

NO. 36140-0-II

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

STATE OF WASHINGTON, Respondent

v.

LANCE BILL SMITH, Appellant

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-01601-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts set forth by the defendant.

Where supplementation is needed, it will be provided in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that he was denied a fair trial because of a claim that the State had emphasized the defendant's exercise of his right to remain silent. Specifically, the defendant refers to two situations:

1. A claim that the State elicited testimony from Detective Oman; that she attempted to speak with Mr. Smith during the investigation; was not able to do so because she had wrong phone numbers;
2. Testimony from Laurie Brown, a lay person, that she had talked with the defendant about the charges and he denied them, stating that if anything had happened, he was not aware of it.

(Brief of Appellant, page 7).

This matter has recently been addressed by our State Supreme Court in State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) where the indication is as follows:

This court has been clear that the State may not comment on the accused's exercise of his Fifth Amendment prearrest right to remain silent. See State v. Sweet, 138 Wn.2d 466,

480-81, 980 P.2d 1223 (1999); Lewis, 130 Wn.2d at 705-06; Crane, 116 Wn.2d at 331. However, not all remarks amount to a “comment” on the exercise of a constitutional right. Sweet, 138 Wn.2d at 481; Lewis, 130 Wn.2d at 706. In Crane, we characterized the issue as “whether the prosecutor manifestly intended the remarks to be a comment on that right.” Crane, 116 Wn.2d at 331. The Crane court then noted that a prosecutor’s statement will not be considered a comment on a constitutional right to remain silent if “standing alone, it was ‘so subtle and so brief that it did not “naturally and necessarily” emphasize defendant’s testimonial silence.’” *Id.* (second alternation in original) (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)). Then in Lewis, we concluded that “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.” 130 Wn.2d at 706-07 (citing Tortolito v. State, 901 P.2d 387, 390 (Wyo. 1995)).

Under Crane and Lewis Devault’s testimony and the prosecutor’s reference in closing argument to the fact that Gregory failed to contact DeVault for three days did not amount to comments on prearrest silence. Gregory did not refuse to talk with police; to the contrary, he freely discussed with DeVault his whereabouts on the night in question. The State explains that DeVault’s testimony was offered to explain the investigative process in this case, not to comment on Gregory’s delay in contacting police. The prosecutor’s argument implies that the delay gave Gregory time to make his story consistent with the statement given by his grandmother, but it does not imply that he was avoiding the police because he was guilty.

Furthermore, the prosecutor’s argument regarding suspiciousness was so subtle and brief that it did not naturally and necessarily emphasize any testimonial silence. Neither the testimony nor the argument amounted to a comment on Gregory’s right to remain silent.

- State v. Gregory, 158 Wn.2d at 839-840.

In the testimony of Detective Oman, the Deputy Prosecutor was asking her what steps she had taken to investigate this particular allegation of misconduct. (RP 377-381). As part of this investigation, she discusses having talked to the mother of the child, an aunt, the child, and also attempts to contact the defendant. She indicated though she was not able to make contact with the defendant.

QUESTION (Deputy Prosecutor): Did you speak to the Defendant?

ANSWER (Detective Oman): No, I did not. I attempted to; however, we didn't have a location for him and I had been given two telephone numbers and one of them, the person that answered said they didn't know him and the second number was disconnected.

QUESTION: All right. And was that the end of your investigation?

ANSWER: Yes.

(RP 379, L.23 – 380, L.5).

The review standards are different for a direct comment on the defendant's right to remain silent and an indirect comment on the defendant's right to remain silent. In a direct comment, prejudice is reviewed using a harmless error beyond a reasonable doubt standard. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Prejudice resulting from indirect comment is reviewed using the lower,

nonconstitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome.

Romero, 113 Wn. App. at 791-792.

There is absolutely nothing in the record to indicate that the prosecution attempted in any way to exploit the answer. Nothing suggests that the jury was asked to rely on the fact that the officer could not contact the defendant. As indicated in State v. Slone, 133 Wn. App. 120, 134 P.3d 1217 (2006), a mere reference to silence is not necessarily an impermissible comment on the right of a defendant to remain silent. There must be some showing of prejudice to the defendant. Slone, 133 Wn. App. at 127 (citing State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999)).

In our situation, there was no inference that the defendant was attempting to hide from the officers nor was there any emphasizing by the State that this testimony had any probative value other than showing the course of the investigation taken by the lead investigator. In fact, the defendant maintained his total and complete innocence throughout this matter and even indicated to the jury in closing argument that he had denied any wrongdoing to the investigators. (RP 506).

The second claimed incident of comment on the defendant's right to remain silent deals with the testimony of Laurie Brown. She indicated

that she is a relative of the little girl involved in this matter. (RP 411).

The claim of violation is that Laurie Brown had talked to the defendant about the charges and that he denied them.

The testimony from Laurie Brown concerning the defendant's comments was during cross examination by the defense. The defense had also indicated in its case in chief that it was going to call Laurie Brown as a witness in their case also (RP 444), but indicated it didn't have to because she had been called by the prosecution. Nevertheless, the questioning was as follows by the defense:

QUESTION (Defense Attorney): Okay. Now, how many conversations have you had with Mr. Smith concerning these allegations?

ANSWER (Laurie Brown): Not many, maybe three or four at the most throughout the last two years.

QUESTION: Okay. Including the one that you told Detective Oman about?

ANSWER: Yes.

QUESTION: Okay. In any of these conversations, without telling us what Mr. Smith told you, has he ever admitted to doing any of these things that have been alleged here?

ANSWER: No.

QUESTION: Now you reported to Detective Oman about something that Mr. Smith had told you. Can you recall exactly what it was that Mr. Smith told you and what was that?

ANSWER: Probably not exactly, but what he had said to me was that if anything had happened, that I'm not aware of it. If she thinks something happened, I'm not aware of it. To those, I don't know if those were the exact words, though.

(RP 417, L.15 – 418, L.8)

This was a lay witness giving testimony that was information that the defense wanted the jury to hear and was consistent with the nature and tenure of the defense offered when the defendant testified in his case in chief and also during closing argument. The thrust of the defense throughout was that the defendant had done nothing wrong and had always indicated that to anyone who had asked him. The State submits that there is absolutely no violation of the defendant's right to remain silent or a comment on that by either of these witnesses.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel.

To establish ineffective assistance of counsel, the defendant must show that the attorney's performance was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Appellate Court accords great deference to counsel's

performance in order to “eliminate the distorting effects of hindsight” and therefore, the Appellate Court presumes reasonable performance. State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001).

As stated in State v. Riofta, 134 Wn. App. 669, 142 P.3d 193 (2006), the Court of Appeals indicated as follows:

We evaluate the reasonableness of counsel’s performance from counsel’s perspective at the time of the alleged error and in light of all of the circumstances. Further, we defer to an attorney’s strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ.

- State v. Riofta, 134 Wn. App. at 693.

The claim of ineffective assistance of counsel runs primarily to two trial issues: a claim that the defense attorney should have moved in limine to prohibit testimony which the defense claims highlighted his exercise of his right to remain silent and a claim that there was a failure to object to testimony by Tamara Webb that everybody had always told her that Mr. Smith’s interactions with the child seemed strange.

The entire thrust of the defense in this case was an ongoing claim that the defendant did not have anything to do with this and had never done anything improper with this child. As indicated in the preceding portion of the brief, the defendant had denied any type of improprieties

when discussing this with a relative in the family (Laurie Brown). He denied it when he took the stand and testified in his own defense at the trial and he also claims that he denied any type of impropriety when he was questioned by officers. This came up in the closing argument by the defense attorney. (RP 506). “When he talked to his sister, when we asked his sister, has he ever admitted to that? When the investigator, when anybody else talked to him he has steadfastly denied that this has ever happened, hasn’t he? And he’s never made any admissions.” (RP 506, L.10-14).

The State submits that what the defense is now claiming as ineffective assistance of counsel was in fact an overall strategy that was implemented and used by the defense at the time of trial.

Concerning the testimony of Tamara Webb, the questioning on redirect examination by the deputy prosecutor dealt with her observations of the interaction between the defendant and the little girl in question.

There was no objection made. The questioning was as follows:

QUESTION (Deputy Prosecutor): When you observed the interaction between Mr. Smith and your daughter, how were they interacting?

ANSWER (Tamara Webb): They were always friendly. She would always sit on his lap or ride on his shoulders or
--

QUESTION: Did you notice anything unusual about their interaction?

ANSWER: Everybody always told me it seemed strange, but I just thought it was because he was our uncle and he loved us.

(RP 296, L.9-15)

It is interesting to note that even in this answer, the mother of the child did not indicate that she felt that there was anything unusual or out of the ordinary about the interaction between the defendant and her daughter. The decision of when or whether to object is a classic example of trial strategy. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Prejudice is established where “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the preceding would have been different.” State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). The State submits that there has been no showing here of any prejudice to the defendant’s ability to present his case or to receive a fair trial.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is that at the time of sentencing he was not given a right of allocution. The State has no exceptions to take to the case law provided by the defendant, other than to indicate that factually the defendant is wrong.

The sentencing of the defendant took place on April 3, 2007. Prior to pronouncing sentence and after hearing from counsel, the court had the following dialog with the defendant:

THE COURT: All right. Mr. Smith, is there anything you wish to tell me before I pronounce sentence?

MR. SMITH: No, Your Honor.

(RP 529, L.24 – 530, L.2)

The State submits that the defendant received his right of allocution in this case and chose not to speak to the judge.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant deals with some of the conditions of community custody that have been imposed. Specifically requirements that the defendant take antabuse and that he not be any place where alcohol is sold by the drink. The defendant is not contesting the ability of the court to prevent him from possessing or using alcohol.

The State has reviewed the pre-sentence investigation report in this matter and notes that there are no concerns voiced concerning the use of alcohol. Further, the suggested additional conditions of sentence that have been requested by the Department of Corrections do not contain any specific allegations of alcohol abuse. With that in mind, the State agrees

that this matter should be returned for determination by the trial court as to whether or not these are appropriate conditions for this defendant.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 5

The fifth assignment of error raised by the defendant is a claim that the lifetime prohibition against contact should only relate to convictions on the first five counts and not on counts six and seven because they were class B and C felonies. Since the State agrees with the defense that this matter needs to go back for redetermination as to some of the conditions of community custody, it would be an appropriate time for the trial court to also reconsider this matter.

VII. CONCLUSION

The defendant received a fair trial and the determination of the jury should be affirmed in all respects. The State agrees that some of the issues of community corrections and no contact orders should be re-reviewed by the trial court.

DATED this 18 day of January, 2008.

Respectfully submitted:
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DEPUTY

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Clark Co. No. 05-1-01601-9

LANCE BILL SMITH,
Appellant.

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On January 23, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

| | | |
|-----|---|--|
| TO: | David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454 | Anne Cruser Attorney for Appellant PO Box 1670 Kalama, WA 98625 |
| | Lance Smith, DOC #295819 Washington State Penitentiary 1313 N.13 th Avenue Walla Walla, WA 99362-1065 | |

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland
Date: January 23, 2008.
Place: Vancouver, Washington.