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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. ANY ERROR IN THE PROSECUTOR'S QUESTIONING OF THE DEFENDANT WAS PROPERLY REMEDIED BY THE COURT'S CURATIVE INSTRUCTION TO THE JURY TO DISREGARD THE QUESTION.

House claims the prosecutor commented on his right to remain silent during the prosecutor's cross examination of him. This argument is not persuasive because the court gave a curative instruction after the alleged offending question.

Defendants have a constitutional right to remain silent. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996); State v. Romero, 113 Wn.App. 779, 786, 54 P.3d 1255 (2002). It is error for the State to use a defendant's constitutionally permitted silence as substantive evidence of guilt. Romero, 113 Wn.App. at 787. An impermissible comment on a defendant's silence is a constitutional error. Easter, 130 WN.2d at 242; State v. Slone, 133 Wn.App. 120, 127 n.5, 134 P.3d 1217 (2006), *review denied*, 159 Wn.2d 1010, 154 P.3d 918 (2007). However, it is not necessarily constitutional error for the State to make an indirect reference to a

defendant's silence. Id. at 78. A direct comment on a defendant's silence occurs when the comment is used either as substantive evidence of guilt or to suggest that silence is an admission of guilt. But, as one Court has explained,

Where the trial court admits evidence of pre-arrest silence, the question remains whether the State *used* it as evidence of the defendant's guilt. See State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235(1996)[emphasis in original]. The Lewis court noted that "[m]ost jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." Lewis, 130 Wn.2d at 706. . . . A mere reference to silence that is not a "comment" is therefore not reversible error absent a showing of prejudice. State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999) (quoting Lewis, 130 Wn.2d at 706-07). The critical distinction is whether the State uses the accused's silence to its advantage, either as evidence of guilt or to suggest to the jury that the silence was an admission of guilt. Lewis, 130 Wn.2d at 707.

State v. Thomas, 142 Wn.App. 589, 595-596, 174 P.3d 1264 (2008)(published in part) (emphasis added).

In the present case, House has not shown how he was prejudiced by the remark since it was objected to, the prosecutor withdrew the question, and the court gave a curative instruction. RP 41, 48. The alleged improper question by the prosecutor came during cross examination when House was testifying. The

prosecutor asked House, "[a]nd it wasn't until today that we finally hear you didn't loan your coat, you loaned the truck and your coat was in the truck." RP 41. An immediate objection by defense counsel followed. Id. The prosecutor then said, "I'll withdraw the question." Id. Defense counsel then requested a mistrial. RP 42. The trial court denied the motion for a mistrial, stating, "I think it can be done by a curative instruction. So unless you object to that curative instruction, I'm going to give one. . . . It says you're instructed to disregard entirely the last question by the deputy prosecutor. . . so how do you want me to word the instruction? RP 46. Then the following discussion took place between defense counsel and the court:

Defense Counsel: The concern the court now has is you don't even want to get close to underscoring what just happened. That's my concern. . .

COURT: The question is going to be do you want me to underscore it or do you want me to just say you're instructed to disregard entirely the last question. I can do it either way.

Defense counsel: I prefer that you underscore it.

COURT: [The court will read the following instruction:] The jury is to disregard entirely the last question by the deputy prosecutor and disregard any suggestion that the defendant had a responsibility to correct or explain his answer to the officer's question at any time since his arrest.

RP 47. So the prosecutor here only asked a question once in an attempt to point out the discrepancy between what House originally told the police officer when he was arrested and after he was read his Miranda rights. RP 41, 51. After House was read his rights, he told the officer that he had loaned his coat to a friend, but at trial House instead said that he had loaned his vehicle with the coat in it to a friend. RP 51; RP 38,39. The prosecutor was not trying to directly "comment" on House's right to remain silent, but instead was trying to point out the inconsistency in House's story. And the prosecutor did withdraw the question. RP 41.

Furthermore, the court instructed the jury to disregard the question and "any suggestion that the defendant had a responsibility to correct or explain his answer to the officer's question at any time since his arrest." RP 48. The jury is presumed to follow curative instructions. State v. Escalona, 49 Wn.App. 251, 255, 742 P.2d 190(1987)(citing State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983)). Under these circumstances, any error was corrected by the court's curative instruction.

1. Any error was harmless.

Because impermissible comments on a defendant's right to remain silent are constitutional errors, the State bears the burden of showing that any error was harmless. *Easter*, 130 Wn.2d at 242. A constitutional error is harmless if the untainted evidence is so overwhelming that it "necessarily leads to a finding of guilt." *State v. Heller*, 58 Wn.App. 414, 421, 793 P.2d 461 (1990)(quoting *State v. Gutierrez*, 50 Wn.App. 583, 590, 749 P.2d 213, *review denied*, 110 Wn.2d 1032 (1988)). Put differently, the State must convince the reviewing court "beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, and . . . the untainted evidence . . .[is] so overwhelming that it necessarily leads to a finding of guilt." *State v. Thomas*, 142 Wn.App. at 598 (citing *Easter*, 130 Wn.2d at 242). The State meets the harmless error test here.

In the present case, the evidence presented shows that the jury would have reached the same result absent the allegedly improper remark by the prosecutor. Here, the officer performed a traffic stop on House's vehicle. RP 13. The officer also learned that House had a suspended license. RP 14. House was placed under arrest for driving while license suspended. RP 15. House

was wearing a carhartt jacket. RP 15. House was the only person inside the vehicle when he was stopped and he had the carhartt jacket on when the officer walked up to the driver's side window. RP 15. Upon searching House, the officer found a baggie and a straw with white powder residue located in the right front pocket of House's jacket. RP 16, 19. These items were placed in an evidence bag. RP 16. House was read his Miranda warnings. RP 20. House told the officer at the scene that the items found in the jacket House was wearing were not his and that he had loaned the jacket to a friend and he had just gotten it back. RP 20, 21. House did not tell the officer at that time who had borrowed the jacket. RP 21, 25. The substance inside the straw found in House's jacket pocket was tested by the Washington State Crime Lab and was found to contain methamphetamine. RP 30, 35. At trial, House changed his story about the jacket and said that he had loaned his truck out with the jacket in it, rather than loaning just the jacket. RP 39, 40. House admitted he was wearing the jacket at the time the officer stopped him. RP 49. House also agreed the contraband was in the jacket pocket, but he said the stuff did not belong to him and that he did not use methamphetamine. RP 39, 50. Obviously the jury did not believe House's version of events. But “[c]redibility

determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). Thus, except for House's inconsistent story, all other evidence presented proves that House was in possession of methamphetamine. Because the untainted evidence overwhelmingly supports the findings of guilty, any error is harmless and House's convictions should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED HOUSE'S MOTION FOR A MISTRIAL.

House further claims that the trial court erred when it refused to grant the defense motion for a mistrial as a remedy for the prosecutor's alleged improper question to the defendant. This argument is also without merit.

A trial court's decision denying a defendant's motion for a mistrial is reviewed for an abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "A reviewing court will find abuse of discretion only when "no reasonable judge would have reached the same conclusion." State v. Rodriguez, 146 Wn.2d 260, 269-270, 45 P.3d 541 (2002), citing Hopson (quoting Safie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). Further, the trial court's denial of a motion for mistrial will

be overturned only when there is a "substantial likelihood" that the error prompting the motion for mistrial affected the jury's verdict. Rodriquez, supra, citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)(quoting State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). Furthermore, our courts have "held that trial courts 'should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" Rodriquez, supra, citing State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *quoted in Hopson*, 113 Wn.2d at 284. Finally, when determining whether the effect of an irregular occurrence during the trial has affected the trial's outcome, the reviewing court looks at, "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000), citing Hopson, 113 WN.2d at 284.

Applying these criteria to the instant case, it is apparent that (1) the "irregularity" was not serious--there was only one briefly-worded allegedly improper question; (2) it did not involve cumulative evidence--there was only one allegedly improper

remark; and (3) the trial court *did* properly instruct the jury to disregard the offending question and answer. Accordingly, there was no "substantial likelihood" that the State's alleged violation affected the outcome at trial. Consequently, House's argument to the contrary is without merit.

CONCLUSION

Any error in the prosecutor's questioning of House was properly cured by the court's instruction to the jury to disregard the question in its entirety. Moreover, the untainted evidence was overwhelming, so any error was also harmless. Furthermore, because the curative instruction remedied any error, and the error was not cumulative or serious, the trial court properly denied the defense motion for a mistrial. Accordingly, House's arguments to the contrary are unpersuasive and his convictions should be affirmed.

RESPECTFULLY SUBMITTED this 3 day of ~~October~~, 2008.

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by:


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Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
Respondent,)
vs.)
LARRY D. HOUSE,)
Appellant.)
_____)

NO. 36994-0-II

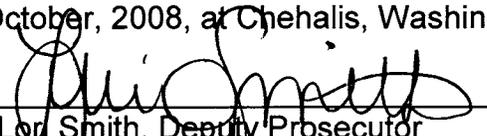
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LORI SMITH, Deputy Prosecutor for Lewis County, Washington,
declare under penalty of perjury of the laws of the State of Washington that
the following is true and correct: On 10/3/08, I served
appellant with a copy of the **RESPONDENT'S BRIEF** by depositing same in
the United States Mail, postage pre-paid, addressed to the attorney for
Appellant at the name and address indicated below:

Anne Mowry Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625

DATED this 3rd DAY OF October, 2008, at Chehalis, Washington.


Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent
Lewis County Prosecuting Attorney's Office,