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NO. 71562-3-I

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

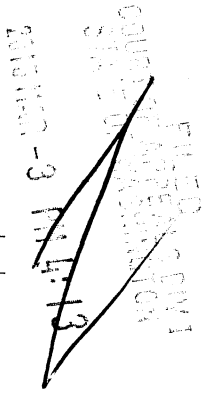
STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Appellant.



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

The Honorable Jean Rietschel, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. INSUFFICIENT EVIDENCE SUPPORTS COUNTS 1-5.

In response to Johnson's claim of insufficiency, the State argues, "Given what the jurors had heard about Potter and appellant's scheme to steal money from the school district by submitting false invoices they could have rationally inferred that appellant had not done the outreach work he billed for the first five invoices." Br. of Resp't, 13. The State essentially argues, "once a liar, always a liar."

The State's argument is contrary to the evidence it introduced at trial. Johnson's opening brief details the numerous State witnesses who said he actually performed the agreed-upon outreach work in the first several months of his contract. Br. of Appellant, 14-18. Given this consistent testimony, the State's suggested inference is based on conjecture. Inferences must be "logically derived from facts proved" and "cannot be based on speculation." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911); State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The State's argument therefore fails.

Furthermore, several "facts" recited by the State as evidence of Johnson's deception are insignificant when examining the record as a whole. First, the State emphasizes Johnson "was not mentioned anywhere in the [Small Business Development Program] informational booklets." Br. of

Resp't, 6. The State believes this shows Johnson never performed outreach work for the District. Br. of Resp't, 13-14. However, Silas Potter explained the program literature did not name *any* of the outreach contractors, let alone Johnson. 6RP 73-74. Second, the State points out that Johnson never attended the personal service contractor meetings. Br. of Resp't, 13-14. Again, however, Potter testified these meetings were not mandatory, just encouraged. 6RP 86-87. Johnson's absence is not probative. This Court should reject the State's attempts to rely on speculation in lieu of reasonable inference.

The State also fails to respond to Johnson's argument of insufficient evidence that he, "together with another," stole the first five checks from the District. See In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). The evidence showed that any illicit agreement between Johnson and Potter did not take place until October 2007. 6RP 201-03. It is a factual impossibility, then, that Johnson stole the money "together with another" before this date. As such, there is insufficient evidence to support the first five counts of theft, which were based on checks issued before October 2007. CP 157-62; State v. Smith, 155 Wn.2d 496, 502, 120 P.3d

559 (2005) ("[D]ue process requires the State to prove every element of the charged crime beyond a reasonable doubt.").[1]

2. THE STATE'S COMMENT ON JOHNSON'S PREARREST SILENCE REQURIES REVERSAL.

In responding to Johnson's comment on silence argument, the State repeatedly asserts Johnson never objected to Detective Savas's testimony. Br. of Resp't, 7, 17, 19. This is false. From the beginning of Savas's testimony, Johnson objected. 9RP 128. Johnson then repeatedly objected under ER 403, arguing Savas's testimony was both prejudicial and irrelevant. 9RP 128-32. After the court consistently overruled Johnson's objections, he requested a continuing objection, to which the court said, "I think that's a good idea," and noted it. 9RP 128-32. Thus, there were not only several contemporaneous objections to Savas's testimony, but also a continuing objection to his entire testimony. 9RP 131-32. This Court should disregard the State's misrepresentation of the record.

Furthermore, Johnson's continuing objection under ER 403 was sufficient to preserve the error. The U.S. Supreme Court has recognized that comment on silence is "intolerably" prejudicial. United States v. Hale, 422 U.S. 171, 180, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975). Furthermore, courts

[1] See also State v. Hickman, 135 Wn.2d 97, 102-05, 954 P.2d 900 (1998) (holding that the State assumes the burden of proving otherwise unnecessary elements of an offense when it does not object to the to-convict instruction).

bar comment on silence, because "silence is so ambiguous that it is of little probative force." Id. at 176; State v. Burke, 163 Wn.2d 204, 218-19, 181 P.3d 1 (2008); State v. Easter, 130 Wn.2d 228, 239, 922 P.2d 1285 (1996). Therefore, Johnson was correct that Savas's testimony was both prejudicial and irrelevant, the twin concerns of ER 403. And, regardless, Washington courts hold comment on silence to be manifest constitutional error reviewable for the first time on appeal. State v. Holmes, 122 Wn. App. 438, 445-47, 93 P.3d 212 (2004); 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).

The State also repeatedly ignores adverse controlling law discussed at length in Johnson's opening brief. See Br. of Appellant, 21-37; Br. of Resp't, 15-18. Instead, the State provides several conclusory statements, without explanation or citation to authority. See Br. of Resp't, 17-18. This demonstrates the State's position is untenable and incorrect.

For instance, the State claims Savas's testimony did not constitute a comment on Johnson's prearrest silence, because the State did not cross-examine Johnson about his silence or discuss it during closing. Br. of Resp't, 17. In so arguing, the State ignores clear case law on this issue. Division Three of this court concisely summarized several principles from the comment on silence cases:

> First, it is constitutional error for a police witness to testify that a defendant refused to speak to him or her. Easter, 130 Wn.2d at 241. Similarly, it is constitutional error for the State to purposefully elicit testimony as to the defendant's silence. Id. at 236; Curtis, 110 Wn. App. at 13. It is constitutional error also for the State to inject the defendant's silence into its closing argument. Easter, 130 Wn.2d at 236. And, more generally, it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt. [State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)].

State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Likewise, this court said in Holmes: "A direct comment on silence—such as a statement that a defendant refused to speak to an officer when contacted—is always a constitutional error." 122 Wn. App. at 445.

Therefore, the State need not further aggravate the prejudice in closing argument for there to be constitutional error—eliciting testimony from a police officer regarding the defendant's silence is enough. Id. Johnson cites several more cases applying this rule in his opening brief. Br. of Appellant, 24-26. Savas's testimony on Johnson's silence was constitutional error, regardless of whether the State cross-examined him about it or discussed it again in closing.

Similarly, in his opening brief, Johnson asserts the State could not anticipatorily impeach him, both as a matter of law and under the facts of the case. Br. of Appellant, 35-37. The State responds by saying nothing more than, "impeachment of appellant with his pre-arrest silence would not have

been improper in this case because appellant testified," citing Burke, 163 Wn.2d at 217. Br. of Resp't, 17. But the Burke court recognized only that anticipatory impeachment *may* be acceptable "with appropriate foundation and with the court's permission." 163 Wn.2d at 218 n.8. Neither occurred here, and the State cites nowhere in the record where it laid the foundation or requested the court's permission to comment on Johnson's silence.

Furthermore, anticipatorily impeaching a defendant with his prearrest silence is of dubious constitutionality at best. Indeed, the Burke court noted that the cases where the defendant's silence was properly admitted for impeachment did so only *after* the defendant took the stand. Id. at 218. The Burke court also recognized that if the State introduces a defendant's silence in its case in chief, the defendant may then be forced to testify to rebut the inference of guilt. Id. This burdens both the defendant's right to prearrest silence and his right not to testify at trial. Curtis, 110 Wn. App. at 15. "Courts are appropriately reluctant to penalize anyone for the exercise of any constitutional right." Burke, 163 Wn.2d at 221.

The State relies on State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999), to argue Savas's testimony was at most a mere reference to Johnson's silence. Br. of Resp't, 16-17. The facts of Sweet are similar to Lewis, and are easily distinguishable from Johnson's case. In Lewis, the police officer testified he told the defendant "that if he was innocent he

should just come in and talk to me about it." 130 Wn.2d at 703. The court held this did not constitute a comment on silence, because the officer never actually said Lewis refused to speak with him or failed to keep his appointments. Id. at 706.

In Sweet, the police officer testified, "I asked him if he would want to take a polygraph examination when he returned to our jurisdiction... He indicated that he would be willing to do that when he got back," and "I asked him if he would provide me with a written statement, and he said that he would do that after he had discussed the matter with his attorney." 138 Wn.2d at 480. But, like in Lewis, the officer never said Sweet thereafter refused to speak with him. Id. at 480-81. Thus, the officer's testimony was a most a mere reference to Sweet's silence. Id. at 481.

Contrast this to Johnson's case, where Savas testified he contacted Johnson at least six times, but Johnson refused to return any of his calls or e-mails. 9RP 132-35. The primary purpose of Savas's testimony was to emphasize Johnson's refusal to speak with him, in contrast with Potter's and Lorrie Sorensen's cooperation. Under these facts, Sweet does not control.[2]

The comments on Johnson's prearrest silence are constitutional error, and are presumed prejudicial. Curtis, 110 Wn. App. at 15. The State

[2] Furthermore, the Sweet court's analysis of this issue is very brief—even perfunctory. See 138 Wn.2d at 480-81. For this additional reason, Sweet is of little persuasive force here.

therefore bears the burden of proving the error was harmless. Easter, 130 Wn.2d at 242. The State does not offer any harmless error analysis here. Br. of Resp't, 15-18. Because the State failed to carry its burden, this Court should not engage in a sua sponte harmless error analysis. See State v. Martines, 182 Wn. App. 519, 331 P.3d 105, review granted __ Wn.2d __, 339 P.3d 634 (2014). Regardless, the error prejudiced the outcome of Johnson's trial. Br. of Appellant, 32-34. This Court should reverse and remand for a new trial.

3. EVEN IF THIS COURT HOLDS DETECTIVE SAVAS'S TESTIMONY WAS ONLY AN INDIRECT COMMENT ON JOHNSON'S SILENCE, REVERSAL IS NEVERTHELESS REQUIRED.

As discussed above and in the opening brief, Savas's testimony was a direct comment on Johnson's silence, intended to invite the jury to infer guilt from his silence. The State nevertheless argues, "At most, Detective Savas' testimony was, as in Sweet, a mere reference to silence and not a comment on that silence." Br. of Resp't, 18.

However, even an indirect comment on silence may be constitutional error, depending on the answers to three questions:

> First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered

> comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Third, was the indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant?
>
> Answering "yes" to any of these three questions means the indirect comment is an error of constitutional proportions meriting review using the constitutional harmless error standard, whether or not objection is first made at the trial court. On the other hand, if "no" is the answer to all three questions and appeal is taken, a non-constitutional error standard of review applies.

Romero, 113 Wn. App. at 790-91 (citations omitted); accord Holmes, 122 Wn. App. at 445-46 (citing Romero with approval).

Examining Savas's testimony results in an obvious "yes" to the first question posed by the Romero court. It is difficult to see Savas's testimony as anything but an intentional comment on Johnson's silence, especially when directly juxtaposed with Potter's and Sorensen's cooperation. The prosecutor's questions were purposeful and Savas's answers were purposeful. Their intent was to focus on Johnson's silence and invite the jury to infer guilt from it. For the same reason, the answer is also "yes" to the second question posed by the Romero court. As such, this Court should reject the State's attempt to avoid constitutional infirmity by calling Savas's testimony a "mere reference" to Johnson's silence.

4. THE STATE FAILS TO DISTINGUISH CONTROLLING CASE LAW IN ARGUING RESENTENCING IS NOT REQUIRED.

In his opening brief, Johnson argues his counsel was ineffective for failing to cite relevant law to the sentencing court that justified an exceptional sentence downward. Br. of Appellant, 39-44. Johnson cited two controlling cases: State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995), and State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002).

Calvert extended the Sanchez[3] rule to financial crimes. 79 Wn. App. at 582-83. In Calvert, a mitigated sentence was warranted because there was minimal difference between forging several small checks totaling $1,575 and forging one large check for that amount. Id. at 583. In McGill, this court recognized counsel is ineffective for failing to alert the sentencing court to the Sanchez rule in situations like Calvert. 112 Wn. App. at 102.

The State neglects to distinguish or acknowledge these cases. Br. of Resp't, 19-21. Instead, the State relies solely on State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003). But, as discussed in the opening brief, Kinneman is distinguishable. Br. of Appellant, 42-43. Specifically, the 67 thefts in Kinneman resulted in multiple different losses to multiple people. 120 Wn. App. at 345-46. Put another way, the multiple thefts caused several different harms, and so the cumulative effect of those thefts was not

[3] State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993).

"nonexistent, trivial, or trifling." Id. at 346. The State does not respond to Johnson's argument that his alleged thefts resulted in only one total amount stolen from one entity—there were no separate harms. Thus, Johnson's case is analogous to Calvert rather than Kinneman.

The State's failure to distinguish controlling case law demonstrates its untenable position. Even if this Court does not reverse on the above-stated issues, it should remand for resentencing because Johnson's counsel was ineffective.

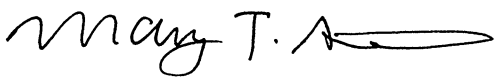
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should dismiss Johnson's first five convictions, and remand for retrial on the remaining charges.

DATED this 3rd day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

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

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 3RD DAY OF MACH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF MACH 2015.

X Patrick Mayovsky