SUPREME COURT NO. 92379-5

NO. 71562-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Petitioner.

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

The Honorable Jean Rietschel, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner David Johnson, the appellant below, asks this Court to grant review of the Court of Appeals' unpublished decision in State v. Johnson, No. 71562-3-I, filed July 27, 2015 (Appendix A). The Court of Appeals denied Johnson's motion for reconsideration on September 18, 2015 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. 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 at trial on the exercise of this right. Did the State violate Johnson's constitutional right to prearrest silence by purposefully eliciting testimony from a police witness that Johnson repeatedly refused to talk to the officer during his investigation?

2. The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Defense counsel objected on ER 403 grounds to the police officer's testimony regarding Johnson's silence. Was counsel ineffective in failing to cite relevant constitutional law that would have resulted in the officer's testimony being excluded?

C. STATEMENT OF THE CASE[1]

The State charged Johnson with several counts of first and second degree theft by color or aid of deception. These charges arose from what the State described as a phony vendor scheme. The State alleged 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.

Potter pleaded guilty and testified against Johnson at trial. He explained he worked as program manager for the Seattle School District's Regional Small Business Development Program, which aimed to increase the number of minority- and women-owned businesses contracting with the District. Potter recruited Johnson to serve as a personal service contractor conducting outreach for the program.

However, the District began requiring its contractors to perform not just outreach work but also teach classes. As a result of this change, Potter testified he and Johnson entered a secret agreement to split money for classes Johnson would not teach. 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. From that point forward, Potter testified, he

[1] For a more complete statement of the facts, including citations to the record, Johnson refers this Court to his opening brief. Br. of Appellant, 2-11.

began creating all Johnson's invoices and forged Johnson's signature on at least 15 subsequent invoices.

Lorrie Sorensen also testified against Johnson. She and Johnson dated during the time period Johnson contracted with the District. She claimed Johnson told her he was getting checks from the District for teaching computer classes, even though Johnson was "not computer literate." Sorensen testified Johnson said, "I can't believe I am getting paid for something I don't even know how to do."

Johnson testified at trial and agreed he never taught any classes. Rather, he contracted with the District to perform outreach work. Numerous State and defense witnesses agreed Johnson recruited contractors through his outreach efforts. Johnson denied entering a secret agreement with Potter. Several witnesses testified to Johnson's functional illiteracy and inability to comprehend complex information. By contrast, Potter is well-educated and several witnesses testified to his repeated dishonesty and deception. It was therefore highly unlikely Johnson could have initiated or participated in such a complicated scheme to steal from the District.

As such, Potter's and Sorensen's testimony were essential to the State's case. Their testimony was the only direct evidence that Johnson intended to defraud the District. The State impermissibly bolstered their

credibility by contrasting their cooperation with police with Johnson's prearrest silence.

During the State's case in chief, Detective Keith Savas testified he worked for the fraud, forgery, and financial exploitation unit of the Seattle Police Department. He said he was assigned to investigate "some improper financial dealings between Silas Potter, David Johnson, through Grace of Mercy." Defense counsel repeatedly objected to Savas's testimony under ER 403, arguing it was both irrelevant and prejudicial. The trial court noted counsel's continuing objection, but overruled it. 9RP 128-32.[2]

The prosecutor then asked Savas what he did to investigate the case, to which he responded, "I worked with your office to interview witnesses, also working with your office obtaining and reviewing evidence." 9RP 132. The prosecutor inquired, "And did you interview a woman named Lorrie Sorensen?" 9RP 132. Savas explained he interviewed Sorensen about the case at her home in Henderson, Nevada, and he took notes for his police report. 9RP 132-33. The prosecutor then asked, "Did you also interview Mr. Potter?" 9RP 133. Savas testified he interviewed Potter at Potter's apartment in Tampa, Florida. 9RP 133. The prosecutor followed up, "And during that course of that recording, did Mr. Potter confess to you these incidents?" 9RP 133. Savas responded, "Yes, he did."

[2] 9RP refers to the transcript from October 31, 2013.

Immediately after Savas testified Potter had confessed, this dialogue between the prosecutor and Detective Savas occurred:

> 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 introduced Johnson's driver's license and the deed to his home through Savas's testimony. 9RP 134-36. This evidence had already been admitted. 9RP 126-27.

Savas testified to nothing else. See 9RP 128-36.

On appeal, Johnson argued Savas's testimony constituted a comment on his prearrest silence, penalizing him for the lawful exercise of his Fifth Amendment right. Br. of Appellant, 20-37. Johnson asserted the State elicited Savas's testimony to imply Johnson's guilt from his silence and bolster Potter's and Sorensen's credibility by contrast. Br. of Appellant, 30-32. Johnson argued the issue was preserved by defense counsel's standing ER 403 objection. In addition, a comment on silence is manifest constitutional error reviewable for the first time on appeal. Br. of Appellant, 20. In the alternative, Johnson argued his counsel was ineffective in failing to assert his Fifth Amendment right to silence when objecting to Savas's testimony. Br. of Appellant, 37-39.

The Court of Appeals rejected Johnson's arguments and held:

> Assuming, without deciding, that he has properly raised this issue, Johnson does not show that the testimony was prejudicial. The State did not use it as substantive evidence of guilt.
>
> The State did not invite the jury to infer guilt from Johnson's failure to response to any particular telephone message or e-mail. And the prosecutor did not refer to Detective Savas's testimony in closing argument. Significantly, there was substantial evidence of Johnson's guilt presented at trial. In sum, Johnson fails to show that the alleged error was prejudicial.
>
> For the same reason, we also reject Johnson's alternative argument that his trial counsel was ineffective for

> failing to object to this testimony. Johnson cannot show that failure to object to this testimony was prejudicial.

Appendix, 11 (footnote omitted).

Johnson moved for reconsideration, arguing the Court of Appeals overlooked numerous cases holding it is constitutional error for a police witness to testify an individual refused to speak to him or her. Motion for Reconsideration, 1-4. Johnson also asserted the Court misapprehended the constitutional harmless error standard by requiring him to show prejudice. Motion for Reconsideration, 4-6. After calling for an answer from the State, the Court of Appeals denied Johnson's motion. Appendix B.

Johnson now seeks review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

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

a. The Court of Appeals decision conflicts with settled Washington law prohibiting comment on silence.

The Court of Appeals assumed, without expressly deciding, that Johnson properly raised the issue of the State's comment on his prearrest silence. Appendix A, 11. The opinion then holds, however, that the "State did not use [Johnson's] silence as substantive evidence of guilt," citing State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). Appendix A, 11 & n.16. The opinion further concluded "[t]he State did not invite the jury to infer

guilt from Johnson's [silence]" and "the prosecutor did not refer to Detective Savas's testimony in closing argument." Appendix A, 11.

These conclusions conflict with numerous decisions from this Court and the Court of Appeals. The Court of Appeals' decision also drastically erodes the right to prearrest silence, which presents a significant question of constitutional law and an issue of substantial public interest. Review is therefore warranted under all four RAP 13.4(b) criteria.

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). This Court held in State v. Burke that "when 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." 163 Wn.2d 204, 217, 181 P.3d 1 (2008). 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.

Courts bar comment on silence for several reasons. "[S]ilence 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); accord Burke, 163 Wn.2d at 218-19 (discussing numerous reasons for an individual's silence); Easter, 130 Wn.2d at 239 (noting silence is "insolubly ambiguous").

Commenting on silence further "place[s] an unfair and impermissible burden upon the assertion of a constitutional right." State v. Gauthier, 174 Wn. App. 257, 265, 298 P.3d 126 (2013). "Courts are appropriately reluctant to penalize anyone for the exercise of any constitutional right." Burke, 163 Wn.2d. at 221:

"A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). In Easter, a police officer testified he questioned Easter at the scene, but Easter refused to answer and looked away without speaking. 130 Wn.2d at 241. The officer characterized Easter as a "smart drunk" based on this evasive behavior. Id. at 241-42. This constituted a comment on silence, compounded by the prosecutor's emphasis on Easter's silence in closing. Id. at 242-43.

Easter is an egregious example of the State's impermissible comment on silence. The Court of Appeals' decision would have it that a comment on silence must rise to the level of that in Easter in order for it to be constitutional error. Appendix A, 11 & n.16. This conflicts with several decisions by the Court of Appeals and this Court. Guidance from this Court is also needed as to whether eliciting testimony on prearrest

silence but not emphasizing it again in closing can constitute a comment on silence.

Division Three has summarized four circumstances in which the State comments on an individual's silence:

> 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; [State v. Curtis, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002)]. 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. Lewis, 130 Wn.2d at 705.

State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Division One has similarly stated: "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." State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004).

In Curtis, the prosecutor asked a police witness whether Curtis said anything after receiving Miranda warnings. 110 Wn. App. at 13. The officer testified Curtis refused to talk and wanted an attorney. Id. Division Three 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 facts of Curtis were not as egregious as Easter, but reversal was nevertheless required. Id. at 15-16.

Similarly, in Romero, Division Three held a police officer's testimony, "I read him his Miranda warnings, which he chose not to waive, would not talk to me," constituted a "direct comment about Mr. Romero's election to remain silent." 113 Wn. App. at 793. In State v. Keene, Division Two 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. 589, 592, 594, 938 P.2d 839 (1997).

Division One did not analyze or address any of these cases. They demonstrate, however, that the Court of Appeals failed to properly identify an egregious comment on silence. This is at odds with decision from Division Two and Three, as well as Division One's own decision in Holmes. Division One's decision also significantly undercuts the right of to remain silent without penalty. Johnson had a constitutional right not to answer Detective Savas's phone calls or e-mails. Yet his refusal to do so was used against him at trial.

The prosecutor deliberately elicited testimony from Detective Savas that Johnson refused to speak with him. This was obvious from the

fact that (1) the prosecutor asked the detective questions specifically aimed at emphasizing Johnson's silence in contrast to Potter's and Sorensen's cooperation, and (2) Savas testified to little else. Br. of Appellant, 27-32. The goal was plain: to invite the jury to infer Johnson's guilt by his silence and to bolster the State's witnesses' credibility by pointing out their cooperation. Any thinking juror could hardly avoid the comparison the prosecutor sought to make.

This raises the question: if the evidence of Johnson's silence was not used to invite the jury to infer guilt, then what was it used for? It is difficult to conceive of any other purpose for Savas's testimony and, indeed, Division One articulated none. The State's post hoc explanation further demonstrates the constitutional violation:

> [The testimony] was elicited . . . to explain the investigative process and deflect any argument by Appellant that Det. Savas did not attempt to get his side of the story after speaking to his codefendants who implicated him.

Respondent's Answer to Appellant's Motion for Reconsideration, 6. This assertion is troubling and would nullify the right to prearrest silence. The same argument could be made in every case—that the officer was simply investigating the crime and the suspect refused to speak with him. But courts have repeatedly held this part of the "investigative process" is

inadmissible because it improperly invites the jury to infer guilt from the accused's silence.

Furthermore, the State cannot anticipatorily rebut an alleged defense by commenting on the accused's silence. In Easter, this Court explained "[t]he cases 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." 130 Wn.2d at 237 (emphasis added). Then, "[o]nly if the prior silence were somehow inconsistent with the later offered defense would the prior silence have any relevance for impeachment purposes." Lewis, 130 Wn.2d at 706 n.2. Otherwise, "[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." Id. "This is a further erosion of his right to remain silent." Curtis, 110 Wn. App. at 15.

Johnson did not testify Savas never contacted him or never gave him an opportunity to share his side of the story. Nor did Johnson claim he spoke with Savas before he was arrested. Therefore, anticipatory comments on Johnson's prearrest silence did not rebut any defense or impeach any inconsistent statement. The only purpose for the comment on Johnson's silence was to invite the jury to infer guilt.

Division One's decision in essence holds that introducing police officer testimony for the primary, if not sole, purpose of emphasizing the

accused's silence is not a comment on silence. This effectively allowed the State to penalize Johnson for the lawful exercise of his right to prearrest silence, placing "an unfair and impermissible burden upon the assertion of a constitutional right." Gauthier, 174 Wn. App. at 264.

This significant erosion of the right to silence warrants this Court's review under all four RAP 13.4(b) criteria. This Court's guidance is also needed to clarify (1) whether police testimony about the accused's silence that is not emphasized again in closing can constitute a comment on silence and (2) whether the State can anticipatorily rebut a defense or impeach the defendant by commenting on his silence. These open issues of law warrant review under RAP 13.4(b)(3) and (4).

b. The Court of Appeals improperly required Johnson to show prejudice, shifting the burden of proof and conflating the constitutional harmless error standard.

The Court of Appeals concluded "Johnson does not show that the testimony was prejudicial," and "Johnson fails to show that the alleged error was prejudicial." Appendix A, 11. But constitutional error is presumed prejudicial and the *State* must prove beyond a reasonable doubt that the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014). The Court of Appeals incorrectly shifted the State's burden to Johnson. Easter, 130 Wn.2d at 242.

Furthermore, where the State "makes no attempt in its briefing" to show harmless error, "the presumption of prejudice stands." Lamar, 180 Wn.2d at 588. The State provided no harmless error analysis in its briefing. Br. of Resp't, 15-18.

The Court of Appeals further concluded "there was substantial evidence of Johnson's guilt presented at trial." Appendix A, 11. But "substantial evidence" is not the standard. The substantial evidence standard is deferential and requires the appellate court to view all evidence in the light most favorable to the prevailing party. Lewis v. Dep't of Licensing, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). It is usually applied to review a trial court's findings of fact. See, e.g., State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Whether there is substantial evidence to support a finding of fact is not the same inquiry as whether overwhelming untainted evidence necessarily leads to a finding of guilt. The Court of Appeals again diminished the harmless error standard by requiring only "substantial evidence" of Johnson's guilt.

The Court of Appeals' opinion began with the presumption of harmlessness and required Johnson to prove prejudice. This conflicts with settled law. See, e.g., State v. Hart, 180 Wn. App. 297, 305, 320 P.3d 1109 (2014) ("Error arising from a Fifth Amendment violation is a constitutional error, which we presume to be prejudicial; we will affirm

only if the State shows that the error was harmless beyond a reasonable doubt."); State v. Fuller, 169 Wn. App. 797, 813, 282 P.3d 126 (2012) (comment on silence is subject to the "stringent" constitutional harmless error standard and the State bears the "heavy burden" of establishing harmlessness beyond a reasonable doubt). Washington cases considering the State's comment on silence almost universally hold such error to be prejudicial. See, e.g., 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.

Holding the State to its burden under the proper standard shows the State's impermissible comment on Johnson's silence prejudiced the outcome of his trial. The State purposefully contrasted Johnson's silence with Potter's and Sorensen's cooperation. Presented with a credibility contest between these three witnesses, the jury could have easily been swayed by Savas's testimony, which insinuated Johnson was hiding his guilt. Comment on Johnson's silence further invited the inference that Johnson's defense was fabricated after the fact.

Division One's application of an incorrect harmless error standard therefore warrants this Court's review under all four RAP 13.4(b) criteria.

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

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) defense counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

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 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 under ER 403. 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). Given counsel's objections, there was no legitimate 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. This case hinged on the credibility of Potter, Sorensen, and Johnson. 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, warranting this Courts review under RAP 13.4(b)(3).

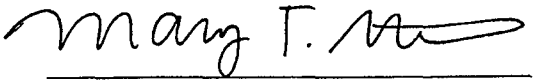
E. CONCLUSION

The State purposefully elicited testimony from a police officer that Johnson repeatedly refused to speak with him before he was arrested. This penalized Johnson's for exercising his constitutional right to prearrest silence. Review is warranted under every RAP 13.4(b) criterion. Johnson asks this Court to grant review and reverse.

DATED this 16th day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID ANTHONY JOHNSON, Appellant.	)	No. 71562-3-I DIVISION ONE UNPUBLISHED FILED: July 27, 2015

Cox, J. — David Johnson appeals his conviction of 36 counts of first and second degree theft, challenging the sufficiency of the evidence supporting 5 counts and seeking a new trial on the remaining convictions. The State presented sufficient evidence to support the convictions. Any reference to his pre-arrest silence was harmless. Johnson fails to demonstrate ineffective assistance of counsel. We affirm.

From 2000 to 2010, Silas Potter worked in the facilities department of the Seattle School District. As coordinator of the District's Historically Underutilized Businesses Program (HUB) and Regional Small Business Development Program (RSBDP), Potter managed efforts to increase participation of minority-owned small businesses in publicly funded construction projects. In June 2010, the District's internal auditor discovered that a $35,000 check intended for RSBDP had been deposited in Potter's personal bank account. Although the money was returned, the Washington State Auditor's office began an investigation and

discovered inconsistencies in records relating to a personal services contract between the District and a business called Grace of Mercy, owned by David Johnson. Ultimately, the State charged Potter and Johnson with 36 counts of first and second degree theft by color or aid of deception based on checks paid by the District to Grace of Mercy between May 2007 and June 2010 for a total of $168,275.

At trial, Potter testified that he met Johnson in 2006, when Johnson was installing security cameras in certain District properties. Potter assisted Johnson in obtaining contracts with the District for his company, Allstate Surveillance, for additional camera installation projects. In April 2007, Potter approved a personal services contract between the District and Grace of Mercy, with Johnson listed as Executive Director, in the amount of $20,800 for services to be performed between March 1 and August 31, 2007. In a description of its scope of work attached to the contract, Grace of Mercy was to work with "existing agencies," "community based organizations," and "firms" in Tacoma and Pierce County to "implement" RSBDP and "raise awareness" for HUB, develop a "working list of interested firms," screen and assess those firms, participate in "implementation" meetings, and meet with the program manager to "insure and assess the progress towards the goals and objectives of the program."

Potter testified that under the initial Grace of Mercy contract, Johnson was to perform "outreach" in the Tacoma area by talking to contractors and "showing them information" about the program. Potter could not describe Johnson's qualifications for such work beyond knowing "a lot of contractors." Potter testified

that Johnson did not meet regularly with him or report to him about any actual outreach efforts and that Johnson did not attend any of the weekly group meetings he conducted with other personal service contractors who were engaged in outreach. Potter also testified that he certified Johnson's invoices for payment by the District without reading the descriptions of his activities or verifying that he had performed the work for which he was billing.

In the following months, Potter approved contract modifications and new contracts increasing the expected dollar amounts and extending the timeframe for services to be performed by Grace of Mercy. Potter testified that he met with Johnson at a Denny's restaurant in September or October of 2007 to discuss a new District requirement that personal service contractors engaged in outreach must also teach classes for small business owners interested in participating in public construction projects. According to Potter, he and Johnson agreed to bill the District as if Johnson were actually teaching the classes and then split the money. For the next several months, Johnson submitted invoices listing classes he claimed to have taught and Potter certified the invoices for payment by the District. Potter admitted that he later began drafting Johnson's invoices and forging Johnson's signature before certifying the invoices for payment. Potter testified that Johnson gave him cash after the District paid each invoice.

Each of Johnson's first four invoices lists 36 hours at $100 per hour for having a "community outreach session with prospective firms;" assessing a total of 45 firms "per SSD requirements" and giving "information for HUB roster;" and meeting "with Mr. Potter weekly to assess program." The second, third, and

fourth invoices indicate Johnson "gave workshop" each month for a total of 49 firms and "worked with contractor on proposal for ... bid" or "on estimating project" for Pierce Transit, Sound Transit, or Pierce County. The fifth invoice lists 51 hours at $100 per hour for the same activities including working with "12 contractors," giving a workshop for "24 firms," assessing "10 firms," giving a "Seminar on Business development" for "14 firms," and "Data entry to compile outreach efforts and to build spreadsheet of firms." The invoices do not include dates or locations for any of these activities or identify any contractors or firms by name.

Cheryl Graves, who worked as Potter's assistant in 2007, testified that she attended RSBDP training classes as well as Potter's weekly group meetings, which she described as "mandatory," with personal service contractors. Although she recalled seeing Johnson at some of the classes "early on," Johnson did not teach any class, did not attend the mandatory weekly contractor meetings, and did not meet on a weekly basis individually with Potter. Graves testified that Johnson did not report anything to her regarding his outreach efforts and that he never provided her with any data regarding firms to enter into the database that she maintained.

Ralph Ibarra testified that he performed outreach and training work for HUB and RSBDP from 2006 or 2007 until 2010. Ibarra attended weekly meetings with Potter and other personal services contractors, including Eddie Rye, to "communicate those different activities that we were engaged in," and "to brief not only one another, but also Mr. Potter, and the Seattle Public Schools

employees so they would know what was going on and what was expected."[1] Ibarra testified that Johnson was not present at any of the many meetings he attended with Potter and other personal services contractors and training instructors over the years he worked for HUB and RSBDP. Rye, who also worked for HUB and RSBDP as a personal services contractor from 2007 to 2010, testified that he met weekly with Potter and other personal services contractors such as Ibarra to discuss the duties each performed and to coordinate efforts. At the time of trial, Rye had never met Johnson.

Johnson presented the testimony of Seven Hobbs, who identified himself as a maintenance worker and owner of a non-profit agency inspired by Johnson. Hobbs had known Johnson for 28 years but became closer friends with him in 2008, when he attended three classes provided by RSBDP at Johnson's suggestion. Although he invited other contractors to participate in the classes, he did not pursue any contract work with the District. Tommy Nicholson, the owner of a carpet cleaning business, testified that he attended a class in Seattle at Johnson's urging but did not find it helpful to his business. Although he could not recall the specific date, he believed he attended the class in 2006. Thomas Roundtree, a former general contractor, testified that he attended approximately "a dozen" RSBDP classes in Seattle in 2008 based on Johnson's recommendation and that he invited other business associates to attend. Raymond Montgomery, an owner of a janitorial business, testified that he went to 6 or 7 RSBDP classes in Seattle in 2008 or 2009.

[1] Report of Proceedings (Oct. 31, 2013) at 147-48.

Johnson denied reading or signing the description of his scope of work attached to the contract or the invoices produced by the State at trial. He produced different documents to support his understanding of his contract with the District and testified that he only requested payment for tasks he actually performed. Johnson testified that he attended RSBDP classes to become familiar with all the information offered. Then he created booklets and flyers by copying District materials and adding a coversheet or contact information referring to Grace of Mercy. Johnson testified that he handed out these documents at Home Depot and Lowe's, "where all the contractors are." Johnson claimed that he met with Potter occasionally "for the first six months," but then Potter was not available so he "always left [his] leads and [his] schedule there at the front desk." Johnson denied meeting Potter at a Denny's restaurant or agreeing to give Potter a share of his earnings. Johnson testified that he never taught classes, never submitted invoices claiming to have taught classes, and never agreed that Potter should submit such invoices on his behalf. Johnson also testified that he loaned Potter money on two occasions, he gave Potter blank checks to reimburse another contractor Potter had added to certain Grace of Mercy invoices, and he made donations to Potter's church.

The jury convicted Johnson as charged and the trial court imposed a standard range sentence. Johnson appeals.

SUFFICIENCY OF THE EVIDENCE

Johnson argues that the State failed to present sufficient evidence to support the first five convictions of theft in the first degree because all the

evidence demonstrated that Johnson actually performed the outreach work specified in his personal service contract before October 2007. He claims that there was no deception because Johnson performed outreach work and submitted accurate invoices. We disagree.

The due process clause of the Fourteenth Amendment of the United States Constitution requires that the State prove beyond a reasonable doubt every element of a crime.[2] To determine whether the evidence is sufficient to sustain a conviction, this court must determine "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt."[3] A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence.[4] On issues concerning conflicting testimony, credibility of witnesses, and persuasiveness of the evidence, this court defers to the jury.[5] Circumstantial evidence and direct evidence are considered equally reliable when weighing the sufficiency of the evidence.[6]

To convict Johnson of each of the first five counts of theft in the first degree as charged, the State had the burden of proving beyond a reasonable doubt that, together with Potter, he committed theft of more than $1,500 "by color and aid of deception."[7] The trial court instructed the jury:

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[2] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
[3] State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).
[4] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[5] State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).
[6] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).
[7] Former RCW 9A.56.030(1)(a) (Laws of 2007, ch. 199, § 3).

> By color or aid of deception means that 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.
> ...
> Deception occurs when an actor knowingly creates or confirms another's false impression which the actor knows to be false or fails to correct another's impression which the actor previously has created or confirmed or prevents another from acquiring information material to the disposition of the property involved or promises performance which the actor does not intend to perform or knows will not be performed.[8]

Here, a jury could find beyond a reasonable doubt that Potter and Johnson knowingly used deception to induce the District to enter and make payments on a personal services contract for services that Johnson did not perform even before making an explicit agreement to present false invoices and share the proceeds in October 2007. Potter and other State witnesses identified the invoices supporting each of the first five payments. Potter certified the invoices for payment without verifying whether Johnson actually performed any of the activities described. Johnson denied any knowledge of the invoices and did not testify that he performed the work described in the invoices. Instead, he testified that he spent 25 hours each week handing out flyers to strangers in front of Home Depot and Lowe's or encouraging his friends to attend classes. The State's witnesses testified that Johnson did not engage in any activities similar to those performed by the other personal services contractors. None of the State's witnesses recognized the documents Johnson provided at trial to explain his different understanding of his contract. The State also provided evidence that Johnson gave Potter money, described as loans or reimbursements, before October 2007, although Potter denied any explicit financial agreement until after

[8] RCW 9A.56.010(4), (5)(a)-(c), (e); Clerk's Papers at 147-48.

that date. Although largely circumstantial, this evidence, viewed in the light most favorable to the State, would allow a rational trier of fact to find the essential elements of the first five counts as charged beyond a reasonable doubt.

The jury was entitled to disbelieve Johnson's evidence and explanation for his actions and find as it did. Resolution of the direct conflicts between Johnson's and Potter's differing versions of events required credibility determinations that we do not review on appeal.

Given our resolution of his challenge to the sufficiency of the evidence, we need not address Johnson's challenge to the restitution order based on the same claim.

FIFTH AMENDMENT

Johnson argues that Detective Keith Savas made an improper comment during his trial testimony on Johnson's pre-arrest exercise of his constitutional right to silence. He claims the comment was particularly improper because Detective Savas also testified that Potter and Johnson's former girlfriend agreed to his requests for interviews and confessed their crimes. We reject this claim because he fails to show prejudice, even if we assume a constitutional violation.

The State may not comment on a defendant's Fifth Amendment right to remain silent.[9] An impermissible comment on silence occurs when the State uses the defendant's silence "as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt."[10] "A mere reference to silence,

[9] State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).
[10] Id. at 707.

however, is not necessarily an impermissible comment and, therefore, not reversible constitutional error, absent a showing of prejudice."[11]

A direct comment, such as when a witness or state agent refers to the defendant's invocation of his or her right to remain silent, is reviewed for prejudice using a harmless error beyond a reasonable doubt standard.[12] An indirect comment, such as when a witness or state agent references a comment or action by the defendant which could be inferred as an attempt to exercise the right to remain silent, is reviewed using the lower, nonconstitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome.[13]

Johnson challenges the following portion of the detective's testimony:

[PROSECUTOR]: Did you attempt to contact Mr. Johnson?

[DETECTIVE]: Yes, I did.

[PROSECUTOR]: How many times did you do that?

[DETECTIVE]: At least six times.

[PROSECUTOR]: How did you go about attempting to contact Mr. Johnson?

[DETECTIVE]: I went to his house a couple of times, I telephoned him at a couple of different telephone numbers, and e-mailed him.

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[11] State v. Slone, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006).

[12] State v. Pottorff, 138 Wn. App. 343, 346-47, 156 P.3d 955 (2007).

[13] Id. at 347; see, e.g., State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999) (officer's testimony that defendant said he would be willing to take a polygraph examination and provide a written statement when neither were introduced at trial was "mere reference to silence" rather than "comment" on silence and not reversible error absent showing of prejudice).

[PROSECUTOR]: Did he respond to any of the telephone messages or e-mails?

[DETECTIVE]: No.[14]

Johnson claims that his attorney's continuing objection to all of the detective's testimony on the grounds of relevance and unfair prejudice was sufficient to preserve his claim of error. The State argues that Johnson waived the error by failing to object and cannot demonstrate a "manifest error affecting a constitutional right."[15]

Assuming, without deciding, that he has properly raised this issue, Johnson does not show that the testimony was prejudicial. The State did not use it as substantive evidence of guilt.[16]

The State did not invite the jury to infer guilt from Johnson's failure to respond to any particular telephone message or e-mail. And the prosecutor did not refer to Detective Savas's testimony in closing argument. Significantly, there was substantial evidence of Johnson's guilt presented at trial. In sum, Johnson fails to show that the alleged error was prejudicial.

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[14] Report of Proceedings (Oct. 31, 2013) at 134.

[15] RAP 2.5(a)(3); see State v. Kalebaugh, __ P.3d __, 2015 WL 4136540, *2 (July 9, 2015) ("This exception strikes a careful policy balance. On the one hand, a procedural rule should not prevent an appellate court from remedying errors that result in serious injustice to an accused. At the same time, if applied too broadly RAP 2.5(a)(3) will devalue objections at trial and deprive judges of the opportunity to correct errors as they happen.").

[16] Cf., State v. Easter, 130 Wn.2d 228, 233-34, 922 P.2d 1285 (1996) (testifying about his conversation with defendant near scene of accident, officer called defendant a "smart drunk," and characterized his silence as evasive and evidence of guilt; and prosecutor repeated "smart drunk" several times during closing).

For the same reason, we also reject Johnson's alternative argument that his trial counsel was ineffective for failing to object to this testimony. Johnson cannot show that failure to object to this testimony was prejudicial.

INEFFECTIVE ASSISTANCE OF COUNSEL

Relying on State v. McGill,[17] Johnson contends his attorney provided ineffective assistance of counsel by failing to cite particular authorities supporting a claim that the operation of RCW 9.94A.589 resulted in a sentence that was clearly excessive under RCW 9.94A.535(1)(g), warranting a downward exceptional sentence. We disagree.

To demonstrate ineffective assistance, Johnson must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient representation.[18] We strongly presume that counsel's representation was not deficient.[19] If a defendant fails to make either of the two showings, the inquiry ends.[20] If counsel's conduct can be characterized as legitimate trial strategy or tactics, counsel's performance is not deficient.[21]

Johnson cannot establish deficient performance. Unlike McGill, this case does not involve an erroneous application of the law and nothing in the record

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[17] 112 Wn. App. 95, 102, 47 P.3d 173 (2002) (where trial court indicated inclination to impose exceptional sentence downward but incorrectly believed it lacked ability to do so, defense counsel was ineffective for failing to cite case law that would allow imposition of exceptional sentence).

[18] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[19] State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

[20] State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

[21] Id. at 863.

suggests the trial court was unaware of its decision-making authority or discretion under RCW 9.94A.535(1)(g) or the relevant case law. Defense counsel cited RCW 9.94A.535(1)(g) in its sentencing memorandum and urged the court exercise its discretion to impose either a first time offender sentence or an exceptional sentence below the standard range, "which you are authorized to do and which . . . [is] fully warranted by all the evidence you've heard as well as the arguments of counsel."[22] Counsel also discussed and distinguished the authority identified by the prosecutor, State v. Kinneman,[23] in his double jeopardy argument. Essentially, Johnson faults his attorney for failing to differently or more persuasively distinguish Kinneman in support of his alternative request for a downward exceptional sentence.[24] Because Johnson cannot demonstrate that counsel's decision to focus his argument on the alternative he viewed as more promising was not strategic, he has accordingly not overcome the strong presumption that counsel's representation was not deficient.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In a statement of additional grounds, Johnson claims that the trial court abused its discretion by refusing to allow "co-counsel when I went pro-se" and allowing the prosecutor "to remove jury instructions" on "lesser charges." He also states that the trial court should have held a suppression hearing. Because

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[22] Report of Proceedings (Feb. 7, 2014) at 54.

[23] 120 Wn. App. 327, 338, 84 P.3d 882 (2003) (state had discretionary authority to charge separate count of theft for each unauthorized withdraw from trust account; defendant not subject to double jeopardy for 67 theft convictions where each was based on a discrete act).

[24] Id. at 341-48 (reversing downward exceptional sentence based on RCW 9.94A.535(1)(g) as not supported by fact or law where cumulative effect of 67 counts of theft of over $200,000 was foreclosure of properties and additional substantial loss to secondary victim).

these statements do not sufficiently inform the court of the nature and occurrence of the alleged error, we cannot review them.[25]

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spearman, C.J.

Appelwick, J.

[25] RAP 10.10(c).

Appendix B

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

STATE OF WASHINGTON, Respondent, v. DAVID ANTHONY JOHNSON, Appellant.	)	No. 71562-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, David A. Johnson, has moved for reconsideration of the opinion filed in this case on July 27, 2015. The panel hearing the case has called for an answer from respondent, state of Washington. The court having considered the motion and respondent's answer has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this __18th___ day of ___September___ 2015.

FOR THE PANEL:

Cox, J.

Judge

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. DAVID JOHNSON, Petitioner.	)))))))))	SUPREME COURT NO. _____ 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 16TH DAY OF OCTOBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 16TH DAY OF OCTOBER 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

October 16, 2015 - 2:18 PM

Transmittal Letter

Document Uploaded: 715623-Petition for Review.pdf

Case Name: David Johnson

Court of Appeals Case Number: 71562-3

Party Respresented:

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

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