

No. 48253-3-II

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

STATE OF WASHINGTON, RESPONDENT

V.

JOSEPH P. STONE, Jr., APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 15-1-00053-5

BRIEF OF RESPONDENT

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

1. Stone's claims of ineffective assistance of counsel should fail because he has failed to meet the two-part test for review of claims of ineffective assistance of counsel.
 - a) Stone contends that certain testimony of SGT Pentz constituted an opinion on guilt and that his trial counsel was ineffective because he did not object to the testimony. The State contends that SGT Pentz's testimony was not an opinion of guilt and that there was no prejudice from the testimony; therefore, Stone's trial counsel was not ineffective for not objecting to the testimony.
 - b) Stone contends that the prosecutor wrongfully elicited testimony that Stone terminated an interrogation with the police. Stone contends that his trial counsel was ineffective because he failed to object when the prosecutor elicited this testimony. The State contends that Stone has not met the test for a claim of ineffective assistance of counsel because, contrary to Stone's assertion, the prosecutor did not elicit this testimony, nor did he refer to it in argument or otherwise suggest that it was evidence of guilt, and Stone suffered no prejudice from the testimony.
2. The trial court record shows that Stone suffers a disability, which is an inability to earn a standard income. Therefore, the State will not be seeking appeal costs if the State is the substantially prevailing party on appeal.

B. FACTS AND STATEMENT OF THE CASE

On or about February 3, 2015, the defendant, Joseph Stone, went into a branch of the Our Community Credit Union in Mason County and tried to cash a check on the account of a person named Suzanne Scott. RP

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24-25, 28, 94. The check was made payable to Joseph Stone, but the name Joseph was misspelled as J-O-S-A-P-H, and the maker, Suzanne Scott, had not signed the check. RP 28, 30-31. Because the signature line for the maker was blank, the credit union refused to cash the check. RP 28.

Stone left the credit union with the uncashed check, but he soon returned, went to a different teller, and tried again to cash the check. RP 29, 33-34. When Stone approached the second teller, the check was endorsed with the signature Suzanne Scott on the back of the check, but the maker's signature line on the front of the check was still blank. RP 34, 46. At some point, either before or after presenting the check to the second teller, Stone, also, endorsed the check. *Id.*

The second teller, also, refused to cash the check, and she refused to return it to Stone. RP 36-38, 47. Instead, she decided to put a ten-day hold on the check and to deposit it into Stone's account, if it cleared within the ten-day hold. *Id.* Stone left the credit union without the check. *Id.* Meanwhile, the teller approached her supervisor about the check, and the credit union tried to verify whether the check was legitimate. RP 34-35. They called the phone number on the check, but reached voice mail, and learned that the name associated with the phone number was different from the name on the check. RP 35.

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Then, Stone returned to the credit union for a third time, this time asking whether he could take out a loan on the check. RP 37, 46. Someone at the credit union called the police and reported that someone was trying to cash a stolen check. RP 68. A Shelton police officer, SGT Virgil Pentz, arrived to investigate. RP 68. When SGT Pentz arrived, one of the tellers pointed out Stone, who was sitting in the lobby. RP 68. The investigation that ensued led to discovery that the check was on a closed account and that the account holder, Suzanne Scott, had died three years earlier, in 2012. RP 48-49, 66, 69; Ex. 11.

The State charged Stone with one count of forgery. CP 155. While the case was pending trial, Stone signed a notice of court date and promise to appear on July 21, 2015, for trial. Ex. 5, 6, 7; RP 56-57. Stone did not appear at the July 21, 2015, court hearing. Ex. 8, 9; RP 57-58. Stone next appeared in court on July 27, 2015. RP 58-59.

The State filed an amended information, adding one count of bail jumping related to Stone's failure to appear at trial on July 21, 2015. CP 126-27. The two-count information of forgery and bail jumping was tried to a jury, and the jury returned guilty verdicts on both counts. CP 62, 63; RP 168-69.

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At sentencing, the trial court judge found that Stone receives a small income from Social Security disability and that he, therefore, “has a very small ability to pay” legal financial obligations (LFOs). RP 178. Based on this finding, the trial court imposed only a \$500.00 victim compensation fund fee and a \$100.00 DNA fee but did not order any discretionary costs. RP 178.

C. ARGUMENT

1. Stone’s claims of ineffective assistance of counsel should fail because he has failed to meet the two-part test for review of claims of ineffective assistance of counsel.

Reviewing courts review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, an appellant must meet both parts of a two-part test, as follows: (1) that counsel’s performance was so deficient that it “fell below an objective standard of reasonableness”; and, (2) that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that it affected the outcome of the trial. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (applying test from *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). If the

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defendant-appellant fails to establish either part of the two-part test, the claim of ineffective assistance of counsel must fail. *Strickland*, 466 U.S. at 700. Finally, when such a claim is premised on trial counsel's failure to object, the appellant must show that the objection likely would have succeeded. *State v. Gerdtz*, 136 Wn. App. 720, 726-27, 150 P.3d 627 (2007).

- a) Stone contends that certain testimony of SGT Pentz constituted an opinion on guilt and that his trial counsel was ineffective because he did not object to the testimony. The State contends that SGT Pentz's testimony was not an opinion of guilt and that there was no prejudice from the testimony; therefore, Stone's trial counsel was not ineffective for not objecting to the testimony.

When conducting direct examination of SGT Pentz at trial, SGT Pentz described his initial contact with Stone, and the prosecutor then presented SGT Pentz with the following question: "Okay. So – and you've – what did you do after this contact with Mr. Stone?" RP 72. To this question, SGT Pentz answered as follows:

Based on the evidence at that time, the check that he presented, he'd actually left the bank to get signatures - more signatures on the check, I detained him and arrested him for one count of forgery.

RP 72. Immediately after SGT Pentz provided this answer, an unidentified voice stated, "Pardon me." RP 72. The trial court judge then said, "Can you

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repeat that please?” RP 72. SGT Pentz then responded with the following paraphrase of his prior statement:

Based on what I had found at that point, the check, which was a closed check, the account was closed, the person who owned the account was dead, the fact that he had actually left the bank and got more signatures on the check, I detained him for one count of forgery at that time.

RP 72. After SGT Pentz provided this answer, the prosecutor then moved on, changing the subject, and asked: “Okay. After you detained him, what did you do?” RP 72.

From this record, Stone contends that “the state repeatedly called upon the arresting officer to not only relate the fact of the arrest, but to specifically inform the jury why he believed the defendant was guilty and why he arrested him.” Br. of Appellant at 12. But SGT Pentz never stated his opinion, much less an opinion of guilt, and, while it nevertheless may be implied that he arrested Stone, SGT Pentz actually said that he “detained” Stone rather than that he arrested him. RP 72. And careful review of the record leads to discovery of no citation to support a contention that the State “repeatedly” raised this topic.

Instead, all that the record reveals is that one time during the trial there was one brief incident where SGT Pentz provided an explanation for why he “detained” Stone. SGT Pentz did not state his own opinion, and

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he did not say, or even infer, that Stone was guilty. RP 72. Instead, he merely stated his reason for detaining him during the investigation, and this explanation merely gave context to further, subsequent testimony about Stone's in-custody, tape-recorded statement. RP 72-73.

It is improper for any witness to testify as to his or her opinion about the guilt of a defendant. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159 (1973). But courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt.” *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

Here, as argued above, SGT Pentz did not give an opinion, directly or indirectly, about the guilt or innocence of Stone. RP 72. Instead, he merely stated the information that was available to him at the time and explained why he had detained Stone. RP 72. Stone's trial counsel had no reason to object. Stone has failed to show that his trial counsel's performance fell below an objective standard of reasonableness, has failed to show that he was prejudiced by his counsel's failure to object, and has failed to show that such an objection would have been granted had he made it. As such, Stone has failed to meet either prong of the two-part test

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for claims of ineffective assistance of counsel, and his claim on this point should be denied. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); *State v. Gerdts*, 136 Wn. App. 720, 726–27, 150 P.3d 627 (2007).

- b) Stone contends that the prosecutor wrongfully elicited testimony that Stone terminated an interrogation with the police. Stone contends that his trial counsel was ineffective because he failed to object when the prosecutor elicited this testimony. The State contends that Stone has not met the test for a claim of ineffective assistance of counsel because, contrary to Stone’s assertion, the prosecutor did not elicit the testimony, nor did he refer to it in argument or otherwise suggest that it was evidence of guilt, and Stone suffered no prejudice from the testimony.

When presenting the testimony and other evidence at trial, the prosecutor laid the groundwork for the admission of Stone’s post-arrest statement, as follows:

- Q. Okay. And after you had gone ahead and gotten this background information from Chief Crumb what did you do?
- A. I recontacted [Stone] at that time, read him his rights and attempted to get a taped statement from him.
- Q. Did he provide you a taped statement?
- A. A partial statement.

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RP 73. Then, rather than accept the answer about “[a] partial statement” and moving on to avoid the subject, the prosecutor instead inquired further, as follows:

Q. Okay. Why do you say partial?

A. As we went in to trying to nail down the facts of what had happened he got more and more agitated, said he hadn’t done anything wrong. I ultimately pointed out to him that the signature on the back looked like they were signed by the same person and it could possibly have been him. He got very agitated and said he didn’t want to talk anymore, so we ended the statement.

RP 73. Thereafter, the prosecutor appropriately avoided the subject and made no further inquiry about the termination of the statement.

After the State rested, however, Stone testified that after he was arrested he gave a voluntary statement, and he said that he became agitated when SGT Pentz contacted him. RP 89-90. His trial counsel then questioned him, as follows:

Q. And you stopped that statement, correct?

A. Uh-hum.

A. And it sounded like on the tape that you were getting frustrated. Why?

A. Because it’s just not something that I needed to wanted to go through, you know. I haven’t been in trouble for a long, long time and I mean I had a life, a really good life. I had

my apartment. I had full custody of my son, you know. I was doing really good. A felony charge is the last thing that I needed.

RP 90.

From this record, Stone contends that “the state specifically elicited evidence from Officer Pentz that the defendant exercised his right to silence during his taped interview.” Br. of Appellant at 14. And Stone contends that the State’s “purpose in presenting this evidence was to invite the jury to infer guilt from the exercise of the constitutional right to silence.” Br. of Appellant at 15. In response, the State contends that the record does not support Stone’s view of the facts.

First, the record does not support Stone’s contention that the State intentionally elicited any testimony that Stone exercised his right to remain silent. RP 73. Instead, the record shows only that the State elicited a response to explain why the interview abruptly ended. RP 73. And after this brief explanation, the prosecutor did not return to the subject, and the prosecutor did not mention it in closing, nor did he in any way imply that the jury should infer guilt from Stone’s partial silence or the exercise of his right to remain silent. RP 136-47, 158-61.

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The State may not use a defendant's silence to "suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (citation omitted). When the State draws specific attention to silence as evidence of guilt, it violates constitutionally protected silence. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1966);[footnote omitted] *see also State v. Fricks*, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979).

But "a mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice." *State v. Sweet*, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999) (quoting *State v. Lewis*, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996)). Here, as in *Lewis*, "[t]here was no statement made during any other testimony or during argument by the prosecutor that [Stone] refused to talk with the police, nor is there any statement that silence should imply guilt." *Lewis* at 706. Also, as in *Lewis*:

Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence. *See Tortolito v. State*, 901 P.2d 387, 390 (Wyo.1995) (citing *Parkhurst v. State*, 628 P.2d 1369 (Wyo.), *cert. denied*, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981) (a mere reference to silence which is not a "comment" on the silence is not reversible error absent a showing of prejudice)). A comment on an accused's silence occurs when used to the State's advantage either as

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substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. *Tortolito*, 901 P.2d at 391. That did not occur in this case.

State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235, 238 (1996).

Thus, the State contends that, on the facts of the instant case, Stone's claim of ineffective assistance of counsel should fail because he cannot show prejudice based upon his counsel's failure to object. *Id.* Stone has not shown that admission of testimony that he became angry and abruptly ended his voluntary statement has in any way prejudiced him or affected the jury's verdicts; thus, even if error occurred on these facts, it was harmless. *State v. Sweet*, 138 Wn.2d 466, 481, 980 P.2d 1223, 1231 (1999).

Because Stone has failed to show prejudice from his counsel's purported error in failing to object on these facts, Stone's claim of ineffective assistance of counsel should fail. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

2. The trial court record shows that Stone suffers a disability, which is an inability to earn a standard income. Therefore, the State will not be seeking appeal costs if the State is the substantially prevailing party on appeal.

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The trial court record shows that Stone suffers a disability that hinders his ability to earn income. RP 178. Therefore, even in the event that the State is the substantially prevailing party on appeal, the State will not, in this particular case, seek appellate costs. Therefore, State respectfully contends that this issue is moot in the instant case.

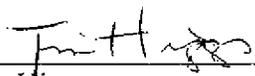
D. CONCLUSION

Stone has not demonstrated prejudice on either of his two claims of ineffective assistance of counsel in this case. Therefore, his claims of ineffective assistance of counsel should fail.

Finally, due to Stone's disability the State will not be seeking appellate costs for this appeal even if the State is the prevailing party; accordingly, the State contends that Stone's objection to costs is moot.

DATED: June 27, 2016.

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