

No. 39580-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH BELL,

Appellant.

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

The Honorable Richard D. Hicks, Judge
Cause No. 09-1-00197-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor improperly elicited testimony that Bell had exercised his right to remain silent, and if so, whether this violated Bell's Fifth and Fourteenth Amendment protection against self-incrimination.

2. Whether Bell received ineffective assistance of counsel because trial counsel (1) failed to object to Deputy Young's testimony that following *Miranda* warnings Bell had basically not said anything, (2) failed to object to the prosecutor's rebuttal argument that Bell's failure to tell the officers at the time of his arrest the same story he told on the witness stand made him incredible, (3) failed to request a curative instruction dealing with this evidence, and (4) referred during his own closing argument to the defendant's statements or lack of same at the time of arrest.

3. Whether the 2008 amendments to the Sentencing Reform Act, which permit the prosecutor to submit a summary of a defendant's criminal history at sentencing as prima facie evidence of that history, violated Bell's rights to due process and against self-incrimination.

B. STATEMENT OF THE CASE.

1. Substantive facts.

On January 30, 2009, Lenn Valdez, who worked for Simply Controls at 6243 Rich Road in Thurston County, was standing outside that business with a co-worker named Heath Strauss, having a smoke break. [RP14] Valdez's car, a white 1994 Saturn with a "for sale" sign in the back was parked in front of the shop. At approximately 11:44 a.m. he heard his car start up and saw it drive away. [RP 14-15] Valdez had not given anyone permission to take

the car. He called 911 while Strauss used a company van to give chase to the Saturn. [RP 15]

Strauss followed the Saturn south on Rich Road from a considerable distance. He observed a black car following the white Saturn. The two cars turned left in front of an elementary school, on what Strauss believed to be 87th Street. He followed the cars to the end of that road, where he lost them. [RP 20] Strauss turned around to head back to Rich Road, but noticed a small herd of deer standing in the driveway of a house, all staring at one area. In order to investigate, Strauss went back down 87th Street, and met the two cars coming toward him, heading toward the school. [RP 21] Strauss tried unsuccessfully to block the cars, but they got past him. By the time he got his van turned around and returned to the intersection of 87th Street and Rich Road, he found the Saturn had been involved in an accident and the black car was nowhere to be seen. [RP 22] During this chase, Strauss had been talking to police dispatch on his cell phone. [RP 25] Strauss checked on the driver of the other car, asked questions of some bystanders, and learned the driver of the Saturn had fled. He began walking in the direction they indicated, and met a Thurston County deputy sheriff within a short distance. [RP 22]

Shortly before noon on January 30, 2009, Leah Thomas was driving a 2007 Kia Optima on Rich Road; her daughter was in the back seat of her car. [RP 27-28] As Thomas approached 87th Street, she observed a black car traveling at a high rate of speed on 87th, approaching the intersection with Rich Road, and realized it would not be able to stop. Thomas slowed down to avoid a collision; the black car “blew” the intersection and went south on Rich Road. [RP 28-29] Thomas then entered the intersection, and as she was crossing it the white Saturn, sliding backward, failed to stop at the stop sign and hit her car on the passenger side rear door and quarter panel. [RP 29] Thomas’s car spun around and went into the ditch on the opposite side of the road. She was uninjured, but her daughter sustained a cut below her eye. [RP 30] An ambulance subsequently responded to give aid. [RP 67]

The driver of the white car got out and fled on foot, running south on Rich Road, apparently trying unsuccessfully to wave down the driver of the black car. [RP 30-31]

At the time of the collision, Cynthia Barton was sitting near a large bay window in the home of her parents, which was at the intersection of 87th and Rich Road. She heard the sound of a car approaching at a high rate of speed, and saw the white car hit

something, although she did not realize there was another car involved until she went outside. [RP 34-37] She observed the driver of the white car jump out of the vehicle and run south. She described him as a young white male wearing a brown Carhartt-type jacket and blue jeans. [RP 36] She did not get a good look at his face, and while it was her impression that he was dressed warmly, she did not specifically recall that he was wearing a hat. [RP 41] A few moments later the police asked her to look at a young white male who was in the back of a patrol car. The young man was breathing hard, his eyes were closed, and he was wearing a brownish Carhartt jacket and blue jeans, and she confirmed that he matched the description of the man she had seen running from the scene. [RP 38-39]

Thurston County sheriff's deputy Mitchell King received the call of a stolen vehicle and arrived at the accident scene at 11:52 a.m., just as the dust from the collision was settling. [RP 44, 56] Deputy Michael Young arrived about the same time. [RP 61] People milling around at the scene told the officers that the male driver of the Saturn ran toward the school. [RP 45, 63] Dispatch relayed that a caller reported a subject had run through a yard off 89th Street, so Young moved to 89th Street and Rich Road. [RP

63] Eight to ten other officers responded [RP 83] and they began establishing a perimeter around the school, making a show of their presence, in an effort to cause the suspect to remain in the area until a K-9 could be brought to the scene. [RP 45] King was at the intersection of 87th and Marie when he saw a male matching the suspect's description trying to jump over a fence between 87th and 89th Streets. [RP 45] King immediately drove there, and Young joined him. While King pointed a taser at the suspect¹, Young handcuffed him at 12:06 p.m. [RP 46, 57, 64] The man was wearing a brown Carhartt-style jacket, blue jeans, and a blue stocking cap. He was tired, very sweaty, and covered in dirt. [RP 47, 65] In addition, his pants, from the waist to mid-thigh, were wet. [RP 47, 65] Concerned that the liquid was urine and obviously aware of the bio-hazard, Deputy Young tried to put on gloves. [RP 65] The suspect, identified in court as Bell, [RP 64] complied with all commands. He was read his *Miranda*² rights and placed in the rear of the patrol car. He said nothing, except that the fluid on his pants was not urine. [RP 47, 65-66] He did not explain his

1 Bell asserts in his statement of facts that he was tased by the officers [Appellant's opening brief at 3] but that was not the testimony. Deputy Young testified that King pointed his taser at Bell, not that he fired it. [RP 64]

2 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

presence there, mention the black car, or say anything about yard work. [RP 81]

Young testified that no other suspects matching the Saturn driver's description were observed in the area. Young was the primary officer at the scene, and if any other officer had located a similar subject, he would have been informed. [RP 84]

An inspection of the Saturn showed that the driver's seat was wet, except for the spot that would have been occupied by the driver. An empty drink cup was on the floorboard of the driver's side. [RP 48]

Bell testified at trial that on the morning of January 30, 2009, he had been at his sister's house in Olympia doing yard work for her. When he finished he was unable to find a ride home to Rainier, so he began walking on a route that took him to Rich Road and 89th Street. [RP 75-76] He noticed a black car pass at a high rate of speed. He went onto the property at an unknown address to get a drink of water from a hose. [RP 76, 79] From there he cut through a field to get back to the road and on the way was confronted by the deputies. [RP 77] He testified that when asked what he was doing there and how his pants got wet, he told the officers that he was walking from his sister's house. [RP 78]

2. Procedure.

Bell was charged with one count of Theft of a Motor Vehicle (RCW 9A.56.065(1) and .020(1)(a)) and one count of Hit and Run—Injury (RCW 46.52.020(1)(4)(b)). [CP 2] No suppression issues were raised pursuant to CrR 3.5 or 3.6. [RP 6] Trial was held on July 13 and 14, 2009. The jury found Bell guilty of both charges. [RP 130]

Sentencing was held on July 16, 2009. The prosecutor submitted a statement of criminal history [CP 51] which showed 12 prior convictions. Bell's offender score was different for the two counts because prior misdemeanors and vehicle prowls are counted differently for the two crimes. [CP 52-53] For the Theft of a Motor Vehicle charge, the offender score was nine or more and the standard range was 43 to 57 months. [CP 52] For the Hit and Run—Injury charge, the offender score was eight and the standard range 53-60 months. [CP 53] The court sentenced Bell to 56 months on each count, to run concurrently. [CP 8]

This timely appeal followed.

C. ARGUMENT.

1. The testimony elicited by the State did not comment on Bell's exercise of his right to remain silent. The prosecutor's remarks in rebuttal argument were not improper, but even if they

had been, it was harmless error. Because Bell testified that he answered the officers' questions and did not invoke his right to remain silent, he cannot now claim that the State violated his Fifth and Fourteenth Amendment rights.

Bell asserts that the State infringed upon his right to remain silent when Deputy Young testified on direct examination as follows:

Q. What did you do next?

A. After he was placed in handcuffs, we asked him, you know, what is—what's all over your pants, just for our protection because when you're handling this individual, now we're going to have to help him up over the fence to get to our patrol vehicle, make sure it isn't urine. And after I read him his *Miranda* warnings, he said he understood—didn't say anything basically, and told us, no, it's not pee when we told him it was pee.

[RP 65-66]

Bell testified at trial. On direct examination, he made these statements:

Q. Okay. What happened when you were in the patrol car?

A. I just lay down in the back of the seat.

Q. Did they ask you any questions?

A. Yeah.

Q. What did they ask you?

A. How my pants got wet and if I—where was I—what I was doing there.

Q. Okay. What was your response?

A. Well, I told them I was walking from my sister's house.

[RP 77-78]

In its rebuttal case, the State recalled Deputy Young to the stand, where he testified:

Q. Now, Deputy Young, do you recall when you came across the defendant and handcuffed him?

A. Yes.

Q. And do you recall advising him his rights (sic) and asking him a question?

A. I do.

Q. Now, at any time did he tell you that he had been walking from his sister's house?

A. No, he did not.

Q. Did he say anything at all about a black car?

A. No, he did not.

Q. Did he say anything at all about doing yard work up in Wilderness on Boulevard?

A. No, he did not

[RP 81]

The prosecutor did not refer to this testimony, or to either Bell's silence or his statements in closing argument. In rebuttal argument, he made these remarks:

The defendant testified. Let's look at his testimony. The defendant says he was just coming from his sister's where he was doing yard work. The defendant says he was merely going on to some stranger's property to get a drink from a hose when he was arrested, somebody he didn't know, someone

else's property all together (sic). The defendant says he actually told the deputies that he was just walking home from his sister's house.

The defendant's credibility, is the testimony of the defendant credible? Well, what are those factors you look to? Did the defendant's testimony make sense? You listened to it. You watched him. You heard him. Did what he say (sic) make sense to you? Did the defendant's testimony fit with the testimony of the two deputies? The two deputies said all he told them was that it's not pee. Remember, we brought Deputy Young back to testify and tell you that no, he didn't say anything about his sister or going back from his sister. . . .

[RP 123-24]

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. 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, 130 Wn.2d 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.

a. Defendant's statements or silence as impeachment.

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, 130 Wn.2d at 237-38. In that case, Easter did not take the stand and so his credibility was not in issue. Bell did, and his was. In State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008), 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, 163 Wn.2d at 217.

b. Prosecutorial misconduct; reference versus comment.

When a defendant claims that prosecutorial misconduct denied him a fair trial, the reviewing court must decide first whether the comments were improper, and if they were, whether there is a substantial likelihood that the comments affected the verdict. If the defendant failed to object to a claimed improper remark, which is the case here, any error is waived unless the comment was so “flagrant and ill intentioned and the resulting prejudice so enduring that jury admonitions could not neutralize its effect.” State v. Bautista-Caldera, 56 Wn. App. 186,193, 783 P.2d 116 (1989) (citing to State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) and State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978)). Failure to object “strongly suggests” that the testimony or argument did not seem particularly prejudicial in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

c. The State did not elicit the testimony.

Bell now complains that the State impermissibly elicited testimony that he invoked his right to remain silent. The State maintains that it did not. The prosecutor asked, “What happened

next?” and a narrative response followed. Young testified both that Bell didn’t “basically” say anything, and that he had made a statement about the fluid on his pants. In Lewis, a police officer said he had told the defendant that if he was innocent he should just come talk to the officer about it. Lewis did not object, but moved for a mistrial at the next recess, arguing that it was a comment on the right to remain silent. The motion was denied. Citing to the principle that “[a] police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions,” the Supreme Court found that this remark was not a comment. Lewis, 130 Wn.2d at 705-06. The court cited with approval to a Wyoming case for the propositions that “a mere reference to silence which is not a ‘comment’ on the silence is not reversible error absent a showing of prejudice,” and “[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 706-07. The Court of Appeals interpreted the Lewis holding to mean that a “mere unsolicited reference, with no suggestion it was proof of guilt, did not violate the Fifth Amendment.” State v. Curtis, 110 Wn. App. 6, 12, 37 P.3d 1274 (2002). See also Burke, 163 Wn.2d at 216

("Thus, focusing largely on the purpose of the remarks, this court distinguishes between 'comments' and 'mere references' to an accused's prearrest silence.")

The present case presents a very similar situation. For one thing, Young's testimony did not actually say that Bell had refused to talk or invoked his right to remain silent. He said that Bell had responded to the question about his pants, but otherwise didn't say anything. All the jury could glean from this is that the police got no further information from Bell. From the context of the deputy's testimony, a jury could infer that Bell spoke to the officers but didn't offer any useful information. That is not the sort of comment on the right to remain silent that the cases contemplate when finding constitutional violations. "[T]he prosecution may not . . . use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." Miranda, 384 U.S. at 468 n.37. Further, the prosecutor's question did not call for any mention of Bell's silence or lack of same, and the deputy did no more than say "he didn't say anything basically" except that the fluid on his pants wasn't urine. The context of the questioning makes it clear that the deputy was not trying to establish that silence was an admission of guilt. He was merely reciting "what happened next" as he understood the

question. The prosecutor did not dwell on the subject and did not refer to it in his closing argument.

d. Impeachment.

The prosecutor did make use of Bell's post-arrest silence, or more accurately, his failure to tell the police he was walking from his sister's house, to attack the credibility of the defendant on rebuttal argument. The only clues to the sequence of *Miranda* warnings and any statements or any silence, for that matter, came during the State's rebuttal case, with this exchange between the prosecutor and Deputy Young:

Q. And do you recall advising him his rights and asking him a question?

A. Yes.

Q. Now, at that time did he tell you that he had been walking from his sister's house?

A. No, he did not.

Q. Did he say anything at all about a black car?

A. No he did not.

Q. Did he say anything at all about doing yard work up in Wilderness on Boulevard?

A. No, he did not.

[RP 81]

On cross-examination, Bell's counsel asked:

Q. And at that location is where you read Mr. Bell his *Miranda* rights.

A. Yes.

Q. And then in response to that he didn't say anything to you after you read those rights.

A. Yes.

[RP 83] It is not clear from these exchanges whether Bell's statements occurred before or after the *Miranda* warnings. The State will assume that the warnings preceded the situation at issue here, including the statement that Bell's pants were not wet from urine. As noted above, post-*Miranda* silence cannot be used for impeachment purposes. Here, however, the argument was not that he had remained silent, but that he had not offered the same story he told on the witness stand, even though he testified that he had made that statement at the time of his arrest. The inference the State wanted the jury to make was not that silence, or an invocation of his right to remain silent, was evidence of his guilt, but that his testimony on the stand was not credible because he had not made the statement he claimed to have made.

Characterizing this interaction between Bell and the police as post-arrest silence is not entirely accurate. "When a defendant does not remain silent, and instead talks to police, the state may comment on what he does *not* say." State v. Clark, 143 Wn.2d

731, 765, 24 P.3d 1006 (2001) (emphasis in original, citing to State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)).

e. Harmless error.

Even if we assume, for sake of argument, that there was error, and the State does not concede error, it was harmless. Errors at trial, even constitutional errors, may be so insignificant as to be harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). An error is harmless if the “untainted” evidence is so overwhelming that the jury would have found the defendant guilty even without the challenged evidence. Id., at 426.

Strong policy reasons support the use of harmless error analysis. “A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.” State v. White, 72 Wn.2d 524, 531, 433 P.2d 682 (1967). A reversal should occur only when the reliability of the verdict is called into question.

State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995).

In Bell’s case, despite his claims to the contrary, the evidence against him was overwhelming. The Saturn was stolen at 11:44 a.m. on the same street where the collision occurred at about 11:50 or 11:51. The officer arrived at 11:52 and the dust was still settling, so it can be inferred that the collision had just occurred.

The driver, a young white male wearing a brown Carhartt-style jacket and blue jeans ran from the area of Rich Road and 87th Street. The police began setting up a perimeter between 87th and 89th streets, around the school, so the area in question was no more than two blocks. The defendant, wearing blue jeans and a brown Carhartt-style jacket, tired, sweaty, breathing heavily, covered with dirt, and with his pants soaked between the waist and mid-thigh, was handcuffed near 89th Street at 12:06 p.m. The driver's seat of the stolen vehicle was soaked with fluid except for the area where the driver would have been sitting, and there was an empty drink cup on the floor of the car. At trial, Bell told an improbable story of doing yard work—in January—for his sister, and then beginning to walk from Olympia to Rainier. Anyone on a Thurston County jury would be aware that Rainier is some miles from Olympia. He did not offer any explanation for the liquid on his pants or why he was tired, sweaty, and panting.

A jury could have acquitted Bell only if it found that by a truly monumental coincidence Bell was within two blocks of a wrecked stolen car with a soaking wet driver's seat, wearing the identical clothing worn by the driver of the vehicle, that his jeans were soaked in the identical place that the driver's pants would have

been wet, within no more than sixteen minutes of the time the collision occurred, and that he was tired, sweaty, and breathing hard as if he had been running. Even more coincidentally, the officers at the scene did not locate anyone else matching that description even though they were closing off the area almost immediately after the collision. Even without a reference to post-arrest silence, the outcome of the trial would have been the same.

f. Bell should be precluded from making a claim of violation of this right to remain silent at all.

Finally, Bell should be precluded from claiming on appeal that his right to remain silent was infringed upon when, at trial, he claimed that he did not remain silent. He testified that, when asked what he was doing there, he told the officers that he was walking from his sister's house. When a defendant waives the right to remain silent and talks to the police, the State may use any statements he makes to impeach inconsistent testimony at trial. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988). "In particular, the State may question a defendant's failure to incorporate the events related at trial into the statement given police or it may challenge inconsistent assertions." Id. The situation here is very similar—Bell claimed he made a particular

statement, the deputy said he did not. The purpose of Young's rebuttal testimony and the prosecutor's rebuttal argument, was not an attempt to insinuate that Bell's silence equated to his guilt. It was meant to demonstrate that he was lying on the witness stand, a credibility issue before the jury. The State did not tell the jury that Bell had remained silent, only that he had not made the statement he claimed to have made.

The State's argument is that Bell cannot take one position at trial—that he had waived his Fifth Amendment rights, and another on appeal—that he invoked the right and the State improperly commented on his right to remain silent. The State cannot be faulted for referring to a statement, or lack of same, when Bell testified he did not remain silent.

2. Bell did not receive ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S.

1008 (1998). 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). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

a. Failure to object to testimony regarding Bell's post-arrest silence and failure to request a curative instruction.

Bell argues that his trial attorney was ineffective because he failed to object to Young's testimony that he didn't say anything after his arrest. However, as argued above, it was not entirely clear that the deputy was saying that Bell invoked his right to remain silent, and an objection, and the request for a curative instruction, would have highlighted the issue for the jury. In addition, Bell's attorney was presumably aware that Bell was going to testify that he had made at least one statement to the police after he was given his *Miranda* warnings, and therefore he would have been in the position of having to argue both that he invoked his rights and waived them at the same time. Such an argument would be unlikely to impress a jury favorably.

b. Defense counsel's questioning of Deputy Young and his closing argument not to hold Bell's silence against him.

Bell's counsel asked two questions of Deputy Young during the State's rebuttal case about Bell's silence; those are set forth above in Section 1. [RP 83] In closing, counsel recounted Bell's version of the events, and argued:

He also told you that as he, you know, was walking, he decided to, you know, go on someone else's

property, which is probably something you're not supposed to do, and drink some water. And as he was coming back from that is when he was apprehended by the officers. Well, you've heard some testimony back and forth about what was said or wasn't said. But I can imagine—or I would submit to you that when you're coming off someone else's property and the officers advise you to, you know, or give you *Miranda* rights, that it shouldn't be held against you when you say okay, you read me *Miranda* rights; I'm not going to say anything.

[RP 118-19]

Defense counsel was already in the position of having to work with the ludicrous story Bell told on the witness stand. There had been testimony both that Bell had talked to the police and that he hadn't. Here counsel made the apparent choice to argue to the jury that Bell thought he was in trouble for trespassing, and because he knew he was guilty of that, he chose not to talk. It seems a reasonable tactic, considering how little counsel had to work with. A tactical choice cannot be the basis for a finding of ineffective assistance of counsel.

Here again, because Bell testified that he answered questions from the police, he should be precluded from arguing that he was prejudiced by his attorney's actions. He cannot claim both that he remained silent and that he didn't.

c. Counsel's failure to object to admission of Bell's two 2004 felony convictions.

A defendant cannot raise evidentiary errors for the first time on appeal. Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. Because this is so, Bell is framing his argument in terms of ineffective assistance of counsel. If the underlying claim is not of constitutional magnitude, however, it is not made so by calling it ineffective assistance of counsel.

Erroneous decisions under ER 609(a) are not of constitutional magnitude. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). A ruling pursuant to ER 609(a) is not reversible error "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Id., citing to State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). A defendant does not have a constitutional right to testify "'free of . . . impeachment' by his prior convictions." Id.

It is error for a trial court to fail to weigh the probative value versus prejudicial effect of prior convictions that are not crimes of dishonesty. State v. Mitchell, 32 Wn. App. 499, 501, 648 P.2d 456 (1982). See also State v. Tharp, 96 Wn.2d 591, 597-98, 637 P.2d 961 (1981). Because an error resulting from an evidentiary rule is not of constitutional dimension, if it does not result in prejudice to the defendant it is not grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Therefore, the standard of review is harmless error, not beyond a reasonable doubt, which applies to constitutional error, but whether, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Id., citing to Tharp, 96 Wn.2d at 599.

At Bell’s trial, the record does not show that the court was ever offered the opportunity to weigh the probative value against the prejudicial effect of the two 2004 convictions. However, Bell did not object, and cannot raise the issue now on appeal. Instead, he couches it in terms of ineffective assistance of counsel, but that still does not turn it into a constitutional issue. In any event, it is apparent from the record that any error in failing to weigh the convictions is harmless because there is no reasonable probability

that the outcome of the trial would have been different if the jury had not heard of those two convictions. The evidence against Bell was so overwhelming, and his testimony on the stand was so incredible, that the outcome would have been the same without the ER 609(a) evidence.

3. The 2008 amendment to RCW 9.94A.500, which provides that a prosecutor's summary of a defendant's criminal history constitutes prima facie evidence of that criminal history, does not violate either Bell's right against self incrimination or his due process right to have the State prove criminal history.

Chapter 231, § 2, LAWS OF 2008, amended RCW 9.94A.500(1) to add this language:

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.

The statute then continues, as it did prior to 2008:

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. . . .

Also of relevance to this discussion is RCW 9.94A.530(2):

In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes

material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. . . .

Bell claims that the 2008 amendment to RCW 9.94A.500(1), as set forth above, violates his rights against self incrimination and unconstitutionally shifts the burden of proof at sentencing to them.

a. Self incrimination.

Bell reads more into the 2008 language than is there. All it says is that the State can meet its burden of producing prima facie evidence of a defendant's criminal history by producing a list of the convictions it believes exist. Bell's self incrimination argument isn't clear, but presumably he is claiming that if he is required to object to the list, or point out errors in it, he is being forced to incriminate himself. It is unclear how that could be.

"Use of information regarding a defendant's conduct, including statements about crimes already punished, does not violate the Fifth Amendment." State v. Strauss, 93 Wn. App. 691, 700, 969 P.2d 529 (1999). "Statements about past offenses already punished cannot incriminate [the defendant] as to those offenses, nor increase his punishment for those offenses." Id. The Fifth Amendment protects a person from "having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or

from having to share his thoughts and beliefs with the Government.” State v. Sweet, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999) (citing to State v. Easter, 130 Wn.2d at 241).

An incriminating question is defined as “one the answer to which will show, or tend to show, [the person] guilty of a crime for which he is yet liable to be punished.” State v. James, 36 Wn.2d 882, 897, 221 P.2d 482 (1950) (citing to other cases). Once a sentence is imposed, incrimination is complete. Mitchell v. United States, 526 U.S. 314, 325, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

Bell apparently equates some presumed duty to notify the court of a missing or erroneous conviction as self incrimination. If he was being required to produce some information or evidence regarding the underlying crimes being sentenced, that would be true. But there is no authority that being required to either tell the court that the State’s summary is incorrect or being stuck with it is in any way requiring him to incriminate himself. The fact that the offender score determines the standard sentencing range is not the same thing as saying that they are being forced to produce evidence that increases their punishment for the crime being sentenced.

The new language, in fact, does not require the defendant to do anything. If the prosecutor's summary includes a conviction that should not be there, it is certainly in the best interest of the defendant to object to that at sentencing. The prosecutor's summary is prima facie evidence; the court is free to accept or reject it as it determines. Why a defendant would want to let a conviction count toward his criminal history, be sentenced to a longer term than he should be, and then seek a resentencing on appeal is a mystery. On the other hand, if the State has omitted a relevant conviction, the statute does not require the defendant to bring it to the court's attention. Since we are dealing here with a jury conviction, not a guilty plea, there is no statutory obligation on the defendant to correct errors in his favor. All the new language says is that if a defendant does not challenge the State's summary, it becomes prima facie evidence of his criminal history. Neither of these scenarios even remotely requires a defendant to incriminate himself.

b. Shifting the burden of proof.

The 2008 amendment was the legislature's response to the opinions in In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005); State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002); State

v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999); and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999). Chapter 231, §§ 2-4, LAWS OF 2008. “It is the legislature’s intent to ensure that offenders receive accurate sentences that are based on their actual, complete criminal history. Accurate sentences further the sentencing reform act’s goals of: (1) Ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history; (2) Ensuring punishment that is just; and (3) Ensuring that sentences are commensurate with the punishment imposed on others for committing similar offenses.”
Id.

Bell’s brief relies on Ford for the assertion that the rule—that failure to object to the State’s identification of prior convictions is not a waiver of a challenge—is constitutionally based. In Ford, however, the State had counted three California convictions in Ford’s criminal history without producing any evidence of comparability to Washington crimes that would count as points toward the offender score. Ford admitted the existence of the convictions, but objected that they shouldn’t count because they resulted in civil commitments only. Ford, 137 Wn.2d at 475. On appeal, he challenged the trial court’s classification of those three

convictions because the State failed to prove that they were comparable to Washington felonies. Id., at 476.

Citing to State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986), the Ford court said:

[W]e held that the use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. See RCW 9.94A.110.

Id., at 479-80. The court went on to find that the State had failed to meet the preponderance standard mandated by the SRA. Id., at 481.

Since 2008, however, the “preponderance standard mandated by the SRA” is a summary provided by the prosecution. The underlying goal of sentencing is to gather an accurate criminal history. Bell does not claim that the summary provided by the State was not accurate. Had there been an error in his history, and he pointed it out to the court, the State would then have to produce the judgment and sentence or some other evidence of the existence of that conviction.

Bell cites to this language from Ford:

Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain

requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

Id., at 482. The very next sentence in the opinion is: “In concluding as we do, we emphasize we are placing no additional burden on the State not already required under the SRA.” Id.

The SRA requirements changed in 2008. The State followed them in this case. The Ford court, in referring to an unconstitutional shifting of the burden of proof, was referring to the State’s failure to do a comparability analysis of the California convictions. It is not up to the defendant to prove that the foreign convictions are not comparable to Washington felonies. At his sentencing, Ford objected to the inclusion of the California convictions, and on appeal the Supreme Court found it was error for the State to be relieved of the burden of proving the comparability to Washington felonies. Notably, Ford did not contest eight other Washington convictions and there is no indication in the opinion that the State committed error by not producing documentary evidence of those.

The new language in RCW 9.94A.500(2) does not relieve the State of its burden of proof. It merely says that a summary of the defendant’s criminal history constitutes a prima facie case. As in any litigation, a prima facie case would win unless there was

evidence to the contrary. The State maintains that it is not fundamentally unfair for the court to rely on a summary uncontested by the defendant. In the guilt phase of a criminal trial, if a defendant does not present evidence, the jury decides on the basis of the State's case alone. Under the 2008 language, the court can find that the State's summary constitutes a preponderance of the evidence. The appellant has pointed to nothing that requires him to tell the court if that summary omits a conviction that should be there. It merely says that the State's summary can be accepted by the court as correct. If it is incomplete, that works to the defendant's advantage. If it contains convictions that should not be there, it is to his advantage to challenge them. The court is not required to accept the summary.

The amendment to the statute is clearly intended to save time and resources. Requiring the State to produce documents that the defendant knows can be produced accomplishes nothing but wasting increasingly scarce time and money. The amendment effectively overruled Ford, State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), and the other cases listed above.

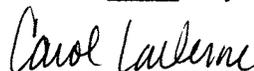
Finally, Bell does not offer any reason why it is an unconstitutional shifting of the burden of proof to the defendant to

require him to object to the prosecutor's summary but not unconstitutional to require him to object to a criminal history included in a presentence investigation, as set forth in 9.94A.530(2). See State v. Atkinson, 113 Wn. App. 661, 669, 54 P.3d 702 (2002). In either case, it is a summary provided by a representative of the State. When the Ford court used the phrase "an unconstitutional shifting of the burden of proof to the defendant," it was referring to a comparability analysis of Ford's California convictions and Washington statutes. Ford., 137 Wn.2d at 482. Nothing in the 2008 amendments relieves the State of its obligation to prove comparability, or the existence of the convictions at all, as long as the defendant objects to the inclusion of those convictions in his offender score. He is not being asked to produce any evidence. He is merely being required to give the court notice of any disagreements with the prosecutor's summary at the time of sentencing, rather than using the appellate process to do the same thing.

D. CONCLUSION.

The State did not infringe on Bell's right against self-incrimination, his counsel was not ineffective, and the 2008 amendments to the SRA are not unconstitutional. The State respectfully asks this court to affirm Bells' convictions.

Respectfully submitted this 15th day of January, 2010.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

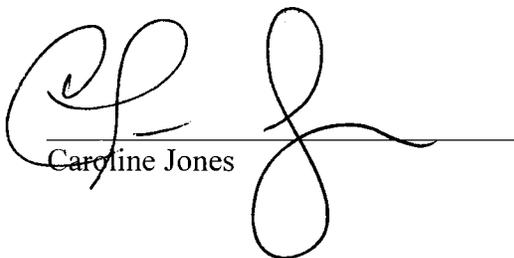
I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: JODI R. BACKLUND
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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 15 day of January, 2010, at Olympia, Washington.



Caroline Jones

STATE OF WASHINGTON
COUNTY OF THURSTON
BY: 
JAN 15 2010