

No. 47797-1-II

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

STATE OF WASHINGTON, RESPONDENT

V.

BLAINE W. WHITEHEAD, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 14-1-00083-9

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whitehead concedes that the crime of burglary was proved in this case, but he disputes whether the evidence was sufficient to prove that it was he who committed this crime. Because it was within the province of the jury to view video evidence in this case and make comparisons between the video evidence and in-court identification of Whitehead along with photos of Whitehead, and because the jury was competent to make these comparisons, the evidence was sufficient to sustain the jury's verdict of guilty.
2. Whitehead contends that his trial attorney was ineffective because he did not object when the State elicited evidence and gave argument during closing that Whitehead gave a false name and retreated when he was initially contacted by a law enforcement officer who was investigating the burglary at issue in this case. The State contends that Whitehead's claim of ineffective assistance of counsel should fail because it is not certain that the trial court would have sustained an objection had Whitehead made one, and even if an objection would have been sustained, Whitehead has not shown, and cannot show, that the result of the trial probably would have been different had his attorney made such an objection.

B. FACTS AND STATEMENT OF THE CASE

On September 29, 2013, Pastor Julie Kanarr, who is the pastor at Grace Lutheran Church in Belfair, Washington, arrived early at the church for Sunday services and discovered that the church had been burglarized. RP 21-22. Pastor Kanarr watched surveillance videos of the church and saw that the burglar had broken into the church the day before, on

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September 28. RP 23-36. Pastor Kanarr called police, and in response Deputy Ellis of the Mason County Sheriff's Office arrived to investigate the burglary. RP 23, 78. When he arrived, Deputy Ellis also watched the surveillance video. RP 24, 78.

Deputy Ellis testified that during his investigation he observed photographs, admitted as Exhibits 8 and 9, which were still shots of the burglar from the surveillance video. RP 79. Deputy Ellis then testified "Yes, sir" when asked, "And with those images in mind, do you recall going to 20 North East Cherokee Beach Lane?" RP 79. Deputy Ellis testified that when he arrived at the residence, which was a mobile home, that he knocked on the door, and that a male occupant partially opened the door. RP 79-80. Deputy Ellis testified that he was 95% certain that this person was the person whose picture was depicted in exhibits 8 and 9 from the surveillance video. RP 80-81.

Deputy Ellis asked the person at the door for his name, to which the person replied "Mark Dillenger." RP 81. Deputy Ellis then told the person at the door, "you're the person that I need to talk to." *Id.* Deputy Ellis testified that the person then "closed the door and went back inside the residence." *Id.* Deputy Ellis testified that he knocked again and that he again told the person he was the person he needed to talk to. *Id.*

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Deputy Ellis testified that he continued to knock but that, as he continued to knock, the person retreated deep into the residence. RP 81-82. After knocking several more times without any response from the residence, Deputy Ellis left and resumed his duties. RP 82.

Deputy Ellis returned to the residence the next day. RP 82. This time, he made contact with Courtney Burrell, who advised that there was no one named "Mark" at that residence. RP 82-83. However, Burrell told Deputy Ellis that there was a person named "Billy Whitehead" who lived at the residence. RP 83. Deputy Ellis returned to his patrol car and searched a computer database and tried to locate information for Billy Whitehead. RP 83-84. The search provided information for a "Blaine Whitehead," so Deputy Ellis printed off a picture of Blaine Whitehead, returned to the residence, and showed the picture to Burrell. RP 84. Burrell identified the picture as "Billy." RP 84. At trial, Burrell identified Whitehead in the courtroom and affirmed that the person in the photo was the defendant, Blaine Whitehead. RP 73. The picture was admitted into evidence as Exhibit 11. RP 85.

C. ARGUMENT

1. Whitehead concedes that the crime of burglary was proved in this case, but he disputes whether the evidence was sufficient

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to prove that it was he who committed this crime. Because it was within the province of the jury to view video evidence in this case and make comparisons between the video evidence and in-court identification of Whitehead along with photos of Whitehead, and because the jury was competent to make these comparisons, the evidence was sufficient to sustain the jury's verdict of guilty.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the

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reviewing court need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find that evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the court setting aside the jury's verdict. *State v. Randecker*, 79 Wn.2d 512, 517--18, 487 P.2d 1295 (1971). It is only necessary for the court to be satisfied that there is substantial evidence to support the State's case or the particular element in question. *Id.* at 518.

In the instant case Whitehead does not dispute that a burglary occurred as charged in the information, but he disputes whether there was sufficient evidence for a jury to find that he was the person who committed the burglary. Br. of Appellant at 11-12. In response, the State contends that the jury had as evidence copies of the surveillance videos that showed Whitehead as he burglarized the church and had copies of still-framed photos of Whitehead from the videos. Ex. 6-9. The jury also had Exhibit 11, which showed Whitehead's appearance as he appeared near in time to the burglary, and it had evidence that this photo was in fact

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Whitehead, who was seated in the courtroom. RP 84. Under these facts, as applied to the standard of review for claims against the sufficiency of the evidence, the evidence is sufficient to sustain the jury's verdict in this case. *See, e.g., State v. Williams*, 96 Wn.2d 215, 219, 634 P.2d 868 (1981); *State v. Jamison*, 93 Wn.2d 794, 613 P.2d 776 (1980).

2. Whitehead contends that his trial attorney was ineffective because he did not object when the State elicited evidence and gave argument during closing that Whitehead gave a false name and retreated when he was initially contacted by a law enforcement officer who was investigation the burglary at issue in this case. The State contends that Whitehead's claim of ineffective assistance of counsel should fail because it is not certain that the trial court would have sustained an objection had Whitehead made one, and even if an objection would have been sustained, Whitehead has not shown, and cannot show, that the result of the trial probably would have been different had his attorney made such an objection.

Whitehead contends that his trial attorney was ineffective because he did not object when the prosecutor elicited testimony that Whitehead refused to speak with Deputy Ellis when Deputy Ellis initially contacted him. Br. of Appellant at 13-19. Whitehead contends that this line of testimony was an improper comment on his pre-arrest constitutional right to remain silent and that his trial counsel, therefore, was ineffective for not objecting to this testimony. *Id.*

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Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, a defendant must show that but for the deficient performance, there is a reasonable probability that the outcome of would have would have been different absent the error. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Whitehead did not assert his right to remain silent; instead, when asked for his name, Whitehead gave a false name and claimed that he was Mark Dillenger. RP 81. Even though Whitehead gave a false name, Deputy Ellis nevertheless tried to speak with him. RP 81-82. There is no evidence in the record to show that Whitehead necessarily had any reason to know why Deputy Ellis wished to speak with him, and there was no testimony that Whitehead refused to answer questions in regards to any particular investigation or that he asserted his right to remain silent in regards to any particular investigation or crime. The testimony was only that Whitehead, who had given a false name, retreated when Deputy Ellis

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persisted in attempting to speak with him. RP 81-82. The State may properly argue that evidence of flight following the commission of a crime is evidence of consciousness of guilt. *State v. Porter*, 58 Wn. App. 57, 62, 791 P.2d 905 (1990).

However, “[o]ur constitutions protect the right of an accused to remain silent.” *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1 (2008), citing *Griffin v. California*, 380 U.S. 609, 614–15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). Generally, if a defendant testifies at trial, his or her prearrest silence may be used to impeach their trial testimony, but silence may not be used as substantive evidence of guilt. *Burke* at 206. A mere reference to silence does not necessarily violate the defendant’s right to remain silent; but, “when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated.” *Burke* at 217. (citations omitted). In the instant case, Whitehead did not testify at trial; thus, his prearrest silence could not be used as impeachment, nor could it be used substantively. *Id.* His flight, however, could be used as evidence. *State v. Porter*, 58 Wn. App. 57, 62, 791 P.2d 905 (1990).

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When Deputy Ellis attempted to contact Whitehead at the mobile home, there was no mention made of any particular question that Whitehead refused to answer, nor was there any indication that Whitehead was necessarily aware of what Deputy Ellis wished to speak with him about. In closing argument, the prosecutor made reference to the fact that Whitehead gave a false name and then retreated when Deputy Ellis tried to contact him, but the prosecutor did not make any particular comment about these facts, nor did he comment that Whitehead refused to answer questions or that he asserted his right to silence. RP 114-15. "A comment on the defendant's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the defendant's silence was an admission of guilt." *State v. Steen*, 164 Wn. App. 789, 813, 265 P.3d 901 (2011), *as amended* (Dec. 20, 2011), citing *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Here, the prosecutor's argument was focused on the fact that Whitehead gave a false name and retreated when contacted by the officer.

Still more, even if error occurred, the constitutional harmless error test would apply. *Burke* at 223. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the

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untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Id.* The jury in the instant case had video evidence that showed Whitehead actively committing the crime. Exhibits 6-9.

In conclusion, the State will return now to Whitehead’s assignment of error on appeal, that his attorney was ineffective. Notwithstanding Whitehead’s characterization of the prosecutor’s actions as a comment on Whitehead’s assertion of the right to remain silent, the State contends that Whitehead has not shown that his attorney was ineffective for failing to object when the prosecutor elicited testimony, and argued in closing, that Whitehead gave a false name and retreated when Deputy Ellis attempted to contact him.

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; two, the defendant must show that such conduct caused actual prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Here, even if the trial court might have sustained an objection by

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counsel had he made one, Whitehead nevertheless cannot show prejudice because he cannot show that the outcome of the trial would have been different. The jury had substantial video evidence of Whitehead actively engaged in commission of the crime.

D. CONCLUSION

The jury had as evidence video recordings of Whitehead as he was actively engaged in commission of the crime of burglarizing the church, as charged in this case. The jury was competent to make comparisons of the video, photographs of Whitehead, and Whitehead as he appeared in court; the jury was thus competent, notwithstanding any particular witness's perceptions, to determine on its own whether it was Whitehead who was shown in the videos burglarizing the church. Thus, the evidence was sufficient to sustain the jury's verdict of guilty in this case.

The prosecutor may have indirectly made reference to Whitehead's silence when the prosecutor made reference to the fact that Whitehead gave a false name and then retreated when an officer attempted initial contact with him to investigate the burglary. But there was no comment made that Whitehead refused to answer questions generally, or that he refused to answer any particular question about any particular

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investigation. The indirect reference to Whitehead's right to remain silent, if any such reference may be inferred, is unlikely to have had any effect on the jury's verdict, particularly when considered in light of the video evidence that showed Whitehead actively engaged in commission of the crime. Thus, on these facts Whitehead has not shown that his attorney was ineffective for failing to object to this evidence, because Whitehead cannot show that there is a reasonable probability that the outcome of the trial would have been different had his attorney raised this objection.

DATED: January 11, 2016.

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