

NO. 44153-5

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON WILLIAMS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 11-1-03966-0

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**RESPONDENT'S BRIEF**

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

1. Has defendant failed to show that the prosecutor engaged in misconduct where she made a fair reply to defendant's closing argument and argued reasonable inferences based on the evidence?
2. Has defendant failed to show that his counsel's performance was either deficient or prejudicial where counsel did not object to comments the prosecutor made which were proper?

B. STATEMENT OF THE CASE.

1. Procedure

On September 28, 2011, the State charged JASON WILLIAMS, hereinafter "defendant," with one count of unlawful possession of a stolen vehicle. CP 1. Jury trial commenced on October 25, 2012, before the Honorable Kathryn J. Nelson. RP 1.

Prior to the introduction of trial testimony, the parties held a CrR 3.5 hearing to determine whether statements made by defendant to the arresting officer were admissible. RP 43-67. At the end of the hearing, defendant stated that he had no objection to the introduction of the statements, including his refusal to name the person he allegedly acquired the stolen motorcycle from. RP 67.

The jury found defendant guilty as charged on October 30, 2012. CP 49; RP 173.

On November 2, 2012, the court sentenced defendant to a low-end, standard-range<sup>1</sup> sentence of six months in custody, together with various costs, fines and restitution. CP 54-65; RP 189.

Defendant filed a timely notice of appeal. CP 66; RP 192.

## 2. Facts

On September 27, 2011, Pierce County Sheriff's Deputy Michael Csapo was assigned to Pierce Transit as security. RP 84. Deputy Csapo was in an unmarked<sup>2</sup> police car when he observed a motorcycle being driven in an erratic manner near where Pacific Highway meets Mountain Highway in Pierce County, Washington. RP 85-86. Based on the erratic driving, Deputy Csapo initiated a traffic stop and contacted defendant, who was operating the motorcycle. RP 87.

Deputy Csapo ran a records check and noticed that the license tabs should have been expired based on the plate number, but that the tabs on the motorcycle were current. RP 90. He then noticed that the vehicle

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<sup>1</sup> Defendant had an offender score of three, giving him a standard range of four to twelve months. CP 54-65.

<sup>2</sup> Deputy Csapo's car was unmarked, but was equipped with an LED light bar in the front window and wig-wag headlights. RP 86.

listed under the license plate number did not match the motorcycle he had stopped. RP 90.

Deputy Csapo asked defendant about the tabs, but defendant had no information. RP 92. Defendant told the deputy that he had acquired the motorcycle from a friend. RP 92. At that point, Deputy Csapo noticed that the ignition was missing from the motorcycle. RP 92.

Deputy Csapo detained defendant and ran the motorcycle's VIN through the Department of Licensing records. RP 93-94. The motorcycle defendant was riding had been reported stolen. RP 94.

Deputy Csapo arrested defendant and asked him where he had gotten the motorcycle. RP 94. Defendant repeated that he had acquired it from a friend, but was unable to give the name of the friend, or any contact information for him. RP 95. Defendant did not have a bill of sale showing he purchased the motorcycle, nor the vehicle's registration, title, or keys. RP 95.

Morgan Jones testified that the motorcycle defendant had been driving was his and that it had been stolen from outside his apartment. Exhibit 2. Mr. Jones did not know defendant and had never given him permission to possess the motorcycle. Exhibit 2. Mr. Jones had the only set of keys, and showed the keys to the officer who responded to the stolen vehicle report. Exhibit 2; RP 114.

Defendant did not testify, but his friend, Dale Jesse Wilson and his friend's father, Dale John Wilson, both testified on defendant's behalf. RP

121, 132. According to the Wilsons, they followed defendant to a McDonalds parking lot because defendant was buying a motorcycle from someone through Craigslist. RP 123, 134. Both men gave a general description of the seller, but neither got out of their own vehicle to get close enough to see the transaction or the condition of the motorcycle. RP 124, 130, 134. Dale Jesse Wilson claimed he saw money change hands and defendant sign a document during the transaction. RP 129.

C. ARGUMENT.

1. THE PROSECUTOR'S ARGUMENT THAT DEFENDANT'S REFUSAL TO IDENTIFY THE PERSON FROM WHOM HE CLAIMED TO HAVE PURCHASED THE MOTORCYCLE FROM WAS NOT AN IMPERMISSIBLE STATEMENT ON DEFENDANT'S RIGHT TO REMAIN SILENT.

A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Alleged misconduct must be viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). A prosecutor's remarks in rebuttal, even if they would otherwise be

improper, are not misconduct if they are “invited, provoked, or occasioned” by defense counsel’s closing argument, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984).

Where a defendant does not object or request a curative instruction, he has waived the error unless the remark is “so flagrant and ill-intentioned” that no instruction could have cured the resulting prejudice. *McKenzie*, 157 Wn.2d at 52. The defendant bears the burden of establishing both the impropriety of the prosecutor’s conduct and its prejudicial effect. *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).

The State may not use pre-arrest or post-arrest silence as substantive evidence of guilt. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). “Comment” means that the State uses the accused’s silence to suggest to the jury that the refusal to talk is an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Testimony that the defendant refused to answer questions can be a comment on the defendant's right to silence. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426, *review denied*, 133 Wn.2d 1019, 948 P.2d 387 (1997) (statement that defendant “had nothing to say” an improper comment on silence). But when a defendant does not remain silent and instead speaks with the police, the State may comment on what he does not say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001). Such refusals do not amount to constitutionally protected silence, and the State

may use them as substantive evidence of guilt. *State v. McFarland*, 73 Wn. App. 57, 64-65, 867 P.2d 660 (1994) (defendant's failure to mention he had contact with a shotgun until after he was confronted with incriminating evidence held admissible when he had spoken freely with the police about the alleged crime), *aff'd*, 127 Wn.2d 332, 899 P.2d 1251 (1995); *State v. Bradfield*, 29 Wn. App. 679, 685, 630 P.2d 494 (non-statements of defendant admissible when defendant voluntarily speaks to the police), *review denied*, 96 Wn.2d 1018 (1981).

Here, defendant did not exercise his right to remain silent, but spoke to the officer about how he had acquired the motorcycle. The prosecutor was entitled to discuss the fact that defendant was unable<sup>3</sup> to name the friend he claimed to have purchased the bike from as it undermined the credibility of the story he gave to the officer.

In addition, the prosecutor's statements in rebuttal closing argument regarding defendant's refusal to give the name of the person he "purchased" the motorcycle from was not a comment on his right to remain silent as the refusal was not used to infer guilt. Reading the

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<sup>3</sup> Evidence of defendant's refusal to provide the information was entered by defendant. The officer's statement during the CrR 3.5 hearing during direct examination was that defendant was "unable to provide" information regarding the friend. RP 54. On cross-examination, defendant asked the officer if he had "refused" to give the name of the friend. RP 57. This pattern was repeated during trial, when the prosecutor asked the officer on direct examination "[h]ow about giving you the name of a friend who he had obtained the motorcycle from." RP 95. The officer responded "no," but did not say that defendant had refused to provide the information. *See*, RP 95. Again on cross-examination, defendant asked the officer if he had "refused to give" that information. RP 105.

argument as a whole, the prosecutor was responding to defendant's closing argument that the fact he did not have a bill of sale or a title was not dispositive as to his knowledge of the bike's stolen status, because those documents could be obtained and completed at a later date. *See*, RP 159; RP 161. The State pointed out that those documents could not be completed at all if defendant did not have the seller's information. RP 161. The prosecutor then noted how defendant's statements to the officer were inconsistent with his witnesses' version of the events. Defendant did not say anything to the officer about purchasing the motorcycle from a random stranger from Craigslist, but he specifically stated that he had purchased the motorcycle from a friend. RP 163. The State's inference was not that defendant was guilty by his refusal to answer the officer's question, but that defendant was not telling the truth to the officer when he said he had just purchased the motorcycle.

Because the prosecutor's argument was proper in the context of the argument as a whole and the evidence presented at trial, defendant has failed to show misconduct.

2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO PROPER ARGUMENT IS NOT DEFICIENT PERFORMANCE.

A defendant is guaranteed the right to effective representation by both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Grier*, 171 Wn.2d 17,

32, 246 P.3d 1260 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)). A defendant demonstrates ineffective representation by satisfying the two-part standard initially announced in *Strickland* and subsequently adopted in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). To demonstrate ineffective assistance, the defendant must show (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced the defense. *Grier*, 171 Wn.2d at 32–33 (citing *Strickland*, 466 U.S. at 687). The defendant bears the burden of proving both parts, and the failure to establish either part defeats the ineffective assistance claim. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687).

A defendant must demonstrate that counsel’s performance was deficient by showing counsel’s performance fell “below an objective standard of reasonableness.” *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel’s performance was reasonable.” *Grier*, 171 Wn.2d at 33 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Reasonableness is measured from counsel’s perspective at the time of the alleged error and in the context of all the circumstances. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert denied, 506 U.S. 856 (1992); *Strickland*, 466 U.S. at 688. That a strategy ultimately proved unsuccessful is “immaterial to an assessment of defense counsel’s initial

calculus; hindsight has no place in an ineffective assistance analysis.”

*Grier*, 171 Wn.2d at 43.

To show prejudice, a defendant must show a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have differed. *Grier*, 171 Wn.2d at 34. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694). In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.” *Grier*, 171 Wn.2d at 34 (internal quotations omitted).

Any error by counsel, even if professionally unreasonable, will only warrant setting aside the judgment if the alleged error affected the judgment. *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Thus, to set aside the judgment, the defendant must affirmatively prove prejudice by showing the error had an actual, not just a conceivable, effect on the outcome. *Crawford*, 159 Wn.2d at 99. Counsel’s decisions regarding whether and when to object “fall firmly within the category of strategic or tactical decisions.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). The failure to object constitutes counsel incompetence justifying reversal only in egregious circumstances on testimony central to the State’s case. *Johnston*, 143 Wn. App. at 19.

As argued above, the prosecutor's statement was proper when reviewed in the context of the argument as a whole. Defendant has failed to show that counsel's performance was either deficient or prejudicial when he did not object to proper argument.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction for unlawful possession of a stolen vehicle.

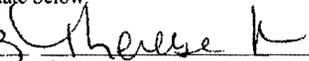
DATED: July 2, 2013.

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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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