

NO. 49486-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

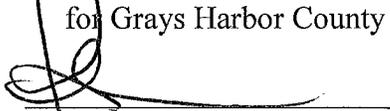
CHRISTIAN A. NEWTON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. Admission of Appellant's statement was not error.**
- 2. Sufficient evidence supports the conviction in this case.**
- 3. The Appellant received effective assistance of counsel.**
- 4. The State does not request costs.**
- 5. Statement of Additional Grounds should be denied.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State generally agrees with the facts as recited by the Appellant. However, the State would note that it is Officer Caranto, not Officer Caputo.

Also, the State disagrees that the Appellant's statement was "[w]hat do you want me to do, tell you that I stole and I am guilty?" Appellant's brief at 5, citing RP 23-25. This citation comes from the pre-trial hearing, not the trial.

At trial, Sergeant Lampky testified that the Appellant "...stated he was guilty, been to Wal-Mart, he had done that crime, and he wanted to know if talking to me or provided statement would provide any lenience toward the event." RP 101-102.

Abigayle Frias described Wal-Mart's database:

...we keep the database, it's called aphis. Every shoplifter is put in there, and if they are trespassing, we put yes so we know where to look for the trespass. Either it will be scanned, the file, or it will be put in the binder. And then we also keep pictures of them at the time of what they look like.

Ms. Frias testified that she "...searched [Appellant's] name, and...found a picture of him in our pictures..."¹ along with a trespass notice. RP 57, 62-3. Ms. Frias identified the Appellant in court as Christian Atley Newton, the person from the photo. RP 48.

ARGUMENT

1. Was it error to admit the Appellant's spontaneous statement?

No. It was not the result of interrogation, and the Appellant's right to remain silent was scrupulously honored.

In this case, the Appellant initially declined to make a statement regarding his actions at Wal-Mart on the day in question. When he asserted his right to remain silent, questioning was immediately discontinued. RP 10.

Approximately 45 minutes later, Sergeant Lampky contacted the Appellant and informed him that he wanted to discuss the use of force to "...determine if he had any injuries or anything that would require medical

¹ This response was objected to, but was not stricken by the trial court.

care” RP 16. Sergeant Lampky reminded the Appellant that he had been advised of his rights and that he had earlier chosen not to speak with Officer Timmons. RP 17. The Appellant chose to participate in this interview, and made an unsolicited statement that he had stolen property from Wal-Mart. RP 17. This was made while en route to the interview room and was not responsive to any question. RP 17.

Generally, volunteered statements, as made by the Appellant herein, are not subject to *Miranda*. They are not the result of interrogation even if the officer, during the course of the Appellant’s statements, asks the Appellant to explain or clarify a matter. *State v. Godsey*, 131 Wn.App. 278, 285, 127 P.3d 11 (2006).

In *Brown*, the appellant was arrested by Officer Lopez for possessing firearms and was advised of his *Miranda* rights. The appellant stated that he understood but did not want to talk about the firearms. Two hours after the arrest, Officer Ent re-advised the appellant of his rights and wanted to talk to the appellant in reference a vehicle prowler case. The appellant admitted that he had stolen firearms from a truck. *State v. Brown*, 158 Wash.App. 49, 53-54, 240 P.3d 1175 (2010).

The *Brown* court held that “Whether a appellant validly waives his previously asserted right to remain silent depends on: (1) whether the

police scrupulously honored the appellant's right to cut off questioning, (2) whether the police continued interrogating the appellant before obtaining a waiver, (3) whether the police coerced the appellant to change his mind, and (4) whether the subsequent waiver was knowing and voluntary.” *State v. Brown*, 158 Wash.App. at 58; citing *State v. Wheeler*, 108 Wash.2d 230, 238, 737 P.2d 1005 (1987).

In this case, the Aberdeen officer scrupulously honored the appellant’s right to cut off questioning by not interrogating him after he asserted his right to remain silent. The Sergeant made contact with the Appellant later and reaffirmed his rights and that he understood them. He further informed the Appellant that he was there just to talk about the officers’ use of force and the Appellant’s potential injuries. There was no coercion used to obtain a statement and the appellant’s waiver was knowing and voluntary.

While the test in *Brown* is helpful, there is no bright line rule. The Appellate courts have used the totality of the circumstances to determine whether or not a waiver is valid after an Appellant has asserted his right to remain silent. The State asks the Court to affirm the trial court in this finding.

2. Does sufficient evidence support the conviction in this case?

Yes. The testimony of Ms. Frias is sufficient to prove the Appellant's identity as the subject of a trespass order.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980).) “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).)

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

In this case, the Appellant challenges only whether or not the State proved "...that the defendant has unlawfully entered or remained at Wal-Mart." Appellant's Brief 24. However, he overlooks the evidence provided through Ms. Frias.

Ms. Frias testified regarding Wal Mart's process of filing the trespass notices along with a photo of the person. She also testified that she had found a trespass and a photo in the system under the Appellant's name. She also made an in-court identification of the Appellant as this same person. This evidence is sufficient to support the finding of the jury.

3. Was trial counsel ineffective for not objecting to testimony regarding the Appellant invoking his right to remain silent?

No. This was a legitimate trial tactic and in any event was harmless.

Standard of review for Ineffective Assistance of Counsel.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination..." *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wash.App. 339, 342, 666 P.2d

400 (1983).) Appellate courts “review the entire record in determining whether a defendant received effective representation at trial.” *Id.*

Strickland explains that the defendant must first show that his counsel’s performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689. “Reviewing courts must be highly deferential to counsel’s performance and ‘should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been

different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the “heavy burden” of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

In this case, testimony was elicited that the Appellant exercised his right to remain silent. RP at 94. This testimony was not objected to by counsel. Choosing to not object and further draw attention to this response is a classic example of trial tactics. This is especially true because the Appellant did later make a statement to Sergeant Lampky. If an objection had been made, it would have merited an instruction, but would not have been sufficient to cause a mistrial.

The exercise of *Miranda* rights is not substantive evidence of guilt. *State v. Lewis*, 130 Wash.2d at 705, 927 P.2d 235. In fact, comments on a defendant's exercise of his or her *Miranda* rights violates due process, because it undermines the implicit assurance that the exercise of *Miranda* carries no penalty. *State v. Easter*, 130 Wash.2d at 236, 922 P.2d 1285 (1996). An error infringing on a criminal defendant's constitutional rights is presumed to be prejudicial, and the State has the burden of proving the

error was harmless. *State v. Nemitz*, 105 Wash. App. 205, 214-15, 19 P.3d 480, 485 (2001); see *State v. Miller*, 131 Wash.2d 78, 90, 929 P.2d 372 (1997); *State v. Caldwell*, 94 Wash.2d 614, 618–19, 618 P.2d 508 (1980).

In *Hager*, the defendant was charged in Pierce County Superior Court with first degree rape of a child. Prior to trial, the trial court granted a motion in limine prohibiting Detective Callas and Detective Dorr from testifying that Hager was “evasive” during questioning. The jury was unable to reach a verdict and, consequently, the trial court granted a motion for a mistrial. *State v. Hager*, 171 Wash. 2d 151, 154, 248 P.3d 512, 513 (2011).

The State elected to retry the case. Before the second trial, the trial court again granted Hager's motion in limine to prevent testimony that Hager was “evasive”, stating that it was adopting the reasoning of the judge in the first trial. In response to questioning at trial, the first detective indicated that Hager was jittery, avoided eye contact, spoke loudly and rapidly, and appeared to be under the influence of methamphetamine.

Later in the trial, when the deputy prosecutor asked a second detective, “What was Mr. Hager's demeanor like during the time that you had contact with him that day,” the detective answered, “He appeared to be angry. He was evasive.” Hager's attorney immediately moved for a

mistrial. Outside the presence of the jury, the deputy prosecutor apologized to the court and said that he forgot to remind the detective to avoid using the word “evasive.” He acknowledged that the detective should not have used that word, but argued that a mistrial was not warranted as long as the jury was instructed to disregard the remark.

The trial court denied Hager's mistrial motion, concluding that the detective had not acted in bad faith and that the error could be cured with a jury instruction. After the jury was brought back into the courtroom, the trial judge instructed it to disregard the remark about Hager appearing evasive. *State v. Hager*, 171 Wash. 2d at 154-55.

On appeal, the Court found the detective’s statement improper as it violated the pretrial ruling and expressed an opinion about Hager’s credibility, thus invading the jury’s province. However, it also found that “[t]he fact that a witness has invaded the province of the jury does not, however, always require a new trial. *State v. Demery*, 144 Wash.2d at 759, 30 P.3d 1278 (“Admitting impermissible opinion testimony ... may be reversible error.” (Emphasis added)). As we said in *State v. Smith*, 144 Wash.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001), a remark ‘can touch on a constitutional right but still be curable by a proper instruction.’” *State v. Hager*, 171 Wash. at 159.

In *State v. Elkins*, the court denied a mistrial after the detective commented on Elkins' right to remain silent and right to counsel. The court held that: "Although it was arguably improper for Kolilis to mention Elkins' exercise of his right to silence and request for counsel, the jury also heard that Elkins later willingly spoke to law enforcement and gave a statement. Thus, any negative implication from Elkins' refusal to talk to law enforcement and his request for counsel was significantly eroded by his later willingness to forgo counsel and give a statement." *State v. Elkins*, 188 Wash. App. 386, 408, 353 P.3d 648, 659, *review denied*, 184 Wash. 2d 1025, 361 P.3d 748 (2015).

As this would not have merited a mistrial, and choosing not to object was a legitimate trial tactic, it was not ineffective assistance of counsel.

4. The State is not requesting costs.

5. Statement of Additional Grounds

The Appellant raises two additional grounds in this case. One is that "[t]he prosecutor admitted evidence as the trial was in session..." The second is an allegation that the prosecutor lied and withheld evidence.

Pursuant to RAP 10.10(c): "Reference to the record and citation to authorities are not necessary or required, but the appellate court will not

consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.” The Appellant does not sufficiently identify his issues to allow review by the Court.

CONCLUSION

For the reasons above, the State respectfully asks that the appeal be denied on all grounds, and that the Court affirm the verdict of the jury.

DATED this 14th day of July, 2017.

Respectfully Submitted,

A handwritten signature in black ink, consisting of a stylized 'K' followed by a horizontal line.

WSBA # 34097

GRAYS HARBOR CO PROS OFC

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