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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JEFFERY RYAN ALLMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 07-1-05664-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant denied the right to a fair trial where the statements made by the prosecutor were proper comments on admissible evidence and did not constitute prosecutorial misconduct?

B. STATEMENT OF THE CASE.

1. Procedure

On November 5, 2007, the State charged defendant, Robert Allman under the name Jeffery Ryan Allman, with one count of unlawful possession of a stolen vehicle. CP 1. On May 12, 2008, the State filed an amended information that added the “also know as” (aka) of Robert James Allman to the information.¹ CP 4, RP 1-4². Defendant’s true name was Robert James Allman. RP 3-4.

On May 12, 2008, the case was assigned to the Honorable James Orlando for jury trial. RP 1. The court held a CrR 3.5 motion on the same day. RP 6. The court found that defendant had been properly given his Miranda warnings and that his statements to Officer Scripps, which included his statement that “Crystal” gave him the car, were admissible.

¹ Jeffery Allman was determined to be the name of defendant’s brother. RP 212.

² The State will refer to the four sequentially paginated volumes as “RP.” The Sentencing hearing on 7/17/08 will be referred to as “Sentencing RP.”

RP 80-81. The court also indicated that the testimony could be elicited that defendant did not respond to questions about Crystals' address but could not go so far as to say that defendant refused to answer any more questions. RP 81.

On May 15, 2008, the jury found defendant guilty as charged. RP 307, CP 27. The court held sentencing on July 17, 2008. Sentencing RP 3, CP 51-63. Defendant's offender score was calculated as at least 11+ and his standard range was 43-57 months. Sentencing RP 10, CP 51-63. The court sentenced defendant to the high end of 57 months. Sentencing RP 10, CP 51-63. Defendant filed this timely appeal. CP 191.

2. Facts

On November 3, 2007, Officers Sean Owens and Eric Scripps were working the graveyard shift. RP 115, 147. Around midnight, the Officers observed the vehicle driven by defendant and ran the license plate through their computer. RP 117- 119, 158. The license check revealed that the vehicle was reported stolen. RP 119, 149. The Officers double checked to make sure and then followed the vehicle into a Safeway parking lot. RP 119.

Once in the parking lot, defendant got out of the vehicle. RP 120. Defendant had been seated in the driver's seat. RP 120, 163. Defendant was taken into custody and read his *Miranda* rights. RP 123. A flathead screwdriver was located in the right front pocket of defendant's coat. RP

124, 138, 146. No car keys of any kind were found on defendant. RP 125, 165. The vehicle was also searched. RP 124. A number of shaved keys were found in the center console as well as the driver's side floorboard. RP 125, 146. Screwdrivers and shaved keys are both used to steal cars. RP 144-145.

Defendant was asked how he came into possession of the vehicle. RP 151. Defendant responded that he had picked up the vehicle from "Crystal." RP 152. Defendant told Officer Scripps that "Crystal" lived in Tillicum. RP 152. Defendant said he has just recently picked up the vehicle, that he did not buy it from "Crystal" but that he was going to put a stereo in it. RP 152. Defendant refused to give any more information about "Crystal." RP 152. Defendant did not provide "Crystal's" full name nor did he provide her address. RP 152.

Anthony Fischer was the owner of the vehicle. RP 170. Fischer was visiting a friend when his vehicle was stolen. RP 171. There was no broken glass left behind and no signs of forcible entry. RP 172. Fischer had the key to the vehicle in his possession. RP 172. When the car was received from defendant in the Safeway parking lot, the stereo was missing and the T-tops were gone. RP 173. A Pioneer stereo had been in the car prior to it being stolen. RP 173. Fischer did not know defendant or Dedra Browning and did not give either of them permission to drive his car. RP 175. Fischer did not keep keys in the center console of his car and did not recognize the shaved keys. RP 174, 175.

Dedra Browning, aka Caldwell, was the passenger in the vehicle. RP 126, 151, 199. Caldwell did not make any statement to police but did testify at trial. Caldwell stated that she had stolen the vehicle with shaved keys that a friend had given her just a few minutes before she stole the car. RP 201. Caldwell claimed she stole the car, sold the stereo and then picked defendant up in Tillicum. RP 203. Caldwell claimed she picked defendant up from "Crystal's" house, and that she also told defendant that she has borrowed the car from "Crystal." RP 204, 226. Caldwell then claimed they went to visit "Crystal's" mom in the hospital and that "Crystal" was at the hospital. RP 205, 228-229. Caldwell also claimed that it only took her 5-10 minutes to take out and sell the stereo but that she couldn't remember the name of the friend she sold it to. RP 204, 223. Caldwell did not know "Crystal's" last name or her address.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR WERE PROPER COMMENTS ON ADMISSIBLE EVIDENCE AND DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor's actions constitute misconduct, the defendant must show that

the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

Defendant alleges two instance of prosecutorial misconduct. Defendant contends the State commented on defendant's right to silence in closing. Defendant also contends that the State shifted the burden to defendant in closing by indicating that defendant should have called a witness in their case. No objections were made to any of the challenged statements.³

- a. As defendant made a statement to police, it was not error for the State to question the deputy about the extent of that statement.

Defendant was read his *Miranda* rights, stated he understood them and answered questions posed to him by the officer. RP 10-12. There is a distinction between a defendant who immediately invokes his right to silence and a defendant who does so at a later time. When a defendant invokes his right to silence after being given *Miranda* warnings, the silence is "insolubly ambiguous." *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.

³ Defendant does not assert ineffective assistance of counsel.

Ct. 2240, 49 L. Ed. 2d 91 (1976). *Miranda* warnings are an assurance to the defendant that his or her silence will carry no penalty. *Id.* at 618.

However, partial silence at the time of the initial statement is not insolubly ambiguous, but “strongly suggests a fabricated defense and the silence properly impeaches the later defense.” *State v. Cosden*, 18 Wn. App. 213, 221, 568 P.2d 802 (1977). Defendant waives the right to remain silent concerning the subject matter of his statement. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980). When a defendant does not remain silent and instead talks to police, the State may comment on what the defendant does not say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) *citing State v. Young*, 89 Wn. 2d 613, 621, 574 P.2d 1171 (1978) (*citing State v. Osborne*, 50 Ohio St. 2d 211, 216, 364 N.E.2d 216 (1977), *vacated on other grounds by* 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1157 (1978)).

A *Doyle* inquiry does not apply when a defendant waives his rights and does not subsequently invoke the right to remain silent. *State v. McFarland*, 73 Wn. App. 57, 65, 867 P.2d 660 (1994). A defendant cannot “rely on *Miranda* when he attempts to toy with police by telling only facts which he wants them to hear.” *State v. Bradfield*, 29 Wn. App. 679, 685, 630 P.2d 484 (1981). “Nonstatements” are properly admitted when defendant gives limited factual information to the police after being Mirandized. *Id.*

In *McFarland*, the defendant made several statements to officers, initially agreed to take a primer residue test and then refused to take the test. *Id.* at 65. It was only after he refused the test that defendant invoked his *Miranda* rights. *Id.* The prosecutor elicited those statements made after *Miranda* from the detective who spoke with the defendant. *Id.* at 64. The prosecutor then stated in his closing, “He had the opportunity to explain that to the police, but he couldn’t or wouldn’t.” *Id.* The court did not find any reversible error. *Id.* at 66.

In the instant case, the court ruled the statements made by defendant to the officer were admissible under CrR 3.5. RP 81. The State then elicited the statements made by defendant to Officer Scripps. RP 151-152. Defendant was asked how he came into possession of the stolen vehicle. RP 151. Defendant said he picked up the vehicle from “Crystal” who lives in Tillicum. RP 152. Defendant also said he did not buy the vehicle from her and that he was going to put a stereo in it. RP 152. Defendant would not give any further information about “Crystal” to the officer. RP 152. Defendant would not supply “Crystal’s” full name to the officer nor would he give an address. RP 152.⁴

⁴ The State was entitled to elicit these statements based on the court’s ruling in the CrR 3.5 hearing. Defense counsel did not object to any of these questions or answers at trial. Further, on appeal, defendant does not allege any error by the court in ruling these statements admissible.

As the evidence was properly admitted, the State was entitled to argue it in closing argument. Similar to *McFarland*, defendant initially answered questions but then refused to answer any more questions. The State's arguments were not comments on defendant's right to remain silent, but were permissible arguments about the subject of defendant's statements. The State argued that defendant's statements to the officer about "Crystal" and about how he obtained the car were incomplete. RP 260-61, 296, 302. If defendant had complete information, the assumption is he would have provided it to the officer. A proper inference from the evidence was that defendant was not telling the truth about "Crystal" given that he would not provide normal details such as a name and address. RP 254, 261, 266, 287-8, 297. The State was entitled to bring attention to defendant's nonstatements about "Crystal" as defendant had made statements about "Crystal" to the officer.

The instant case is distinguishable from the cases cited by defendant. First, in *State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997), the defendant never made a statement to police and the State remarked on that as evidence of guilt. Here, defendant did make statements to the police, and the issue of pre-arrest silence has to be analyzed differently than a case where defendant never makes any statements. Second, in *State v. Heller*, 58 Wn. App. 414, 793 P.2d 461 (1990), the State improperly questioned defendant about her failure to return and provide further information to the police after the initial

interrogation. In the instant case, defendant waived his right to remain silent on the subject of his statement to the officer. The State properly confined its argument to the subjects of his statement, specifically “Crystal” and how defendant received the vehicle. The cases cited by defense are not analogous to the case at bar.

Further, in rebuttal closing, the State was entitled to respond to the arguments of defense counsel. “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *Russell*, 125 Wn.2d at 85-6, citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *Green*, 46 Wn. App. at 96.

Defense counsel argued in his closing that the defendant had nothing to hide from the officers. RP 283. He also argued that defendant was acting chivalrous when he refused to give the officer “Crystal’s” name. RP 280. Defense claimed that defendant didn’t tell the officer “Crystal’s” information so that way they couldn’t go arrest her. RP 280. The State again pointed out in rebuttal that the story defendant told just

did not make sense. Defendant did seem to be hiding normal information from the office and indeed gave him his brother's name instead of his own. RP 287, 288, 296, 297, 302. The State's arguments were proper arguments about admissible testimony and proper responses to defense counsel's arguments.

As defense did not object to the prosecutor's statements, the proper test is whether these statements were flagrant and ill-intentioned. The testimony elicited by the State was proper and ruled admissible by the court. RP 81. Defendant was given his *Miranda* warnings, waived them and answered the officer's questions. RP 10-12. As defendant provided information to the deputy, he waived his right to remain silent about the subject of the questions he answered. The State was permitted to reference that testimony, and to make proper inferences from it, in the State's closing argument. As defendant did not remain silent, the State was entitled to address what defendant did not say, in this case, the information about the mysterious "Crystal."

The arguments at issue here were not improper and no prejudice to defendant can be shown. As defendant's statements had been deemed admissible there is nothing to suggest that addressing them was ill-intentioned. No objections were made to the prosecutor's statements in closing. The prosecutor's remarks in closing were appropriate in light of the facts of this case, the court's ruling and case law.

- b. The prosecutor did not shift the burden to defendant by pointing out the evidentiary deficiencies in their theory.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. See *Russell*, 125 Wn.2d at 85-86.

In *State v. Gregory*, 158 Wn.2d 759, 812, 147 P.3d 1201 (2006), the defendant was convicted of aggravated first degree murder, and the State sought the death penalty. At the close of the penalty phase, the prosecutor noted that, while Gregory hired a mitigation specialist, Gregory failed to call many witnesses who could have offered evidence to mitigate Gregory's conduct. *Id.* at 859. The *Gregory* court held that the prosecutor had not improperly shifted the burden of proof because (1) prosecutors do not shift the burden when they argue that a defendant's version of events is not corroborated by the evidence, and (2) a jury is presumed to follow the court's instructions regarding the proper burden of proof. *Id.* at 861-862.

In the instant case, defendant told the officer that he had borrowed the car from a woman named "Crystal" who lived in Tillicum. RP 152. Defendant did not give any more information about "Crystal" including

her last name or where she lived. RP 152. Defendant's girlfriend, Caldwell, testified at trial and claimed that she had stolen the car. RP 201. Caldwell testified that she picked defendant up from "Crystal's" house but also told defendant that she borrowed the car from "Crystal." RP 204, 226. Caldwell then stated they went to visit "Crystal's" mom in the hospital and that "Crystal" was at the hospital. RP 205, 228. Yet, Caldwell also couldn't recall "Crystal's" name or her address. RP 217. Caldwell also testified that "Crystal" was a real person and that defendant knew her. RP 211.

In his closing argument, defense counsel argued:

We know Crystal does exist. We know that because her mother was in the hospital. Both—Dedra has testified to that. We don't have any reason to believe that Crystal is a fictional person at all. And that at least there's some corroboration in the fact, according to Dedra, Mr. Allman was at Crystal's house. So Crystal's real. Nothing unreasonable about Crystal being real, nothing in the testimony or the evidence you have heard would suggest she's not a real person.

RP 279-80.

The prosecutor's argument in rebuttal closing noted that defendant's arguments lacked evidentiary support. The prosecutor countered the defense argument by indicating, "I don't know if Crystal exists. Who knows? It's awfully convenient. If she does exist, why isn't she here?" RP 296. The prosecutor's statement only served to point out the lack of evidentiary support for the defense theory in that it was suspect

based on the statements made by defendant and by Dedra Caldwell at trial that "Crystal" even existed. The prosecutor's statement was in direct response to defense counsel's argument and was a proper argument about the evidence.

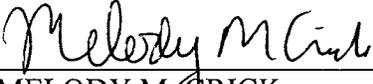
Moreover, the jury in this case was presumed to apply the proper burden of proof because the court instructed the jury on that burden. CP 28-46 (Instruction 2). A jury is presumed to follow a court's instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). There is no evidence of burden shifting or of improper argument. This court should affirm defendant's conviction.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the conviction below.

DATED: MARCH 5, 2009

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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