

original

No. 36128-1-II

Um

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN I. TUCKETT,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 06-1-00026-9

BRIEF OF RESPONDENT

EDWARD P. LOMBARDO
Deputy Prosecuting Attorney
Attorney for Respondent
WSBA # 34591

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
Tel: (360) 427-9670 Ext. 417
Fax: (360) 427-7754

TABLE OF CONTENTS

	<u>Page(s)</u>
A. Appellant’s Assignments of Error.....	1
B. Issues Pertaining to Assignments of Error.....	1
C. Evidence Relied Upon.....	1
D. Statement of the Case.....	2-6
1. Procedural History & Statement of Facts.....	2-3
3. Summary of Argument.....	3-6
E. Argument.....	6-20
1. TUCKETT WAS NOT DENIED A FAIR TRIAL WHEN DETECTIVE HELDRETH AND OFFICER MAIAVA MADE DIRECT COMMENTS REGARDING TUCKETT’S PRE- ARREST REQUEST FOR COUNSEL WHEN: (a) THESE COMMENTS AT MOST CONSTITUTED HARMLESS ERROR BEYOND A REASONABLE DOUBT; AND (b) THE UNTAINTED EVIDENCE WAS SO OVERWHELMING THAT IT WOULD NECESSARILY HAVE LED TO TUCKETT’S BEING FOUND GUILTY.....	6-17
2. TUCKETT WAS NOT DENIED EFFECTIVE ASSISTANCE WHEN HIS COURT-APPOINTED ATTORNEY DID NOT OBJECT TO DETECTIVE HELDRETH AND OFFICER MAIAVA’S DIRECT COMMENTS AND/OR ASKED QUESTIONS ABOUT THESE COMMENTS HIMSELF BECAUSE THEY: (a) DID NOT PREJUDICE TUCKETT’S DEFENSE; (b) WERE NOT ARGUED BY THE STATE AT ANY POINT IN THE TRIAL; AND (c) AT MOST CONSTITUTED HARMLESS ERROR.....	17-20

Page(s)

F. Conclusion.....21

TABLE OF AUTHORITIES

1. Table of Cases	<u>Page(s)</u>
<u>State v. Curtis</u> , 110 Wash.App. 6, 37 P.3d 1274 (2002).....	6, 7, 10, 20
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	7
<u>State v. Fricks</u> , 91 Wn.2d 391, 588 P.2d 1328 (1979).....	7
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	19
<u>State v. Guloy</u> , 104 Wash.2d 412, 705 P.2d 1182 (1985).....	6
<u>State v. McFarland</u> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	18, 19
<u>State v. Pottorff</u> , 138 Wash.App. 343, 156 P.3d 955 (2007).....	7, 8, 9, 10, 11, 13
<u>State v. Rodriguez</u> , 121 Wash.App. 180, 87 P.3d 1201 (2004).....	18, 19
<u>State v. Romero</u> , 113 Wash.App. 779, 54 P.3d 1255 (2002).....	7, 18, 19
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	19

2. Other Jurisdictions

<u>Miranda v. Arizona</u> , 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966).....	2, 7, 8, 9, 14
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	5, 18, 20

3. Court Rules

RAP 10.3(b).....	2
------------------	---

4. Other

Page(s)

Karl B. Tegland, 5B Washington Practice, Evidence:
Law and Practice § 801.46 at 353 (4th ed. 1999).....8

A. ASSIGNMENTS OF ERROR

1. 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.
2. 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

1. If Detective Heldreth and Officer Maiava made direct comments regarding Tuckett's request for an attorney when he was questioned during the investigation phase of this case, was Tuckett denied a fair trial when:
 - (a) these comments at most constituted harmless error beyond a reasonable doubt; and
 - (b) the untainted evidence was so overwhelming that it would necessarily have led to a finding guilt?
2. Was Tuckett denied effective assistance when his attorney did not object to Detective Heldreth and Officer Maiava's direct comments and/or asked questions about them himself when these comments:
 - (a) did not prejudice Tuckett's defense;
 - (b) were not argued by the State at any point in the trial; and/or
 - (c) at most constituted harmless error?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History and Facts.

Pursuant to RAP 10.3(b), the State accepts Tuckett's recitation of the procedural history and facts and adds the following:

On or around January 30, 2006, Officer Maiava of the Shelton Police Department had primary contact with Tuckett to see if he "would come down to the police department." RP 91: 16-18. Tuckett accepted this offer, and "rode to the police department with Officer Maiava." RP 91: 19-21. Once Tuckett arrived at the Shelton Police Department, he "was advised of his Miranda...rights...waived his rights and signed the rights form for Officer Maiava." RP 91: 22-25. Detective Heldreth with the Shelton Police Department was present during the interview that Officer Maiava had with Tuckett and "listen[ed] to what was being said back and forth between the two." RP 92: 1-9. Detective Heldreth was not present during the entire interview between Officer Maiava and Tuckett, as he left to "call [Tuckett's] employer" to "verify [Tuckett's] timeline." RP 92: 12-22.

Upon learning that Tuckett's timeline of events "conflicted," Detective Heldreth told Tuckett that he and Officer Maiava "needed to know the truth." RP 95: 22-25; 96: 1. After he was asked to tell the truth but before he requested an attorney, Tuckett's "demeanor changed" in that

Detective Heldreth noted that he “appeared to be nervous” that he (Heldreth) would immediately start calling people to check on his timeline of events. RP 161: 24-25; 162: 1-17. Tuckett then told law enforcement that “he wanted an attorney” and that “[t]he interview stopped.” RP 96: 2-7; 162: 1-4. After the interview stopped, Officer Maiava “placed [Tuckett] under arrest...allowed him an opportunity to review his statement...[and] was...allowed to make corrections to it.” RP 124: 21-25; 125: 1. Officer Maiava arrested Tuckett on the charged of “attempted rape in the second degree.” RP 124: 19.

3. Summary of Argument

Officer Maiava and Detective Heldreth’s direct comments at trial regarding Tuckett’s request for an attorney during his pre-arrest interview at most constitute harmless error. That Officer Maiava and/or Detective Heldreth merely stated that Tuckett requested an attorney during his pre-arrest questioning, without more, constituted at most harmless error beyond a reasonable doubt.

While Detective Heldreth’s direct testimony did end with his statement that Tuckett “wanted an attorney---and we stopped,” the State also asked him additional, non-related questions on re-direct. RP 96: 2-7. That the State asked these non-related questions is important, because it shows that it did not attempt to emphasize Tuckett’s request for counsel.

Granted, while Detective Heldreth reiterated this exchange between Tuckett later in the trial, the comment presented nothing new to the jury and was merely part of the State's continuing attempt to establish its factual timeline. Had the State simply ended Detective Heldreth's testimony after eliciting that Tuckett halted the pre-arrest interview and then not asked any additional, non-related questions on re-direct, then Tuckett's argument might be more persuasive.

This same rationale applies to Officer Maiava's testimony, as the record shows that the State was simply trying to develop its timeline of events and did not try to use his request for counsel against him. The record shows that during direct examination, the State put numerous questions to Officer Maiava both before and after he stated that Tuckett requested an attorney and ended his pre-arrest interview. Had the State asked either Detective Heldreth or Officer Maiava additional questions that required them to elaborate on Tuckett's request for counsel and/or any communication he may have made after he asserted that right, then Tuckett's argument could have greater merit.

Any error that may have occurred through the admission of these statements was harmless because the untainted evidence was so overwhelming in Tuckett's case that it would necessarily have led to a finding of guilt. The victim, Angela Atkins, knew Tuckett from school and

positively identified him as being the man who: (a) grabbed her around her neck and waist; (b) got his hand up her shirt; (c) had his hand on both her breasts; and was (d) trying to undo her pants. RP 57: 14-22. Nicole Fortner, an eyewitness, saw “a male pulling at [the victim’s] shirt [as] she was trying to run away...” RP 50: 7-8. Substantial testimony was also given regarding the sequence of events, and it was determined that a sufficient gap in the timeline existed where Tuckett’s whereabouts were undetermined; a time when he could have committed indecent liberties.

Lastly, Tuckett received effective assistance of counsel because neither prong of the Strickland test was satisfied. The record shows that the comments by Detective Heldreth and Officer Maiava at most constituted harmless error and in no way prejudiced Tuckett’s defense. Court-appointed counsel for Tuckett may well have realized that if he objected to the innocuous questions that were put to Detective Heldreth and Officer Maiava, that he might well divert the jury’s attention in the wrong direction and away from the true focus in the case; namely the victim’s identification of Tuckett as the assailant, her detailed explanation the injuries she sustained, the manner of Tuckett’s sexual assault upon her, as well as the overall timeline of events. The record indicates that the questions Tuckett’s attorney asked law enforcement regarding his client’s request for counsel was merely for clarification and in no way prejudiced

Tuckett's defense. Tuckett received a fair trial and effective assistance of counsel. The trial court did not err and its judgment should be affirmed.

E. ARGUMENT

1. TUCKETT WAS NOT DENIED A FAIR TRIAL WHEN DETECTIVE HELDRETH AND OFFICER MAIAVA MADE DIRECT COMMENTS REGARDING TUCKETT'S PRE-ARREST REQUEST FOR COUNSEL WHEN:
 - (a) THESE COMMENTS AT MOST CONSTITUTED HARMLESS ERROR BEYOND A REASONABLE DOUBT; AND
 - (b) THE UNTAINTED EVIDENCE WAS SO OVERWHELMING THAT IT WOULD NECESSARILY HAVE LED TO TUCKETT'S BEING FOUND GUILTY.

Tuckett was not denied a fair trial when Detective Heldreth and Officer Maiava made direct comments regarding Tuckett's pre-arrest request for counsel when: (a) these comments at most constituted harmless error beyond a reasonable doubt; and (b) the untainted evidence was so overwhelming that it would necessarily have led to Tuckett's being found guilty.

Constitutional error is presumed to be prejudicial, and the State bears the burden of proving the error harmless. State v. Curtis, 110 Wash.App. 6, 15, 37 P.3d 1274 (2002); see State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). It is well established, however, that constitutional errors, including violations of a defendant's rights...may be so insignificant as to be harmless. State v. Guloy, 104 Wash.2d at 425. A

constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.

The right against self-incrimination is liberally construed. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). The exercise of constitutionally guaranteed Miranda rights must be without penalty. Curtis, 110 Wash.App. at 8; see Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). The State penalizes a defendant for asserting those rights when it introduces evidence of the defendant's exercise of Miranda rights as substantive evidence of guilt. Curtis, 110 Wash.App. at 8. An accused Fifth Amended right to silence can be circumvented by the State 'just as effectively by questioning the arresting officer or commenting in closing argument as by questioning the defendant himself.' Easter, 130 Wn.2d at 236; see State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

The first question to be asked is whether the comment is a direct or indirect comment on the defendant's right to remain silent. State v. Pottorff, 138 Wash.App. 343, 346-347, 156 P.3d 955 (2007); see State v. Romero, 113 Wash.App. 779, 54 P.3d 1255 (2002). A direct comment occurs when a witness or state agent makes reference to the defendant's invocation of his or her right to remain silent. Pottorff, 138 Wash.App. at

346-347. An indirect comment on the right to remain silent occurs when a witness or state agent references a comment or action by the defendant which could be inferred as an attempt to exercise the right to remain silent. Pottorff, 138 Wash.App. at 347.

A respected legal commentator has noted that ‘a fine line [exists] between [what] is forbidden and what is allowed.’ Romero, 113 Wash.App. at 787 citing Karl B. Tegland, 5B Washington Practice, Evidence: Law and Practice § 801.46 at 353 (4th ed. 1999). Review standards of direct and indirect comments differ. Pottorff, 138 Wash.App. at 347. Direct comment prejudice is reviewed using a harmless error beyond a reasonable doubt standard. Prejudice resulting from an indirect comment is reviewed using the lower, non-constitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome.

The facts of Pottorff are analogous to Tuckett’s case because the officer’s direct comment regarding defendant Pottorff’s invocation of his Miranda rights is not only quite similar to the comments made by Detective Heldreth and Officer Maiava, but also was determined to be harmless error beyond a reasonable doubt.

In Pottorff, the defendant was charged with assault in the third degree when he struck another person over the head with a cane. Pottorff,

138 Wash.App. at 345-346. During defendant Pottorff's trial, Officer Davis testified that upon arriving, he advised Pottorff of his rights. Pottorff, 138 Wash.App. 345. Pottorff agreed and freely talked with Officer Davis, partly explaining that he had "slapped [the victim] around a little." The State then asked Officer Davis: "[a]nd what happened after your conversation with the defendant was concluded?" Without objection, Officer Davis non-responsively replied:

I pointed-out the cane [and]...asked...Mr. Pottorff if he struck [the victim] with this cane. Mr. Pottorff said that-he didn't reply. He said at that time he wanted to invoke his right to remain silent, so we took the cane from him and placed him under arrest for assault.
Pottorff, 138 Wash.App. at 345-346.

The State did not pursue this testimony from Officer Davis and did not argue the point in closing. Pottorff, 138 Wash.App. at 346.

The Court in Pottorff reasoned that although Officer Davis' direct comment was impermissible, nothing in the record showed that the State exploited this non-responsive answer for substantive truth of the defendant's guilt. Pottorff, 138 Wash.App. at 347. The State immediately continued with non-related questioning, and did not argue the point to the jury. Thus, nothing suggests that the jury relied upon Pottorff's silence as an admission of guilt. Further, the impermissible comment on Pottorff's silence did not directly follow Officer Davis' Miranda warning testimony,

which distinguishes this case from Romero and Curtis. Pottorff, 138 Wash.App. at 348. Instead, Pottorff agreed to waive his rights and did answer Officer Davis' questions, giving a full explanation of the events, but omitting mention of using the cane to hit the victim. Although the State did not seek any advantage from Officer Davis' comment on Pottorff's silence, the State could have commented on what Pottorff did not say, because he did not remain silent entirely, but did talk to the police. Assuming error, it would be harmless beyond a reasonable doubt.

Similarly, the direct comments made by Detective Heldreth and Officer Maiava at most constitute harmless error, for like those in Pottorff, there is: (a) nothing to suggest that the State pursued this testimony; (b) exploited it in any way; and/or (c) that the jury in any way relied upon Pottorff's silence as an admission of guilt. Like the exchange in Pottorff between the State and Officer Davis, a very similar one occurred in Tuckett's case during Detective Heldreth's direct testimony. In Tuckett's trial, the State was in the process of developing a factual timeline through Detective Heldreth. RP 91-95. After Detective Heldreth testified that he told Tuckett that his (Tuckett's) timeline of events "was not working for [them]" and that they "needed to know the truth," the following exchange occurred:

State: Did [Tuckett] supply you with any additional information after you confronted him with that information?

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

State: Thank you.

Det.: ---and we stopped. The interview stopped.

State: Thank you, I don't have anything further. RP 96: 2-8.

As can be seen from both the testimony in Tuckett's case and in case law, both the timing of a direct comment and/or what, if anything, the State does with it are of critical importance.

A review of the exchange between the State and Detective Heldreth in conjunction with the questioning immediately prior to this shows that the State was trying to establish a timeline of events. When the State asked Detective Heldreth whether Tuckett supplied him with "any additional information," the detective's response, like Officer Davis' in Pottorff, was arguably non-responsive. Instead of elaborating on the factual timeline, Detective Heldreth related Tuckett's request for counsel. The record itself shows that the moment Detective Heldreth said the word "attorney," the State immediately interrupted him and said "[t]hank you," perhaps in an attempt to halt the detective from making any additional direct comments on Tuckett's right to silence. Had the State ended its examination of Detective Heldreth by not asking him any questions on re-

direct, then the error, if it occurred, would very likely have not been harmless.

This potential error could have prejudiced Tuckett because the jury might have inferred that Tuckett admitted guilt when he ended the interview and requested counsel. What actually occurred is that on re-direct, the State continued to inquire about the timeline of events regarding another witness. RP 101-102. This demonstrates that the State, at that time, moved-on with its case. Granted, while Detective Heldreth again noted how Tuckett requested an attorney when he was recalled later in the trial, the information was not new to the jury and the State was still trying to establish the timeline that was central to its case. RP 161: 22-25; 162: 1-4.

This rationale is even more persuasive with Officer Maiava's comments, as the record shows that, as with Detective Heldreth's testimony, the State continued its process of outlining a specific timeline of events. RP 107-123. The exchange between the State and Officer Maiava occurred as follows:

State: Okay. After you concluded taking a statement from [Tuckett], what happened next?

Maiava: Following that--we actually had gotten through at about 2:56. After getting his description of what he was wearing, [Tuckett] requested an attorney at that time---

State: Okay, and did...

Maiava: --so the statement was ended.

State: Okay. And after the statement was ended, what happened next?

Maiava: ...[I] advised him that he was under arrest for attempted rape second degree—

State: Okay.

Maiava: --which is when I placed him under arrest.
RP 124: 8-21.

This exchange is similar to the ones that the State had with Detective Heldreth, and shows that the State was simply developing its factual and procedural timeline. In neither the 16 pages of Officer Maiava's testimony prior to this, or in the 5-plus pages of direct examination that followed, did the State at any time try to use Tuckett's request for counsel to infer guilt. Had the State abruptly ended its examination of Officer Maiava at the point when Tuckett invoked his right to remain silent and/or used it during closing argument, then Tuckett's defense might well have been prejudiced. The record here shows that if any error occurred that it was harmless, especially because like defendant Pottorff, Tuckett did not remain entirely silent but initially waived his rights and talked with the police. That Tuckett's attorney asked law enforcement about how his client invoked his right to silence was also harmless, because the record

indicates that this was merely to clarify what occurred, and presented little if anything new for the jury to consider.

In addition, none of the direct comments made in Tuckett's case were anywhere near as egregious as those that occurred in Romero. In that case, the prosecutor and police sergeant engaged in the following exchange regarding defendant Romero's arrest:

State: Okay. And what happened there?

Sgt.: I brought him into the station and put him in the holding cell, he was somewhat uncooperative so-

Defense: Your honor, I would object, I have previously objected to that.

Court: Just respond to the question, sir, please.

Sgt.: Ok, we put him in the holding cell, I read him his Miranda warnings, which he chose not to waive, would not talk to me.
Romero, 113 Wash.App. at 784-785.

Unlike the relatively innocuous comments made by Detective Heldreth, Officer Maiava and Tuckett's attorney, the Sergeant's comments regarding Romero's arrest were purposeful and involved the prejudicial adjective "uncooperative" in conjunction with his description of how Romero "would not talk with" him. While defendant Romero's right to silence was violated, Tuckett's was not.

Additionally, even though the comments made by Detective Heldreth and Officer Maiava at most constituted harmless error beyond a reasonable doubt, the untainted evidence was so overwhelming that it would necessarily have led to Tuckett's being found guilty. The victim not only positively identified Tuckett as being the one who passed her on the street because she "could see his face under the streetlight," but testified that "[o]ut of the corner of her eye" she could see that Tuckett "had turned around and started to follow her." RP 56: 2-11. The victim knew Tuckett because he was "a kid that [she] went to school with." RP 56: 3-5. The victim testified that when she was about to try and "put some distance between herself and [Tuckett]," that she "felt somebody grab [her] around [her] neck and around [her] waist." RP 56: 16-19. That "somebody" was "Benjamin Tuckett," whom she had gone "to school together [with] for...many years." RP 56: 20-21; 24.

After the victim "went dead weight and dropped to the ground," Tuckett "got his hand up [her] shirt and got his hand on both of [her] breasts." RP 57: 16-21. Tuckett also "tri[ed] to undo [her] pants and [she] was screaming the whole time and trying to fight him off." RP 57: 21-22. The victim testified that "[a]fter I had told him that I knew who he was, I said, Ben, get off me; I know who you are; we went to school together. He told me to shut up and calm down and everything would be okay." RP

57: 24-25; 58: 1-2. After “trying to kick” Tuckett, the victim was “finally able to elbow him under his ribs and felt him give out.” RP 58: 13-17. After “elbowing” Tuckett again, the victim “jumped in front of a lady’s car who was coming down the hill.” RP 58: 17-19. The victim testified that she “figured that [Tuckett] was probably going to rape her, and then, at the worst, kill [her].” RP 60: 12-13. Not only did the victim sustain a “split lip” that had “gravel inside of it” from this attack, but also “had a scratch on the side of [her] face...a bruise on [her] arm, and [her] knee was pretty banged up from going down onto the ground.” RP 62: 5-8. The victim also had “a few scratches on her back just from the scuffle.” RP 62: 11-12. The victim identified Tuckett in court as the person who attacked her. RP 62: 13-16.

The victim’s version of events is consistent with the testimony of Nicole Fortner, who testified that she saw “a girl trying to flag-down cars” and who “almost jumped in the front of [her] car.” RP 44: 4-7. Ms. Fortner saw “a guy standing over by [a] car” and “slammed on her brakes right there.” RP 44: 18-22. Ms. Fortner also testified that she saw “the guy holding [the victim’s] shirt,” and that “he let go of her and she came running to my car, flailing.” RP 45: 5-6. When Ms. Fortner “reached over and rolled down [her] passenger’s window,” the victim was “frantic and distraught, screaming call 911, 911.” RP 44: 22-24. Ms. Fortner thought

the victim at first said Tuckett had “stolen her car,” but “had said I think he’s getting in the car or he’s getting away.” RP 44: 25; 26: 1-2.

Significant evidence was also presented by the State regarding the clothing Tuckett wore, the make and model of car he drove, and a detailed timeline of events that occurred before, during and after Tuckett attacked the victim.

Unlike the “credibility contest” in Romero that “ultimately turned on the testimony of one eyewitness,” very specific, credible, direct testimony was given by the victim, Ms. Fortner and other witnesses regarding Tuckett’s attack and the sequence of events around it. Romero, 113 Wash.App. at 795. Disregarding any direct comments made by Detective Heldreth and/or Officer Maiava, the untainted evidence is so overwhelming that it necessarily would have led to Tuckett’s being found guilty of indecent liberties with forcible compulsion. Tuckett is not entitled to a new trial and the judgment and sentence of the trial court is correct and should be affirmed.

2. TUCKETT WAS NOT DENIED EFFECTIVE ASSISTANCE WHEN HIS COURT-APPOINTED ATTORNEY DID NOT OBJECT TO DETECTIVE HELDRETH AND OFFICER MAIAVA'S DIRECT COMMENTS AND/OR ASKED QUESTIONS ABOUT THESE COMMENTS HIMSELF BECAUSE THEY:
 - (a) DID NOT PREJUDICE TUCKETT'S DEFENSE;
 - (b) WERE NOT ARGUED BY THE STATE AT ANY POINT IN THE TRIAL; AND
 - (c) AT MOST CONSTITUTED HARMLESS ERROR.

Tuckett was not denied effective assistance when his court-appointed attorney did not object to Detective Heldreth and Officer Maiava's direct comments and/or asked questions about these comments himself because they: (a) did not prejudice Tuckett's defense; (b) were not argued by the State at any point in the trial; and (c) at most constituted harmless error.

We start with the strong presumption that counsel's representation was effective. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. Rodriguez at 184; see State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. Strickland v.

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
see McFarland at 334-335.

Deficient performance is performance ‘below an objective standard of reasonableness based on consideration of all the circumstances’. Rodriguez at 184; citing Studd at 551. Prejudice means that there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different. McFarland at 334-335. Effective assistance of counsel does not mean ‘successful assistance of counsel.’ State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

As stated in the facts as recited by both Tuckett and the State, the true focus of Tuckett’s trial was not on whether his right to silence was violated, but whether the State could prove the facts of its case beyond a reasonable doubt. This focus is confirmed in that all but a fragment of the trial record involves testimony and evidence regarding the basic facts of what occurred. That court-appointed counsel for Tuckett did not object during Detective Heldreth and/or Officer Maiava’s testimony when they directly commented on Tuckett’s invocation of right to remain silent could well have been part of a general strategy. This same rationale

applies to when Tuckett's attorney asked Detective Heldreth and Officer Maiava about this issue on cross-examination. As the Court aptly reasoned in Curtis when discussing the effect of defense objections:

Eliciting such testimony puts the defense in a difficult position. Counsel must gamble on whether to object and ask for a curative instruction--a course of action which frequently does more harm than good--or to leave the comment alone...The likely curative value of an instruction must be weighed against the possibility of additional damage by further impressing upon the jury's attention to the defendant's decision not to talk without a lawyer. Curtis, 110 Wash.App. at 15.

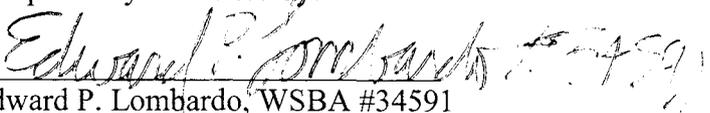
That counsel for Tuckett vigorously challenged the factual basis of the State's case and tried to discredit it by highlighting its inconsistencies during cross-examination demonstrates that Tuckett received effective assistance of counsel. Instead of diverting the jury's attention to a non-issue that may have ultimately prejudiced his client, counsel for Tuckett simply employed a very straightforward approach during this trial. That Tuckett's attorney was unsuccessful does not mean that Tuckett received ineffective assistance. Neither prong of the Strickland test is satisfied and the trial court did not err.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 7TH day of November, 2007

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 36128-1-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
BENJAMIN I. TUCKETT ,)	
)	
Appellant,)	
_____)	



I, EDWARD P. LOMBARDO, declare and state as follows:

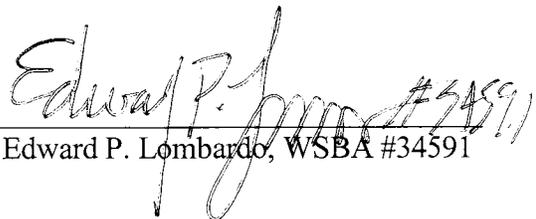
On WEDNESDAY, NOVEMBER 7, 2007, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached (BRIEF OF
RESPONDENT), to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 7TH day of NOVEMBER, 2007, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

Mason County Prosecutor's Office
521 N. Fourth Street, P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 FAX