

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES 1

ARGUMENT..... 2

I. The prosecutor commented on Mr. Bell’s constitutional right to remain silent. 2

A. Standard of Review..... 2

B. The prosecutor improperly elicited testimony that Mr. Bell remained silent after invoking his *Miranda* rights. 2

C. The prosecutor’s misconduct was prejudicial..... 4

D. Mr. Bell did not testify that he had waived his right to remain silent..... 5

II. Defense counsel was ineffective..... 6

A. Standard of Review..... 6

B. Defense counsel was ineffective for failing to object to the prosecutor’s misconduct, for emphasizing Mr. Bell’s post-*Miranda* silence, and for failing to request an instruction limiting the jury’s consideration of the improperly admitted evidence..... 6

C. Defense counsel was ineffective for failing to object to the admission of Mr. Bell’s prior felony convictions under ER 609(a)(1). 9

III. The SRA, as amended in 2008, violates the Fifth and Fourteenth Amendment rights to due process and privilege against self-incrimination by shifting the burden of proof at sentencing. 10

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694
(1966)..... 3, 4, 5, 6, 7, 8, 9, 10, 11

WASHINGTON CASES

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 7
In re Hubert, 138 Wn. App. 924, 158 P.3d 1282 (2007)..... 7, 9
State v. Boehning, 127 Wn. App. 511, 111 P. 3d 899 (2005)..... 3
State v. Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008)..... 3, 5, 6
State v. Heller, 58 Wn.App. 414, 793 P.2d 461 (1990)..... 5
State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996)..... 7, 8
State v. Holmes, 122 Wn.App. 438, 93 P.3d 212 (2004)..... 3
State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006)..... 7
State v. Knapp, 148 Wn.App. 414, 199 P.3d 505 (2009)..... 3, 6, 7
State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 10
State v. MacDonald, 122 Wn. App. 804, 95 P.3d 1248 (2004) 3
State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 7, 10, 11
State v. Romero, 113 Wn.App. 779, 54 P.3d 1255 (2002)..... 3

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 3, 11
U.S. Const. Amend. XIV 11

OTHER AUTHORITIES

ER 609 10, 11

ARGUMENT

I. THE PROSECUTOR COMMENTED ON MR. BELL'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.

A. Standard of Review

Prosecutorial misconduct requires reversal whenever it prejudices the accused person's right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Prejudice is presumed when prosecutorial misconduct infringes a constitutional right. *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008).

B. The prosecutor improperly elicited testimony that Mr. Bell remained silent after invoking his *Miranda* rights.

An accused person has a constitutional privilege against self-incrimination, and a prosecutor's comment on the exercise of this right violates the Fifth Amendment. U.S. Const. Amend. V; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *State v. Holmes*, 122 Wn.App. 438, 445, 93 P.3d 212 (2004); *State v. MacDonald*, 122 Wn. App. 804, 812, 95 P.3d 1248 (2004). A prosecutor crosses the line by eliciting testimony that the accused person chose to remain silent after receiving *Miranda* warnings. See, e.g., *State v. Knapp*, 148 Wn.App. 414, 422, 199 P.3d 505 (2009) (citing *State v. Romero*, 113 Wn.App. 779, 54 P.3d 1255 (2002)).

Here, the prosecutor introduced testimony that Mr. Bell remained silent after receiving *Miranda* warnings. RP (7/13/09) 81-82. Specifically, the prosecutor asked Deputy Young if he recalled handcuffing Mr. Bell, advising him of his rights, and asking him a question. RP (7/13/09) 81. The prosecutor then asked: “at any time did he tell you that he had been walking from his sister’s house?” and followed up with questions on the other things Mr. Bell hadn’t said. RP (7/13/09) 81-82.

This violated Mr. Bell’s constitutional privilege against self-incrimination. Contrary to Respondent’s argument, the comment was not an inadvertent reference, or a narrative response to the question “What happened next?” Brief of Respondent, p. 12-13. The prosecutor directly and explicitly asked about the administration of *Miranda* rights and Mr. Bell’s subsequent silence. RP (7/13/09) 81-82.

Nor were the prosecutor’s questions proper impeachment, as Respondent asserts. Brief of Respondent, pp. 15-17. A prosecutor may impeach trial testimony with prior inconsistent statements (or omissions);

however, Mr. Bell did not make *any* post-*Miranda* statements.¹ *See, e.g., State v. Heller*, 58 Wn.App. 414, 417, 793 P.2d 461 (1990).

Mr. Bell initially made statements to the police, but exercised his right to remain silent once the officer administered *Miranda* warnings. Proper impeachment would have been limited to evidence that Mr. Bell did not provide his explanation to the police—without reference to the administration of *Miranda* warnings or his post-*Miranda* silence. Instead, the prosecutor focused on the fact that Mr. Bell was informed of his rights and didn't say anything.²

C. The prosecutor's misconduct was prejudicial.

The misconduct is presumed to be prejudicial. *Flores, supra*. Furthermore, in this case a reasonable jury could have acquitted Mr. Bell: the evidence was not so overwhelming that it necessarily established guilt. No one positively identified Mr. Bell as the driver, and no physical evidence linked Mr. Bell to the accident. RP (7/13/09) 14-74. His clothing was not unique, and the witness's description of the driver's

¹ Although Respondent claims that “[i]t is not clear... whether [Mr.] Bell's statements occurred before or after the *Miranda* warnings,” this is demonstrably false. Brief of Respondent, p. 16. The officer clearly testified that Mr. Bell chose to remain silent after receiving his *Miranda* warnings. RP (7/13/09) 83. Accordingly, Respondent's assumption “that the warnings preceded the situation [sic] at issue here” is not warranted. Brief of Respondent, p. 16.

² Mr. Bell did not testify that he'd offered the explanation *after* receiving *Miranda* warnings. RP (7/13/09) 77-78. Thus the timing of the warnings was unrelated to the prosecutor's attempted impeachment.

clothing did not include the hat Mr. Bell was wearing when he was arrested. RP (7/13/09) 36. Mr. Bell provided an innocent explanation for his presence and his appearance.

It cannot be said beyond a reasonable doubt that the constitutional violation was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Flores*, at 25. Mr. Bell's convictions must be reversed and his case remanded for a new trial. *Knapp*, *supra*.

D. Mr. Bell did not testify that he had waived his right to remain silent.

Respondent erroneously claims (without citation to the record) that Mr. Bell testified that he had waived his right to remain silent. Brief of Respondent, p. 19. This is incorrect. Mr. Bell did not claim that he'd waived his *Miranda* rights. Instead, he testified that he'd provided information to the police, without asserting that it was after administration of *Miranda*. RP (7/13/09) 77-78. His version of events was confirmed when the officer testified that Mr. Bell chose to remain silent after receiving his *Miranda* warnings. RP (7/13/09) 83.

Mr. Bell is not "tak[ing] one position at trial... and another on appeal." Brief of Respondent, p. 20. He made a pre-*Miranda* statement to the police, and exercised his right to remain silent after being administered

his *Miranda* warnings. Because the prosecutor highlighted Mr. Bell's post-*Miranda* silence, the convictions must be reversed and the case remanded for a new trial. *Knapp, supra*.

II. DEFENSE COUNSEL WAS INEFFECTIVE.

A. Standard of Review

Claims of ineffective assistance are reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Defense counsel was ineffective for failing to object to the prosecutor's misconduct, for emphasizing Mr. Bell's post-*Miranda* silence, and for failing to request an instruction limiting the jury's consideration of the improperly admitted evidence.

Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). The presumption that defense counsel performed adequately is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the

introduction of evidence of... prior convictions has no support in the record.”)

In this case, defense counsel should have objected to the testimony that Mr. Bell remained silent after administration of *Miranda* warnings, should not have compounded the problem by highlighting his silence on redirect examination and then again in closing. RP (7/13/09) 81-82, 83; RP (7/14/09) 118. Furthermore, defense counsel should have asked for a limiting instruction.

Respondent speculates that defense counsel didn't raise an objection or request a limiting instruction because to do so “would have highlighted the issue for the jury.” Brief of Respondent, p. 24.

Respondent also suggests that defense counsel had other tactical reasons for his actions. Brief of Respondent, pp. 24-25.

This argument—that defense counsel pursued a legitimate strategy—is without merit. First, there is no indication that defense counsel was concerned about highlighting the issue. Defense counsel himself drew attention to the testimony by bringing it up on redirect and again in closing. RP (7/13/09) 83; RP (7/14/09) 118. Thus, there is nothing in the record that counsel was actually pursuing the alleged strategy. *Hendrickson*, at 78-79.

Second, without an objection and a limiting instruction, the jury was free to consider Mr. Bell's post-*Miranda* silence as substantive evidence of guilt. There is no legitimate reason explaining defense counsel's decision to permit the jury to consider the evidence as substantive evidence of guilt, and counsel's closing argument suggests that was not a strategy he was pursuing. RP (7/14/09) 118.

Third, Mr. Bell's testimony was internally consistent, and did not force defense counsel to make irrational choices (as Respondent suggests). See Brief of Respondent, pp. 24, 25. Mr. Bell told the jury that he answered the officers' initial questions. RP (7/13/09) 77-78. Deputy Young clarified that Mr. Bell was initially asked about a wet mark on his pants (to ensure that it wasn't urine), and then administered *Miranda* warnings. At that point, he elected to remain silent (after the warnings were administered). RP (7/13/09) 47, 65-66, 81, 83. The difference between the officers' testimony and Mr. Bell's testimony was that Mr. Bell told the jury that he'd given a more lengthy pre-*Miranda* statement; the officers claimed he'd only answered their question about his wet pants. RP (7/13/09) 47, 65-66, 77-78, 81, 83.

Whatever strategy defense counsel pursued, it was not "based on reasoned decision-making..." *Hubert*, at 929. Counsel's performance was objectively unreasonable, and prejudiced Mr. Bell. Jurors were free

to consider Mr. Bell's post-*Miranda* silence as proof of guilt. There is a reasonable possibility that the outcome of the proceeding would have differed had the error not occurred. Accordingly, Mr. Bell's convictions must be reversed and the case remanded for a new trial. *Reichenbach, supra.*

C. Defense counsel was ineffective for failing to object to the admission of Mr. Bell's prior felony convictions under ER 609(a)(1).

Respondent concedes that the court was not "offered the opportunity to weigh" Mr. Bell's 2004 convictions. Brief of Respondent, p. 27. Respondent erroneously suggests that Mr. Bell's ineffective assistance claim is not of constitutional magnitude. Brief of Respondent, p. 27. This is incorrect. An ineffective assistance claim raises "an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 861-862, 215 P.3d 177 (2009).

Nowhere does Respondent suggest that Mr. Bell's 2004 convictions were properly admitted, or that an objection under ER 609(a) would have been overruled. Brief of Respondent, pp. 26-28. Presumably, Respondent agrees that a proper objection would have been sustained. ER 609(a). Thus counsel's performance was deficient, and the issue on appeal turns on whether or not Mr. Bell suffered prejudice.

Mr. Bell's entire trial strategy rested on his testimony. His credibility was therefore critical. His trustworthiness had already been attacked (with his forgery conviction, with evidence contradicting his testimony that he'd explained his presence and appearance to the police at the scene, and with improperly admitted testimony about his post-*Miranda* silence). His admission that he'd also been convicted of two prior felonies may well have tipped the balance against him and changed the outcome of the trial. Accordingly, there is a reasonable possibility that Mr. Bell would have been acquitted (or that the jury would have been unable to reach a verdict) had defense counsel raised a proper objection under ER 609(a). His convictions must be reversed and the case remanded for a new trial. *Reichenbach, supra*.

III. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

Mr. Bell rests on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Bell's convictions must be vacated and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on February 9, 2009.

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