

Original

NO. 34328-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

COREY LAMONT THOMAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson
The Honorable James Orlando
The Honorable Lisa Worswick
The Honorable Sergio Armijo

No. 05-1-02436-6

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the prosecutor committed misconduct during the State's case-in-chief or during closing argument?
2. Did the trial court properly instruct the jury where defendant was not entitled to a unanimity instruction for the crime of obstructing a law enforcement officer where the State did not assert multiple acts to support a single charge?
3. Has defendant failed to show that he was deprived of his Sixth Amendment right to counsel where he could not satisfy either prong of the Strickland test?

B. STATEMENT OF THE CASE.

1. Procedure

On May 18, 2005, the State charged COREY LAMONT THOMAS, hereinafter "defendant," with one count of burglary in the second degree (RCW 9A.52.030(1)), one count of making or having burglar tools (RCW 9A.52.060(1) and 9A.52.060(2)), and one count of obstructing a law enforcement officer (RCW 9A.76.020(1)), in Pierce

County Superior Court Cause number 05-1-02436-6. CP¹ 1-3. Defendant had two other criminal cases proceeding at the same time, filed under Cause numbers 05-1-04407-3 and 05-1-04377-8. RP (09/27/05) 2-3.

The court granted several continuances on behalf of defense counsel, over defendant's objection. RP (09/27/05) 4; RP (10/19/05) 1; (10/24/05) 13-14; (11/21/05) 15-18. The court also granted defendant's request to proceed pro se. RP (09/27/05) 7. However, defendant later requested counsel, and the court denied his following, equivocal, requests to proceed pro se. RP (10/04/05) 5-7, 13; RP (10/19/05) 6, 10; RP (11/21/05) 18-20; RP (11/29/05) 22, 30. Finally, the court allowed defendant to represent himself for cause numbers 05-1-04407-3 and 05-1-04377-8. RP (01/03/06) 3, 7-22. Defendant continued to be represented by counsel in this case. RP (01/03/06) 22.

On February 7, 2006, the court held a 3.5 hearing to determine whether defendant's pre- and post-arrest statements to police were admissible. RP 61. Specifically, the State argued that defendant's statement of, "I give up," at the time of his arrest, and his attempts to retrieve his keys from the police station after he posted bail were

¹ Citations to Clerk's Papers will be to "CP." Because the verbatim reports of proceedings for the pretrial conferences are not sequentially numbered, citations to pretrial hearings will be to "RP," followed by the date of the hearing in parenthesis. For example, citations to the pretrial hearing held on September 27, 2005, will be to RP (09/27/05) page. Trial began on February 7, 2006, with a 3.5 hearing immediately preceding. The 3.5 and trial transcripts are sequentially numbered beginning with page 60, and will be cited as "RP".

voluntary. RP 97. Defendant claimed that these statements were not admissible because they were not relevant. RP 96-97. The court heard from Community Service Officer Gail Conelly, Sergeant Ryan Larson, Detective Les Bunton, and Officer Russell Martin regarding defendant's statements. RP 61, 68, 80, 90. The court ruled that all the statements were voluntary, were made on defendant's own terms, and were admissible. RP 98-99.

Trial proceeded directly after the 3.5 hearing before the Honorable Sergio Armijo, and continued through February 13, 2006. RP 100, 403. The jury returned guilty verdicts on all three counts. CP 139-41; RP 453.

The court sentenced defendant to a high end, standard range of 22 months for the burglary count, and 365 days with 365 suspended for the combined misdemeanor charges. CP 167-78, 183-88. Defendant's sentence for these crimes was to run concurrent with an exceptional 75 month sentence on an unrelated assault charge. RP 460.

2. Facts

On May 17, 2005, at approximately 4:15 a.m., Troy White was driving in Lakewood, Pierce County, Washington, when he noticed a man standing outside the S & P Smoke Shop, located at 8203 South Tacoma Way. RP 119, 157. As he passed the front of the business, Mr. White heard a loud shout, saw the door kick open, and watched three people run

out of the smoke shop. RP 157. Mr. White did not stop, but called 911 on his cell phone. RP 157.

Lakewood police officers Brian Wurts and David Butts responded to the 911 call. RP 160, 332. The officers saw a mini van make a U-turn in front of the smoke shop and they followed the van. RP 161-62, 333. When they caught up to the van, Officer Wurts activated the squad car's lights and the van pulled over. RP 162, 333. The officers got out of the car and approached the van from both sides. RP 162. Both officers saw large containers in the back of the van. RP 163, 333.

Just as the officers reached the rear bumper of the van, it sped off. RP 164, 334. The officers believed that the van contained the burglary suspects and returned to their squad car to give chase. RP 164, 335.

Officer Wurts activated the sirens while Officer Butts called for back up. RP 164, 335. The driver of the mini van lost control of the vehicle while taking a tight corner at a high rate of speed. RP 166. The van went through a chain link fence surrounding a private yard, and worked its way back to South Tacoma Way, where it came to an abrupt stop. RP 166. Officer Wurts pinned the driver's door shut with the squad car and the officers saw two men exit the other side of the van. RP 166-67, 337. Officer Wurts apprehended a third man, Jamelle Stevens, while he was struggling to exit the van. RP 168. Officer Butts observed the other two suspects running south and began to set up a containment area. RP 167, 169.

Lakewood police officer Russell Martin arrived with his K-9 partner, Bo. RP 101, 105. Officer Martin contacted Officer Butts, who showed him where the suspects were last seen. RP 107, 339. Bo caught a scent and tracked it through several private yards before catching up to defendant, approximately five minutes later. RP 108-09, 112, 339. Officer Martin was holding Bo for the entire track and never released him. RP 111-12.

When Bo found defendant, defendant stood up from behind a truck and jumped on the hood. RP 112, 340. Defendant put his hands in the air and yelled, "I give up." RP 112, 340. After defendant was taken into custody, Officer Butts asked defendant his name, but defendant would not respond. RP 341. Officer Butts found \$569.59 and a pager in defendant's pants pocket. RP 342.

Officer Martin attempted to track the last suspect, but Bo was unable to pick up a scent. RP 113-15.

Sergeant Ryan Larson, head of the property crime unit for the Lakewood Police Department, went to the smoke shop. RP 118. While at the scene, Sergeant Larson inspected the outside of the building. RP 119-20, 122. He found a footprint on top of the air conditioner and that the phone lines in the back of the building had been cut, indicating the suspect's attempt to disable the alarm system. RP 122, 127. Sergeant Larson also found pry marks on the back door, which was still locked, and the front door, which had actually been pried open. RP 119-20, 122. The

footprint was eventually matched to the shoe Mr. Stevens was wearing at his arrest. RP 330.

Inside the building, Sergeant Larson saw several items scattered on the floor, including matchbooks, cigarette cartons, and the drawer to the cash register. RP 123. Sergeant Larson took particular notice of the matchbooks, as they were unique to the store and he knew matchbooks had been seen in the mini van. RP 137. Sergeant Larson also noticed that two of the shelves of cigarette cartons behind the counter were empty. RP 123. To Sergeant Larson, it looked as if someone had scattered matchbooks and cigarette cartons in their haste to grab as many cartons as possible. RP 123. Finally, Sergeant Larson took a video tape from the store's surveillance system. RP 121.

Sergeant Larson returned to the station, where defendant and Mr. Stevens were in custody; the mini van had been towed there as well. RP 124, 139, 141. Sergeant Larson attempted to identify defendant and give him his Miranda² warnings, but defendant "told me I was the police, to figure out who he was." RP 139-40.

Sergeant Larson and Detective Les Bunton reviewed the surveillance video. RP 140. The officers were able to identify defendant in the tape by the unique stitching on his sweatshirt. RP 140. At that time,

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 889 (1968).

defendant was in the holding cell, wearing the same sweatshirt. RP 140.

The other person on the video was Mr. Stevens. RP 141.

After reviewing the tape, Sergeant Larson drafted a search warrant for the mini van. RP 141. Detective Bunton escorted defendant to a single-occupancy restroom for inmates' use only. RP 179, 191-92. The restroom automatically locks when the door is shut, which alleviates the need for officers to watch the inmates while they are using the facilities. RP 181. Defendant used the restroom for approximately five minutes before Detective Bunton returned and placed him back in a holding cell. RP 181. Defendant was wearing his sweatshirt when he entered the restroom. RP 181.

Meanwhile, Detective Bunton spoke to defendant in an effort get his identification. RP 176. Detective Bunton informed defendant that he was going to be fingerprinted and the officers would eventually find out who he was anyway. RP 176. As defendant was being fingerprinted, he gave his name and date of birth. RP 176-77. Detective Bunton noticed that defendant was not wearing his sweatshirt during the booking process, and thought that a forensics officer had taken it. RP 177-79, 181. After fingerprinting, defendant was placed back in the holding cell, and eventually transported to the Pierce County Jail. RP 177, 190.

After defendant was transported to the jail, Detective Bunton received a call from Officer Wade, asking where defendant's sweatshirt was. RP 190. Defendant had arrived at the jail without it. RP 190.

Detective Bunton checked both holding cells at the station, and also checked the inmate's restroom. RP 191.

While in the restroom, Detective Bunton saw a scrap of cloth floating in the toilet. RP 191. Maintenance workers retrieved half of defendant's sweatshirt from where it was stuffed down the toilet, and the other half from where it was stuffed up the toilet paper dispenser. RP 193-94; 317-19.

Sergeant Larson, Detective Bunton, Officer Miller and Forensics Officer Wade executed the search warrant on the van the following day. RP 141. The officers found 89 cartons of cigarettes, ski masks with holes for the eyes, a large pry bar, Motorola radios, matchbooks similar to the matchbooks seen at the smoke shop, and some vehicle rental paperwork for the mini van. RP 142, 146-47. The officers also found bolt cutters, wire cutters, a screwdriver, three pairs of gloves, a flashlight, and three sets of keys, unrelated to the mini van. RP 256-275. According to the rental paperwork found in the mini van, the van had been rented to a John Blasco, and defendant was listed as a secondary driver. RP 270.

After defendant posted bail, he contacted the Lakewood Police Department several times in an effort to recover a set of keys found in the mini van. RP 149, 198. Defendant told Detective Larson that a deputy prosecutor said he could get his keys back. RP 149. Detective Larson called the prosecutor, who stated, "No. That's the most ludicrous thing I've heard. I never said that to him." RP 149. Detective Larson believed

the keys were a critical part of the investigation and refused to release them. RP 150. Detective Bunson called the message phone number that defendant left, informing defendant that the Department would not be releasing his keys. RP 198-200. The message phone number was for John Blasko's phone. RP 200.

At trial, defendant testified that he had been at home, when his "cousin," Mr. Stevens called between 3:00 and 4:00 a.m., to sell him approximately \$600 worth of cigarettes. RP 367-68. According to defendant, Mr. Stevens told defendant to meet him at the B & I, a store on South Tacoma Way, to get the cigarettes. RP 368.

Defendant testified that he went to the B & I in Mr. Stevens' car. RP 369. Defendant claimed that he drove Mr. Steven's car because he had loaned the van to Mr. Stevens earlier that day. RP 391-92. Defendant admitted that he did not own the van and that John Blasco had rented it. RP 395. At first, defendant stated that he was just an additional driver, but later he claimed that Mr. Blasco rented the van specifically for defendant to use on a family road trip. RP 395-97. Defendant could not remember the day the van was rented, but admitted he was present at the time. RP 396-97. While defendant claimed he owned several different vehicles, he admitted he loaned Mr. Stevens a vehicle that Mr. Stevens was not authorized to drive. RP 392, 394.

When defendant arrived at the B & I, an unidentified person who was in the van with Mr. Stevens took Mr. Stevens' car and defendant got

in the van³. RP 369. Defendant claimed that the officers pulled the van over just as they left the B & I parking lot. RP 369. According to defendant, when the officers approached the van, “they took off.” RP 369. When the van finally stopped, “everybody hopped out and ran.” RP 369.

Defendant admitted that he ran from the police because he knew buying the cigarettes was illegal and that he “shouldn’t maybe have been buying” them. RP 379. Defendant testified that when he saw the K-9 unit, he gave himself up, stating, “I didn’t do nothing. I give up.” RP 369.

Defendant also testified that he tried to comply with the officers’ orders to put his hands down, but he could not because the dog barked at him. RP 369-70. According to defendant, “the officer yells to put [his hands] down. I told him if I put my hands down, the dog is going to bite me, so I wasn’t going to put my hands down. So they came and put handcuffs on me and took me to Lakewood precinct.” RP 370.

Defendant also testified that he made several attempts to retrieve his belongings from the police department after he posted bail. RP 370-73. According to defendant, the officers took, “my keys, my pager and I believe they took one other thing. I can’t remember what it is right off the top of my head.” RP 370. Defendant stated that he filed a complaint asking for his keys back, and “telling them that I wasn’t part of it and I had been falsely charged and asked that a lieutenant or a sergeant speak to me

³ There is no reference in the record as to who was actually driving the van.

regarding the false charges I had placed to me.” RP 371. Defendant also claimed that he had been told by “Officer Brown that my keys were sitting on the arresting officer’s desk and should be given to me by the end of the day,” and also that a prosecutor told him he could have his keys. RP 372-73, 382-83. Defendant then claimed that he asked, again, for an officer to speak to him, he was told that he could not speak to a lieutenant and that no sergeants were available. RP 372.

Finally, defendant claimed that, a week later, the department called his message number several times and left messages for him to come pick up his property. RP 373. According to defendant, when he went to the station, they gave him his keys and his pager and arrested him again. RP 373, 387.

When questioned about whether or not he refused to give the police his name, defendant responded, “I told them I did not want to talk to them at all if they were charging me with a crime.” RP 386. When reminded that the police could not speak to him unless they had permission from his attorney, defendant stated:

For what I was asking for, I think that they could have talked to me. I wanted my property. I knew they wouldn’t talk to me about what I was necessarily charged with, but the things I was asking for had nothing to do with what I was charged with.” RP 386.

RP 385. Defendant also stated that he did not try to flush anything down the toilet at the precinct, nor did he stuff his sweatshirt up the toilet paper roll.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR COMMITTED MISCONDUCT.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). "[A] conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Here, defendant has failed to show prosecutorial misconduct, let alone reversible misconduct.

Defendant argues that the prosecutor committed misconduct warranting reversal by eliciting testimony regarding defendant's pre-arrest silence. See Appellant's Brief at 1-2. Defendant also claims that the prosecutor committed misconduct in closing argument by inferring guilt

from defendant's silence, misstating evidence and the law of accomplice liability and misstating the standard of reasonable doubt. See Appellant's Brief at 3-4. Defendant's arguments are without merit. Defendant failed to object to both the challenged testimony and the prosecutor's arguments during closing. The testimony was limited to defendant's refusal to identify himself to law enforcement and the prosecutor did not misstate evidence or law in closing.

- a. The prosecutor did not commit misconduct when he elicited testimony that drew no inference of guilt from defendant's pre- or post-arrest silence but did impeach defendant's testimony.

The Fifth Amendment of the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." In a similar provision, article I, section 9 of the Washington Constitution reads in part: "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts give the same interpretation to both clauses. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

In Washington State, the right to remain silent applies in both pre- and post-arrest situations. Easter, 130 Wn.2d at 243. "[T]he prosecution may not . . . use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." Id. at 236 (citing Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). The

State cannot portray the exercise of this right as substantive evidence of guilt. State v. Romero, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002).

Accordingly, the State cannot seek comments from witnesses relating to a defendant's silence in order to infer guilt from such silence. Easter, 130 Wn.2d at 236. "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, 707, 927 P.2d 235 (1996). But introduction of nontestimonial evidence, such as physical evidence, demeanor, and conduct, is permissible. Easter, 130 Wn.2d at 243. And "a mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice." Lewis, 130 Wn.2d at 706-070. Finally, "[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he does not say." State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (emphasis in original).

After Miranda warnings have been given, and even if the arrestee invokes the right to remain silent, police may ask the arrestee "routine questions during the booking process." State v. Wheeler, 108 Wn.2d 230, 238, 737 P.3d 1005 (1987). An exception for routine booking procedures arises because the questions asked rarely elicit an incriminating response. Id.

In this case, defendant was charged with obstructing a law enforcement officer. CP 1-3. A person obstructs law enforcement when

he willfully hinders, delays, or obstructs any law enforcement officer in the in the discharge of his or her official powers or duties. RCW 9A.76.020(1). The State argued that defendant's behavior in refusing to give the officers his name, together with his attempts to destroy evidence, hindered the investigation. RP 434.

Defendant never invoked his right to remain silent. Officer Butts testified that when defendant was tracked down by the K-9 unit, defendant jumped up on a vehicle and started yelling, "I give up." RP 340. During the arrest, Officer Butts asked defendant for his name, and defendant would not answer him. RP 341. According to Officer Butts, defendant did not identify himself at all. RP 341.

Later, when Sergeant Larson asked defendant his name, defendant responded, "[you are] the police, [you] figure out who [I am]." RP 140. The State's purpose in eliciting this testimony was to show defendant was taunting the officers and willfully obstructing the investigation. The inference drawn from defendant's statement was not that his silence admitted guilt to the burglary, but that he was actively trying to hinder or delay the police investigation.

Finally, Detective Bunton made a reference to defendant's silence when he testified that defendant did not want to talk to the officers at all. RP 176. The State asked:

Q. Did he give you his name?

A. No, he didn't

- Q. Did he assist in any way identifying himself?
- A. No, he didn't.
- Q. After he refused to identify himself, what happened next?
- A. We told him that he was going to be fingerprinted and we would eventually find out who he was anyway.
- Q. And did he eventually tell you his name?
- A. Yes.

RP 176. The State elicited testimony that defendant stalled before eventually giving his name. The purpose of the evidence was to show the delay, not the fact that defendant exercised his right to remain silent.

Throughout the State's case-in-chief, the focus on defendant's behavior was related to the officers' inability to identify defendant, which was the basis of the obstruction charge. The prosecutor did not argue or in any way infer that defendant's lack of cooperation was an admission of guilt for the burglary charge.

Defendant took the stand on his own behalf. See RP 366.

Defendant claimed that he did not comply with the officers' request to put his hands down only because he was afraid the dog would bite him. RP 370. He denied flushing his sweatshirt down the toilet. RP 385.

Defendant testified that he attempted to retrieve his keys and to speak to an officer because he had been falsely charged, and he had to file complaints against the department because the police would not cooperate with him.

RP 371-75. Defendant stated, "I complained and asked them to talk to me two times and they didn't." RP 386. Defendant never claimed that he invoked his right to remain silent and, according to his testimony, he was cooperative but the police were refusing to speak to him. See generally RP 366-98.

Defendant's version of the event indicates that he did nothing wrong, he was cooperative, and the police were opposing his efforts to work with them. However, his refusal to give his identity to the officers directly contradicted his testimony that he was trying to cooperate and the police refused to listen to him. It was permissible for the State to impeach him on cross examination.

b. The prosecutor did not commit misconduct during closing argument.

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction

could have cured the error and the defense failed to request one, then reversal is not required. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); Binkin, 79 Wn. App 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

Here, defendant claims the prosecutor committed error during closing argument when he inferred defendant’s guilt based on defendant’s failure to identify himself, misstated the law and evidence in support of accomplice liability, and misstated the standard of reasonable doubt. See Appellant’s Brief at 3-4. Defendant did not object during the State’s closing argument. See RP 419-35, 444-51.

i. Defendant failed to object.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); Binkin, 79 Wn. App 293-294. Where

the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

Defendant failed to object at trial to any of the arguments to which he now assigns error. “[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (quoting Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)). Defendant also failed to demonstrate that the remarks were so flagrant or ill intentioned that they prejudiced the defense or could not have been cured by instruction.

ii Defendant’s failure to identify himself.

As argued above, the prosecutor properly elicited defendant’s refusal to identify himself to the officers. The prosecutor’s use of defendant’s refusals was proper in closing where the prosecutor argued that defendant’s behavior hindered the officer’s investigation. The prosecutor also properly used defendant’s behavior to impeach his testimony.

The prosecutor’s first statement in closing that defendant refused to identify himself came directly after he quoted defendant’s statement, “I

give up.” RP 422-23. The prosecutor again argued that defendant refused to give his name or birth date at the station, “so they begin to take pictures of him and they begin reviewing the tape.” RP 423. In neither case does the prosecutor suggest or infer that defendant’s refusal could be an admission of guilt.

The prosecutor used defendant’s refusal to give his name to impeach defendant’s testimony that he was cooperative and that he did not know about the burglary. Defendant’s refusal to identify himself contradicts his testimony and it can properly be used to impeach him. RP 429-30.

The State made the same argument during rebuttal. The State responded to the defense argument that nothing but the sweatshirt tied defendant to the scene of the crime. RP 445. The prosecutor described all the evidence which linked defendant to the crime, including defendant’s conduct after contact with the police, to impeach defendant’s assertion that he did not know about the burglary. RP 445.

Finally, the State argued that, by not giving his name or date of birth, defendant hindered the officers’ investigation. RP 434. Again, the testimony at trial was that defendant told Sergeant Larson that he was the police, he could figure out who he was. RP 140. The State’s argument, based on the testimony adduced at trial, was not that defendant exercised his right to remain silent, therefore he was guilty. Rather, the argument

was that defendant actively attempted to hinder or delay the officers' investigation by refusing to give his name.

This remark was the only instance where the prosecutor drew an inference of guilt from defendant's lack of cooperation. As argued above, defendant was charged with obstruction, and defendant's refusal to give the officers his name was evidence of that crime.

Additionally, the State's focus at trial was not to infer guilt from defendant's silence because he did, in fact, speak to the police. The focus was on what defendant did, and did not, say and how his behavior affected the investigation. However, if this Court does find that this argument was an impermissible comment on defendant's silence, the comment related only to defendant's obstruction charge. If the Court reverses on this issue, it should only reverse the misdemeanor obstruction conviction.

Defendant did not affirmatively exercise his right to remain silent, nor did he stand mute. Defendant spoke to the officers and he took the stand in his own defense. The prosecutor's arguments in closing were proper where they were comments on what defendant did not say and were used to impeach defendant's credibility.

iii. Accomplice liability.

Defendant asserts that the prosecutor misstated the law regarding accomplice liability and argued facts not in evidence when he stated, during closing, that defendant testified that he provided the van to get the

cigarettes. See Appellant's Brief at 28. However, the State's theory of the case was that defendant was not an accomplice to the crime, but had actively participated. See RP 419-35. Additionally, while the prosecutor was arguing in the alternative, the argument was a logical inference from defendant's own testimony.

Defendant also claims that the prosecutor misstated the law of accomplice liability when he argued that the jury could find defendant guilty as an accomplice based on his "presence by the evidence." See Appellant's Brief at 32. Defendant's assertion is without merit where he failed to review the prosecutor's statement in the context of the entire argument. The prosecutor argued:

[The accomplice liability instruction] says, "or aids or agrees to aid another person in planning or committing the crime. The word aid means all assistance, whether given by words, acts, encouragement, support or presence." Assuming that you don't think Mr. Thomas went into that building, he was an accomplice. He provided aid by providing the van, knowing they were going to commit a crime to get him cigarettes. His own admission makes him guilty of that crime. Also his presence by the evidence makes him guilty of that crime. Either way, Mr. Thomas is guilty of burglary in the second degree.

RP 433.

At trial, defendant claimed he loaned Mr. Stevens the van and was unaware of the Mr. Stevens' plan to commit a crime. RP 390-91. However, defendant was present in the van with 89 cartons of cigarettes, together with burglary tools, minutes after the burglary occurred. See RP

142, 334, 369. While defendant claimed the van was pulled over just as they left the B & I, Officers Wurts and Butts testified that they first saw the van in front of the smoke shop. RP 161, 333. Even if defendant sat in the van while the burglary occurred, it was approximately 4:30 a.m., the smoke shop was not open for business, the front door had been pried open, and defendant had provided the van used in the crime. RP 120, 161, 391. The prosecutor's argument inferred that defendant knew about the burglary, assisted with the burglary, and was present at the burglary. The prosecutor's statement was a proper argument for defendant's guilt under an accomplice liability instruction.

Defendant also claims that the prosecutor misstated the facts of the case when he argued that defendant "testified that he provided the van to get the cigarettes." RP 429. Defendant's testimony supports the prosecutor's argument. It was reasonable to argue that defendant would know that he was helping Mr. Stevens commit the crime when he expected Mr. Stevens to show up with \$600 worth of stolen cigarettes at 4:00 a.m., after acquiring them through a burglary.

At trial, defendant testified that he met Mr. Stevens at the B & I, a store on South Tacoma Way. RP 368-69. Defendant claimed he had loaned his rental van to Mr. Stevens because they "all pretty much drive each others' vehicles," even though Mr. Stevens was not authorized to drive it. RP 392, 394. Defendant could not remember the date he rented the van, but admitted that he loaned it to Mr. Stevens four days after he

was supposed to return it. RP 397-98. Defendant also admitted that he had already made arrangements to purchase illegal cigarettes from Mr. Stevens before he went to the B & I. RP 376. While defendant claimed it was not his intent to provide a way for Mr. Stevens to commit a crime, he expected Mr. Stevens to return the van when he returned with the illegal cigarettes. RP 390-91, 393. This creates a reasonable inference that defendant knew he was assisting Mr. Stevens with stealing cigarettes from some location by providing him with a means of transportation.

Defendant's testimony also suggests that he knew the van had been involved in a crime, other than transporting illegal cigarettes. Defendant testified that he ran from the police because he did not want to be "caught up with whatever was going on." RP 379. He admitted that he knew buying the cigarettes was illegal. RP 379. However, defendant testimony also suggested that he knew the reason the officers were chasing him was not because of the cigarettes:

Q. And you also just testified that when the dog contacted you, you saw the dog coming, you stood up and said, "I didn't do anything. I give up," correct?

A. Yes.

Q. But you've now just testified that you did do something, you were purchasing cigarettes that you knew you shouldn't have been purchasing, correct?

A. Yes.

Q. So you did do something.

- A. Yes. What I was talking about is as far as them chasing us, I got out and ran but I was not part of whatever reason they were behind us. I put my hands up and said that.

RP 380. According to defendant's own testimony, while he knew the cigarettes were illegal, he knew the officers were chasing them for some other reason. If defendant did not know about the burglary, he would have no reason to believe that the officers were interested in anything but illegal purchase of the cigarettes.

Because defendant did not object to any of the arguments the prosecutor made during closing, even if the remarks were in error, defendant cannot show that he was prejudiced by the error or that an instruction could not have cured the error.

Defendant cannot show he was prejudiced by the prosecutor's statements. As argued above, the State presented overwhelming evidence to prove that defendant was present in the store during the burglary. The State also presented sufficient evidence to prove defendant's consciousness of guilt, as manifest by his attempts to destroy evidence. Because the overwhelming evidence indicated that defendant was a principal, not an accomplice, defendant was not prejudiced by any error on the accomplice liability instruction.

Additionally, the court gave the jury the following instruction:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the

lawyer's statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 80-105. If defendant had objected during closing, the court could have reminded the jury that it could not consider the prosecutor's statements as the law, it could only consider the court's instructions. The court's instruction properly stated that, to be an accomplice, a person had to knowingly facilitate the crime, not commit a crime. See CP 80-105.

Defendant has failed to show that the remarks were error. Even if the remarks were error, defendant has failed to show that the remarks were so flagrant or ill-intentioned that he was prejudiced, or that any prejudice could not have been cured by instruction.

iv. Reasonable doubt

Defendant next claims that the prosecutor committed misconduct by misstating the "reasonable doubt" standard. The jury was instructed that:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 80-105.

In closing, defense counsel stated, “[t]here’s another explanation that you can’t throw out as being unreasonable, and that means there’s reasonable doubt.” RP 440. Counsel also stated, “[i]f, however much you may think it looks bad for Mr. Thomas, but there’s still another reasonable explanation that you just can’t throw away, then that’s a reasonable doubt and you must come back with a not guilty verdict, if you have a reasonable doubt as to any element.” RP 443.

In response, the prosecutor addressed defendant’s reasonable doubt argument. RP 449-50. The prosecutor read the reasonable doubt instruction to the jury and explained that if the jury “[knew] he did it, we feel that he did it, the State has proved to you beyond a reasonable doubt that he did it. Why? Because if you know he did it, you have an abiding belief.” RP 450.

Defendant cannot show that the argument was error. The prosecutor read the jury instruction. RP 450. When the prosecutor finished his argument, he instructed the members of the jury to “[f]ollow the instructions.” RP 451. The prosecutor’s attempt to define an abiding belief did not trivialize, reduce, or otherwise compromise the high standard of beyond a reasonable doubt.

Again, defendant did not object to this argument in closing. He cannot show that the argument was so flagrant and ill-intentioned that he was prejudiced and that an instruction could not have cured the prejudice.

- c. If the court does find error, such error is harmless.

The standard of review for a claim of constitutional error is whether the court can conclude that the error was harmless beyond a reasonable doubt. State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). An appellate court will find a constitutional error harmless if it is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242.

Here, the evidence of defendant's guilt consisted of a video tape taken by the store's surveillance system. RP 121, 140, 178-79, 190, 227, 232. Defendant was identified as one of the men in the video based on a distinctive article of clothing seen on the tape, and that defendant was wearing at the time of his arrest, only a few minutes after the crime. RP 178, 190, 232. The sweatshirt in the video had distinctive stitching, a hood and a patch on the arm, but defendant's sweatshirt showed the same distinctive stitching, and also showed that the hood and patch had been torn off. RP 218-20, 281-83. Defendant's attempt to destroy the sweatshirt after the police recognized it from the video indicated that defendant was aware that it could place him at the crime. It took the officers two days to recover the sweatshirt from the toilet. RP 318-19. A K-9 unit tracked defendant down from where the officers saw him run

from the van to the place he was arrested within minutes. RP 108-110, 338-340. Additionally, matchbooks identical to ones found at the store, defendant's keys, and rental paperwork with defendant's name on it were all found in the van, together with a crowbar, bolt cutters, ski masks, gloves, and 89 cartons of cigarettes. RP 142, 146-47, 256-75.

While defendant's version of the event was different from the State's, no reasonable jury would have believed his story when it saw the video, pictures of defendant in his sweatshirt taken by police, and the actual sweatshirt as it was recovered by the officers from the inmate's restroom.

The overwhelming evidence in this case showed that defendant was present in the store, he was in the van fleeing from the scene, stolen items from the burglary were in the van, together with tools used in the burglary, and he attempted to hinder the officers' investigation by destroying evidence. No reasonable jury could have acquitted defendant absent the error.

2. DEFENDANT WAS NOT ENTITLED TO A UNANIMITY INSTRUCTION FOR THE CRIME OF OBSTRUCTING A LAW ENFORCEMENT OFFICER WHERE THE STATE DID NOT PRESENT MULTIPLE ACTS TO SUPPORT THE CHARGE.

Criminal defendants have a right to a unanimous jury verdict.

Const. art. 1, § 21. A defendant may be convicted only when a unanimous

jury concludes that the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976), or when the State presents evidence of several acts that could form the basis of one count charged. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).

When the State presents evidence of several distinct criminal acts and charges the defendant with only a single crime, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. Petrich, 101 Wn.2d at 570-572.

There are two exceptions to the Petrich rule; the “alternative means” approach and the “continuous act.” State v. Crane, 116 Wn.2d 315, 325-26, 804 P.2d 10 (1991). Under the alternative means approach, a single offense may be committed in more than one way. Id. at 325. Under the continuous act exception, a continuing course of conduct may form the basis of one charge in an information. Id. at 326 (citing Petrich, 101 Wn.2d at 571). The court evaluates a defendant’s acts in a commonsense manner to determine whether they form one continuing offense. Petrich, 101 Wn.2d at 571.

Where criminal conduct occurs within a short time frame, a commonsense approach suggests that the continuing offense exception

applies. See Crane, 116 Wn.2d at 330. In Crane, the Court held that jury unanimity was not required where the defendant assaulted the child victim multiple times within a two hour period. Id. at 330.

Also, evidence that a defendant engaged in a series of acts intended to secure the same objective supports a finding that a defendant's conduct was a continuing course of conduct rather than several distinct acts. See State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In Handran, the defendant assaulted the victim by both kissing and hitting her. Id. The Court held that, while each act could have formed the assault, the acts constituted a continuing course of conduct by the defendant, against the same victim, aimed at the single purpose of having sex with her. Id.

If the State fails to articulate a specific act or provide a unanimity instruction when a Petrich instruction is required, error has occurred. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1998). However, this type of error is subject to harmless error analysis under a constitutional standard. Id. The standard for determining whether the error is harmless may be stated as follows: the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. Id. This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. Id.

In the instant case, the State did not present evidence of several acts which could each support an obstruction conviction. Instead, the State presented evidence that defendant's refusals to identify himself and his attempts to destroy evidence as a single act of obstruction.

RCW 9A.76.020(1) states that the crime of obstructing a law enforcement officer occurs when a person "willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." The elements of this statute are that: (1) the defendant's action or inaction hinders, delays, or obstructs the officer; (2) the officer is "in the midst of discharging his official powers or duties"; (3) the defendant knows that the officer is discharging his duties; and (4) the obstructor knowingly intends to hinder. City of Sunnyside v. Wendt, 51 Wn. App. 846, 851-52, 755 P.2d 847 (1988).

Mere refusal to answer questions cannot support an arrest for obstructing a law enforcement official. State v. Contreras, 92 Wn. App. 307, 316, 966 P.2d 915 (1998); State v. Hoffman, 35 Wn. App. 13, 16, 664 P.2d 1259 (1983). However, the refusal to provide identification, combined with other circumstances, may support probable cause for an arrest or conviction for obstructing law enforcement officers' performance of their duties. See State v. Turner, 103 Wn. App. 515, 525-26, 13 P.3d 234 (2000) (holding evidence sufficient for obstructing conviction where defendant refused to give his name and threatened and lunged at officer); Contreras, 92 Wn. App. at 315-17 (holding arrest for obstructing was

lawful based on defendant disobeying order to keep hands up and exit vehicle and giving false name); City of Sunnyside v. Wendt, 51 Wn. App. 846, 854-55, 755 P.2d 847 (1988) (upholding conviction of obstructing based on defendant's refusal to identify himself after his involvement in a motor vehicle accident).

Several distinct acts can be used to support one charge of obstructing a law enforcement officer. See Contreras, 92 Wn. App. at 317. In Contreras, Division II held that the defendant's actions of disobeying police orders to put his hands up and to exit the vehicle, and giving false information hindered and delayed the officers' investigation of a possible vehicle prowler. Id.

Defendant claims that the State argued four distinct acts to support the single obstruction charge. Specifically, the fact that defendant ran, his refusal to identify himself pre-arrest, refusal to identify himself post-arrest, and flushing his sweatshirt down the toilet. See Appellant's Brief at 39. Contrary to defendant's assertions, the State argued that defendant obstructed the officers by failing to give his name and by flushing his sweatshirt down the toilet. RP 434. The prosecutor mentioned the fact that defendant ran from the officers to infer that defendant knew they were law enforcement officers. RP 434. As a defendant's refusal to identify himself is insufficient evidence to support a charge of obstruction, his refusal, together with the act of destroying evidence, was necessary for the jury to find defendant guilty.

Additionally, both actions were part of a continuing course of conduct, performed over a short period of time, designed to achieve a single purpose. Defendant's refusals to identify himself and his destruction of evidence linking him to the crime occurred within a twelve-hour period, the entire time he was held after his arrest. RP 370. Defendant's obstruction charge was entirely based on his repeated attempts to delay the officer's investigation. A unanimity instruction was not required.

3. DEFENDANT HAS FAILED TO SHOW THAT HE WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn. 2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. State v. Maurice, 79 Wn. App. 541, 544, 903 P.2d 514 (1995). The standard of review for

effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694.

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland,

466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

Defendant claims that he received ineffective assistance of counsel based on counsel's failure to object to all the errors alleged above. As argued above, defendant has failed to show any prejudicial error in his trial. Defense counsel properly requested continuances until he was confident in his ability to represent defendant. RP (10/24/05) 13; (11/21/05) 15. Counsel made objections during the prosecutor's cross examination of defendant as he thought were warranted. RP 377, 380, 385, 388, 390. Counsel argued during closing that the prosecutor had misstated testimony and that he believed the jurors would recognize the misstatements from what they knew of the evidence. RP 436. As for defendant's assignments of error, defense counsel had no reason to object to proper argument and a unanimity instruction was not required.

Defendant failed both prongs of the Strickland test where counsel's performance did not fall below an objective standard of reasonableness, nor was he prejudiced by counsel's lack of objection where such objection would have been overruled.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm the jury's finding of defendant's guilt for one count of burglary in the second degree, one count of making or having burglar tools, and one count of obstructing a law enforcement officer.

If this Court does find error in the prosecutor's closing argument, such error related only to the obstruction charge and the Court should reverse on only that charge.

DATED: MAY 2, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney

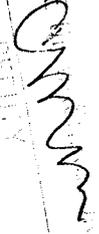

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Kimberley Demarco
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or
ABC-LMI delivery to the attorney of record for the appellant and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

12/07 
Date Signature

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