No. 46093-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Hernandez,

Appellant.

Pierce County Superior Court Cause No. 13-1-02943-1

The Honorable Judge Garold Johnson

Appellant's Reply Brief

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I. MR. HERNANDEZ'S CONVICTION RESTED ON EVIDENCE THAT HE EXERCISED HIS RIGHT TO REMAIN SILENT.

A suspect's post-*Miranda* invocation of the right to remain silent is not admissible for any purpose. *State v. Pinson*, 44259-1-II, 2014 WL 4358461, --- Wn. App. ---, --- P.3d --- (Sept. 3, 2014) (*citing State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)). Once an improper comment on an accused person's silence has been made, "the bell is hard to unring." *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004).

A. Officer Volk's direct comment on Mr. Hernandez's post-*Miranda* invocation of his right to remain silent violated that right.

Officer Volk directly commented on Mr. Hernandez's post-*Miranda* exercise of his Fifth Amendment privilege. RP 226-227. This direct comment infringed Mr. Hernandez's right. *Holmes*, 122 Wn. App. at 445. The trial court's attempt to cure the error could not unring the bell. RP 227, 230; *Holmes*, 122 Wn. App. at 446.

Furthermore, the prosecutor eliminated any curative effect by twice alluding to Mr. Hernandez's exercise of his right to remain silent during closing argument. RP 373. Even so, the state erroneously argues that "the statement was not brought up during closing." Brief of Respondent, p. 11. The record contradicts this claim. RP 373.

Volk's direct comment on Mr. Hernandez's post-*Miranda* exercise of his privilege against self-incrimination violated his rights under the Fifth and Fourteenth Amendments. *Holmes*, 122 Wn. App. at 445. Mr. Hernandez's convictions must be reversed. *Id.*

B. The prosecutor's misconduct prejudiced Mr. Hernandez.

A prosecutor commits misconduct and violates the privilege against self-incrimination by arguing that constitutionally protected silence constitutes evidence of guilt. *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). Here, the prosecutor committed misconduct by twice commenting on Mr. Hernandez's "failure" to speak in his defense after his arrest. RP 373. The state's attorney continued with the improper argument even after the court sustained Mr. Hernandez's first objection. RP 373. The state appears to concede that the argument was improper. Brief of Respondent, p. 16. Still, Respondent claims that reversal is not required because Mr. Hernandez cannot demonstrate prejudice. Brief of Respondent, pp. 16.

Prosecutorial misconduct prejudices the accused if there is a substantial likelihood that the jury's verdict was affected.[1] *In re*

[1] The state argues that an "abuse of discretion" standard of review applies because Mr. Hernandez moved for a mistrial. Brief of Respondent, pp. 14 -15 (*citing State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), *as corrected* (Dec. 22, 2006) *overruled in part on other grounds by State v. W.R., Jr.*, --- Wn.2d---, 336 P.3d 1134 (Wash. 2014).). This is

Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here, the state argues that Mr. Hernandez cannot show prejudice because there was *some* evidence that he was the driver of the car. Brief of Respondent, p. 16.

But the prosecution's evidence was slim. Furthermore, the state's eyewitness testimony was undermined by indications that the eyewitnesses did not accurately perceive the interior of the vehicle. RP 164-65, 201. Additionally, both the prosecutor and a police witness had already commented on Mr. Hernandez's exercise of his right to silence during the presentation of testimony.[2] RP 227-30. Finally, the prosecutor's comments in closing undid any curative effect of the court's prior instruction.

The prosecutor encouraged the jury to infer from Mr. Hernandez's post-*Miranda* "silence" that he had been the driver of the car.[3] There is a

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incorrect. *Gregory* does not support the prosecutor's argument. In *Gregory*, the Supreme Court upheld the trial court's decision to overrule the defendant's objection. *Id.* Here, neither party contests the trial court's ruling on the objection. Brief of Respondent, p. 16. The issue of prejudice is properly analyzed under the traditional standard for prosecutorial misconduct. *See Glassman*, 175 Wn.2d at 704. Indeed, a holding to the contrary would *discourage* defendants from seeking a mistrial in hope of a more favorable standard on appeal.

[2] The court had already attempted to cure this error. RP 227-30.

[3] The misconduct was particularly egregious because it contradicted facts known to the prosecutor. Mr. Hernandez actually did speak up at some point (despite his invocation of his rights). He told the police that he'd been a passenger, and had just been picked up at 7-11. RP 9-10. Accordingly, the prosecutor's misconduct, in addition to violating Mr. Hernandez's constitutional rights, appears to have been a deliberate attempt to mislead the jury.

substantial likelihood that the improper argument affected the outcome of Mr. Hernandez's trial. *Glasmann*, 175 Wn.2d at 704.

The state committed prejudicial misconduct by making repeated comments on Mr. Hernandez's post-*Miranda* exercise of his right to remain silent. *State v. Silva*, 119 Wn. App. 422, 429, 81 P.3d 889 (2003); *Knapp*, 148 Wn. App. at 420. Mr. Hernandez's convictions must be reversed. *Id.*

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO PRESENT CRITICAL EXCULPATORY EVIDENCE.

A. Defense counsel's performance was deficient.

The primary and most crucial aspect of the right to confront adverse witnesses is the right to conduct meaningful cross-examination of adverse witnesses *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The due process clause (along with the Sixth Amendment right to compulsory process) also guarantees criminal defendants a meaningful opportunity to present a complete defense. U.S. Const. Amends. VI; XIV; Wash. Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

Here, Mr. Hernandez told the police that he was a passenger in the car, and that the car was going 70-100 mph. RP 234. But the jury only

heard his statement about the car's speed. RP 234. The prosecutor used these statements (and the "lack" of any exculpatory statements) as proof that Mr. Hernandez had been the driver. RP 373.

The exculpatory portions of Mr. Hernandez's statements were admissible under the common law rule of completeness and ER 106. Defense counsel should have introduced them to place the other statements in context.

Under the common law rule of completeness, "when a confession is introduced, the defendant has the right to require that the whole statement be placed before the jury." *State v. Stallworth*, 19 Wn. App. 728, 734-735, 577 P.2d 617 (1978). The rule's purpose "is 'to prevent a party from misleading the jury.'" *U.S. v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004) (quoting *United States v. Wilkerson,* 84 F.3d 692, 696 (4th Cir. 1996)). The common law rule survives despite partial codification under ER 106. *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

This common law rule applies to oral, written, and recorded statements. *State v. Larry*, 108 Wn. App. 894, 909-910, 34 P.3d 241 (2001), *review denied,* 146 Wn.2d 1022 (2002) (*adopting the reasoning in United States v. Lewis*, 954 F.2d 1386, 1392 (7th Cir. 1992)). The state argues that ER 106 applies only to written or recorded statements. Brief

of Respondent, p. 20. Respondent does not respond to Mr. Hernandez's arguments regarding the common law rule of completeness. Nor does Respondent does not address Mr. Hernandez's constitutional arguments. The state's formalistic reliance on the language ER 106 is misplaced. *Larry*, 108 Wn. App. at 909-910.

The introduction of Mr. Hernandez's statement related to the car's speed was designed to mislead the jury. As outlined at length in Mr. Hernandez's Opening Brief, the exculpatory portions of his statement were admissible under the common law rule of completeness. *State v. Alsup*, 75 Wn. App. 128, 133-134, 876 P.2d 935 (1994); *United States v. Velasco,* 953 F.2d 1467, 1475 (7th Cir. 1992). Admission of the balance of the statement was also necessary in order for Mr. Hernandez to adequately confront the state's witnesses and to put on a defense. *Darden*, 145 Wn.2d at 620; *Holmes* 547 U.S. at 324.

Mr. Hernandez's defense attorney provided ineffective assistance. Counsel should have contested the state's motion to exclude exculpatory portions of his client's statement. RP 10; *Stallworth*, 19 Wn. App. at 734-735. The exculpatory portions were essential to put the other portions context, and were admissible under the common law rule of completeness and ER 106. *Id.; State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RP 10.

B. Counsel's deficient performance cannot be justified as part of a reasonable strategy.

In order to excuse otherwise deficient performance, a tactical decision on the part of defense counsel must be reasonable. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). Counsel's failure to contest the state's motion was not part of a reasonable strategy.

The entire defense theory in Mr. Hernandez's case was that he was not the driver of the car. RP 381-402. Still, Respondent argues that defense counsel's decision was based on strategy. According to Respondent, counsel failed to contest the state's motion to exclude the exculpatory evidence because counsel intended to rely on the testimony of another witness to establish that Mr. Hernandez had not been the driver. Brief of Respondent, pp. 20-21.

This alleged "strategy" was not reasonable. That other witness never testified at trial. *See* RP *generally*. Neither the state nor the defense called her to the stand. *See* RP *generally*. The existence of a non-testifying witness cannot excuse Mr. Hernandez's attorney's failure to present readily-available exculpatory evidence. This is especially true where the evidence would have put Mr. Hernandez's "confession" in context. Defense counsel had no valid tactical reason for waiving admission of the exculpatory portions of Mr. Hernandez's statement to

police. *Saunders*, 91 Wn. App. at 578. If counsel's strategy did revolve around the testimony of the non-testifying witness, that strategy was not reasonable.[4] *Grier*, 171 Wn.2d at 34.

C. The deficient performance prejudiced Mr. Hernandez.

Defense counsel's deficient performance requires reversal if there is a reasonable probability that it affected the outcome of the trial. *Kyllo*, 166 Wn.2d at 862. Here, the state argues that Mr. Hernandez cannot show prejudice because the state presented *some* evidence that he was the driver of the car. Brief of Respondent, pp. 21-22. But the state's evidence only highlights the need for admission of Mr. Hernandez's statement that someone else had been driving. Without Mr. Hernandez's exculpatory statement, his assertion that the car was going 70-100 mph sounded like a confession – a boast about how fast he was driving. Indeed, the prosecutor argued the point extensively in closing. RP 373. The argument was facilitated by counsel's failure to introduce the exculpatory portions of the statement. RP 373. Mr. Hernandez was prejudiced by his

[4] The state also argues that Mr. Hernandez received effective assistance of counsel because he points only to one failure on the part of his attorney. Brief of Respondent, p. 21. But there are numerous examples of cases reversing for ineffective assistance based on a single critical error on the part of defense counsel. *See e.g. State v. Fedoruk*, No. 43693-1-II, 2014 WL 6944787, at *6, --- Wn. App. ---, --- P.3d --- (Dec. 9, 2014); *State v. Hassan*, --- Wn. App. ---, 336 P.3d 99, 105 (October 21, 2014); *Kyllo*, 166 Wn.2d at 862. The analysis looks not to the quantity of counsel's errors, but whether there is a reasonable probability that the error affected the outcome of the trial. .*Kyllo*, 166 Wn.2d at 862.

attorney's failure to place his statement about the car's speed in its vital context. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance by failing to introduce the exculpatory portions of Mr. Hernandez's statement. Mr. Hernandez's convictions must be reversed. *Kyllo*, 166 Wn.2d at 862.

III. THE COURT'S TO-CONVICT INSTRUCTION PERMITTED CONVICTION ABSENT PROOF OF EACH ELEMENT OF THE CHARGED CRIME.

A to-convict instruction violates due process if it permits conviction absent proof of each element of a charged offense. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The court's instruction in this case suffered from that flaw.

The court instructed the jury that it could convict Mr. Hernandez for possession of a stolen vehicle if they found that he "knowingly received, retained, possessed, or disposed of a stolen motor vehicle." CP 38. But that language defines the offense of possession of stolen property. RCW 9A.56.140(1); *Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship*, 163 Wn. App. 531, 538-539, 260 P.3d 906 (2011) *review denied,* 173 Wn.2d 1036, 277 P.3d 669 (2012). Possession of a stolen vehicle, on the other hand, criminalizes only possession. RCW 9A.56.068.

The state does not contest that court's instruction inaccurately enumerated the elements of possession of a stolen vehicle. Brief of

Respondent, pp. 22-24. Respondent's failure to present argument on this issue may be treated as a concession.[5] *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, the state argues only that the instruction is proper because a person cannot "dispose" of a vehicle without first "possessing" it. Brief of Respondent, p. 23. But Respondent also acknowledges that a passenger in a car could dispose of a vehicle by running from it after an accident. Brief of Respondent, p. 26. That is exactly what was at issue in this case. Mr. Hernandez's defense theory was that he was not the driver of the car, but that he did climb out and flee after the driver got into an accident. Under the court's to-convict instruction and the facts of the case, the jury could have convicted Mr. Hernandez for "disposing" of the car, even if he was not the driver, and therefore did not actually possess it.

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[5] The state argues instead that the court should not review this issue because it does not constitute manifest error affecting a constitutional right. Brief of Respondent, pp. 23-24. But the violation of Mr. Hernandez's right to due process constitutes constitutional error. *Mills*, 154 Wn.2d 1.

Additionally, an error is manifest if it "actually affected [the defendant's] rights at trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). To secure review, an appellant need only make "*a plausible* showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *Id.* (emphasis added). The appellant must show that the trial judge could have foreseen and corrected the error and that the record contains sufficient facts to review the claim. *Id.* Here, the court could have foreseen this error by simply reviewing the statutes related to the offense of possession of a stolen vehicle. Likewise, all of the necessary facts are in contained in the jury instructions themselves. Review is appropriate under RAP 2.5(a)(3).

An improper jury instruction affecting a constitutional right requires reversal unless the state can demonstrate beyond a reasonable doubt that it did not contribute to the verdict. *State v. Montgomery*, 163 Wn.2d 577, 600, 183 P.3d 267 (2008). Here, the state argues only that the error was harmless because there was some evidence that Mr. Hernandez drove the car. Brief of Respondent, pp. 22-23.

This evidence was not overwhelming. Furthermore, it was undermined by indications that the state's witnesses either did not see or did not accurately remember who was actually in the car. RP 164-65, 201. Under the court's to-convict instruction, the jury could have disbelieved the state's evidence, found that Mr. Hernandez was a passenger in the car, and still convicted him of possession of a stolen vehicle based on his "disposal" of the vehicle. Mr. Hernandez was prejudiced by the to-convict instruction's misstatement of the elements of the offense.

The court's instructions violated Mr. Hernandez's right to due process by permitting conviction even if the state did not prove each element of the charge. *Mills*, 154 Wn.2d at 6. Mr. Hernandez's conviction for possession of a stolen vehicle must be reversed. *Id.*

IV. MR. HERNANDEZ'S CONVICTION FOR POSSESSION OF A STOLEN VEHICLE VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT.

Mr. Hernandez relies on the argument set forth in his Opening Brief.

V. THE INFORMATION FAILED TO INCLUDE CRITICAL FACTS NECESSARY FOR MR. HERNANDEZ TO PREPARE A DEFENSE OR TO DEFEND AGAINST SUBSEQUENT PROSECUTION FOR THE SAME OFFENSE.

The language charging a crime must include more than "the elements of the offense intended to be charged." *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted). The language of the statute "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." *Id.* (citations and internal quotation marks omitted). The language must be specific enough to allow the defendant to plead the former acquittal or conviction if subsequently charged for the same offense. *Id.*

The Information charging Mr. Hernandez contains no critical facts. CP 1. Still, the state argues that the language is sufficient because it includes each element of the crime. Brief of Respondent, pp. 6-8. Respondent misapprehends the constitutional requirements set forth in *Russell.* Respondent does not address the requirement that an Information charge facts as well as legal elements. *See Russell*, 369 U.S. at 763-64.

Any "critical facts must be found within the four corners of the charging document." *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). Still, the state argues that the Information was constitutionally sufficient because the necessary facts were included in the Declaration of Probable Cause. Brief of Respondent, p. 8. But the probable cause statement is not within the four corners of the charging document. Again, Respondent misinterprets the constitutional standard. *Id.*

In cases involving stolen property, the Information need not name the owner of the property, but must "clearly" charge the accused person with a crime relating to "specifically described property." *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). A charging document is constitutionally deficient if it includes "not a single word to indicate the nature, character, or value of the property." *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920). Here, the Information does not include any description of the stolen vehicle Mr. Hernandez was alleged to have possessed. CP 1.

Where the Information is deficient, no prejudice need be shown. *State v. Kjorsvik*, 117 Wn.2d 93, 106, 812 P.2d 86 (1991).[6] Respondent

[6] The accused must only demonstrate actual prejudice resulting from an insufficient charging document if the necessary facts appear, or can be found by fair construction, in the charging document. *Id.*

does not claim that the Information includes facts identifying the stolen car. Nor does Respondent outline any reasonable construction of the Information that meets this requirement. Brief of Respondent, pp. 6-8. Still, the state argues that the conviction should be affirmed because Mr. Hernandez cannot demonstrate prejudice. Brief of Respondent, p. 8. But the court need not find actual prejudice if the necessary facts do not appear in the Information. *Id.* The state's argument is without merit.

The Information is constitutionally deficient because it does not allege unlawful possession of "specifically described property." *Greathouse*, 113 Wn. App. at 903. Mr. Hernandez's conviction for possession of a stolen vehicle must be reversed, and the charge dismissed without prejudice. *State v. Rivas*, 168 Wn. App. 882, 893, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013).

VI. THE COURT VIOLATED MR. HERNANDEZ'S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPOSING ATTORNEY'S FEES IN A MANNER THAT IMPERMISSIBLY CHILLS THE EXERCISE OF THAT RIGHT.

Mr. Hernandez relies on the argument set forth in his Opening Brief.

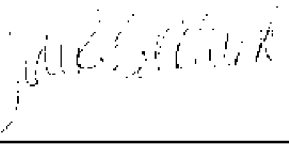
CONCLUSION

For the reasons set forth above and in Mr. Hernandez's Opening Brief, Mr. Hernandez's conviction must be reversed and the order for him

to pay attorney's fees must be vacated.

Respectfully submitted on December 23, 2014,

BACKLUND AND MISTRY



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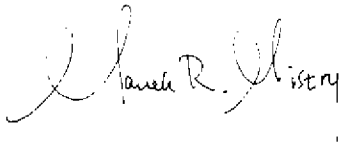

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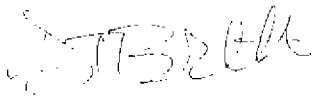

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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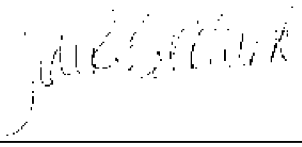

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