

FILED

APR 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 29397-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES LEIVAN, APPELLANT

BRIEF OF RESPONDENT

Karen Horowitz
Attorney for Respondent, State of Washington
WSBA # 40513
Grant County Prosecuting Attorney's Office
P.O. Box 37
Ephrata, WA 98823-0037
(509) 754-2011

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A. ASSIGNMENTS OF ERROR

The Respondent, State of Washington, asserts that no error occurred in the trial and conviction of the Appellant and respectfully requests that his conviction be affirmed.

B. STATEMENT OF THE CASE

The Appellant, Charles LeiVan, was convicted following a jury trial of one count of Trafficking in Stolen Property in the First Degree under RCW 9A.82.050 based on accomplice liability. CP 46. A standard range sentence was imposed. CP 46-63.

During the morning of July 19, 2009 John Hoersch discovered that a theft had occurred on his property. 2RP 50-51. Mr. Hoersch lived and operated a business at 9448 Adams Rd. N. in Quincy, WA. 2RP 45. Around 9:00 or 10:00 in the morning he found that several truck radiators, aluminum engine parts, and irrigation pipe were missing from the northwest corner of his property. 2RP 51-52. Mr. Hoersch assumed that the items had been removed recently because there was antifreeze still dripping off the truck frames when he became aware of the theft. 2RP 50-51. Mr. Hoersch also saw two sets of footprints and two sets of tire tracks on his property in the area where the stolen items had been. 2RP 55. Mr. Hoersch recalled seeing Mr. LeiVan ride his motorcycle on Mr. Hoersch's

property two days prior to July 19, 2009, near the area where the stolen property had been located. 2RP 71.

Mr. Hoersch telephoned local scrap yards which accept scrap metal and went to Bargain Town the next day. 2RP 59-60. He found the stolen radiators, engine parts, and irrigation pipe at Bargain Town. 2RP 60-61. The property was returned to Mr. Hoersch. 2RP 67.

Jonathan Edwards worked at Bargain Town in Moses Lake, WA. 2RP 77. Wayne Hannah brought in the stolen property belonging to Mr. Hoersch around midday on July 19, 2009. 2RP 80. Mr. Hannah was accompanied by two men, one of whom was Mr. LeiVan. 2RP 81-82. Mr. LeiVan helped Mr. Hannah unload the metal, which Mr. Hannah then sold for \$685.55. 2RP 89, 93. Mr. Edwards noted that the metal looked “suspicious” because it appeared too usable to be recycled as scrap metal. 2RP 94.

Mr. Hannah testified that Mr. LeiVan and Carlos Bazan came to his home on July 19, 2009. 3RP 106. Mr. LeiVan and Mr. Bazan had a trailer full of pipes and radiators. 3RP 110. Mr. Hannah agreed to sell the metal for them because Mr. Bazan was not able to sell scrap metal because of a prior conviction. 3RP 111-12. Mr. Hannah received \$686 for the load of metal; he gave \$600 to Mr. Bazan. 3RP 118-20. Mr. Hannah did

not know whether Mr. Bazan then gave Mr. LeiVan any of the money he had received. 3RP 119-20.

Mr. Bazan pled guilty to trafficking in stolen property. 3RP 152. Mr. Bazan and Mr. LeiVan both testified that Mr. LeiVan's involvement was limited to driving Mr. Bazan and helping to unload the metal at Bargain Town. 3RP 145, 244-46. Mr. LeiVan denied having any knowledge that the radiators, irrigation pipe, and other metal pieces were stolen. 3RP 247.

Corporal Mike Crowder of the Grant County Sheriff's Office investigated the theft which occurred at Mr. Hoersch's property. 3RP 160. Corporal Crowder observed two sets of tire tracks and two sets of footprints in the area where Mr. Hoersch's property had been located before it was stolen. 3RP 162-63. Mr. Edwards gave Corporal Crowder the license plate number of the truck Mr. Hannah, Mr. Bazan, and Mr. LeiVan used to bring items to Bargain Town on July 19, 2009. 3RP 166. Corporal Crowder later found that truck at Mr. Bazan's address. 3RP 169. Inside the truck he saw tools for cutting metal. 3RP 170. Corporal Crowder also saw joints and fittings which appeared to match with the stolen irrigation pipes. 3RP 170. The truck's tires had mud and dirt on them, and their tread was consistent with the tracks Corporal Crowder had observed at Mr. Hoersch's property. 3RP 170.

Corporal Crowder also went to the home of Mr. LeiVan. 3RP 171.

At Mr. LeiVan's home he found a trailer that matched the description given of the trailer used to deliver the property to Bargain Town. 3RP 172. There was dirt on the trailer tires and the tread appeared consistent with the second set of tracks found on Mr. Hoersch's property. 3RP 175. Corporal Crowder testified that he left his card with Mr. LeiVan's sister and asked that she have Mr. LeiVan call him, but Mr. LeiVan never called. 3RP 190-91.

C. STATEMENT OF THE ISSUES

1. During closing argument the prosecutor stated, "During jury selection in this case, there was a lot of talk about metal thefts in general. And that it happens frequently here in Grant County, and nobody's ever caught. The defendant here, Charles LeiVan, is accused in this case of trafficking in stolen metal. And he's accused of doing that on or about July 20th of last year." Is this prosecutorial misconduct warranting reversal of Mr. LeiVan's conviction for trafficking in stolen property in the first degree?
2. The investigating officer stated that he gave Mr. LeiVan's sister his business card and asked that she have her brother call him as soon as possible, but Mr. LeiVan never contacted the officer. Did

this constitute an improper comment on Mr. LeiVan's right to remain silent requiring reversal of Mr. LeiVan's conviction?

D. ARGUMENT

1. No prosecutorial misconduct occurred during the State of Washington's closing argument when the prosecutor began by referencing a discussion during jury selection in which it was stated that metal thefts occur frequently in Grant County and that the perpetrators are rarely caught.

No prosecutorial misconduct occurred during the State of Washington's closing argument when the prosecutor referenced a discussion that occurred during jury selection. In closing argument, the prosecutor said the following:

“During jury selection in this case, there was a lot of talk about metal thefts in general. And that it happens frequently here in Grant County, and nobody's ever caught. The defendant here, Charles LeiVan, is accused in this case of trafficking in stolen metal. And he's accused of doing that on or about July 20th of last year.” 3 RP 290.

The defense did not object to this statement. 3 RP 290.

A defendant claiming prosecutorial misconduct bears the burden of establishing both the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict. *Id.* A defendant who does not timely object and request a curative instruction

waives any claim on appeal unless the argument is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Allegedly improper comments are to be reviewed on appeal in the context of the prosecutor’s entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

Prosecutorial misconduct is grounds for reversal only when the conduct “was both improper and prejudicial in the context of the entire record and circumstances at trial.” *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

Mr. LeiVan claims that the State of Washington’s remark in closing argument was a statement “[encouraging] the jury to punish someone, anyone, for this general problem because it happens so often and ‘nobody’s ever caught.’” Appellant’s Brief, pp. 6-7. Taken in context, however, the prosecutor’s words were not improper argument and were not prejudicial to Mr. LeiVan. The prosecutor began closing argument by thanking the jury for its service. 3RP 290. He then made the comments challenged here, and then transitioned into a lengthy summary of the evidence presented throughout the trial. 3RP 290-300. In light of the

prosecutor's other statements focusing on the specific facts presented at trial, the disputed comments were innocuous. The prosecutor was clearly not urging the jury to punish Mr. LeiVan for the general problem of metal thefts because "nobody's ever caught." Instead, the prosecutor argued based on the evidence that Mr. Bazan, who had already pled guilty, and Mr. LeiVan were acting together and were "caught" trafficking stolen property. 3RP 292. This is not misconduct warranting reversal of Mr. LeiVan's conviction.

2. There was no comment on Mr. LeiVan's right to remain silent when the prosecutor elicited testimony that Mr. LeiVan did not respond to a message left with his sister by the investigating officer.

The prosecutor did not comment on Mr. LeiVan's right to remain silent when he elicited testimony during the direct examination of Corporal Crowder that the officer had left his business card with Mr. LeiVan's sister, asked for Mr. LeiVan to telephone him, and Mr. LeiVan did not do so. 3RP 190-91. Mr. LeiVan argues that the following testimony during the direct examination of Corporal Mike Crowder constituted an improper comment on his right to silence:

"Q: What did you give her?

A: I gave her my business card with my cell phone number and asked that she have her brother call me as soon as possible.

Q: Okay. And did the defendant ever contact you?

A: No." 3RP 190-91.

The defense did not raise an objection. 3RP 190-91.

The State may not comment on a defendant's exercise of his Fifth Amendment right to remain silent. *See State v. Sweet*, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999); *State v. Lewis*, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996). Not all remarks, however, amount to a "comment" on the exercise of a constitutional right. *Sweet*, 138 Wn.2d at 481; *Lewis*, 130 Wn.2d at 706. Improper references to silence are not reversible error absent prejudice and are not reviewable for the first time on appeal. *State v. Romero*, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002).

A "comment" occurs when the State uses a defendant's silence as substantive evidence of guilt or suggests the silence was an admission of guilt. *State v. Gregory*, 158 Wn.2d 759, 838, 147 P.3d 1201 (2006), *citing Lewis*, 130 Wn.2d at 707. A comment is more likely to be found when the State refers directly to the defendant's exercise of the right to silence. *See, e.g., Romero*, 113 Wn. App. at 785 ("I read him his *Miranda* warnings, which he chose not to waive, would not talk to me."); *State v. Curtis*, 110 Wn. App. 6, 37 P.3d 1274 (2002) (officer testified he read defendant his *Miranda* rights and defendant refused to talk, stating he wanted an attorney). In *State v. Crane*, the issue was characterized as "whether the prosecutor manifestly intended the remarks to be a comment on [the right

to remain silent].” *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

By contrast, indirect or fleeting references to a defendant’s apparent exercise of the right to silence do not rise to the level of constitutional error. *State v. Burke*, 163 Wn.2d 204, 225-26, 181 P.3d 1 (2008). For example, in *State v. Sweet*, a detective testified that when he asked the defendant to provide a written statement, the defendant “said that he would do that after he had discussed the matter with his attorney.” *Sweet*, 138 Wn.2d at 480. The testimony was found to be “at best ‘a mere reference to silence which is not a “comment” on the silence [and] is not reversible error absent a showing of prejudice.’” *Id.* at 481 (alteration in original), *quoting Lewis*, 130 Wn.2d at 706-07; *see also Lewis*, 130 Wn.2d at 706 (officer testified he told the defendant if he was innocent he should come in and talk about it). Further, in *State v. Crane*, the Court noted that a prosecutor’s statement will not be considered a comment on a constitutional right to remain silent if “standing alone, [it] was ‘so subtle and so brief that [it] did not “naturally and necessarily” emphasize defendant’s testimonial silence.’” *Crane*, 116 Wn.2d at 331, *quoting State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978).

The challenged statements here were at most indirect references to Mr. LeiVan’s silence and were not being used as substantive evidence of

Mr. LeiVan's guilt. As explained by the prosecutor, the information was offered to describe the course of the officer's investigation. 3RP 188. Mr. LeiVan cannot show prejudice that resulted from these statements. His sister did not testify at trial so there was no information that she ever even passed along the message from Corporal Crowder. Mr. LeiVan did testify but was never questioned about his failure to make a statement to Corporal Crowder. 3RP 242-68. The challenged statements were not a comment on Mr. LeiVan's right to silence and reversible error did not occur.

E. CONCLUSION

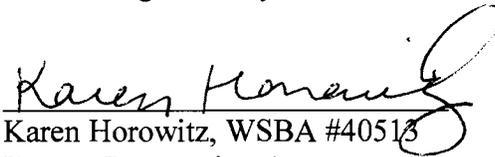
For the reasons set out above, the State respectfully requests that Mr. LeiVan's conviction be affirmed.

DATED: April 21, 2011

Respectfully submitted:

D. ANGUS LEE,

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