

Original

NO. 36128-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BENJAMIN I. TUCKETT,

Appellant,

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DIVISION II
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APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 06-1-000-26-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Tuckett a fair trial where Detective Heldreth and Officer Maiava improperly commented on Tuckett's constitutional right to remain silent by exercising his right to counsel.
02. The trial court erred in permitting Tuckett to be represented by counsel who provided ineffective assistance by failing to object to Detective Heldreth and Officer Maiava's testimony that Tuckett invoked his right to remain silent by exercising his right to counsel or by exacerbating or waiving the issue by confirming with both witnesses that Tuckett had a right to do so and that the questioning had to stop as a result of his request.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Tuckett was denied a fair trial based on Detective Heldreth and Officer Maiava's testimony that Tuckett invoked his right to remain silent by exercising his right to counsel? [Assignment of Error No. 1].
02. Whether Tuckett was prejudiced as a result of his counsel's failure to object to Detective Heldreth and Officer Maiava's testimony that Tuckett invoked his right to remain silent by exercising his right to counsel or by exacerbating or waiving the issue by confirming with both witnesses that Tuckett had a right to do so and that the questioning had to stop as a result of his request? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Benjamin I. Tuckett (Tuckett) was charged by information filed in Mason County Superior Court on February 2, 2006 with indecent liberties, contrary to RCW 9A.44.100. [CP 57-58].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on February 15, 2007, the Honorable James B. Sawyer II presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 206].

The jury returned a verdict of guilty as charged, Tuckett was sentenced within his standard range and timely notice of this appeal followed. [CP 3, 5-15, 39].

02. Substantive Facts

On January 25, 2006, Angela Atkins drove home with her boyfriend after getting off work at 11:30 p.m. When her car ran out of gas, she decided to walk to a gas station, leaving her boyfriend asleep in the car. [RP 55]. While walking to the station, she passed Tuckett, a person she had gone to school with for many years [RP 56]. Out of the corner of her eye she saw him turn around and start to follow her. [RP 56]. He eventually grabbed her about the neck and waist.

(H)e got his hand up my shirt and got his hand on both of my breasts. He was trying to undo my pants and I was screaming the whole time and trying to fight him off.

[RP 57].

Atkins explained that the touching was underneath both her shirt and bra. “He told me to shut up and calm down and everything would be okay.” [RP 58]. When she got free, Tuckett ran to a car parked within 10 feet and sped off. [RP 58-59, 61]. “He had a smell of alcohol on him.” [RP 65]. Her physical injuries included a split lip, a scratch on the side of her face, a bruise on her arm and her knee was “pretty banged up from going down to the ground.” [RP 62]. She later selected Tuckett’s picture in a photomontage for the police. [RP 69, 114]. The parties stipulated that Atkins has never been married to Tuckett. [RP 200-01].

While driving home that evening, Nicole Fortner stopped her vehicle when she “saw a girl trying to flag down cars.” [RP 44]. “She was frantic and distraught, screaming call 911, 911.” [RP 44].

I saw the guy holding her by the shirt. He let go of her and she came running to my car, flailing.

[RP 45].

Fortner saw the assailant run and get into a sports-type car and drive away. [RP 45, 47]. He was wearing jeans and a maroon sweatshirt.

[RP 45]. "I know he was tall ... about 5' 11." [RP 46]. She did not see his face. [RP 48].

The police interviewed Tuckett on January 30, 2006. He explained that he had clocked out of work at 10:30 p.m. but did not leave until "around 11:00 p.m. or 11:30 p.m.(.) had gone to a local tavern but couldn't get in because he didn't have his ID, had called a friend in Lacey and had stayed at the friend's house that night. [RP 92-95, 120-22, 130].

The police obtained the records for the phone booth from where the call was made and confirmed the 12:33 a.m. telephone call to Tuckett's friend, Sariah Murdock, who testified that Tuckett had in fact stayed at her house that evening. [RP 126-27, 197]. Tuckett time records at work indicated that he had clocked out at 9:02 p.m. [RP 129-30, 180-81]. The person Tuckett worked with that night, Diana Michel, remembered that he had left around 11:20 p.m., ten minutes either way. [RP 192]. "I didn't leave until 11:49." [RP 193]. "I know that he left a half an hour prior to me leaving." [RP 194].

The police established a timeline and determined that there was "at least an hour and a half that we were looking at as unaccounted for, that we couldn't account for his whereabouts. And during that hour and a half is the time that this crime could have occurred." [RP 164].

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D. ARGUMENT

01. TUCKETT WAS DENIED A FAIR TRIAL WHERE DETECTIVE HELDRETH AND OFFICER MAIAVA IMPROPERLY COMMENTED ON HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT BY EXERCISING HIS RIGHT TO COUNSEL.

The privilege against self-incrimination, or the right to remain silent, is based upon the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S.Ct. 1602 (1966).¹ "The purpose of the right is ... 'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or having to share his thoughts and beliefs with the Government.'" State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (quoting Doe v. United States, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)). A defendant's constitutional right to silence applies in both pre- and post-arrest situations. State v. Easter, 130 Wn.2d at 243. Even without an explicit reference to Miranda, a prosecutor may be deemed to have purposely

¹ "[T]he protection of article 1, § 9 is coextensive with, not broader than, the protection of the Fifth Amendment." State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) (citing State v. Moore, 79 Wn.2d 51, 483 P.2d 630 (1971)). Article 1, § 9 provides:

No person shall be compelled in any criminal case to give evidence against himself . . .

The Fifth Amendment provides:

elicited the fact of silence in the face of arrest. In the Ninth Circuit case of Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), the court held the following exchange between the prosecutor and the arresting officer was the sort of inquiry forbidden by the Supreme Court in Miranda and Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

- Q. Who arrested Mr. Douglas?
A. I did.
Q. Did he make any statements to you?
A. No.

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) (quoting Douglas v. Cupp, at 267.

It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. State v. Easter, 130 Wn.2d at 241. Likewise, it is constitutional error for the State to purposefully elicit testimony as to a defendant's silence. State v. Curtis, 110 Wn. App. at 13. Comments regarding a constitutional claim of silence may be reviewed for the first time on appeal. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing State v. Curtis, 110 Wn. App. at 11; State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); RAP 2.5(a)(3)). Silence

... nor shall [any person] be compelled in any criminal case to be a witness against himself . . .

cannot be used to infer guilt. Romero, 113 Wn. App. at 787. The State bears the burden of overcoming the presumption that a constitutional error is prejudicial. State v. Easter, 130 Wn.2d at 242.

Division III of this Court reversed a conviction where an officer testified that he had read the defendant his Miranda rights and that the defendant refused to talk to him and wanted an attorney. State v. Curtis, 110 Wn. App. at 9. The court reasoned that although the State did not “harp” on the officer’s testimony, the “question and answer were injected into the trial for no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer.” Id. at 13-14.

During trial, Detective Heldreth testified that when he and Officer Maiava met with Tuckett at the police station, Tuckett “was advised of his Miranda warnings, or his rights, and he waived his rights and signed the rights form(,)” before freely explaining his version of the events, at which point Heldreth confronted him with what the detective deemed were problems with his, Tuckett’s, timeline. [RP 95]. The prosecutor then asked: “Did he supply you with any additional information after you confronted him with that information?” [RP 96]. Without objection, Heldreth replied:

A. No. Actually, after I confronted him with that, he wanted an attorney - -

Q. Thank you.

A. - - and we stopped. The interview stopped.

[RP 96].

Later, after Heldreth reiterated that he had confronted Tuckett with the same information, the prosecutor asked: “And what – how did the defendant respond when you did that?” [RP 161]. Without objection, Heldreth replied:

A. And I believe that was about the time that he stopped talking - -

Q. Okay.

A. - - and requested an attorney.

[RP 162].

When the prosecutor asked Officer Maiava, who questioned Tuckett along with Heldreth, what happened after he concluded taking Tuckett’s statement, Maiava, without objection, responded:

A. ... After getting his description of what he was wearing, he requested an attorney at that time - -

Q. Okay, and did ...

A. - - so the statement was ended.

[RP 124].

Here, Detective Heldreth's direct comment referencing Tuckett's invocation of his right to silence by requesting an attorney was impermissible, as was Officer Maiava's similar comment, which exacerbated and highlighted a continuing theme. State v. Romero, 113 Wn. App. at 793; State v. Pottorff, 138 Wn. App. 343, 346-47, 156 P.3d 955 (2007) (direct comment where officer referenced defendant's invocation of rights during questioning). And this error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). Our Supreme Court has held that any direct police testimony as to a defendant's refusal to answer questions is a violation of the defendant's right to silence. Easter, 130 Wn.2d at 241; also see State v. Lewis, 130 Wn.2d 700, 706, 929 P.2d 235 (1996) (defendant's "right to silence was violated by testimony he did not answer and looked away without speaking" when questioned by officer).

In State v. Lewis, at 705-07, on the other hand, where the officer testified that the defendant only told him he was innocent, not that the defendant refused to talk to him, the court held this indirect reference to the defendant's silence is not constitutional error absent additional comment implying guilt. Thus if the comment is direct, constitutional

error exists requiring a constitutional harmless error analysis. Easter, 130 Wn.2d at 241. Conversely, if the comment is indirect, three questions should be considered before determining whether the comment rises to constitutional proportions.

First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? State v. Curtis, 110 Wn. App. 6, 13-14, 37 P.3d 1274 (2002). Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Douglas, 578 F.2d at 267. Third, was the indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant? State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Answering "yes" to any of these three questions means the indirect comment is an error of constitutional proportions meriting review using the constitutional harmless error standard, whether or not objection is first made at the trial court See Easter, 130 Wn.2d at 241-42. On the other hand, if "no" is the answer to all three questions and appeal is taken, a non-constitutional error standard of review applies. See Sweet, 138 Wn.2d at 481; Lewis, 130 Wn.2d at 706-07.

State v. Romero, 113 Wn. App. at 790-91.

Even applying this framework, it can be concluded that Heldreth and Maiava's testimony constitutes error of constitutional proportion and is not harmless. First, each of the responses was responsive to the prosecutor's questioning, which, in various forms (Any additional information? How did he respond? What happened?) was posed three times and elicited almost identical responses (defendant invoked rights by requesting attorney) from two witnesses. Secondly, each of the responses was purposeful and intended to denigrate Tuckett and undermine his defense. The direct implication of the testimony was that Tuckett was guilty and thus refused to give an additional statement without a lawyer when confronted with alleged conflicts with his timeline, which appears more egregious than the silence followed by looking away in Easter, especially in consideration of State v. Demery, 144 Wn.2d 753, 765, 30 P.2d 251 (1992) ("a police officer's testimony may particularly affect a jury because of its 'special aura of reliability.'"), and in consideration of State v. Keene, 86 Wn. App. 589, 594, 938 P.2d 839 (1997), in which this court held that a defendant's right to silence was violated when the officer testified that she made an appointment to meet with the accused, he missed the appointment, and that he did not return any of her phone calls. "The detective's comment violated the defendant's right to silence." Id. Concomitantly, it can be asserted that the State did exploit the testimony.

Simply, given that Tuckett's defense was that he didn't do it and that his timeline supported this claim [RP 224, 228], the State's attack on Tuckett's timeline during closing argument [RP 217-19, 228-30], had the effect of highlighting Tuckett's invocation of his rights rather than answering questions about the alleged conflicts with his version of the sequence and timing of the events.

There was no probative value in the responses at issue. Rather, the only value was the inference that only a person who had something to hide or was guilty would remain silent by exercising his right to an attorney, as was the case in Curtis, 110 Wn. App. at 13-14. The responses served no purpose other than to imply that Tuckett's exercise of his rights "was more consistent with guilt than with innocence." See Curtis, 110 Wn. App. at 14.

The State's evidence against Tuckett was not overwhelming. As argued by counsel in closing: no conclusive evidence refuted Tuckett's timeline, Tuckett did not have the same clothes as the assailant, Tuckett was neither as slim nor as tall as the assailant and Tuckett drove a vehicle different than Fortner testified the assailant had used to leave the scene. [RP 223-28.

The improper testimony, which clearly insinuated that Tuckett was hiding his guilt, had a practical and identifiable consequence in the trial of

this case and cannot be said to be harmless beyond a reasonable doubt. See Easter, 130 Wn.2d at 242-43, with the result that Tuckett's conviction must be reversed.

02. TUCKETT WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO DETECTIVE HELDRETH AND OFFICER MAIAVA'S TESTIMONY THAT TUCKETT INVOKED HIS RIGHT TO REMAIN SILENT BY EXERCISING HIS RIGHT TO COUNSEL OR BY EXACERBATING OR WAIVING THE ISSUE BY CONFIRMING WITH BOTH WITNESSES THAT TUCKETT HAD A RIGHT TO DO SO AND THAT QUESTIONING HAD TO STOP AS A RESULT OF HIS REQUEST.²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below.

² While it is submitted that the error presented herein may be raised for the first time on appeal for the reasons previously argued in this brief, this portion of the brief is presented out of an abundance of caution should this court disagree with this assessment.

State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

During cross-examination of Heldreth, for whatever reason, Tuckett's counsel asked and Heldreth answered in the following manner.

Q. Now, when an individual wants to speak with an attorney the questioning stops, correct?

A. Yes.

Q. And it's certainly within his rights to do that, correct?

A. Yes.

[RP 97].

This theme was repeated during counsel's questioning of Maiava.

Q. Now, when he asked for an attorney – which he's perfectly entitled to do; you would agree with that – did you afford him an opportunity to try to call an attorney or otherwise attempt to provide him with one?

A. I don't recall. Certainly, in any case, I – when I do that when they request an attorney, he was afforded the opportunity at the time. But if he – whether or not he had an attorney in mind or if he wanted to look one up or call, I don't recall if he wanted or made that request.

Q. Okay. But at that point the interview ceased and –

A. Exactly.

[RP 138].

Should this court determine that trial counsel waived the issue relating to Heldreth and Maiava's improper testimony as argued in the preceding section by failing to object to the testimony or by exacerbating or waiving the issue by confirming with both witnesses that Tuckett had a right to do so and that the questioning had to stop as a result of his request, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to this testimony or so questioned the witnesses. Since the testimony at issue, for the reasons

previously argued herein, violated Tuckett's constitutional right to remain silent by exercising his right to counsel, had counsel objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief, and counsel erred in asking the two witnesses the questions posed above.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident. Again, as previously argued, since the State's case against Tuckett was not overwhelming, the only value in the testimony at issue was the inference that he had something to hide, which undoubtedly undermined his defense as argued in the preceding section of this brief.

Counsel's performance was deficient, which was highly prejudicial to Tuckett, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

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E. CONCLUSION

Based on the above, Tuckett respectfully requests this court to reverse and dismiss his conviction.

DATED this 13th day of September 2007.

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