

No. 36486-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS L. TUCKER,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge
Cause No. 06-1-02128-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a question asked of the defendant by the prosecutor on cross-examination was an unconstitutional comment on his right to remain silent.

2. Whether Instruction No. 8, which permits but does not require the jury to infer that a person who enters or remains unlawfully in a building acted with the intent to commit a crime therein, was supported by the evidence, and whether it was an unconstitutional comment on the evidence.

3. Whether Tucker received ineffective assistance of counsel based upon failure to object to the prosecutor's question, failure to object to the giving of Instruction No. 8, and/or failure to propose a voluntary intoxication defense instruction.

4. Whether there was sufficient evidence presented to the jury to uphold Tucker's conviction for burglary in the second degree.

B. STATEMENT OF THE CASE.

1. The State accepts Tucker's statement of the facts, with the following additions.

While nothing was taken from the Taco Time restaurant, the alarm box and cameras were damaged [RP 61-62], the sliding door of a cooler or refrigerator was removed from its track [RP 45], some items of food had been moved or removed [RP 47], ketchup was splashed around and ruined items had to be discarded [RP 61]. The office had been rifled through and a chair set up on a table [RP 49], and some file drawers were pulled out [RP 99].

Tucker includes argument in his statement of the case in that he states as fact that the State improperly questioned him.

C. ARGUMENT.

1. The prosecutor's question to Tucker during cross-examination was not an unconstitutional comment on his right to remain silent.

The Fifth Amendment to the United States Constitution and Wash. Const. art. I, section 9, both protect against being compelled to give evidence against oneself in a criminal case, and the two are interpreted equivalently. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). A defendant's pre-arrest silence "may not be used by the State in its case in chief as substantive evidence of defendant's guilt." State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996), citing to Easter, *supra*. In Lewis, the court held that a police witness cannot comment on a defendant's silence in such a way as to infer guilt from a refusal to answer questions. Lewis, *supra*, at 705.

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.

Id., at 707.

The Easter court noted that post-arrest silence, after *Miranda* warnings have been given, may not be used for any purpose, but that pre-arrest silence may be used for impeachment purposes if the defendant takes the witness stand at trial. Easter, *supra*, at 237-38. In that case, Easter did not take the stand and so his credibility was not in issue. Tucker did, and his was. In a very recent case, State v. Burke, No. 78528-7 (March 13, 2007), the Washington Supreme Court cited to several federal cases for the holdings that the Fifth Amendment prohibits impeachment based upon silence when the defendant does not testify, and the Fourteenth Amendment prohibits impeachment based on silence after *Miranda* warnings are given, whether or not the defendant testifies, but there is no constitutional violation if the defendant testifies at trial and is impeached for remaining silent before the arrest and before the State's issuance of *Miranda* warnings. "We have concluded that even when a defendant testifies at trial, use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt". Burke, *supra*, at 15.

In Tucker's case, the record is silent as to when, or whether, he was read his *Miranda* warnings. There was no evidence regarding any statements he made to officers other than giving his

name and confirming he was alone in the building. [RP 103] He testified at trial with a lengthy, exculpatory explanation of being in the building almost by chance while looking for a safe place to sleep on a cold and rainy night. On cross-examination, this exchange took place:

Q.: When you were arrested, you immediately told the police officers this story that you are telling us here today, right?

A.: No, I didn't.

[RP 159]

Contrary to Tucker's argument in his brief, his attorney did object to this question, the court sustained it and instructed the jury to disregard it, and the prosecutor ended his questioning. During the prosecutor's closing argument, while he certainly attacked the story Tucker told on the witness stand, he did not mention Tucker's failure to tell anyone this story at the time of his arrest.

Impeachment evidence is offered to show that a witness is not truthful. Impeachment by using a defendant's silence may not be used to argue that he remained silent because he is guilty. Burke, *supra*, at 18. Here, although Tucker persists in characterizing this as a comment on his silence, the question asked by the prosecutor did not reference silence or tell the jury that he

had remained silent, only that prior to trial he had not told anyone that he was in Taco Time for a non-criminal purpose, but only seeking shelter. The inference is that Tucker had had a substantial amount of time to think up a story, and if it were true, he would have told it sooner. Tucker asserts that it is improper for the State to imply that he was lying during his testimony, but there is no authority for that argument. There was substantial evidence that he was lying. That is the purpose of impeachment.

The Lewis court did not reach the question of when silence could properly be used for impeachment purposes because the error in that case occurred during the State's case in chief. Lewis, *supra*, at 706, fn. 2. Likewise in Easter, the defendant did not testify and the court did not reach that issue. Easter, at 243. Because the jury had no information that Tucker had been read the *Miranda* warnings, nor given any information about his either exercising or waiving those rights, it was proper impeachment evidence that the State was entitled to elicit, and it would not have been error for the court to allow it.

As noted above, only references to a defendant's silence which are a comment on that silence are prohibited.

Washington courts have held that the Fifth Amendment prohibits the State from using the defendant's prearrest silence as substantive evidence of his guilt. . . . Therefore, "[a] police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." . . . But "a mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice. . . . "Comment" means that the State uses the accused's silence to suggest to the jury that the refusal to talk is an admission of guilt.

State v. Henderson, 100 Wn. App. 794, 798, 998 P.2d 907 (2000).

Here, there was no mention whatsoever of a refusal to talk, and the prosecutor did not imply that he had refused to talk. The implication was that whatever he said, it wasn't what he said on the witness stand. At most, the question was a passing reference rather than a comment.

In Burke, the court focused on the purpose of the remarks at issue.

Finally, when the defendant's silence is raised, we must consider "whether the prosecutor manifestly intended the remarks to be a comment on that right." State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). 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.* . . . A remark that does not amount to a comment is considered a "mere reference" to silence and is not reversible error absent a showing of prejudice. . . .

Burke, *supra*, at 14.

Division Three has analyzed comments on the defendant's silence by first determining if they were direct or indirect. "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." State v. Pottorf, 138 Wn. App. 343, 346, 156 P.3d 955 (2007). Direct comment prejudice is reviewed under a harmless error beyond a reasonable doubt standard. "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." Prejudice from an indirect comment is reviewed under the nonconstitutional harmless error standard "to determine whether no reasonable probability exists that the error affected the outcome." Id., at 347.

Here the question, even if considered a comment, was at most indirect, and the nonconstitutional harmless error standard would apply. As in Pottorf, the prosecutor did nothing to exploit the question, did not ask further questions, and did not argue the point in closing. Even if it were error, it is harmless beyond a reasonable

doubt, and certainly would come under the nonconstitutional standard.

Contrary to Tucker's argument, the evidence against him was overwhelming. He was in the Taco Time restaurant about 2:00 a.m., when the business was closed. The alarm had gone off shortly before 2:00 a.m. and then quit. He was found trying to hide under a piece of kitchen equipment. The office had been ransacked, food moved or spilled, the alarm box disconnected and damaged, the security camera moved and covered, and the door to the refrigerator taken off its track. Even had he told the police the story he told on the witness stand, it is unlikely the jury would have believed him.

2. Instruction No. 8, which permits but does not require the jury to infer that a person who enters or remains unlawfully in a building acted with the intent to commit a crime therein, was supported by the evidence and was not an unconstitutional comment on the evidence.

Instruction No. 8 [CP 34, WPIC 60.05] reads as follows:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

The instruction is based upon RCW 9A.52.040:

Inference of intent. In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

A court reviews jury instructions de novo. State v. Cross, 156 Wn.2d 580, 617, 132 P.3d 80 (2006).

The constitutionality of this instruction was affirmed in State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995). The court there held that it is properly given when it is not the sole evidence of intent. Tucker's argument that it was ignores the ample evidence that someone had disabled the alarm system, covered a security camera, opened file drawers in the office, and spilled food in the kitchen. The defendant admitted being there during the time frame these things would have happened, and claimed no one else was present. The inference instruction was only one of many pieces of information the jury could consider in determining intent. It is clearly discretionary; the jury may disregard it if it chooses. If there was any problem with the instruction, it was redundancy. There was more than sufficient evidence for the jury to find intent without the instruction.

The jury in this case was also given Instructions No. 11, 12, and 13, which allowed it to consider first degree criminal trespass as a lesser-included offense of second degree burglary. [CP 37-39] Not only was the jury instructed that the inference of intent in Instruction No. 8 was permissive, they were also instructed that it could consider a lesser-included offense that did not include the intent to commit a crime inside the building. There is no chance that the jury could have been confused about the law or the range of its options.

The trial court did not comment on the evidence by giving Instruction No. 8. It is unclear how instructing the jury on the correct law can be construed as a comment on the evidence. The essential question is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true. State v. Levy, 156 Wn.2d 709, 726, 132 P.3d 1076 (2006). If a trial judge has not entered the "fray of combat", assumed the role of counsel, established disputed facts, proved the State's case, or indicated an opinion of the credibility of a witness, he or she has not impermissibly commented on the evidence. State v. Sivins, 138 Wn. App. 52, 60, 155 P.3d 982 (2007). Here the only "fact" included in the instruction was that the defendant had

entered or remained unlawfully, a fact to which Tucker admitted. Even if the jury believed that the judge was telling them he had unlawfully entered the building, it would make no difference whatsoever.

3. Tucker did not receive ineffective assistance of counsel.

Both the state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice resulting from that performance. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To show deficient performance, the defendant must show that the performance of his attorney fell below an objective standard of reasonableness, and to establish the prejudice prong, he must demonstrate that but for the deficient representation, the outcome of the trial would have been different. Id. A reviewing court assumes a defendant received effective representation, and performance that is tactically sound is not deficient. McFarland, supra, at 335-36.

a. Counsel was not ineffective for failing to object to the prosecutor's question discussed above—whether he had told the police at the time of his arrest that he was merely looking for a warm and safe place to sleep.

As noted earlier, Tucker's trial counsel did object, the objection was sustained, and the court instructed the jury to disregard the question. [RP 159] Juries are assumed to follow instructions. Brunson, *supra*, at 109. Trial counsel cannot be faulted for doing what Tucker now argues is the correct thing to do.

b. Counsel was not ineffective for failing to object to Instruction No. 8.

As discussed above, Instruction No. 8 was a proper statement of the law, supported by the evidence produced at trial. It is not ineffective for defense counsel to fail to object to something that is not objectionable. Further, as also discussed above, the lesser-included offense of first degree criminal trespass was also included in the instructions, and Tucker's attorney was thus able to, and did, argue lack of intent to commit a crime inside the Taco Time building. There is nothing in the record to cause a reviewing court to believe the outcome of the trial would have been different had the instruction not been given.

c. Counsel was not ineffective for failing to propose a voluntary intoxication defense instruction.

Tucker was not entitled to the voluntary intoxication defense instruction.

When a voluntary intoxication instruction is sought, the defendant must show (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state. . . Put another way, the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged. . . . Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be "substantial evidence of the effects of the alcohol on the defendant's mind or body." . . .

State v. Gabryschak, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996), cites omitted.

A defendant need not testify at trial, but may still be entitled to the voluntary intoxication instruction as long as the evidence presented in the State's case, including cross-examination of State witnesses, includes substantial evidence to support it. Id., at 253.

Tucker did testify, and his testimony combined with that of the police officers, did show substantial evidence of drinking. Second degree burglary does have elements of knowingly entering or remaining in a building and intent to commit a crime inside a building. However, Tucker does not meet the third prong of the

Gabryschak test, in that the evidence did not establish that his ability to acquire that mental state was impaired.

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. . . . Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state. . . .

Gabryschak, *supra*, at 254, cites omitted. In Gabryschak's case, the witnesses all agreed that the defendant was intoxicated. However, he consistently refused to open the door to officers who were called when neighbors heard him shouting at his elderly mother in an apartment. He blocked the door with his body, requiring police to climb in a second floor window to assure the safety of his mother and another occupant of the apartment. He tried to break away and run after being placed under arrest and threatened to kill the officer taking him to jail, indicating he was aware he was under arrest and going to jail. The trial court correctly refused to give the voluntary intoxication instruction.

In Tucker's case, the evidence indicated that while he may have been intoxicated, he was still able to form intent. If his testimony were believed, he was able to form the intent to break

into the Taco Time building to find shelter. He was able to reason that he needed a safe place out of the weather, that he couldn't get a bus until morning, and that since he had no money, other options were not open to him. The same capacity that allowed him to make these deductions would allow him to form the intent to burglarize the restaurant, and the jury was free to disbelieve his testimony. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, Tucker's trial counsel considered and rejected the voluntary intoxication defense. At a pretrial hearing on May 31, 2007, counsel told the court:

Your Honor, at this time I just want to state for the record that the defense would not be presenting a voluntary intoxication defense, and we had contacted two witnesses in regards to that. At this time the defense will not be calling those particular witnesses due to investigation that was done by the defense.

[05/31/07 RP 4] During closing argument, defense counsel, arguing that the defendant's testimony was credible, took into

account that the evidence had not supported a voluntary intoxication defense:

We are not trying to say that he something to drink (sic) so much that he couldn't get into the building, because obviously he did. Obviously, he was able to think rationally in order to get into the building, and so what we are stuck with is the testimony that he gave, which is different from the pictures that you have been able to see.

[RP 196-97]

Tucker's defense attorney investigated the possibility of a voluntary intoxication defense and concluded it was not available. The evidence at trial supported that conclusion. Tucker argues that the record does not reveal any tactical or strategic reason for failing to propose the instruction. Perhaps he wanted to avoid insulting the intelligence of the jury. Tucker has not identified any reason to think the outcome of the trial would have been different had the instruction been given. Counsel was not ineffective for failing to do the hopeless.

4. There was sufficient evidence presented at trial to support Tucker's conviction for burglary in the second degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id., at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, *supra*, at 71. This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In order to convict Tucker of second degree burglary, the State was required to prove (1) that on or about November 1, 2006, he entered or remained unlawfully in a building other than a dwelling; (2) that the entering or remaining was with intent to commit a crime against a person or property therein; and (3) that the acts occurred in the State of Washington. [CP 36, Instruction No. 10] Evidence was presented by Jennifer Cox, the manager of Taco Time, Olympia police officers Shelby Nutter and Charles Gassett, and Tucker himself.

From the testimony of these witnesses, the jury heard that the alarm on the closed, under-renovation Taco Time building in Olympia sounded shortly before 2:00 a.m. on November 14, 2006; Cox was notified. Although she was further notified that police officers had found nothing amiss and the alarm had ceased sounding, she went to the restaurant, arriving approximately 2:00 o'clock. When she entered the building, she heard a noise in the back kitchen area, promptly left the building, and called the police. [RP 28-33]

When the police arrived, Officer Nutter took up a post where she could see into the building through the drive-through window. She saw an African-American male wearing a lime-green windbreaker sliding on his back, with some object she could not identify in his hand. [RP 72-73] Officer Charles Gasset and another officer entered the building using Cox's key. They saw Tucker crouched or kneeling behind a piece of plywood; when he saw them, he turned and ran to the back of the store. [RP 88-89] They announced themselves and shortly located Tucker on his back on a low shelf in the kitchen area. He did not respond when told to show his hands, and since one hand was out of sight, the officer shot him with a Tazer. Still Tucker did not respond, and after

a second Tazer shot was fired at him, an officer physically pulled him out onto the floor and handcuffed him. [RP 90-96]

A subsequent inspection of the building showed that a refrigerator door had been removed from its sliding track, food items were moved or spilled, the office had been rifled through, a chair was put up on a table, file drawers were opened, and the security camera had been turned and covered with a shirt. In addition, the alarm box had been taken off the wall and disconnected. [RP 45-59, 98-100]

Tucker admitted entering the building in the general time frame that the alarm had gone off [RP 156] and denied that anyone else had been in the building while he was there [RP 154].

Given this evidence, assuming its truth and construing it in the light most favorable to the prosecution, there was more than enough evidence that a rational trier of fact could have found, beyond a reasonable doubt, that Tucker was guilty of second degree burglary.

E. CONCLUSION.

The prosecutor did not impermissibly comment on Tucker's right to remain silent, the instruction permitting the jury to infer criminal intent from the fact of unlawful entry or remaining in a

building was correct, Tucker did not receive ineffective assistance of counsel, and there was more than sufficient evidence to support a conviction for second degree burglary. The State respectfully asks this court to affirm Tucker's conviction.

Respectfully submitted this 14th of March, 2008.

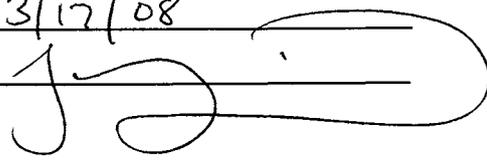


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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on March 17, 2008.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 3/17/08
Signature: 

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, No. 36486-7-II, on all parties or their counsel of record on the date below as follows:

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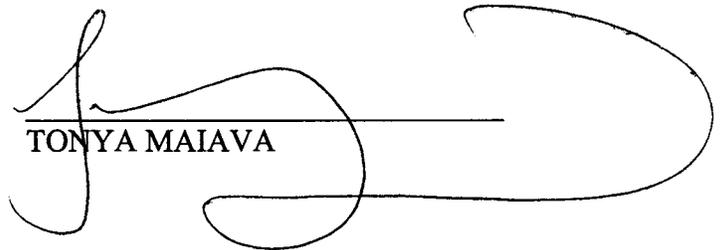
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TO:

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

Dated this 17th day of March, 2008, at Olympia, Washington.


TONYA MAIAVA