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Court of Appeals
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NO. 51229-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ALBERT WILLIAM MCGREGOR,
Appellant.

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

THE HONORABLE F. MARK McCAULEY , JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. Was defense counsel ineffective for failing to object to testimony regarding other suspicious fires at the trial level?**
- 2. Was a police officer's testimony that the Appellant terminated questioning and asked for an attorney a comment on his right to remain silent and his right to counsel?**
- 3. Was Appellant denied a fair trial due to the cumulative effect of errors at trial?**
- 4. Did the sentencing court exceed its authority by ordering Appellant to pay \$1,300 towards the cost of his defense after finding him indigent?**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

In the early morning hours of October 30, 2016 police and firefighters responded to a fire at 502 Karr Street in Hoquiam, Washington. 11/7/2017 RP 7 – 8. As that fire was being extinguished, Hoquiam police officer Figg noticed a second fire, across the street from the one at 502 Karr. 11/8/2017 RP 198. This fire, at 459 Emerson Avenue, appeared to be burning in an alcove near the kitchen. Firefighters gained entry onto the property and extinguished the fire. At this point first responders were unaware of any additional fires. 11/8/2017 RP 200.

Hoquiam Detective Grossi was on the scene and after the kitchen fire at 459 Emerson was extinguished, he obtained a search warrant for the

property. He along with other officers began to conduct an investigation by walking around the perimeter of the residence and photographing the area. 11/7/2017 RP 107. As he was walking the perimeter, Detective Grossi noticed a can that appeared new located by a back door to the garage. The can was upright and had a “smart straw” that was pointed at the door, which appeared to have scorch or burn marks. 11/7/2017 RP 109. The can appeared to be “WD-40, which is a petroleum based canister can under pressure used for lubricating...” 11/7/2017 RP 70.

Hoquiam police officer High was also on the scene and took part in the investigation. After the WD-40 can was discovered Officer High found a dry cigarette butt located in the wet grass in the yard. Both the can and the butt were later collected and processed. 11/7/2017 RP 72. Investigators also collected charred and uncharred wood samples from the burned door. 11/7/2017 RP 77 - 78. Hoquiam police sergeant Krohn later submitted these pieces of evidence to the Washington State Patrol Crime Lab for testing. 11/7/2017 RP 18 - 23.

Police originally suspected a man named Donald Martin as the suspect in the fire. 11/7/2017 RP 25. He submitted print cards and a DNA buccal swab that were sent to the Washington State Patrol Crime Labs for testing. However while a palm print had been found on the WD-40 can

and DNA was found on the cigarette butt, both the latent print lab and the DNA lab eliminated Martin as a suspect. 11/7/2017 RP 26 – 29. Both labs then independently identified the Appellant, Albert McGregor, as the person matching the palm print and the DNA. 11/7/2017 RP 29.

Police spent several days attempting to locate the Appellant. They finally made contact at his apartment, which he shared with his girlfriend, Danyle Olmstead. 11/7/2017 RP 30. On March 29 or 30, 2017 Officers contacted Olmstead at the apartment. They heard her talking from one side of the apartment but also heard noises from the other. 11/7/2017 RP 31. Olmstead denied the Appellant was in the residence but after a few minutes, he emerged from a room on the side of the apartment from which the noise came. He was taken into custody and transported to the police station for questioning. 11/7/2017 RP 32.

At the police station the Appellant was *Mirandized* and agreed to be interviewed. Sergeant Krohn testified that he began the interview by asking if the Appellant knew anything generally about four or five suspicious fires that had occurred over a six month period. The Appellant stated he knew about the fires at 502 Karr and 459 Emerson as he had heard the sirens and came out to look to see what was going on. He denied being on the property at 459 Emerson, but when confronted with evidence

of the cigarette butt DNA he claimed he and Olmstead had been on the property to look at it as it was for sale. 11/7/2017 RP 32 – 34. He told Sergeant Krohn he said he must have left the butt there at that time and proceeded to describe in some detail where he walked around in the back yard and where the cigarette butt was actually located. 11/7/2017 RP 36 – 37. When asked why his palm print might be at the scene he said some tools had recently been stolen. The Appellant was asked whether that included any aerosol flammable liquid containers. When asked at trial if that was the point at which the interview ended, Sergeant Krohn answered: “Yes. At that point he asked for an attorney.” 11/7/2017 RP 37 – 38.

RESPONSE TO ASSIGNMENTS OF ERROR

A. Was defense counsel ineffective for failing to object to testimony regarding other suspicious fires at the trial level?

No. Defense counsel was not ineffective for failing to object to testimony regarding other suspicious fires because defense counsel elicited the testimony as a strategy.

Ineffective Assistance of Counsel Standard

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.

Motion in Limine

On the morning of trial the parties argued motions in limine to the court. The State and the Defense agreed that there would be no discussion of any other fires than the two that occurred on the morning in question. The implicit reason for including the fire at 502 Karr was that it told the whole story, the *res gestae*, of the crime. Without that evidence the events of that morning would have made very little sense and would have confused the jury.

MR. SORIANO: And also the last one, is, there were other -- there are four other fires in the area, in the immediate area of this particular property, 459 Emerson, and we have agreed not to have any reference or discussion about all these other fires, except for November 7, 2017 the -- the address, the 502.

MR. PETERSEN: Right. So, the only discussion of any other fire would be that at the time that they discovered this fire at 459 Emerson, fire fighters and police were working on another fire across the street at 502 Karr, and one of the officers heard an alarm, and they went over and saw a fire burning in the kitchen area, and then after they got the search warrant, found the origin of the fire that is at issue here. So, the only time I want to discuss any other fire is just to set the scene, they were fighting another fire, and this is what happened. And we are not -- there is not going to be any attempt, whatsoever, to try to pin any of these fires on Mr. McGregor, with the exception of the one we are talking about, which is on the west side of the house.

MR. SORIANO: That's correct.

THE COURT: All right. Sounds like you are all on the same page on that.

MR. SORIANO: Yes.

11/07/2017 RP 10, 11.

Res Gestae

“(R)es gestae” evidence “ ‘complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place” *State v. Grier*, 168 Wash.App. 635 278 P.3d 225 (2012), (quoting *State v. Tharp*, 27 Wash.App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96

Wash.2d 591, 637 P.2d 961 (1981). Based on the conversation cited above, the State's apparent reason for introducing the evidence was to give the jury a complete picture of the events. It would have made little sense to begin the testimony by pretending the 502 Karr fire did not exist and just dropping first responders on the scene of the 459 Emerson fire with no explanation of how they got there.

Trial Testimony

During trial, there was general testimony from multiple witnesses regarding the fire at 502 Karr, the fire for which emergency personnel first responded. Only once during trial was a witness asked to opine on the cause of any fire other than the one at issue. This came when defense counsel, during the cross-examination of Sergeant Krohn, asked him his theory on the origin of the fire near the kitchen. 11/07/2017 RP 43. This was not inadvertent as defense counsel and, at other times the defense expert, Mr. Scrivener, repeatedly conflated or attempted to conflate the two fires at 459 Emerson. 11/07/2017 RP 42, 43; 11/09/2018 RP 22 – 25, 38 – 42, and 43 – 46. This strategy was apparent to the State at the outset and the State repeatedly attempted to guide questioning back to the single fire at issue. 11/09/2018 RP 52. Counsel can only speculate as to the purpose of this strategy, but it is reasonable to assume that it was done for the specific

purpose of confusing the jury as to which fire the State could prove and which fire it couldn't, thus potentially leading to a reasonable doubt as to the cause of the fire.

With one exception, there was no testimony at all during the trial about any other fires. The exception occurred when the prosecutor asked Sergeant Krohn to describe his interview with the Defendant and he began by answering "...We had four to five different suspicious fires over a six month period. And so I asked him just kind of a generic, do you know anything about the fires going on? There was a specific fire that I had seen him outside of, not related to – to why he's here, and I asked him about that." 11/07/2017 RP 32, 33. This testimony was not objected to, was not focused on, and was not again discussed until closing argument when the prosecutor cautioned the jury that the only relevant fire was the one on the back of 459 Emerson where the WD-40 can was found:

"We talked about a lamp. That lamp, as you heard in testimony, was with the other fire. And that brings up an important point that I've been striving this entire trial to stick to, and that is this, we are only talking about that fire. We're only talking the charring point. We are -- this case is not about the fire in the kitchen, it's not. Now, you can speculate all you want as to the other fire, but it's not charred, it is not

-- there's a specific reason that it's not at issue and that's because we don't have evidence to give you to prove that we know who did it. So let's be very clear, we are only talking about that one fire, the charring on the west side of the house in the back yard. So when we heard testimony about the kitchen fire or about the 502 car fire or any other fire, that's just background, that's hear -- it's scene setting, it's background, or it's what's muddled up. But it's -- when we're talking about that, we're not talking about that, we are not in any way asserting or even thinking that we can prove that Mr. McGregor had anything to do with that, that's all we're talking about, we're only talking about that one fire.” 11/9/2017 RP 118, 119

2. **Was a police officer’s testimony that the Appellant terminated questioning and asked for an attorney a comment on his right to remain silent and his right to counsel?**

No. While the officer’s testimony was a comment on the Defendant’s silence, no further use was made of the comment by the State and therefore any error is harmless.

Standard of review.

Under the Fifth Amendment to the United States Constitution, no person “shall ... be compelled in any criminal case to be a witness against himself.” The Fourteenth Amendment applies this principle to the states.

Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Under the *Washington State Constitution* “[n]o person shall be compelled in any criminal case to give evidence against himself.” Art. I, § 9.

“Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence.” *State v. Easter*, 130 Wn.2d 228, 234, 922 P.2d 1285 (1996).

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 *State v. Easter*, the State Supreme Court held a defendant's pre-arrest silence, in answer to the inquiries of a police officer, may not be used by the State in its case in chief as substantive evidence of defendant's guilt. *Id.* This was further refined in the companion case of *State v. Lewis*,

Id. In Lewis, Seattle Police Detective Steiger testified to a telephone conversation with the defendant in which he said the Defendant told him that “those women were just at my apartment and nothing happened, and they were both just cokeheads.” *Id* at 706. He also said that Lewis told him he was innocent.” The *Lewis* Court noted that “(t)here was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk to police, nor is there any statement that silence should imply guilt. *Id* at 706.

In this case, in replying to a question from the prosecutor about when the interview ended, Sergeant Krohn made the unresponsive statement that “Yes. At that point he asked for an attorney.” 11/7/2017 RP 37 – 38. No objection was made, there were no follow up questions, no other witness testified about this, and the State ignored the issue for the remainder of the trial.

“A comment on an accused silence occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Lewis* at 707. Here, no further use whatsoever was made of the Sergeant’s unresponsive comment and the error, if any, is harmless.

3. Was Appellant denied a fair trial due to the cumulative effect of errors at trial?

No. Because there was only one error and that error was harmless, there is no “cumulative error.”

Standard of Review.

The cumulative error doctrine allows reversal of a defendant’s conviction “when the combined effect of errors during trial effectively” denies a defendant a fair trial, even if the individual errors alone would be harmless. *State v. Venegas*, 155 Wn.App. 507, 520, 228 P.3d 813 (2010). “The doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.” *Id.*

In *Venegas*, the identified a number of serious errors committed by the State, including “arguments that impinged on Venegas’s presumption of innocence...a discovery sanction that prevented the defense from potentially presenting expert testimony...the trial court failed to balance the prejudicial effect of ‘other acts’ evidence against its probative value.” The Court also found that prosecutor committed flagrant misconduct by repeatedly attacking Venegas’s presumption of innocence with improper arguments that have no basis in law.” *Id* at 525.

Here, defense counsel appeared in part to pursue a strategy of confusion by repeatedly eliciting testimony about the cause of the kitchen fire, which was not the subject of the case. This strategy was met at every turn by the prosecutor, who continually reminded witnesses, and later the jury, that there was only one fire at issue in the case and to disregard speculation about any other fires. Sergeant Krohn told the jury that McGregor terminated his questioning and “asked for a lawyer.” No further use was made of that comment. As defense counsel was not ineffective but pursuing a fairly obvious strategy, and as Sergeant Krohn’s error in commenting on the interview termination is harmless, there are simply no meaningful errors to accumulate, and thus, no cumulative error.

4. Did the sentencing court exceed its authority by ordering Appellant to pay \$1,300 towards the cost of his defense after finding him indigent, necessitating striking these LFO’s from the Judgment and Sentence?

No. While a sentencing court is required to conduct an individualized inquiry into a defendant’s ability to pay LFO’s, the remedy for failure is remand.

Standard of Review.

For the first time on appeal, the Defendant challenges the court’s imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) held that it is not error for a court of appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *State v. Blazina*, at 833. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *Id.* The decision to review is discretionary on the reviewing court under RAP 2.5. *Id.* In other words, this Court may continue to apply its decision in *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014).

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This Court's reasons in *State v. Duncan* appropriately balance the efficient use of judicial resources with fairness.

While the *Blazina* opinion speaks to a national outcry for reform, the remedy is not in a longer sentencing hearing to assess an ability to earn that may not be put to use until after many years of incarceration. As the *Duncan* opinion explains, at imposition, the State's burden of proof is low. *State v. Duncan*, 18 Wn. App. at 250. At the moment the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful"

to portray oneself as perpetually unemployed and irretrievably indigent.

State v. Duncan, 18 Wn. App. at 250.

The remedy to this cry for reform is at the time of collections when offenders could benefit from assistance in drafting a petition to remit all or part of the costs under RCW 10.01.160(4). While public defenders are appointed on the LFO docket when there is a risk of incarceration, their exposure to their client is brief. Offenders could benefit from a plain language court form similar to CR 08.0800 and CR 08.0810 which regards waiving interest on LFO's, but citing RCW 10.01.160(4) in order to request remission of the principal pro se.

Unless an offender is (1) permanently disabled and unable to earn at the time of sentencing or (2) not facing a term of incarceration, and neither of these conditions apply to Mr. McGregor's situation, then sentencing is not the best time to address the offender's ability to pay LFO's. At sentencing, Mr. McGregor was looking at a term of 15-20 months. He would not be earning income any time soon. In the year and a half that he is incarcerated, his circumstances may significantly change to improve or worsen his ability to pay. If he takes advantage of treatment and training in prison, his skill set will improve. In that time, other

circumstances such as his responsibilities and his health could change.

The better time to assess his ability is after his release from prison.

The Defendant claims there is no support on the record for the court's finding that he has the present or future ability to pay. Brief of Appellant at 18. This is not true. Because the State's burden is low, the fact that the Defendant is able-bodied and without apparent barriers (other than every offender's barrier, i.e. the criminal conviction) to employment, the record is sufficient.

The Defendant notes that he was found indigent at the beginning and the end of the proceedings in trial court. Brief of Appellant at 16. There is a significant difference between one's ability to pay a monthly amount and being immediately able to come up with the thousands of dollars necessary to retain an attorney and transcribe a record. In any case, indigency is a condition, not an ability. And it is not a static condition.

The Defendant challenges the imposition of discretionary costs. Brief of Appellant at 13-14. Even were a finding unsupported in the record, the authority does not require the striking of costs. At most, under the newest authority, the remedy would be a remand. *State v. Blazina*, Id at 685.

CONCLUSION

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

DATED this _____ day of January, 2019.

Respectfully Submitted,



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GRAYS HARBOR COUNTY PROSECUTOR'S OFFICE

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