72497-5

NO. 72497-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS HO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS AND THE HONORABLE TERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1) Whether the superior court properly denied Ho's motion, made on the eve of trial, for counsel of his choice, when such motion was conditioned on the simultaneous granting of a long continuance for new counsel to prepare.
2) Whether Ho can appeal his standard-range sentence.
3) Whether Ho waived his right to challenge on appeal the propriety of a detective's testimony regarding his interview of Ho.
4) Whether Ho's and his associates' shooting attack on the victims amounted to a continuing course of conduct, thus obviating any need for a unanimity instruction.
5) Whether the State delivered suitable closing argument.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Douglas Ho, was charged by amended information and tried with co-defendant Victor Contreras for three counts of assault in the first degree and one count of unlawful possession of a firearm in the first degree. CP 189-91. The three counts of first-degree assault alleged that Ho and Contreras assaulted Lawrence West, William Ngeth, and Troung Ngo on the

night of July 22-23, 2012, with the intent to inflict bodily harm; in addition, Ho and Contreras were accused of committing these assaults to benefit their criminal street gang. CP 189-90. The firearm charge concerned Ho's possession of a handgun during the commission of the assaults, despite his prior conviction for residential burglary. CP 191.

By jury verdicts rendered on May 14, 2014, Ho was found guilty as charged for his substantive offenses, as well as for the gang aggravator. CP 321-30. Ho received a standard-range sentence. CP 415-22.

2. SUBSTANTIVE FACTS

During the afternoon of July 22, 2012, Lawrence West and Troung Ngo visited the Beacon Hill home of their friend, William Ngeth, to work on Ngeth's car with him. 8RP 20-21.[1] The three young men were members of a Seattle street gang that called itself the Tiny Raskal Gangsters (TRGs). 8RP 8-9. In the late evening, the three decided to drive to another TRG member's house on Rainier Ave. S. in Ngeth's car. 8RP 22-23.

[1] The verbatim report of proceedings consists of 14 volumes, referred to in this brief hereinafter as follows: 1RP (8/9/2012, 10/4/2012, 11/8/2012, 11/15/2012, 12/13/2012, 1/10/2013, 4/25/2013, 5/2/2013, 5/30/2013, 6/6/2013, 8/22/2013, 9/9/2013, 4/8/2014, 5/14/2014, and 9/5/2014); 2RP (4/10/2014); 3RP (4/15/2014); 4RP (4/21/2014); 5RP (4/22/2014); 6RP (4/23/2014); 7RP (4/24/2014); 8RP (5/5/2014); 9RP (5/6/2014); 10RP (5/7/2014); 11RP (5/8/2014); 12RP (5/12/2014); 13RP (5/13/2014); and 14RP (5/14/2014).

Ngeth stopped his car at the intersection of Beacon Ave. S. and S. Spokane St. at a traffic signal. 8RP 25. While the men waited for the light to change, a tan car pulled up alongside Ngeth's vehicle. 8RP 25. West was concerned – he knew that he needed to be on the lookout for a tan car because such a vehicle belonged to Contreras, a member of another street gang, Insane Boyz. 8RP 27. The TRGs and Insane Boyz had been involved in a long-standing feud, including a recent incident in which shots had been fired at the home where Insane Boyz member Ho lived with his family. 7RP 122-24.

West turned to Contreras's car and saw Ho emerge from the car's sunroof, holding a gun. 8RP 27-28. Contreras was driving his car, Ho was in the front passenger seat, and a third, unidentified person was in the rear seat behind Contreras.

West told Ngeth to drive and Ngeth complied, running the still-red traffic signal. 8RP 27, 29. West heard one shot fired from Contreras's car, and felt the impact when the round struck Ngeth's vehicle. 8RP 29-30. Contreras began to Ngeth's car. 8RP 29.

Ngeth, driving at high speed, tried to escape Contreras's pursuing vehicle, but was unsuccessful. 8RP 32-35. Eventually, Ngeth turned sharply to avoid a dead end at a cul-de-sac located at

22nd Ave. S. and S. Lucille St., and crashed into the curb, immobilizing his vehicle. 8RP 35. As West, Ngeth, and Ngo got out of their car and began to run, West saw Contreras's car stop, and watched Contreras and Ho get out. 8RP 35.

West's group scattered. 8RP 39. Ho and Contreras fired many gunshots at the TRGs; residents of the area said that the shooting lasted for at least 90 seconds and counted up to 15 rounds being fired. 7RP 12; 9RP 158-59.

As West climbed a fence in his effort to flee, he felt something hit him. 8RP 42. As he hid, West heard Contreras's car drive off, and Seattle Police Department (SPD) patrol cars arriving. 8RP 45. West was taken to Harborview Medical Center, where doctors determined that he had been shot in the torso and arm. 10RP 8-9.

Investigators suspected that Insane Boyz members may have been involved in this incident, and asked patrol officers to look for Contreras's car. 7RP 50. On July 24, 2012, SPD officers located Contreras's car at a barbeque site at Seward Park; Contreras and Ho were both present. 7RP 50. Inside Contreras's car, police found a Smith and Wesson .40 caliber pistol, a Glock .45 caliber pistol, and boxes of .45 caliber and .40 caliber ammunition.

7RP 57-61. In a second vehicle at the scene that belonged to the girlfriend of another Insane Boyz member, police recovered a Kimber .45 caliber pistol. 7RP 54.

Examination of the weapons and ammunition by SPD latent print examiners were somewhat fruitless, but Ho's fingerprints were lifted from the magazine of the Kimber pistol. 9RP 47-51.

Police recovered a number of slugs and shell casings from the shooting scenes at 22nd Ave. S./S. Lucille St. and Beacon Ave. S./S. Spokane St. 6RP 103-04, 115-17, 138-39, 150-51. A firearms examiner from the Washington State Patrol Crime Laboratory examined the guns recovered by SPD officers on July 24, 2012, along with the slugs and casings. 7RP 158, 170. Each of the guns was determined to be operable, and many of the slugs and cartridges found at the shooting locations were determined to have been fired from those weapons. 7RP 175-86.

In addition, cell phone records analyzed by an SPD detective revealed that the phones owned by Contreras and Ho were used at nearly the same time on the night of July 22, 2012, in the area of Beacon Ave. S. near S. Spokane St. 11RP 53, 59.

Stipulations were read to the jury that explained that both Contreras and Ho had prior convictions for serious offenses and

were thus prohibited from having firearms on July 22-23, 2012. 11RP 71.

Neither Contreras nor Ho testified in their own cases-in-chief, and both rested without calling any witnesses to testify in their defense. 12RP 34-36.

C. ARGUMENT

1. THE SUPERIOR COURT PROPERLY DENIED HO'S UNTIMELY MOTION FOR A CONTINUANCE AND SUBSTITUTION OF COUNSEL

Ho begins his appeal by contending that he was deprived of his 6th Amendment right to counsel when the presiding judge of the King County Superior Court preliminarily denied his request, made two days before his trial was scheduled to commence, to substitute a private attorney for his appointed counsel, contingent on the court's simultaneous granting of a 90-day continuance to allow the to-be-retained lawyer to prepare. Ho characterizes the trial court's decision as an erroneous infringement of his constitutional right that amounted to structural error. His claim is without merit.

Ho's trial with co-defendant Contreras was set to begin on April 10, 2014. Supp. CP ___ (sub no. 106, Order on Omnibus Hearing, filed on Mar. 21, 2014). Ho had been arraigned in the instant matter on August 9, 2012, and his and co-defendant

Contreras's cases had been postponed for well over a year, for a variety of reasons (largely at the request of one or both co-defendants) that are not the subject of challenge in this appeal.[2]

On April 8, 2014 – two days before the scheduled trial date – Ho appeared before the presiding court with a motion to substitute appointed counsel with a hired attorney. 1RP 76. At the hearing on Ho's motion, his sought-after counsel explained to the presiding court that Ho was making his request for substitution simply because that was his preference, and not due to any difficulties with his current attorney. 1RP 76. The private attorney conditioned Ho's motion on the court's granting of a continuance of the trial date for approximately 90 days. 1RP 76-77.

Ho's co-defendant, Contreras, was present at the hearing and adamantly objected, through counsel, to any more

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[2] It should be noted that Ho states in his brief to this Court that he was "perfectly happy" with his original appointed attorneys, and only sought to retain private counsel after his original lawyers were "forced" out by the State by a "strategic" decision to delay disclosure of a witness, whose presence created a potential conflict, seemingly in order to somehow harm Ho. Amended Brief of Appellant, at 17. Ho's timeline is off. As the sought-to-be-appointed private attorney explained to the presiding court on April 8, 2014, Ho had conferred with him in March 2013, when Ho's original appointed counsel was still assigned to the case, but Ho was unable to hire him at that time because of "some problems that [Ho's] family" had. 1RP 76. As to Ho's assertion to this Court that delay in his going to trial was caused largely by the State's deliberately underhanded strategizing (prior to the setting of a first trial date, much less before an omnibus hearing), this claim was litigated before the presiding court through pleadings and oral argument in the form of a motion to exclude the testimony of the challenged witness, and was rejected. CP 63-91; 1RP 59-63.

continuances. 1RP 77. One of the two deputy prosecutors assigned to the matter informed the court that she anticipated beginning a different case on April 9th that she expected would occupy her for the next five weeks. 1RP 77-78. The presiding court issued the following ruling:

> THE COURT: Well, I think that – I think I'm going to have to deny this without prejudice. Mr. Crowley [the private attorney], I may let you in, actually. But it depends on what happens with [the prosecutor's April 9th case]. But that case would have a huge ripple effect on all the other cases in the system. So at this point I'm going to keep you on for trial in two days.
>
> MR. CROWLEY: Very well.
>
> THE COURT: All right. Mr. Todd [Ho's appointed counsel], you're still on the case.
>
> MR. TODD: Thank-you.
>
> THE COURT: Thank-you. And I assume Mr. Todd would notify you if things change with [the deputy prosecutor] going out to trial in [the April 9th case].
>
> MR. CROWLEY: That's great.

1RP 78.

Presumably, the deputy prosecutor's other trial was either postponed or resolved, because Ho's and Contreras's joint trial commenced on April 10th, as scheduled. At no point did Ho ask either the presiding court or the trial judge to revisit his request for

substitution of counsel, and the trial proceeded apace with Ho's appointed attorney.

It is this tentative ruling that the presiding court issued on April 8th that Ho asks this Court to deem a structural infringement of his constitutional right to counsel. Ho's request should be rejected for two reasons.

First, it is abundantly clear from the record that the presiding court's decision at the April 8th hearing was not final, and was simply a placeholder meant to maintain the status quo until more information concerning the prosecutor's other commitment could be gained. The court effectively directed Ho's current attorney to keep Ho's preferred counsel apprised of developments that could affect the start of the instant trial, so that the private attorney could elect to renew Ho's motion on a more certain footing regarding timing. There is no reason, based on the existing record, to believe that Ho's failure to request substitution anew on April 10th was anything other than a voluntary decision on his part. There is also no way of determining with any confidence how either the presiding court or the trial court would have ruled on such a motion to substitute counsel had Ho, as he had effectively been invited by the presiding court, renewed it now that circumstances had changed.

Second, structural error occurs only in the context of an erroneous deprivation of a defendant's choice as to counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 150-52, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). When a defendant desires new counsel but requires a continuance to do so, the trial court's decision is reviewed for an abuse of discretion "so arbitrary as to violate due process." State v. Hampton, __ Wn.2d __, __ P.3d __ (Wash. Nov. 19, 2015), available at 2015 WL7294538, *3 (quoting Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)); see also State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010) (explaining that a trial court presented with such a motion must balance the defendant's right to choose his lawyer against the public's interest in the prompt and efficient administration of justice, and that this exercise falls within the discretion of the court).

In its provisional ruling here, the presiding court did not abuse its discretion. The trial court was entitled to take a variety of circumstances into account when considering Ho's conditional motion for new counsel. See Hampton, 2015 WL 7294538, at *7. As the Hampton court explained, a trial court can consider "all relevant information," including the timing of the motion, the length

of the continuance sought, whether the court had granted earlier continuance requests sought by the defendant, whether current counsel was prepared to go to trial, and whether the defendant had some legitimate cause for dissatisfaction with his current attorney. Id.

Although Ho had been considering replacement of appointed counsel for over a year, he did not present such a motion until the eve of trial. 1RP 76. A continuance of at least three months would have affected not only Ho's trial, but his co-defendant's as well, and Contreras was strongly opposed to further delay of a matter that had already been postponed many times, often at the request of one or both defendants, since the case had been filed in August 2012. CP 16-18, 45, 52, 55, 59, 61-62, 75, 92-93, 99-100, 104-05, 108, 109-10 (various orders on defense motions to continue proceedings). And, as private counsel explained to the presiding judge, Ho's relationship with his current attorney was satisfactory, and Ho's decision was "simply a choice of counsel case that he wishes to substitute me in." 1RP 76.

A trial court abuses its discretion when its decision is manifestly unreasonable, such that no reasonable judge would conceivably take the same position. Hampton, 2015 WL 7294538,

at *7. The State does not concede that the presiding judge's ruling on Ho's April 8, 2014, motion was definitive and final. Compare 1RP 78 (presiding court's oral ruling) and Gonzalez-Lopez, 548 U.S. at 142-43 (detailing the federal district court's repeated denials of defendant's successive petitions for his counsel of choice to be admitted *pro hac vice*, effectively barring the attorney from representing him). However, even assuming, *arguendo*, that the presiding court's April 8th decision was conclusive, it was not "outside the range of acceptable choices," thereby constituting an abuse. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (citations omitted). The timing of Ho's motion, the absence of any dissatisfaction with his current lawyer, the long history of the case, and the effect that a three-month delay (at minimum) would have on his co-defendant, when balanced against Ho's right to chosen counsel, provided a more-than-minimally sufficient basis for the presiding court to deny his motion.[3]

[3] In his brief to this Court, Ho contends that a trial court cannot be allowed to consider the effect of a continuance on the efficient administration of justice when ruling on a motion for substitution of counsel conditioned on the granting of a continuance. Amended Brief of Appellant, at 16, citing State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009). Ho's reliance on Kenyon, which concerned a defendant's right to a speedy trial, rather than his right to counsel, is misplaced.

2. HO IS NOT ENTITLED TO VACATION OF HIS STANDARD-RANGE SENTENCE AND RESENTENCING

Following the jury's verdicts, Ho received a standard-range sentence for his multiple serious violent offenses, each carrying its own firearm enhancement. CP 415-22. On appeal, he contends, for the first time, that the trial court should have taken into account the fact that he had turned 18 years of age several months before he committed his crimes, and was obligated to consider giving him an exceptional sentence below the standard range due to his purported immaturity. Amended Brief of Appellant, at 18-28. Ho's argument is without merit.

Generally, a defendant may not appeal from a standard range sentence. State v. Schloredt, 97 Wn. App. 789, 801, 987 P.2d 647 (1999). Appellate review is permitted only in narrow circumstances: when the trial court has *refused* to exercise discretion at all, or when it has relied on an impermissible basis for *refusing* to impose an exceptional sentence below the standard range. Id.

Ho asserts that vacation of his sentence is required because the state supreme court recently ruled, in State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), that an adult defendant's relative

youthfulness can be considered by a trial judge when presented with that defendant's request for an exceptional sentence. In O'Dell, a five-justice majority held that the trial court had incorrectly interpreted existing case law when it affirmatively rejected the defendant's express request that it consider his ability to appreciate the wrongfulness of his conduct, because he was not a juvenile. O'Dell, 358 P.3d at 360, 361-62, 368 (noting, *inter alia*, that the defendant's rape of a child occurred ten days after the defendant's 18th birthday). The O'Dell majority based its holding on the U.S. Supreme Court's decision to strike down as unconstitutional an Alabama statute that required that state's courts to impose, in all cases of juveniles convicted of capital murder, a sentence of life imprisonment without possibility of parole. See Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 2460, 183 L. Ed. 2d (2012) (holding that categorical denial of consideration of a minor's "lessened culpability" and greater "capacity for change" in such sentencing hearings violated the 8th Amendment's prohibition against cruel and unusual punishment).

There is a critical distinction that must be drawn between the circumstances present in O'Dell and Miller and those here. The Miller court addressed a state statute that actively removed any

discretion from trial courts. Miller, 132 S. Ct. at 2462-63, 2475. And the trial court in O'Dell affirmatively and expressly declined to consider the defendant's request for an exceptional sentence because it believed – erroneously, according to the O'Dell majority – that the defendant's age barred him from such a sentence on the statutory basis he had proceeded under. O'Dell, 358 P.3d at 361, 366-67; see also RCW 9.94A.535(1)(e). Thus, in each of those instances the trial court actively refused to exercise discretion, either because it was actually barred by the legislature from doing so, or because it mistakenly believed it was so barred.[4]

Here, in contrast, Ho never sought an exceptional sentence on the basis of his supposed immaturity. Rather, he requested, without success, a sentence below the standard range on the non-statutory ground that he would have pleaded to crimes that would have resulted in a shorter sentence had the State allowed him to. 1RP 104-05. The defendant in O'Dell presented, in support of his request for lesser punishment, testimony from friends and family at his sentencing hearing regarding his immaturity that could, the O'Dell majority noted, justify an exceptional sentence. Ho made no

[4] See also State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) (reversing defendant's standard-range sentence where trial court categorically refused to consider his request for a drug-offender sentencing alternative (DOSA) sentence because it believed that the DOSA program was inadequately funded.)

such presentation. To allow a defendant to obtain vacation of his original sentence and resentencing under such circumstances presents obvious problems,[5] and runs afoul of the long-standing principles that prohibit appellate review of standard range sentences where the trial court was never even asked to consider the basis supporting an exceptional sentence delinquently being argued for on appeal.

3. DETECTIVE SEVAAETASI'S TESTIMONY CONCERNING HIS INTERVIEW OF CONTRERAS DID NOT AMOUNT TO MANIFEST CONSTITUTIONAL ERROR.

In his final three bases for reversal, Ho has adopted and asked this Court to incorporate into his appeal the arguments presented by co-defendant Contreras in his appeal to this Court. To ensure consistent treatment of these two co-defendants, the State repeats the counter-arguments it made in response to Contreras's appeal, modified only where necessary to recognize that the instant matter involves Ho.

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[5] For instance, acceptance of Ho's position would allow a vast number of adult defendants to seek the same remedy, even if they, like Ho, received standard-range penalties at hearings during which they did not seek exceptional sentences on the basis of particularized immaturity. Also, the absence of O'Dell-like testimony regarding Ho's purported immaturity within the existing record forces this Court into wholesale speculation as to whether resentencing would produce a different outcome.

Ho seeks reversal of his convictions due to the following testimony of SPD Detective Robert Sevaaetasi on direct examination in the State's case-in-chief, during which the detective described his conversation with Ho and Contreras following their arrest:

> Q [by deputy prosecutor]: Did you have a conversation with Mr. Ho and Mr. Contreras?
>
> A [Det. Sevaaetasi]: Yes.
>
> Q: Was that done separately?
>
> A: Yes.
>
> Q: Take us through that.
>
> A: Well, they were held in interview rooms up on the seventh floor at headquarters. They're separate rooms. I went in there. I think a very brief conversation like, "How are you doing?" And then they asked why they were there. I read them their rights, and I told them that they were there for investigation of a shooting. Once I did that, I put both of them separately in separate room when this happened, and they denied any knowledge of it.
>
> Q: When asked about their whereabouts on the night question, was there an answer?
>
> A: They couldn't account for where they were.
>
> Q: Did both of them give the same kind of answers?
>
> A: Yes. They had – they were – they were kind of indifferent to the whole incident, being interviewed,

being advised of their rights. It was like nonchalant to them, and I found this not at all unusual.

Q: The nonchalance you didn't find unusual?

A: Yeah, or the indifference to it and that there was similar behavior.

Q: Explain nonchalance and indifference.

A: Well, you know, normally you would arrest someone, put them in handcuffs, and take them to the police station. They would – some protestation about guilt or innocence or whatever or why they're there. There was no such attitude from them. They were – really kind of indifferent, just sat there. And when I asked them if they could account for their—their whereabouts, it was, "I don't remember. I don't know."

9RP 97-98.

Ho did not object to this testimony during Det. Sevaaetasi's direct examination. Nevertheless, he contends that reversal of his convictions is required because it amounted to manifest constitutional error. Specifically, Ho asserts that the detective's testimony amounted to either an improper comment on his exercise of his constitutional right to remain silent or an improper expression by the detective of his opinion on Ho's guilt, and that this caused him actual prejudice.

Ho's claim is without merit. An error raised for the first time on appeal must be manifest and truly of constitutional dimension.

State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Moreover, the appellant must demonstrate that the alleged error actually affected his rights at trial. Id. at 926-27. Ho cannot meet his obligations here. The detective's testimony did not concern Ho's silence, but his *statements* while being interrogated. Furthermore, a fact witness is permitted under well-established case law to describe a defendant's demeanor, and the detective's testimony here contained no expression of his subjective belief as to Ho's guilt. Finally, Ho fails to show how the detective's testimony caused him genuine harm that would cause this Court to question the jury's verdict. His contention should be rejected.

Generally, a police witness may not comment on the silence of a defendant in order to imply guilty from a refusal to answer questions. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). To do so violates the defendant's Fifth Amendment right to refrain from self-incrimination. State v. Easter, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996).

However, when a defendant talks to investigators, a police witness may comment on what he does or does not say. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001). Likewise, a witness's reference to a defendant's demeanor cannot be

construed as naturally and necessarily referring to the defendant's exercise of his Fifth Amendment right to remain silent. See State v. Barry, 183 Wn.2d 297, 306-07, 352 P.3d 161(2015). A reviewing court should examine "the nature of the statement and the context in which it was offered... to determine the presence of error." United States v. Elkins, 774 F.2d 530, 537-38 (1st Cir. 1985), quoted in Barry, 183 Wn.2d at 308.

Here, it is clear from the excerpted testimony reprinted *supra* that Det. Sevaaetasi was explaining Ho's manner and conduct while in custody and participating in an interview, as opposed to commenting on an exercise by Ho of his Fifth Amendment right to silence in response to interrogation or advisement. Sevaaetasi was simply describing Ho's blasé demeanor, following his arrest on suspicion of a violent offense, when asked in an interview room at police headquarters to state where he had been on the night of the crime.

The cases to which Ho tries to equate Det. Sevaaetasi's testimony are inapposite. In State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004), the case detective was far more explicit in his suggestion that the defendant's failure to proclaim his innocence was suspicious. See Holmes, 122 Wn. App. at 442 (quoting

detective: "When he was advised what the charge was, there wasn't any kind of denial or something that I would normally expect to see."). Here, in contrast, Det. Sevaaetasi described Ho's "attitude" of nonchalance, i.e., a lack of concern altogether about being in custody, as opposed to an absence of an expression of blamelessness, and observed that Ho's demeanor was "not at all unusual." 9RP 98. Furthermore, whereas in Holmes the deputy prosecutor emphasized the detective's comment in closing argument, here there is no suggestion that the State made any reference to Det. Sevaaetasi's observation. See Holmes, 122 Wn. App. at 442-43.

Similarly, in State v. Pinson, 183 Wn. App. 411, 333 P.3d 528 (2014), the detective specifically noted during his testimony that the defendant "became quiet" when their conversation turned to the specifics of the alleged crime, and the deputy prosecutor expressly noted in closing argument that the defendant's silence was "evidence of his guilt." Pinson, 183 Wn. App. at 414-15. Here, there was no parallel description of Ho as somehow "clamming up" while being questioned, and no exploitation of such an event in closing argument.

United States v. Velarde-Gomez, 269 F.3d 1023 (9th Cir. 2001), also involves far more direct testimony regarding a defendant's *silence*, as opposed to manner and behavior, when being questioned. In that case, a U.S. Customs agent testified that when he told Velarde-Gomez that he had found 63 pounds of marijuana in his car's gas tank, the defendant had "no response," said nothing, and did not deny knowledge of the drugs. Velarde-Gomez, 269 F.3d at 1027. In contrast, here Det. Sevaaetasi was describing Ho's and Contreras's seeming disinterest in their then-current status as arrestees, as well as their *answers* to questions, as opposed to their exercise of their right to avoid self-incrimination. Moreover, as in Holmes and Pinson, the prosecutor in Velarde-Gomez highlighted the defendant's silence as probative of his culpability, unlike here. Id. at 1028.

Just as Det. Sevaaetasi's testimony did not infringe Ho's Fifth Amendment right to silence, it also did not amount to an expression of opinion on Ho's guilt. Such testimony can amount to a violation of a defendant's Sixth Amendment right to trial by jury. See State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, opinion testimony as to a defendant's *conduct* is admissible if it is prefaced with proper foundation: personal

observations of the defendant's conduct, factually recounted by the witness, directing supporting the witness's conclusion. State v. Stenson, 132 Wn.2d 668, 724, 940 P.2d 1239 (1997).

Here, it is difficult to see how Det. Sevaaetasi's statement can be interpreted as a judgment of Ho's culpability. He expressed no conclusions about Ho on the basis of the defendant's coolness to being arrested and interrogated. He did not describe Ho's detachment as indicative of anything in particular, explaining that Ho neither proclaimed his innocence nor admitted his guilt. Det. Sevaaetasi simply pointed out his personal observation that Ho was seemingly unconcerned about being at a police station. 9RP 97-98. Given that the State's evidence established that Ho was a long-standing gang member with prior contact with law enforcement,[6] the jury was unlikely to interpret Det. Sevaaetasi's description as anything other than that of a person familiar with police interaction.

Det. Sevaaetasi's remarks stand in ready distinction from those at issue in State v. Haga, 8 Wn. App. 481, 507 P.2d 159 (1973), a case on which Ho relies. In Haga, a paramedic testified that the defendant showed no grief following the death of his wife,

[6] 14RP 22, 29.

and made no efforts to assist in the medic's life-saving efforts. Haga, 8 Wn. App. at 490. The paramedic explained that the defendant's behavior was notably unusual compared to the conduct and demeanor of other spouses of dying individuals he had encountered in the past. Id. This Court held that this testimony was problematic because the paramedic was permitted to testify as an expert on bereavement response, when there was no such area of expertise, and his statements carried the inescapable implication that Haga had caused his wife's death. Id. at 491-92.

Here, in contrast, Det. Sevaaetasi was testifying from his direct observation of Ho's demeanor that supported his conclusion that Ho appeared indifferent to his circumstances. Neither the detective nor the State purported to establish that the detective was any sort of expert witness on the subject of proper reactions to being arrested. Moreover, the detective's testimony carried no implicit suggestion as to his belief of Ho's guilt; rather it was merely a conclusion that Ho did not appear to be flustered by being arrested and interrogated. This Court has upheld the admission of similar testimony in the past, rejecting assertions that such evidence is akin to that deemed inappropriate in Haga. See, e.g., State v. Allen, 50 Wn. App. 412, 749 P.2d 702 (1988).

Finally, even if this Court were to conclude that the admission of Det. Sevaaetasi's somewhat oblique testimony touched on Ho's constitutional rights, it is still readily apparent that he fails to demonstrate actual prejudice warranting this Court's review despite the absence of a timely objection. Det. Sevaaetasi's remarks were limited to a few moments of testimony in a lengthy trial, and are not nearly as patently suggestive as the statements elicited from witnesses in the cases that Ho has relied upon. Unlike those cases, in which the witnesses' testimony carried the unavoidable insinuation that the defendant either exercised his right to remain silent in order to deflect his guilt or behaved in a manner wholly inconsistent with an innocent person, here the detective's testimony suggested only that Ho did not appear to be shocked to be in police custody, and that the detective did not find this to be unusual. As discussed *supra*, given the jury's appropriate awareness of Ho's history of gang participation and encounters with police, Det. Sevaaetasi's testimony does not carry the same sting that was present in these other cases.

Furthermore, the jurors were properly instructed that they were the sole judges of credibility, that the defendants' refusal to testify could not be used to infer guilt, and that the opinions of

expert witnesses need not be blankly accepted. CP 76, 81, 84. Proper instructions are critical to the determination of whether opinion testimony unfairly prejudiced a defendant. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

Lastly, Ho can point to no attempt by the State in closing argument to remind the jury of this aspect of Det. Sevaaetasi's testimony and/or contend that it was probative of Ho's guilt. Instead, the State focused on the testimony of Lawrence West, the victim who was struck by gunfire; the physical evidence recovered at the scene and from the vehicles belonging to Contreras's mother and an associate of Ho's and Contreras's gang; other witnesses' descriptions of the events on July 22, 2012; and abundant proof of motive in the form of a long-standing, violent dispute between the gangs that the victims and defendants belonged to. 13RP 16-35.

For the same reason – i.e., the absence of prejudice – Ho's claim that his counsel was constitutionally ineffective for failing to object is also defective. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (setting forth the two-prong test for performance and prejudice when determining whether counsel provided ineffective assistance); Petition of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993) (restating that failure to

establish one prong is fatal, and the reviewing court need not consider the other prong).

Ho can neither establish plain error of constitutional magnitude nor the degree of prejudice that would justify review of his claim despite his failure to object at trial. The lack of substantial injury similarly defeats his claim of ineffective assistance of counsel. Ho's claims should be denied.

4. THE ASSAULTS ON THE VICTIMS AMOUNTED TO A CONTINUING COURSE OF CONDUCT, NEGATING THE NEED FOR A UNANIMITY INSTRUCTION.

Ho next contends that his right to a unanimous jury was violated because the trial court failed to instruct the jurors that they need to unanimously agree on which act of assault was proved beyond a reasonable doubt. He asserts that two separate incidents occurred – at the intersection of Beacon Ave. S. and S. Spokane Street, where the shooting commenced, and in the area of 22nd Ave. S. and S. Lucille St., where it ended – and that each was a stand-alone event that could have justified his conviction. Ho argues that in the absence of an instruction modeled on the state supreme court's decision in State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), his convictions for assault cannot stand.

Ho's contention is without merit. A Petrich instruction is not required where multiple acts are so closely related as to amount to a continuing course of conduct. Here, Ho and his associates engaged in an uninterrupted effort to chase down and shoot rival gang members. In other words, Ho was an active participant in a single enterprise. Under the circumstances, a unanimity instruction was unwarranted.

The determination of whether a unanimity instruction is needed depends on whether a prosecution constitutes a "multiple acts case." State v. Locke, 175 Wn. App. 779, 802, 307 P.3d 771 (2013). Courts are required to distinguish, however, between one continuous offense and several distinct acts, each of which could be the basis for the charged crime(s). Locke, 80 Wn. App. at 802-03. A unanimity instruction is not required when the State's evidence shows that the several acts indicate a "continuing course of conduct," defined as an "ongoing enterprise with a single objective." Id. at 803, quoting State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). To determine whether multiple acts constitute a continuing course of conduct, the reviewing court evaluates the facts of the case in a commonsense manner. Locke, 175 Wn. App. at 803; see also Love, 80 Wn. App. at 361 (noting

that evidence of conduct at different times and places and involving different victims suggests an absence of a single-minded enterprise).

Ho's claim defies common sense. He asserts that a unanimity instruction was required because his group began firing bullets at their victims at one intersection but then resumed shooting at a different location. He ignores the fact that the purported "break in the action" amounted to the victims' unsuccessful attempt to flee from the initial shooting. Ho maintained an uninterrupted pursuit of the fleeing victims, and then continued his and his comrades' fusillade after the victims' vehicle crashed. As SPD officers told the jury, a report of shots fired at the intersection of Beacon Ave. S. and S. Spokane St. was quickly updated to the nearby area of 22nd Ave. S. and S. Lucille St. By the time responding officers arrived at the second location, Ho and his associates had already completed their assaults and fled from the scene. 6RP 65-68; 7RP 71-76.

Lawrence West explained in detail how he and his friends were initially attacked by Ho and his associates, then were pursued by them in a high-speed car chase, and were again shot at in a compressed period of time. It challenges logic to suggest that this

unbroken episode of attack was, in actuality, a sequence of events with separate and definitive beginning and end points.

This Court has recognized, in Love, that the continuing course of conduct exception to State v. Petrich is applicable to multiple acts of assault. See Love, 80 Wn. App. at 361. Common sense compels the conclusion that Ho's group attack on the named victims in this case was an uninterrupted, ongoing enterprise with a single objective that occurred in a very short period of time during the course of a pursuit. It is little wonder that neither Ho's counsel, nor his co-defendant's, sought a Petrich instruction under these circumstances.

5. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT.

Lastly, Ho accuses the State of committing misconduct in closing argument in two instances. First, he asserts that the deputy prosecutor engaged in deliberate wrongdoing in her initial remarks when she told the jury that "[w]e only know for certain two of the individuals that were shooting that night. That was Mr. Contreras and Mr. Ho." 13RP 15-16. Ho contends that, in this remark, the deputy prosecutor effectively vouched for the credibility of Lawrence West, and also represented a calculated effort by the

prosecutor to align the State and the jury together against him. Ho asserts that this remark was so flagrant and ill-intentioned that it could not have been remedied by a curative instruction, thus enabling him to seek appellate relief despite his failure to object at trial.

Ho also argues that the prosecutor committed reversible misconduct during her rebuttal, when she told the jury that both defense attorneys "have gone through in their closing and tried to explain away or dismiss every single piece of the State's evidence. But it gets to a point where you lose – where it becomes nonsensical." Despite the fact that the trial court overruled an objection by his attorney to this statement, Ho nevertheless maintains that the prosecutor improperly disparaged his attorney's role as defense counsel with this requirement, causing such prejudice that a new trial is required.

Ho's contentions should be rejected. In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict.

Id. A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Id. If defense counsel fails to object to the prosecutor's statements, then reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction would have cured the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Although it is improper for a prosecutor to personally vouch for a witness's credibility, a prosecutor may argue inferences from the evidence, and a reviewing court cannot find prejudicial error unless "it is 'clear and unmistakable' that counsel is expressing a personal opinion." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), quoting State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

Even within the circumscribed context of the unobjected-to remark here, it is far from unmistakable that the prosecutor was vouching for Lawrence West's credibility. The prosecutor makes no overt, direct references to West's believability or offer any personal estimation. Rather, the prosecutor notes that evidence pointing to the involvement of Ho and Cervantes as two of a group of shooters

targeting rival gang members included West's testimony, physical evidence, cell phone records, and ballistics analysis, along with proof of obvious motive. 13RP 16-17. Furthermore, the prosecutor shortly thereafter reminded the jury that it was its job to assess witness credibility. 13RP 18.

In addition, it is difficult to understand how the prosecutor's one usage of the term "we" in the course of a lengthy argument connoted a flagrant and ill-intentioned attempt to engender the jury's loyalty, as opposed to amounting to a meaningless choice of pronoun. The sole Washington case on which Ho relies, State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), is readily distinguishable. Reed involved a prosecution's closing argument that was rife was outrageous remarks; the prosecutor repeatedly called the defendant a liar and asked the jurors to refuse to "let a bunch of city lawyers... and city doctors who drive down here [i.e., Pacific County] in their Mercedes Benz" influence their decision. Reed, 102 Wn.2d at 143-44.

To equate the remarks by the prosecutor in Reed with the single collective first-person reference in this case is spurious. The prosecutor's statement here was innocuous and had none of the loaded, inflammatory nature of the closing argument in Reed, which

was a direct plea for sympathy by the prosecutor on the basis of insider-outsider status. It was a relatively meaningless choice of term used only to re-introduce the jury to the wealth of evidence pointing to the culpability of Ho and his co-defendant. Furthermore, any risk that the jury would have erroneously construed the prosecutor's one-time choice of words here could have readily been remedied with a curative instruction had one been sought.

Comparison of the prosecutor's argument in Reed with the State's closing remarks here also shows the deficiency of Ho's claim that the State disparaged his attorney's role in the trial. Not only did the prosecutor in Reed malign opposing counsel because he was an urbanite, as opposed to "down here in the woods," he also told the jury that it must have been irritating for defense counsel to represent the defendant "when you don't have anything." Reed, 102 Wn.2d at 143. The prosecutor further suggested "most all trial lawyers" make disparaging comments for shock value. Id.; see also State v. Thorgerson, 172 Wn.2d 438, 466, 258 P.3d 43 (2011) (questioning the suitability of a prosecutor's description of defense counsel's strategy as "sleight of hand"); State v. Negrete, 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (criticizing prosecutor for

arguing that the defendant's lawyer was "being paid to twist the words of the witnesses.").

As the Thorgerson court observed, it is not misconduct, in contrast, for a prosecutor to argue that the evidence does not support the defense's theory of the case. Thorgerson, 172 Wn.2d at 465-66 (observing that even "isolated remarks calling defense arguments 'bogus' and desperate," while strong and perhaps close to improper, do not directly impugn the role or integrity of counsel, and such isolated comments are unlikely to amount to prosecutorial misconduct."). In other words, defense counsel's arguments are open to a prosecutor's appraisal, which is precisely what occurred in this case. The deputy prosecutor, on rebuttal, simply criticized the merits of the *closing arguments* of both defense attorneys, rather than the attorneys qua attorneys. There was neither direct disparagement nor even a clear effort to depict defense counsel's strategy as deceptive. The prosecutor merely observed that both defense attorneys had beseeched the jurors to treat each piece of evidence in isolation, as opposed to in their totality, and that absurd results would follow were the jury to follow opposing counsel's request. The trial court properly overruled the objection made by Ho's attorney, and Ho makes little effort to demonstrate that the

prosecutor's remark so tainted the proceedings that this Court should lack confidence in the propriety of the outcome of the trial.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Douglas Ho's convictions and his judgment and sentence.

DATED this 4th day of January, 2016.

RESPECTFULLY submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kathryn Russell Selk, containing a copy of the Brief of Respondent, in STATE V. DOUGLAS HO, Cause No. 72497-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

01-04-16
Date

Done in Seattle, Washington