TO PREARREST SILENCE.

If this court concludes the constitutional error was not preserved because counsel did not raise an argument under the Fifth Amendment or article I, section 9, then that failing deprived Johnson of his right to effective

assistance of counsel. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance of counsel claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Counsel's failure to raise a Fifth Amendment argument was unreasonably deficient in light of the copious case law holding that comment on prearrest silence violates the Fifth Amendment. See argument sections C.2.a.-b., supra; see also State v. Ermert, 94 Wn.2d 839, 848, 850-51, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance). Counsel clearly understood this evidence was damaging and tried to keep it from the jury, objecting on ER 403 grounds. 9RP 128-32. It was unreasonably deficient to fail to cite the pertinent law that would have supported that argument. State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d

627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). And, given counsel's objections, there is no apparent strategic reason for failing to object on Fifth Amendment grounds.

Prejudice from deficient performance occurs when there is a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice from deficient performance requires reversal whenever the error undermines confidence in the outcome. Id. That confidence is undermined here. As discussed above, this case hinged largely on credibility. There is a reasonable probability that the improper evidence of Johnson's silence—especially in direct comparison to Potter's and Sorensen's cooperation—was a deciding factor. Johnson's convictions should be reversed because he was denied his constitutional right to effective assistance of counsel.

5. COUNSEL WAS INEFFECTIVE IN FAILING TO CITE RELEVANT CASE LAW WHEN REQUESTING A SENTENCE BELOW THE STANDARD RANGE.

Johnson's counsel requested a mitigated sentence, arguing that double jeopardy prohibited Johnson from being sentenced for more than one count of theft because the convictions stemmed from a single overarching scheme. 3RP 51-53. The sentencing court rejected this argument and imposed the lowest possible standard range sentence: 43 months. CP 308. Defense counsel was unreasonably deficient in failing to recognize and cite

relevant case law describing the court's authority to impose a mitigated sentence under State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993). This prejudiced Johnson, because the court was not provided the argument to allow an informed decision regarding its ability to impose a sentence below the standard range.

As discussed above, counsel is ineffective when his deficient performance prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Failure to recognize and cite appropriate case law constitutes deficient performance. Adamy, 151 Wn. App. at 588; see also State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law).

The Sentencing Reform Act of 1981 (SRA) permits an exceptional sentence downward when: "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). In Sanchez, the defendant was convicted of three counts of delivering cocaine. 69 Wn. App. at 256-57. All three counts arose from controlled buys of small amounts of cocaine, initiated by police and the same informant over a brief period of time. Id. The sentencing court concluded, and Division Two of this court agreed, that operation of the SRA's multiple offense policy resulted in a presumptive sentence that was

clearly excessive. Id. at 260-62. The court held that "the difference between the first buy, viewed alone, and all three buys, viewed cumulatively, was trivial or trifling." Id. at 261.

In State v. Hortman, this court agreed with the rule of Sanchez. 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994). The Hortman court explained:

> Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective determination dependent upon the individual sentencing philosophy of a given judge. Rather, it is an objective inquiry based on the Legislature's own stated purposes for the act. See RCW 9.94A.010 (setting forth the purposes of the SRA). Sanchez holds that a presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling.

Id. at 463-64. The purposes of the SRA include ensuring punishments are proportionate to the seriousness of the offense and the offender's criminal history, encouraging commensurate punishments, protecting the public, offering the offender an opportunity for self-improvement, and making frugal use of the State's resources. RCW 9.94A.010. The Hortman court held that none of these purposes are served by the multiple offense policy when there is little difference between the effects of the first act and the cumulative effects of subsequent acts. Id. at 464.

The rule of Sanchez and Hortman has since been applied in the context of financial crimes. State v. Calvert, 79 Wn. App. 569, 582-83, 903

P.2d 1003 (1995). Calvert forged several checks worth $1,575 as part of "one plan or scheme." Id. at 582. The sentencing court imposed an exceptional sentence downward, finding "that the whole should not be greater than the sum of its parts." Id. at 583. In other words, there was minimal difference between forging several small checks totaling $1,575 versus forging one large check for that amount. Id. Thus, Division Three of this court upheld the mitigated sentence. Id.

This court reached the opposite result in State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003). There, a lawyer made 67 separate unauthorized withdrawals totaling more than $200,000 from his Interest on Lawyer Trust Account (IOLTA) over the course of 16 months. Id. at 331-33. These 67 thefts resulted in foreclosure of four or five properties, and two victims incurred losses as a result. Id. at 345-46. Nothing indicated that the first theft would have caused the foreclosures and loss of real property. Id. at 346. Therefore, the court held, "the cumulative effect cannot be said to be nonexistent, trivial, or trifling." Id.

Johnson's theft convictions are analogous to the multiple forgeries in Calvert, rather than the multiple thefts in Kinneman. The theft convictions stemmed from one overarching scheme, like in Calvert. Though the scheme

extended for a long period of time,[6] there is no evidence similar to that in Kinneman where the ongoing scheme caused several different losses like foreclosure of multiple properties. Johnson's thefts resulted only in one amount stolen from one victim. The State proved no other cumulative effects. Like in Calvert, the difference between one large check for $168,275 and several smaller checks totaling that amount was nonexistent, trivial, or trifling. Therefore, under the Sanchez rule, the sentencing court would have had authority to consider a mitigated sentence.

In State v. McGill, the appellant argued his attorney was ineffective for failing to request an exceptional sentence below the standard range based on Sanchez and the multiple offense policy. 112 Wn. App. 95, 101, 47 P.3d 173 (2002). There, the State cited Division Three's decision in State v. Hernandez-Hernandez, 104 Wn. App. 263, 15 P.3d 719 (2001), which held that counsel was not ineffective on this basis because the trial court was free to reject the Sanchez argument. McGill, 112 Wn. App. at 102. This court disagreed and declined to follow Hernandez-Hernandez, instead recognizing that "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." Id.

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[6] As shown in argument C.1, supra, the period of time did not start until October 2007.

Like in McGill, Johnson's counsel did not refer the trial court to Sanchez, Hortman, or Calvert. As such, the court did not have an opportunity to consider whether "the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts [were] nonexistent, trivial or trifling." Hortman, 76 Wn. App. at 463-64. McGill recognizes such a failure to be ineffective assistance of counsel. 112 Wn. App. at 102.

The rule of McGill makes sense in light of Hortman. The Hortman court emphasized that whether a presumptive sentence is clearly excessive is not a subjective determination for the trial judge. 76 Wn. App. at 463-64. Rather, it is an objective inquiry based on the stated purposes of the SRA. Id. Those purposes are not served when there is little difference between the individual effect and the cumulative effect of multiple offenses, like here. Id. at 464. Therefore, it is easy to see the prejudice that results from not bringing the Sanchez rule to the trial court's attention. Johnson could have very likely received a mitigated sentence had his counsel done so. This is especially true where the court was not inclined to impose a harsh sentence, but rather imposed the lowest standard range sentence possible.

Based on McGill, this court should reverse and remand for resentencing because Johnson's counsel was ineffective in failing to argue relevant case law at sentencing.

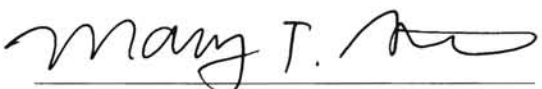
D. CONCLUSION

This court should reverse and dismiss Johnson's first five theft convictions, and vacate restitution ordered on those counts. This court should then reverse Johnson's remaining convictions and remand for a new trial because the State invited the jury to infer guilt from Johnson's prearrest silence. This court should also remand for resentencing because Johnson's counsel was ineffective in failing to cite relevant case law regarding the trial court's authority to impose a mitigated sentence under Sanchez.

DATED this 4th day of December, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71562-3-I
	)	
DAVID JOHNSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANDREW COSBY
DOC NO. 372861
LARCH CORRECTIONS CENTER
15314 NE DOLE VALLEY ROAD
YACOLT, WA 98675

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF DECEMBER 2014.

x Patrick Mayovsky