

NO. 49851-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER FULLER,

Appellant.

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

The Honorable Jeffrey P. Bassett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The law enforcement officer's testimony that appellant refused to answer questions after his arrest violated appellant's constitutional right to silence.

2. The trial court acted without authority when it ordered forfeiture of property to law enforcement.

Issues pertaining to assignments of error

1. The sheriff's deputy who arrested appellant testified that appellant was uncooperative and refused to answer any questions about the incident, and the prosecutor relied on this testimony in arguing that appellant was not credible. Where the case came down to a credibility contest, and the improper comment on appellant's right to silence could have swayed the jury, is reversal and remand for a new trial required?

2. Where the trial court ordered forfeiture of property seized by law enforcement without statutory authority, must the forfeiture provision be stricken from appellant's judgment and sentence?

B. STATEMENT OF THE CASE

1. Procedural History

The Kitsap County Prosecuting Attorney charged appellant Christopher Fuller with theft of a motor vehicle and second degree

possession of stolen property, an access device. CP 9-12; RCW 9A.56.020(1)(a); RCW 9A.56.065; RCW 9A.56.140(1); RCW 9A.56.160(1)(c). The case proceeded to jury trial before the Honorable Jeffrey Bassett, and the jury returned guilty verdicts. CP 65. The court imposed a low-end standard range sentence, and it ordered forfeiture of all seized property. CP 67-68, 72. Fuller filed this timely appeal. CP 77.

2. Substantive Facts

On August 6, 2016, Christopher Fuller ran into Theodore Borchers, who he has known since high school, at Starbucks in Port Orchard as they were both using Wi-Fi. 2RP¹ 115-16, 195-96. They started talking, and Fuller asked Borchers if he wanted to help him with a roofing job later that day. 2RP 116, 196. Borchers agreed, and they spent the next several hours together waiting to hear from the person they would be working for. 2RP 116-17, 196-97.

Around 8:00 a.m. Borchers got a call from his friend, Bradley Fulton, who needed help jumpstarting his car. Borchers drove to the shopping center where Fulton's car was parked. 2RP 117. Borchers got out and helped his friend while Fuller waited in the car. 2RP 119-20. Fuller helped by repositioning Borchers' car. 2RP 141-42. Once Fulton's

¹ The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—10/31/16 and 11/1/16; 2RP—11/2/16; 3RP—11/3/16; 4RP—11/4/16; 5RP—11/9/16.

car was started, Fuller said something to Borchers and then drove off in Borchers's car. 2RP 142, 148, 227.

Fuller ended up at a Shell station about six miles away. Once he stopped the car, he was unable to restart it, because Borchers still had the key fob. 2RP 205. Fuller made some calls from the Shell station's phone, told the attendant he was waiting for a ride to help him get the car towed, then said he was leaving. 2RP 162-64, 210. Fuller walked around the car gathering some items, including a hard hat and reflective vest, which he wore as he walked away down the road. 1RP 81-82; 2RP 162-63.

Fuller testified at trial that while they were driving around that morning, he and Borchers went to the house of Rhonda Lemon, a close friend of Fuller's, to borrow some money for gas and lunch. 2RP 198. She needed a little time and asked them to come back in half an hour. 2RP 198. Borchers then got the call from Fulton, and as they were heading over to help him, they agreed that Fuller would borrow Borchers's car to go pick up the money from Lemon, and they would meet back up at the smoke shop where Fulton was parked. 2RP 199-200. Fuller believed he had permission to use Borchers's car. 2RP 202.

Fuller drove to Lemon's house to pick up the money, then drove to the Shell station to get gas. 2RP 203. When he realized he could not restart the car at the Shell station, he tried to contact Borchers. He called

the smoke shop where he had left Borchers with Fulton, but Borchers was no longer there. 2RP 206-07. Fuller looked through the car trying to find a spare key fob or some other way to start the vehicle. 2RP 207-08, 213. He decided to go to Lemon's house to make some more calls, and he gathered up items that looked valuable, because he did not want to leave them in the unattended car. 2RP 208-11. From Lemon's house Fuller called the smoke shop again. He also called the car dealership to try to arrange to have the car towed if he was unable to locate Borchers. 2RP 214-15.

Lemon testified at trial that Fuller came to her house that morning to borrow some money, and he returned later, on foot, to make some phone calls. 2RP 265-67. She looked up the number of the smoke shop for him. 2RP 267.

Borchers gave a different account than Fuller. He denied talking to Fuller about using the car. He said he was surprised when Fuller drove off, and he and Fulton searched for Fuller and the car for a time before he called the police to report the car missing. 2RP 121, 123-26. Borchers testified that Fuller did not have permission to drive his car. 2RP 138.

Deputy Steve Argyle responded to the report of a stolen vehicle. 1RP 69. While he was talking with Borchers, another 911 call came in about a suspicious person and a car left at the Shell station on Mile Hill

Road. 1RP 71. Argyle went to the Shell station and called Borchers to meet him there. Borchers identified the car and went through it to see if anything was missing. 1RP 72-73. While he was at the Shell station, Argyle viewed the security video, which showed Fuller pulling up to the pump, going in and out of the car, and walking around it several times before walking away from the station about 90 minutes after he arrived. 1RP 73. Argyle did not obtain a copy of the security video, and only his description of it was entered in evidence. 1RP 75, 81-82.

Argyle and a couple of other deputies circled the area looking of the suspect. 1RP 83. About an hour later, Argyle spotted Fuller walking on Mile Hill Road toward the Shell station. 1RP 85-85. Argyle testified that he recognized Fuller from the security video, so he immediately pulled over and told Fuller he was under arrest for vehicle theft. 1RP 85-86. Argyle described Fuller as argumentative, threatening, and very agitated and said he refused to follow commands. 1RP 86. Argyle testified that Fuller said he did nothing wrong, but he would not answer any specific questions. 1RP 86. Argyle tried to read Fuller his Miranda rights, but Fuller would not listen. 1RP 86.

On cross examination, Argyle testified that he saw Fuller walking and he stopped his car and waved Fuller over. Defense counsel asked if Argyle told Fuller he was under arrest and tried to confirm that Fuller said

he did not do anything. 1RP 98. Argyle responded that Fuller would not answer any questions; he just kept repeating that he didn't do anything. 1RP 98-99.

Argyle found several items belonging to Borchers in Fuller's possession, including a debit card. 1RP 86-89; 2RP 136. Some of the items were returned to Borchers that day, and the rest were placed in evidence. 1RP 89, 92. Borchers testified that Fuller did not have permission to remove any of his belongings from the car. 2RP 133.

Fuller testified that he was arrested as he was walking back to the Shell station to wait for the tow truck. 2RP 215. He was carrying the items he had removed from Borchers's car for safekeeping. 2RP 215-18. He did not realize there was a debit card among the items he was carrying, and he did not intend to keep it. 2RP 22-21. Fuller testified it was not his intent to deprive Borchers of his car or his belongings. 2RP 219-20.

C. ARGUMENT

1. DEPUTY ARGYLE'S TESTIMONY THAT FULLER REFUSED TO ANSWER QUESTIONS AFTER HIS ARREST VIOLATED FULLER'S CONSTITUTIONAL RIGHT TO SILENCE.

The Fifth Amendment to the United States Constitution guarantees that a criminal defendant shall not be compelled to be a witness against himself. U.S. Const. amend V. Nor may the State comment on a

defendant's exercise of that right. *Griffin v. California*, 380 U.S. 609, 613-15, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). The Washington Constitution guarantees the same protections. Wash. Const., art. I, § 9; *State v. Earls*, 116 Wn.2d 364, 374-74, 805 P.2d 211 (1991) (federal and state protections coextensive).

“The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citations omitted). Thus, it is constitutional error for the State to elicit testimony or make closing argument as to the defendant's silence to infer guilt. *Easter*, 130 Wn.2d at 236. Further, it is well settled that comments on the defendant's post-arrest silence violate due process. *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979). “A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions.” *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

Washington courts have distinguished between a direct comment on the defendant's silence, which violates his or her constitutional right,

and an indirect reference to silence, which is not error absent further comment inferring guilt. *See Romero*, 113 Wn. App. at 786-87. The Supreme Court has held, however, “that it is a violation of the defendant’s right to silence for a police officer to testify that the defendant refused to talk to him or her.” *Romero*, 113 Wn. App. at 787 (citing *Easter*, 130 Wn.2d at 241; *Lewis*, 130 Wn.2d at 706). Moreover, it is unfair for the State to emphasize the defendant’s silence in closing argument. *Easter*, 130 Wn.2d at 242-43.

Any direct police testimony as to the defendant’s refusal to answer questions is a violation of the right to silence. *Romero*, 113 Wn. App. at 792 (citing *Easter*, 130 Wn.2d at 241). In *Romero*, a law enforcement officer testified that after the defendant was arrested and placed in a holding cell, he was somewhat uncooperative, chose not to waive his rights, and would not talk. *Romero*, 113 Wn. App. at 785. This was a direct comment on the defendant’s choice of silence in response to questioning and thus constitutional error. *Id.* at 792.

Here, in the same way, Deputy Argyle directly commented on Fuller’s decision not to answer questions after his arrest. Argyle described Fuller as uncooperative and commented that Fuller repeated that he did nothing wrong, but he refused to answer any specific questions about the incident. 1RP 86. On cross examination, when defense counsel tried to

focus on what Fuller said, Argyle again commented that Fuller refused to answer any questions. 1RP 98-99.

The prosecutor then relied on Argyle's comments in closing argument. She argued that the jury had heard completely different versions of events, both of which could not be true, and it would have to judge the credibility of those versions. 3RP 371-72. Arguing that Fuller was not credible, the prosecutor commented on Fuller's demeanor when arrested and his refusal to answer questions about the incident: "Deputy Argyle describes the defendant as belligerent, uncooperative, fighting him, not responding clearly to his answers, not responding clearly to his questions or commands." 3RP 379.

These direct comments from the law enforcement officer, relied on by the prosecutor in closing, served only to infer that Fuller's lack of cooperation was more consistent with guilt than with innocence. They constitute constitutional error. *See Romero*, 113 Wn. App. at 790 ("it is constitutional error for a police witness to testify that a defendant refused to speak to him or her.... It is also constitutional error for the State to inject the defendant's silence into its closing argument.")

Although Defense counsel did not object to Argyle's testimony, counsel's failure to object does not preclude review of this error. A comment on exercise of the right to remain silent is manifest constitutional

error which may be raised for the first time on appeal. *Romero*, 113 Wn. App. at 790-91; RAP 2.5(a)(3). Generally speaking, manifest constitutional error requires a plausible showing that the error had “practical and identifiable consequences.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The improper comment on Fuller’s right to silence is manifest on the record. It is apparent from Argyle’s testimony that he commented on Fuller’s refusal to answer questions, implying that if Fuller’s denial of wrongdoing were true he would have been willing to answer. Nothing more is needed to show the strong likelihood of a serious violation of Fuller’s Fifth Amendment rights. This Court should review the error despite the lack of objection below.

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 the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Easter*, 130 Wn.2d at 242. The State bears the burden of proving the error was harmless. *Id.* It cannot meet its burden in this case.

The prejudice arising from comments on a defendant’s silence is especially apparent in cases where witness credibility—particularly the defendant’s credibility—is a key issue. *State v. Burke*, 163 Wn.2d 204, 222-23, 181 P.3d 1 (2008); *Romero*, 113 Wn. App. at 795. For instance,

in *Burke*, the defendant was charged with third degree rape of a child. His defense was that the alleged victim told him she was of legal age to consent and that he reasonably believed her. As part of its case in chief, the State presented testimony that Burke ended his interview with police without ever mentioning that he believed she was of legal age. The Supreme Court concluded that “[r]epeated references to Burke’s silence had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury’s consideration.” *Burke*, 163 Wn.2d at 222-23. Likewise, in *Romero*, the jury was presented with a “credibility contest” between Romero and one eyewitness. *Romero*, 113 Wn. App. at 795. The jury could have been swayed by the officer’s testimony that Romero refused to talk to him, “which insinuated Mr. Romero was hiding his guilt.” *Id.*

The same is true here. The jury was presented with a credibility contest between Fuller, who testified he had permission to use Borchers’s car and a responsibility to safeguard its contents, and Borchers, who said he did not. The prosecutor’s closing argument established that its case rested on the jury’s resolution of this contest and implied that Fuller’s refusal to answer questions after he was arrested damaged his credibility. 3RP 379. As the prosecutor’s argument intended, the jury could have been swayed by Argyle’s improper testimony which insinuated that Fuller

refused to answer questions because he was guilty. Under these circumstances, this Court cannot say the constitutional error was harmless beyond a reasonable doubt, and Fuller is entitled to a new trial.

2. THE TRIAL COURT ACTED WITHOUT STATUTORY AUTHORITY IN ORDERING FORFEITURE OF PROPERTY AS A CONDITION OF SENTENCE.

In imposing sentence, the trial court selected a boilerplate condition on the judgment and sentence ordering that Fuller “Forfeit all seized property referenced in the discovery to the originating law enforcement agency unless otherwise stated.” CP 72. This Court should strike the order of forfeiture, because a sentencing court has no inherent authority to order forfeiture, there was no statute supporting the order, and the order was in violation of RCW 9.92.110, which abolished the doctrine of allowing forfeiture of property simply based on a defendant’s conviction of any crime. The fact that Fuller did not challenge the forfeiture provision at resentencing does not preclude him from raising the issue in this appeal. Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A trial court has no inherent authority to order forfeiture of property in connection with a criminal conviction; the authority to order forfeiture as part of a judgment and sentence is purely statutory. *State v.*

Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992). It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. *Id.*

An unauthorized forfeiture order must be stricken from the judgment and sentence. *State v. Roberts*, 185 Wn. App. 94, 330 P.3d 995 (2014). *Roberts* is directly on point. In that case the sentencing court wrote on the judgment and sentence, “[f]orfeit any items seized by law enforcement,” as a condition of sentencing. *Roberts*, 185 Wn. App. at 96. This Court rejected the prosecution’s efforts to argue that there was any authority for such an order of forfeiture simply based on the conviction, instead holding that there was no statutory or inherent authority authorizing government forfeiture of items as a condition of sentencing. *Id.* at 95-96. Further, the Court rejected the idea that a defendant must somehow make a motion for the return of property or meet some other burden in order to challenge the unlawful condition of sentencing authorizing immediate forfeiture of property. *Id.* at 96.

As this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. *Alaway*, 64 Wn. App. at 799. Instead, “the State cannot confiscate” a citizen’s property “merely

because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures.” *Id.*

The Legislature has carefully crafted such procedures and has included protections against governmental abuse of the awesome authority of taking away the property of a citizen. *See, e.g.*, RCW 10.105.010 (law enforcement may seize certain items to forfeit but must serve notice and offer a hearing, etc.); RCW 69.50.505 (controlled substance forfeitures requiring notice, an opportunity to heard, a right of removal, a civil proceeding etc.); *Smith v. Mount*, 45 Wn. App. 623, 726 P.2d 474, *review denied*, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Further, many forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, in separate civil proceedings, that property should be forfeited as a result of its relation to a crime. *See* RCW 9A.83.030 (money laundering: attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, etc.); RCW 9.46.231 (gambling laws: 15 days notice, etc.). And CrR 2.3(e) governs property seized with a warrant supported by probable cause and issued by a judge which requires serving

the person when the item is seized with a written inventory and information on how to get their property back if they believe their property was improperly seized under the warrant. But that rule is limited to items deemed “(1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears to be committed[.]”

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant based solely upon his criminal conviction without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. Nor do the statutes authorize such a forfeiture without any of the process which is constitutionally due before the government may seize property or at least the process the Legislature required before such forfeitures may occur. *See, e.g., Alaway*, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had “inherent power to order how property used in criminal activity should be disposed of”).

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. Indeed, to the extent

that the trial court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, “[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein.” Thus, under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture. This Court should therefore strike the improper forfeiture condition from Fuller’s sentence.

D. CONCLUSION

The direct comment on Fuller’s refusal to answer questions violated his right to silence, and his convictions must be reversed and the case remanded for a new trial. In addition, the trial court lacked authority to order forfeiture, and the forfeiture provision must be stricken from the judgment and sentence.

DATED May 30, 2017.

Respectfully submitted,



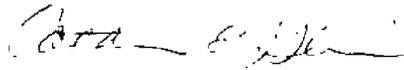
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Catherine E. Glinski
Done in Manchester, WA
May 30, 2017

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