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NO. 36098-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KYLE KNAPP, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 06-1-05544-8

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Has defendant failed to show that any improper evidence commenting on his exercise of his right to remain silent was adduced at trial?
2. Has defendant failed to show that any prejudice flowing from the prosecutor's improper argument, which was not objected to at trial, could not have been cured by a limiting instruction?
3. Does the record in this case demonstrate that any error flowing from the prosecutor's argument was harmless beyond a reasonable doubt?
4. Has defendant failed to show that his attorney was so woefully inadequate so as to deprive him of his Sixth Amendment right to assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On November 27, 2006, the Pierce County Prosecutor's Office filed an information charging appellant, Kyle Cameron Knapp ("defendant"), with one count of residential burglary. CP 1. The State alleged that defendant unlawfully entered the dwelling of Patricia Huggins at 1416 S.45th Street, Tacoma on November 14, 2006, with the intent to commit a crime therein. Id.

The matter came on for a jury trial before the Honorable Vicki L. Hogan on March 6, 2007. RP 3.¹ After hearing the evidence, the jury found defendant guilty as charged. CP 34.

At sentencing on March 16, 2007, the court determined that defendant should be sentenced upon an offender score of "1" and a standard range of 6-12 months. CP 38-48; SRP 11-12. The court imposed a mid range sentence of 9 months with credit for 19 days served, \$1,200 in legal/financial obligations. CP 38-48; SRP 12-13.

Defendant filed a timely notice of appeal from entry of this judgment. CP 53.

2. Facts

Darren Blakeslee, a contractor, was working on one of his houses on 45th Street South in Tacoma on November 14, 2006. RP 17. He noticed two men that were walking around, knocking on doors of houses, sometimes being scared off by dogs. RP 18. Their activity looked suspicious to him. RP 18. As he watched out the window of his house, the men walked by on the opposite side of the street and to the front door of the house at 1416 South 45th. RP 18, 24, 27. This house was across the street and one house over from his own house. RP 18, 23. The men knocked on the front door, but no one answered. RP 18-19. The men

¹ The State will employ the same system of referencing the verbatim report of proceedings as used in the appellant's brief. See Appellant's brief at p.2, n.1.

looked at each other then went around to the back of the house to the back porch. RP 19. Mr. Blakeslee called 911. RP 19. At trial, Mr. Blakeslee identified the defendant as one of the men involved in the burglary.² RP 22.

Officers O'Keefe and Vause of the Tacoma Police Department were the first to respond to the 911 call. RP 41, 52-53. The officers proceeded around the back of the house to see what was going on. RP 42, 53. Officer Vause got to where she could see the back deck area and saw that a window by the barbecue was open and the screen was off; she could hear people talking inside the house. RP 53-54. Officer Vause signaled to her partner that it was a burglary in process; O'Keefe called for priority back up. RP 42, 54-55. A man came out of the house turned and looked around; a second man, wearing gloves, came to the door. RP 55, 62. The best description Vause could give of the second subject was a white male, with short hair, wearing gloves. RP 63. Officer Vause drew her weapon and ordered the men to put their hands up; the first man complied but the second one retreated into the house and slammed the door. RP 42-43, 55-57. The first suspect, identified as Michael Barton, was taken into custody. RP 43-44, 50, 57. By this time, Officer Harris arrived on the scene; he went around to the other side of the house to try to help contain the other suspect inside the house. RP 44, 57-58, 122.

² Mr. Blakeslee used the term 'robbery' rather than burglary. RP 21-22.

When he got to the other side of the house, Officer Harris saw a screen pop out of a window. RP 123. He looked up and saw a man inside who was starting to crawl out the window. RP 123-124. The man and Officer Harris stared at each other for a few moments. RP 124. Officer Harris yelled that the suspect was coming out the window. RP 44, 58, 124. At trial, He identified the defendant as being the person he saw inside the house. RP 124. The defendant crawled back inside the house in disregard of Harris's commands. RP 125. Officer Harris heard sounds consistent with the defendant barricading himself inside. RP 125

Officer O'Keefe got on the PA system repeatedly directing the suspect to come out of the house and surrender. RP 58-59. Officer Peterson responded to the scene and contacted Michael Barton who showed him a white Chevy Suburban parked about a block away. RP 66-67. The registered owner of this vehicle was Kyle Knapp. RP 67. An officer went to defendant's home on the 5600 block of South K Street, but no one was there. RP 68. Eventually the SWAT team was called to the scene. RP 45.

Patricia Huggins testified that she lives at 1416 South 45th Street in Tacoma. RP 31. On November 14th, 2006 her husband left for work around 6:00 in the morning and she left for work by 7:30 a.m. RP 36-37. No one had permission to be in her home that day. RP 39. While she was at work she was contacted by a police officer who told her that there had been a break in at her home; they had one suspect in custody but the other

suspect had barricaded himself inside. RP 37. Hours later when, she was allowed back inside her home after it had been searched by the SWAT team, she noted that her jewelry and other personal items had been collected into a suitcase and duffle bag and that her home was a mess from things having been rifled through. RP 34-36, 38-39, 46. There was also evidence that persons had used window to either enter or exit the house. RP 32-34, 38-39. The next day police came back to the house because the Huggins's found an opening to their attic opened and their garage door opened the next morning indicating that someone had spent the night inside the house. RP 60.

Detective Hofner contacted both Mr. Blakeslee and Officer Vause and showed them each a photo montage that included a photograph of the defendant. RP 20, 28, 62, 70-71, 81-83. Officer Vause was unable to make any sort of identification of the second subject. RP 62, 83. Mr. Blakeslee could not identify anyone from the pictures, but indicated that he was very busy and did not spend a lot of time looking at them. RP 28-29, 71.

On November 16, Detective Hofner got a call from the defendant asking about the whereabouts of his car. RP 71, 83. Detective Hofner made arrangement to meet defendant at his residence. RP 71-72. Also at the residence were Melinda Barton, the other suspects sister, and Scott Law, who matched defendant's general description. RP 85-86. At this meeting, defendant told Hofner that he was at Carman Badgley's

apartment two days earlier and called her to come over so that the detective could speak to her. RP 107-108. Defendant gave the detective a written statement as well. RP 108-109. Defendant agreed to let the detective search his home and the detective searched the home but did not locate anything of evidentiary value. RP 109. Detective Hofner had asked Mr. Blakeslee to drive by a residence to see if he recognized the person that the detective was talking to in the front yard; Mr. Blakeslee estimates that he was 25 feet away from the suspect during this procedure. RP 21, 72. Mr. Blakeslee was "110 percent" certain that the person the detective was talking to was one of the men he had seen involved with the burglary. RP 21, 73.

On November 20th, Detective Hofner met defendant at Burns Towing. RP 75. The defendant consented to a search of his vehicle. RP 110. Inside, Detective Hofner located tools such as a hammer, wrenches, screwdrivers, a knife, bolt cutters, cable cutters, and a pry bar. RP 75-76. Detective Hofner had shown Officer Harris photographs of two other possible suspects, Scott Law and Jason Benson, along with a photo of the defendant as possible being the man that had barricaded himself in the house. RP 116-118, 125-126. Officer Harris indicated that neither Law or Benson were the man he saw in the house, but that the defendant was. Id. The next day Officer Harris met Detective Hofner at defendant's house, he positively identified the defendant as the person that he had seen inside the

Huggins's home. RP 76, 111, 126. Detective Hofner arrested defendant at that time. RP 77.

At trial defendant presented the testimony of his former girlfriend Carman Badgley as an alibi witness and to corroborate his own testimony that he was at Ms. Badgley's house at the time of the burglary. RP 137-143, 149-166.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT IMPROPER EVIDENCE WAS ADDUCED WHICH COMMENTED ON HIS RIGHT TO SILENCE, BUT THERE WAS IMPROPER ARGUMENT; REVERSAL IS NOT REQUIRED BECAUSE THE PREJUDICE COULD HAVE BEEN CURED BY A LIMITING INSTRUCTION AND THE ERROR WAS HARMLESS.

Generally, when a person has a statutory or constitutional right to engage or not engage in some behavior or action, it is improper for a prosecutor to argue that a criminal defendant's exercise of that right is evidence of guilt. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1997)(right to remain silent); State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)(right not to testify); State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978)(exercise of marital privilege).

A defendant has a constitutional right to remain silent. State v. Easter, 130 Wn.2d at 235-36. Concomitant with that right is the prohibition of prosecutorial comment on its exercise. State v. Crane, 116

Wn.2d at 331. In Washington, the right applies equally to pre-arrest and post arrest silences. Easter, 130 Wn.2d at 243. The test employed to determine whether a defendant's constitutional right has been violated is whether language used by the prosecutor was manifestly intended as, or was of such character that a jury would naturally and necessarily assume the statement to be, a comment on the accused's rights. State v. French, 101 Wn. App. 380, 389, 4 P.3d 857 (2000); State v. Crawford, 21 Wn. App. 146, 584 P.2d 442 (1978). "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). "[A] mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice." Id. at 706-07 (citing Tortolito v. Wyoming, 901 P.2d 387, 390 (Wyo. 1995)).

A constitutional error occurs if a police witness testifies that a witness refused to speak with him, if the State purposefully elicits testimony as to the accused's silence, or if the State exploits the accused's silence into its closing argument. See State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Any error in admitting such statements is subject to a constitutional harmless error analysis. Id. at 790.

On the other hand, when a defendant does not remain silent and talks to law enforcement officers, the State may comment on what the defendant does not say. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d

1006, cert. denied, 534 U.S. 1000 (2001)(citing State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)). In addition, if the defendant waives the right to remain silent and makes a post-arrest statement, the prosecutor may draw the attention of the jury to the fact that a story told at trial was omitted from that statement. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988).

- a. Defendant has failed to show that there was improper evidence of his exercising his right to remain silent.

Defendant alleges that the prosecutor improperly sought the admission of evidence of his silence on two different points in the direct examination of the lead detective. The first instance occurred when the detective was discussing what occurred on a November 16, 2006, visit to the defendant's house. The jury was informed that the detective was going to have a witness to the burglary come by the house as the detective spoke to the defendant on his front porch to see if the witness could identify defendant as one of the burglars. RP 71-73. Another officer reported to the detective, within the hearing of the defendant, the results of the show up:

Detective: She said [the witness] reported a positive identification of Kyle Knapp as the second suspect.

Prosecutor: Okay. What did Mr. Knapp do in response to that, hearing that information?

Detective: *Well, he immediately hung his head but did not say anything.*

RP 73. The information before the jury regarding this visit to defendant's house was that defendant had voluntarily spoken to the detective that day, allowed him to search his home, had given him an alibi and presented him with an alibi witness and been on the front porch for the identification procedure. RP 105-111. It is not clear from the record in what order this series of events occurred. RP 71-73, 105-111, 155-160. It was also clear that defendant was not arrested that day. Id.

The second instance occurred when the detective testified about returning to the defendant's house about a week later so that a different witness, an officer, could be in position outside to see whether, as the detective spoke to the defendant on his front porch, the officer could identify defendant as the burglar he saw inside the victim's house. RP 76-77.

Detective: I saw Officer Harris nod his head, and that signified to me that he had identified Kyle Knapp as the second suspect in this case.

Prosecutor: And what did you do then?

Detective: I told Kyle Knapp that he was under arrest, and then I handcuffed him, searched him, and we placed him in to the patrol car later.

Prosecutor: What was Mr. Knapp's immediate reaction to being identified?

Detective: *None really. Fairly complacent, consistent, seemingly uncaring attitude, but he was cooperative.*

RP 77. On cross-examination, defense counsel came back to this testimony, asked the detective to review his notes to see whether he had noted any other kind of response to being arrested. The detective testified that in his report that he noted that the defendant had hung his head during the handcuffing and search. RP 112. By the end of the trial, the jury knew that defendant had had somewhere between four and six conversations with the detective over a period of time prior to his arrest and that he had given the detective a written statement. RP 164. The jury was informed that the defendant always remained consistent during these contacts that, at the time of the burglary, he was at his girlfriend's house. RP 164-165.

Firstly, the State submits that defendant cannot show that the language used by the prosecutor during questioning was "manifestly intended as, or was of such character that a jury would naturally and necessarily assume the statement to be, a comment on the accused's right" to remain silent. Defendant presents no authority based on a similar fact pattern where a court has found that this type of question is an improper comment on an accused's right to trial. The State disputes that such a question is improper.

As for the detectives responses, to the extent that the detective's responses describe the defendant's conduct they are not comments about silence and not improper. See Schmerber v. California, 384 U.S. 757,

761-64, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)(privilege against self-incrimination only protects testimonial communication, not observations of conduct or real evidence). It is not an improper comment on the right to remain silent to adduce that a defendant “hung his head” upon being arrested. The only portion of the first response that was remotely improper was the portion referring to the lack of a verbal response. The second challenged statement does not convey whether or not the defendant made any statements upon being informed that he had been identified; it simply describes his demeanor.

Secondly, the trial record does not support the conclusion that the defendant remained completely silent during either of these challenged conversations. Thus, it is not clear whether the principles of Clark or Easter are most applicable to this analysis.

But even assuming that the principles of Easter apply, there is nothing about these two exchanges from which the jury would naturally and necessarily assume that the detective’s statements were a comment on the accused’s right to remain silent. As noted above the second challenged statement does not convey whether or not the defendant made any statements, but only describes his demeanor. There is nothing from what was said to construe a reference to silence. The first challenged statement does expressly indicate that defendant said “nothing” in response to learning of the identification, but the evidence adduced did not convey that defendant had invoked his right to remain silent or even that

he refused to answer a question. The jury heard only that he did not respond verbally when he learned that a witness had identified him. The facts of State v Lewis are similar in this regard.

In Lewis, the officer did not testify that the defendant refused to talk to him; rather, the officer relayed that the defendant had told him that he was innocent. Id. at 706. The Supreme Court held the testimony not to be an error, focusing on the fact that “[t]here was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police.” Lewis, 130 Wn.2d at 706.

In this case, the jury was also informed that defendant was not silent that day and had spoken to the detective about his side of the story. Defendant told the detective that day where he had been during the burglary and called his alibi to come over to the house to speak to the detective. As the evidence was unclear as to the sequence of events, the jury could not be certain whether the identification procedure was done first, last, or somewhere in the middle. From the entirety of the evidence, the jury would not conclude that the defendant was silent at all. The fact that neither of the detective’s statements provoked a response from defense counsel is further indication that, in the context of the trial, neither response sounded as if it were a reference to the defendant’s right to remain silent. Thus, the jury would not necessarily conclude that this was a comment on silence. The clear import from the totality of the evidence was that defendant denied his involvement to the detective that day, a

position that was consistent with his trial testimony, and not that he was silent upon accusation. Defendant has failed to show that improper evidence was adduced at trial.

- b. Any prejudice flowing from the prosecutor's improper argument could have been eliminated by a curative instruction.

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 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. Binkin, at 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., see also, State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

Defendant asserts that the prosecutor committed misconduct by making the following argument:

Prosecutor: And another reason to believe that this defendant, Kyle Knapp, did the burglary, both times that it was mentioned to him that Darren Blakeslee identified him and then Officer Harris identified him, what did he do? He put his head down. *Did he say, “No. It wasn’t me”?* No.

RP 179.

The State concedes that the italicized portion of the above argument was improper in that it implies that an innocent person would have made such a denial in the face of accusation which violates the prohibition against commenting about the exercise of the right to remain silent. There was no objection to the argument in the trial court, consequently, defendant must show that the remark was so flagrant and ill-intentioned that no curative instruction could have eliminated the prejudice. He cannot make this showing, because if there had been a prompt objection the court could have instructed the jury to disregard the improper argument.

For example in State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) the prosecutor -despite previous admonitions from the court- made

arguments that improperly referred to facts not in evidence. The defense objected, and the court reminded the jury that it was to consider the evidence before it, the exhibits and the instructions. The Supreme Court found that defense counsel's objection and the court's prompt response arguably cured any resulting prejudice. A jury is presumed to follow its instructions. The Court concluded that the remark was not so prejudicial so as to warrant a new trial. State v. Russell, 125 Wn.2d at 88.

Such prompt action in this case could have easily set the case back on a proper course. Defendant offers no argument as to why a curative instruction would have been insufficient.

c. The prosecutor's improper argument was harmless error.

When a prosecutor's comments are objected to at trial and allegedly infringe a separate constitutional right such as the right to remain silent, they are subject to the constitutional harmless error standard. It is the State's burden to show that the error was not prejudicial. Easter, 130 Wn.2d at 242-43. A constitutional error is harmless only if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995), and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). Misconduct relating to

argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). This court should find the error to be harmless beyond a reasonable doubt.

First, the prosecutor did not compound the error by repeating this argument many times in closing argument as was done in Easter. See Easter, 130 Wn.2d at 242-243; United States v. Tenorio, 69 F.3d 1103, 1107 (11th Cir. 1995)(prejudice where comments on silence “pervaded the trial” and were touchstone of closing argument). The improper argument consisted of one sentence -said once - during closing arguments that covered several pages of transcript. RP 173-184, 206-213. It was not the primary theme of the prosecutor’s argument, but a minor argument.

The fact that a burglary occurred was not in dispute in this case. The question before the jury was whether the defendant was the second suspect who was trapped inside the house but managed to evade arrest on the day of the burglary. On this point, the jury heard from two eyewitnesses who identified the defendant as the person who they had seen involved in the burglary.

The civilian witness, Mr. Blakeslee, had been observing two men knock on doors in the neighborhood and called the police because their activities looked suspicious; this occurred in daylight hours. RP 17-20. The men passed directly in front of the window out of which he was

looking, but on the opposite side of the street. RP 18, 26-27. A few days later, this witness positively identified the defendant as one of the two men that he had seen that day. RP 21-22. He also identified the defendant at trial and was sure of his identification. RP 22. The jury was able to assess the witness's credibility as to his confidence in his identification. Nothing about the prosecutor's argument tainted this evidence of identification.

The jury also heard the testimony of Officer Harris, who responded to the burglary in progress and had a face to face confrontation with the second suspect.

Officer Harris: Well, I looked up –I looked up and the subject was starting to crawl out the window, and I looked up at him, and he looked back at me, and I started yelling commands at him. He just sort of stared at me a few moments, almost in hesitation of, should I listen to him or not? Then [he]³ retreated back in the house.

Prosecutor: Did the two of you get eye contact?

Officer Harris: Oh, yes.

Prosecutor: How long did that last?

Officer Harris: Three to four seconds. It was a lengthy pause, more than you would expect.

Prosecutor: Did you see anyone in the courtroom that you saw on that day?

Officer Harris: I do that would be the defendant.

³ The VRP states "I retreated back in the house" but from the context of the evidence, the officer must have misspoke. He later indicated that the suspect retreated back into the house. RP 125.

RP 124. The jury also heard that Officer Harris was shown pictures of two other possible suspects and that he was certain that these pictures were not of the man he saw retreat back into the house that day; the jury heard that he did positively identify the defendant from a photograph. RP 125-126. Officer Harris also positively identified the defendant as the person he saw inside the victim's house from a show up done on the defendant's porch. RP 126. He was certain—"without a doubt"—about his identification. RP 126. The jury was able to assess the officer's credibility as to his confidence in his identification. Nothing about the prosecutor's argument tainted this evidence of identification.

Buttressing these identifications was the fact that defendant's car was found parked a block away from the victim's residence while the suspect was trapped inside the victim's house. RP 66-68. Again this evidence was untainted by the prosecutor's argument.

The jury also heard from the defendant's alibi witness, Carman Badgley. RP 137-148. The jury was able to assess her credibility from her testimony in court. The prosecutor's argument would not have tainted the jury's assessment of Ms. Badgley's testimony or the determination it made regarding her credibility.

The jury heard the defendant's denials of involvement first hand when he testified at trial. RP 149-170. The jury was able to assess his credibility from the testimony adduced in court and was not limited to

relying on a detective's testimony about his demeanor during the investigation. The jury was instructed that:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 20-33, Instruction No 1. This instruction focused the jury to consider what it saw and heard from the witnesses in the courtroom in making credibility determinations, rather than focusing on testimony about what occurred during the investigation much less the prosecutor's argument as to what should be considered in assessing credibility. Considering the defendant testified at trial, it is unlikely that the jury would give more credence to someone else's characterization of the defendant's demeanor than it would give to what it observed first hand. The jury's credibility determination as to the defendant's credibility would be based on untainted evidence – his testimony at trial.

Finally, the jury was unlikely to be affected by the improper nature of the prosecutor's argument because it was a weak argument considering

the facts of this case. As discussed earlier, the evidence in this case showed that the defendant - throughout the course of the investigation- made repeated denials of his involvement in the burglary and maintained that he was at his girlfriend's when the crime occurred. The jury might well have concluded that the defendant did not make any "additional" statements of denial upon learning of the identifications because he had nothing further to add to the denials that he had already made. The defense used the defendant's cooperation with the investigation as a primary theme of his defense, pointing out that he called the police, consented to searches of his house and car, and gave written statements when he did not have to cooperate. RP 196-200. A jury would conclude that the prosecutor's argument about the absence of a "denial" was not supported by the evidence and give it no weight.

In conclusion the record in this case demonstrates that the prosecutor's argument did not affect the outcome of the case beyond a reasonable doubt. The court should find the error to be harmless.

The cases that defendant relies upon to argue that the error was not harmless are distinguishable. In State v. Romero, the State adduced evidence that the defendant invoked his right to remain silent and would not speak to the officer upon arrest. Romero also testified at trial setting up a great contrast between what the jury knew of his initial refusal versus what he wanted the jury to believe based upon his testimony at trial. The jury here was never told that the defendant refused to answer questions or

that he invoked his right to remain silent; it only heard that he did not respond verbally when given information that he had been identified as being involved in the burglary. Moreover, the jury did hear that defendant had told the police at the outset that he was at his girlfriend's; this was consistent with his trial testimony not conflicting as it had been in Romero. The evidentiary violation was more serious in Romero and it resulted in damage to Romero's defense at trial. That has not been shown in the case before the court.

Similarly in State v. Keene, 86 Wn. App. 589, 594, 938 P.2d 839 (1997), this court held it reversible error for: 1) a detective to testify that the defendant did not contact her after being warned she would turn the case over to the prosecutor's office if she did not hear from him again; and, 2) a prosecutor to argue that the jury should decide "if those are the actions of a person who did not commit these acts." Once again there was clear evidence that Keene was not cooperating with the investigation coupled with an argument that the jury should infer guilt from the lack of cooperation. In this case the jury heard repeated evidence of the defendant's cooperation with the investigation and never heard that he refused to cooperate, refused to answer questions or that he invoked his right to remain silent. The prejudicial impact was not the same as in Keene. In this case, the untainted evidence is overwhelming and results in the error being harmless.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF 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 proceedings 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).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226,

743 P.2d 816 (1987).

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).

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). 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). 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. Id. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). "The decision not to object is often tactical." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

a. Defense counsel provided competent assistance during the trial.

On the whole, defense counsel provided effective assistance at trial; the minor mistakes defendant alleges are insufficient to support a claim of ineffective assistance of counsel. Defense counsel objected frequently to the State's evidence. RP 42, 57, 59, 66, 67, 77, 117, 118, 119, 120. He cross-examined witnesses effectively, highlighting factors that would cause the jury to doubt the identification of defendant as the second suspect. RP 23-29, 47-49, 61-64, 78-89, 104-115, 127-132. He presented the testimony of a witness that supported defendant's alibi claim in addition to the testimony of the defendant himself. RP 137-143, 145-148, 149-166, 169-172. His closing presented a consistent and coherent theme as to why the jury should return a verdict of not guilty. RP 181-205. The minor errors that defendant alleges in this case are insufficient

alone to show that defense counsel was ineffective on the whole during trial. See Ciskie, 110 Wn.2d 263; Carpenter, 52 Wn. App. at 684-685. Even if counsel made demonstrable mistakes, his performance on the whole record was sufficiently effective so as to provide defendant with his Sixth Amendment right to counsel.

- b. As the statements that were broadcast by police over the PA system to the second subject holed up inside the house were not intended as assertions, but commands, they did not constitute inadmissible hearsay.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

Defendant contends that his attorney was ineffective for failing to object to hearsay evidence allegedly adduced during the following testimony of Officer Krause:

Prosecutor: Okay. Now during that time was Officer O’Keefe doing anything with respect to trying to get that second suspect out of the house?

Officer: Officer O’Keefe was relieved by several other officers, and he went to my patrol car, which was parked out front, and he was on the PA making announcements to come out of the house.

Prosecutor: And what was he saying?

Officer: He was saying, [“]Kyle come out of the house. This is the police.[”] He repeated that possibly 20 or 30 times, told him what door to come out of and gave him instructions to come out. [“]You won’t be hurt. Just come out.[”] This went on for probably the whole hour.

RP 58-59. Defendant contends that this last paragraph was inadmissible hearsay.

“A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” ER 801(a). “‘Hearsay’ is a statement . . . offered in evidence to prove the truth of the matter asserted.” ER 801(c). A statement is defined as an assertion, or oral, written or nonverbal conduct that is intended to be an assertion. ER 801(a). Since the hearsay rule excludes only assertive statements, questions, which by their nature are not assertive, are not usually hearsay. State v. Collins, 76 Wn. App. 496, 498, 886 P.2d 243

(1995); United States v. Lewis, 902 F.2d 1176 (5th Cir. Miss. 1990).

Similarly, imperative statements or commands, by their nature, are also not assertive; consequently such statements are ordinarily not hearsay.

See 5B Karl B. Tegland, Washington Practice Evidence § 801.3 at 320 (5th Ed. 2007); State v. Fish, 99 Wn. App 86, 96, 992 P.2d 505 (1999). The statements defendant says were improperly admitted were commands or imperative statements, not assertions. Moreover, the statements were not admitted for the truth of the matter asserted⁴ but to show the steps in trying to resolve the standoff between the police and the second subject inside the house. Defendant cannot show that the trial court would have excluded the statements as hearsay had such an objection been made.

- c. As defendant cannot show that Detective Hofner's statement that he did not say anything upon learning of a witness identification was a comment on his right to remain silent, he cannot show deficient performance in the failure to object.

As discussed above, The State dispute the defendant's characterization of the two challenged statements as being improper comments on the defendant's right to remain silent. The Fifth Amendment prevents the state from commenting on "the silence of the

⁴ Defendant indicates that there is no evidence how the police came up with the name "Kyle." The jury heard that the other suspect who was arrested showed an officer a white Chevy Suburban parked a block away. RP 66-67. The police determined that this car was registered to defendant, Kyle Knapp. RP 67.

defendant so as to infer guilt from a refusal to answer questions.” State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Neither statement indicates that the defendant refused to answer a question or that he invoked his right to remain silent. The substance of the statements describes the defendant’s reaction to learning that a witness had identified him as being involved in the burglary; the second challenged statement does not indicate whether the defendant made any verbal response or not. There was considerable evidence before the jury that the defendant was cooperative with the detective on every occasion they had contact and that defendant maintained that he was with his girlfriend at the time of the burglary. “When 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 at 765. The record in this case simply does not establish that the portion of the detective’s response about the defendant not saying “anything” was improper. Consequently, defendant cannot show that the lack of objection was deficient performance.

- d. Defendant cannot show deficient performance or resulting prejudice from counsel’s failure to seek a mistrial.

A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599

(1986); Hopson, 113 Wn.2d at 284. The decision to deny a request for mistrial based upon alleged prosecutorial misconduct lies within the sound discretion of the trial court, and it will not be disturbed absent an abuse of discretion. State v. Ray, 116 Wn. 2d 531, 549, 806 P.2d 1220 (1991); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Here defendant asserts that his attorney was ineffective for failing to request a mistrial after the prosecutor engaged in misconduct during closing argument. But in order to succeed on this claim, defendant must show that the trial court would have granted the mistrial had it been asked for. As argued previously, it would have been very easy for the court to cure any prejudice resulting from improper argument by instructing the jury to disregard the offending argument as was done in State v. Russell. The error in this case was curable by a limiting instruction; a new trial was not necessary. Defendant cannot show from the record before this court that the trial court would have granted a motion for mistrial. Moreover, as the State argued previously, the error in this case was harmless beyond a reasonable doubt. Defendant cannot show resulting prejudice from his attorney's failure to seek a curative instruction, as the jury's verdict was not affected by the error.

In this case, Defendant received a fair trial but not a perfect one. While his attorney could have performed better by objecting and seeking a curative instruction, defendant was not deprived of his right to counsel by this one mistake.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the conviction below.

DATED: FEBRUARY 12, 2008

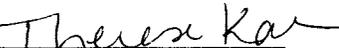
GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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.

2-12-08 
Date Signature

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