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NO. 66778-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHELLISE B. MONTGOMERY,

Appellant.

REC'D  
SEP 23 2011  
King County Prosecutor  
Appellate Unit

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

The Honorable Beth M. Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by denying Shellise B. Montgomery's motion for a new trial because the prosecutor improperly commented on her prearrest silence during rebuttal closing argument.

2. Montgomery's forgery conviction must be reversed and dismissed because that charge was added to the original, timely filed information after the statute of limitations for forgery expired.

Issues Pertaining to Assignments of Error

1. The state charged Montgomery with theft, identity theft and forgery based on her taking of a tax refund check she received after preparing an income tax return for her fiancé's business partner that included two fictitious dependents. Montgomery's defense was she unwittingly committed the crimes because she relied on financial information the business partner gave her and her belief her fiancé was acting on his business partner's behalf. During rebuttal closing argument, the prosecutor remarked Montgomery did not contact the police or the Internal Revenue Service (IRS) when she learned of her mistake. Did the trial court err by finding the prosecutor improperly commented on Montgomery's silence but that the comment did not result in prejudice?

2. Must Montgomery's forgery conviction be reversed and dismissed with prejudice because the state added the charge in an amended information filed after the statute of limitations expired and the amendment did not relate back to the timely filed original information that had been dismissed without prejudice?

B. STATEMENT OF THE CASE

Joseph Miles and Joseph Irving became business partners in 2005. 3RP 319, 338-39.<sup>1</sup> Irving and Shellise B. Montgomery were engaged to be married when Miles met Montgomery in early 2006. 3RP 316-19, 340-41. Miles was aware that Irving and Montgomery were romantically involved. 3RP 341. Because Miles was to leave the country in March 2006 for a 6-month business trip, he wanted to hire someone to prepare his 2005 business and personal income tax returns. 3RP 318-19, 365. Irving told Miles that Montgomery prepared tax returns, so Miles sought out her services. 3RP 318-19, 340-41.

Montgomery agreed to do Miles' tax returns. Miles later delivered the necessary paperwork to Montgomery at her central Seattle office. 3RP

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<sup>1</sup> The verbatim report of proceedings is cited to as follows: 1RP – 4/7/08; 2RP – 12/28/09, 1/13/10, 2/2/10, 7/2/10, 11/16/10; 3RP – 11/16/10, 11/17/10, 11/18/10, 11/22/10, 11/29/10, 11/30/10; 4RP 1/5/11, 3/4/11.

320-23, 343-49. He also left several phone numbers that Montgomery could use to call him while he was overseas. 3RP 322-23. Miles assumed Montgomery would contact him if she needed more documentation. 3RP 321-22

Miles returned to Seattle in August 2006. 3RP 317, 325-26. He heard nothing from Montgomery while he was gone, so he assumed there were no problems with his taxes. 3RP 324-25, 365. And he had spoken occasionally with Irving, who told him Montgomery had taken care of his taxes and filed the return on time. 3RP 365-66.

This, however, turned out to be untrue. Upon his return, Miles had mail and telephone messages from the state Department of Revenue and the Internal Revenue Service (IRS). 3RP 325-27, 351. He began calling Irving and Montgomery for his tax information but heard nothing. Miles originally testified he went twice to Montgomery's office to no avail, but on cross examination admitted he met with Montgomery in her office and she gave him his tax return and other documents shortly after hearing from the tax authorities. 3RP 327-28, 351-59.

In the section of the return called "Exemptions," Montgomery listed two nephews, Joseph Elliott and Kenny Shouting, as dependents. Ex. 5. Miles said he did not know them. 3RP 332-33. He confronted

Montgomery with this error and demanded to know where she obtained the information. 3RP 360-61. The return showed Miles was entitled to a tax refund, so he asked Montgomery where it was. Miles recalled Montgomery's answer "might have been really vague, something rather – just more cause for alarm. It may have even been a reference to Joseph [Irving]. I don't know." 3RP 361.

Miles never received a refund check, although a cashier's check for \$5,258 was issued on April 26, 2006, showing him as payee. 3RP 407-10, 419-20; Ex. 7. Someone -- not Miles -- had signed Miles' name on the back of the check. 3RP 336-37; Ex. 7. Miles did not give his permission for either Montgomery or Irving to endorse the check for him. 3RP 361.

Miles contacted Seattle police and reported the theft of his check. 3RP 298-301. Further investigation revealed the check had been deposited on May 6, 2006, in a Bank of America account for a business called "Cash on the Spot." 3RP 450-51. "Cash On the Spot" was Montgomery's business. 3RP 428, 436-40. The deposit was for \$5,258. 3RP 299-300, 447-51; Ex. 7.

In September 2006, Miles hired tax preparer Larry Walkden to help him with his tax problems. 3RP 337, 459-60. The IRS ultimately accepted the tax return Walkden prepared as the original 2005 return.

Walkden's version of the return included no claim for dependents. Under this amended return, Miles was to receive a \$266 refund. 3RP 460-61.

The State charged Montgomery with first degree theft, first degree identity theft, and forgery. CP 1-5.

Montgomery testified she had several businesses, including Montgomery Income Tax and Cash On the Spot, which focused on "payday loans" and check cashing. 3RP 509-10. She met Miles in January 2006 through her then-fiancé, Irving. 3RP 528-29. Montgomery entered into a formal agreement with Miles to do his taxes. 3RP 529-530. As part of that agreement, Miles reviewed and signed several documents. One was called "Head of Household Filing Status," which required the customer to agree that all information provided for tax preparation is true and accurate. 3RP 510-11, 530, 555-56; Ex. 4.

Miles also reviewed a "service agreement form," which in part explained the "rapid refund process" Montgomery would use to accelerate the issuance of Miles' refund check. 3RP 514-15, 531-33. Miles gave Montgomery documents related to his employment and unemployment benefits she needed to prepare his tax return. 3RP 512, 528-30.

After she reviewed Miles' financial information, Montgomery became uncomfortable with the "exorbitant" amount of business expenses

Miles claimed. 3RP 534. She decided not to prepare Miles' tax return and returned Miles' documents to Irving, who was Miles' business partner. 3RP 534-35, 568. She did not bring her concerns to Miles. 3RP 568. About a week later, Irving returned the documents and told her Miles wanted her to do his taxes and to become his bookkeeper. She agreed to complete Miles' tax return because she trusted Irving. 3RP 535.

Montgomery did not claim all of Miles' business expenses, testifying she "couldn't justify it." 3RP 535, 568. She assumed that because she was going to be Miles' bookkeeper, she would meet with him later to figure out the expenses for the next tax year. 3RP 535-37. She did not "add" two dependents to Miles' tax return; rather, Montgomery said she relied on the information he gave her. 3RP 536-37. She explained she would not add fraudulent information to a tax return "because everything is traced back to me. No." 3RP 537.

Miles was not present in Montgomery's office when she prepared his tax return. This was atypical, but Montgomery trusted and was working with Irving on Miles' taxes. 3RP 537. Montgomery did not know Miles was out of town at the time. 3RP 537. Miles had not told her he was leaving the country. 3RP 566-68.

Miles chose the "rapid refund" option, which allows an approved taxpayer to receive a "refund check" in one or two days rather than eight weeks or longer. The way it works is that a participating bank gives a loan to the approved taxpayer in the amount of the anticipated tax refund check minus fees. The bank releases the "loan" to the taxpayer – through the tax preparer – and then waits for the IRS check and keeps it when it arrives. This way, the taxpayer gets access to the anticipated federal tax refund money much quicker. 3RP 516-17.

In Miles' case, the lender was Chase Bank. When Montgomery was alerted that Chase released the funds, she printed a pre-approved Chase "refund" check for Miles on April 26, 2006. 3RP 538-39, 560-61. She then gave Miles' completed tax return and refund check to Irving, with the understanding Irving would deliver the documents to Miles for his signature. 3RP 538-39, 560.

Several hours later, Irving returned with the check. Miles' name was signed on the back of the check. 3RP 540. Montgomery believed Miles' signature was genuine, and did not recognize it as being in Irving's hand. 3RP 540-41, 565-66, 569. Montgomery cashed the check and gave the currency to Irving, whom she thought would deliver it to Miles as his business partner. 3RP 540-41, 565-66.

After waiting several days, Montgomery wrote "Payable to Cash On the Spot" under Miles' purported signature, and on May 8, 2006, deposited the check into the Cash On the Spot business account. 3RP 541-43, 560-62. She believed she had done nothing wrong because she relied on Irving's word. 3RP 543-44.

Montgomery did not hear from Miles until August 2006, when the two met in her office. 3RP 518-21, 537, 544-45. Miles was irate, hostile, and threatening. He said he was in trouble with the state Department of Revenue. Montgomery felt endangered, so when Miles demanded his file, she turned it over to him without first making copies of any of the original documents. 3RP 519-21, 544-47. Miles did not, however, demand his refund check. 3RP 521, 538.

A week or two later, Montgomery's relationship with Irving ended and Miles began to call her on the telephone. 3RP 546-47. Miles admitted he called Montgomery 20 times or more in one day. 3RP 351. Montgomery then began to suspect that Miles and Irving were acting together against her. 3RP 546-47. It was not until October 2006, when detectives came to see her, that she learned Miles had not received his refund money. 3RP 538.

During closing argument, the prosecutor asserted Montgomery needed to quickly replenish her Cash On the Spot business account because it was depleted of funds at the end of May 2006. She added the two dependents to increase the amount of Miles' refund. She was able to do these things because, by filing the return electronically using approved tax preparer software, Montgomery did not first have to have Miles sign all the paperwork. CP 47-52.

Defense counsel argued Montgomery trusted Irving was acting on Miles' behalf, did not know Miles was out of the country, and did not believe she was doing anything wrong by cashing the check and depositing it into her business account. CP 57-69. Counsel said, "There's no indication to her that she's about to be deceived, that she's being lied to and Mr. Miles is not going to get his money, not what she expected, not what she expected at all." CP 62. Montgomery loved and trusted Irving, counsel contended, and would not have cashed the refund check and given Irving the money had she known he was not going to deliver it to Miles. CP 62.

On rebuttal, the prosecutor summed up by emphasizing that unlike Miles, who contacted the authorities when he learned of his tax woes, Montgomery did nothing:

And remember *the defendant there's no evidence she contacted the police, no evidence that she contacted the IRS when she learned there was a problem.* It was Mr. Miles who did both of those things, Mr. Miles who has paid a significant price for what has happened to him. And it's time for the defendant to pay hers and own up to what she did. And that is why I ask that you find her guilty as charged of all three counts. Thank you.

CP 72 (emphasis added). Defense counsel did not object to this remark.

A King County jury found Montgomery guilty as charged of first degree theft, identity theft, and forgery. CP 21-23; 3RP 593.

Montgomery filed a timely motion for arrest of judgment and for new trial under CrR 7.4 and 7.5, respectively. CP 36-39. She maintained that (1) the State failed to prove the essential element of intent with respect to each charge; and (2) the prosecutor committed reversible misconduct in rebuttal closing argument by remarking she did not contact the police or IRS when she became aware there was a problem with Miles' tax return. CP 38-39. Montgomery contended this was an improper comment on her exercise of the constitutional right to remain silent. CP 38-39.

The trial court found sufficient evidence to support each verdict. 4RP 38-40. The court found the prosecutor's statement during rebuttal argument an improper comment on Montgomery's constitutional right to remain silent, but concluded the misconduct was harmless. 4RP 40-41.

At sentencing, the trial court concluded the theft and forgery were the same criminal conduct. 3RP 70-71. The court imposed concurrent standard range sentences totaling nine months, to be served in electronic home detention. CP 79; 3RP 70-71. The court also ordered 12 months community custody for identity theft. CP 79.

C. ARGUMENT

1. THE PROSECUTOR'S COMMENT ON MONTGOMERY'S PREARREST SILENCE WAS IMPROPER AND PREJUDICED HER RIGHT TO A FAIR TRIAL.

a. Summary of argument

At the end of rebuttal argument, the prosecutor implied that if Montgomery had been unwittingly induced by Irving to commit the crimes, she would have contacted the police or the IRS upon learning Miles' tax return was not accurate. CP 72. Montgomery did not object to the remark. In a motion for new trial, however, Montgomery asserted the prosecutor improperly commented on her right to remain silent. The trial court agreed, but concluded there was no prejudice and denied the motion. This was error; it is substantially likely a reasonable juror would have found Montgomery did not intentionally commit any of the crimes had he or she not heard the prosecutor's improper comment. This Court should reverse Montgomery's convictions.

b. Motion for new trial

A trial court's denial of a motion for new trial is reviewed for an abuse of discretion. State v. Emery, 161 Wn. App. 172, 191, 253 P.3d 413 (2011). A trial court abuses its discretion "if it is exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the underlying law that causes non harmless error in the trial." State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

c. The prosecutor commented on silence.

Both the federal and state constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. Const. amend. V; Const. art. I, § 9; State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). A prosecutor violates the accused's right to silence where she makes a statement suggesting silence should imply guilt, or the defendant had an affirmative obligation to come forward with an explanation. State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996); State v. Heller, 58 Wn. App. 414, 419-21, 793 P.2d 461 (1990). Furthermore, it is "constitutional error for the State to inject the defendant's silence into its closing argument." State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002).

If the defendant testifies at trial, the State may use prearrest, pre-Miranda<sup>2</sup> warning silence only as impeachment. Burke, 163 Wn.2d at 217. The State's substantive use of prearrest silence as evidence of guilt, in contrast, violates the Fifth Amendment. Burke, 163 Wn.2d at 218; Easter, 130 Wn.2d at 235. Our Supreme Court "has been very careful to limit the use of silence to impeachment only." Burke, 163 Wn.2d at 219.

In Montgomery's case, the prosecutor used Montgomery's silence as evidence of guilt. The prosecutor stated Montgomery did not contact the police or the IRS when she learned there was a problem with Miles' taxes. The implication was that if Montgomery had been duped and did not intend to commit the crimes, she had nothing to hide and thus would have reported the problem to the authorities as soon as she learned of it. This was improper. See Romero, 113 Wn. App. at 794 (police officer's testimony about defendant's silence served no probative purpose other than to infer it "was more consistent with guilt than with innocence."), quoting State v. Curtis, 110 Wn. App. 6, 14, 37 P.3d 1274 (2002).

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Several cases support this conclusion. Our Supreme Court in State v. Jones<sup>3</sup> concluded the prosecutor improperly commented on the right to remain silent during closing argument by contending the accused "fled to Texas and never called the police to try to clear up what had happened with his niece." Jones, 168 Wn.2d at 725.

In State v. Knapp,<sup>4</sup> the prosecutor elicited testimony that the accused said nothing when informed by a police officer he had been positively identified as a burglary suspect. 148 Wn. App. at 419. During closing argument, the prosecutor said one reason to find guilt was the accused's failure to tell the officer it was not him the witnesses saw. Knapp, 148 Wn. App. at 420. On review, the court found the prosecutor impermissibly commented on silence during closing arguments, "suggesting that the jury should infer guilt from his failure to deny the accusation." Knapp, 148 Wn. App. at 421; see State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (detective's testimony that accused did not immediately deny accusations of sexual abuse or appear surprised when hearing them, and prosecutor's use of testimony during closing argument, constituted improper comments on right to remain silent).

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<sup>3</sup> 168 Wn.2d 713, 230 P.3d 576 (2010).

<sup>4</sup> 148 Wn. App. 414, 199 P.3d 505 (2009).

In State v. Keane,<sup>5</sup> a police detective testified she and the accused exchanged telephone messages, but that the accused did not call her again after she left a message stating she would turn the case over to the prosecutor if she did not hear from him. During closing argument, the prosecutor recounted this testimony, then invited jurors to ask whether "those are the actions of a person who did not commit these acts." Keane, 86 Wn. App. at 592. On appeal, the court held the prosecutor's remark was a forbidden comment on the defendant's right to remain silent because it improperly suggested silence was an admission of guilt. Id.

Similarly, in Scarborough v. Arizona, the prosecutor during closing argument remarked the defendant said nothing upon being told he was under arrest. The prosecutor asserted "he would have said something-if he were not guilty." 531 F.2d 959, 960 (9th Cir. 1976). This was fundamental error; the prosecutor told jurors they could infer guilt from the defendant's silence. Scarborough, 531 F.2d at 961.

Similarly at Montgomery's trial, the prosecutor used the silence to infer guilt rather than for impeachment. Although Montgomery testified, the prosecutor asked her no questions about not contacting the police or IRS when she learned about Miles' tax problems. Nor did the prosecutor

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<sup>5</sup> 86 Wn. App. 589, 592, 938 P.2d 839 (1997).

elicit testimony from Detective Thompson, who had interviewed Montgomery during the investigation, for impeachment purposes despite the trial court's pretrial ruling that such use of Montgomery's statements would be allowed. 3RP 90-91 (trial court ruling on CrR 3.5 motion); 3RP 297-300 (direct examination of Thompson).

Instead, the prosecutor saved Montgomery's prearrest silence for the end of her rebuttal closing argument, when it would most influence the jury. See Douglas v. Cupp, 578 F.2d 266, 267 (9th Cir. 1978) ("While perhaps inadvertent, the placement of the suspect question [that elicited testimony defendant made no statements upon arrest] at the end of the arresting officer's testimony gave it a prominence which it would not have had, had it simply been recounted as part of a description of the events culminating in the petitioner's arrest."), cert. denied, 439 U.S. 1081 (1979).

The manner in which the prosecutor used Montgomery's failure to contact the authorities reveals its intended purpose was to emphasize the silence suggested guilt. This is important, because in deciding the ultimate question this Court must consider whether the prosecutor "manifestly intended the remarks to be a comment on" the right to remain silent as opposed to a "mere reference" to that right. State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991); see Burke, 163 Wn.2d at 216 ("A remark

that does not amount to a comment is considered a 'mere reference' to silence and is not reversible error absent a showing of prejudice. . . . Thus, *focusing largely on the purpose of the remarks*, this court distinguishes between 'comments' and 'mere references' to an accused's prearrest right to silence.") (emphasis added).

For these reasons, the trial court correctly found the prosecutor impermissibly commented on Montgomery's exercise of silence. This Court should so find.

d. The comment on silence was prejudicial.

In contrast to that conclusion, however, the trial court erred by denying Montgomery's motion for a new trial by concluding the improper remark did not cause prejudice. The State must show a constitutional error was harmless beyond a reasonable doubt. Easter, 130 Wn.2d at 242. A constitutional error is harmless only if a reviewing court is convinced the untainted evidence is so overwhelming that any reasonable jury would have found guilt absent the error. Burke, 163 Wn.2d at 222; Knapp, 148 Wn. App. at 421.

Montgomery's trial boiled down to whether jurors believed Montgomery acted with the intent to commit the charged crimes. See CP 68 (defense counsel argued in closing that "Ms. Montgomery did not

intend to commit any crimes. She did not intend to commit the crime of Theft in the First Degree. She did not intend to commit Identity Theft First Degree or the crime of Forgery.") To believe she lacked the requisite intent, the jury would have had to believe Irving tricked her into including false information on the tax return, cashing the forged refund check, and depositing the check into her business account. As in Burke, the prosecutor's comment on Montgomery's silence undermined her credibility as a witness and impermissibly inferred she was guilty for failing to contact the authorities. Burke, 163 Wn.2d at 222-23.

In addition, this Court's conclusion in Holmes is apt:

While the consistent testimony of the three girls was compelling evidence against Holmes, the outcome of the trial depended on the jury's evaluation of his credibility as compared to theirs. Credibility determinations "cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable." State v. Gutierrez, 50 Wash.App. 583, 591, 749 P.2d 213 (1988). See also Romero, 113 Wash.App. at 795, 54 P.3d 1255. For this reason we are not in a position to say that the jury would necessarily have reached the same result if Holmes' denial of the charges had not been tainted by the improper comments.

Holmes, 122 Wn. App. at 447. See also State v. Fricks, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979) (state's improper use of post-arrest silence not harmless despite substantial evidence against defendant; defendant's

credibility was at issue because he testified and his explanation was plausible).

The same is true of Montgomery's case. Montgomery's "exculpating story" is hardly "facially unbelievable." Miles' own testimony corroborated Montgomery's assertions that he and Irving were business partners, that Irving and Montgomery were engaged to be married, and that Montgomery gave him his tax return when he visited her office. 3RP 319, 357-58. Further, Montgomery emphasized that any tax preparation wrongdoing could easily be traced back to the culprit. 3RP 524, 528, 537, 547-48, 559. She said, "Any allegation, any accusation of any type of wrongdoing could be the death of my business." 3RP 524.

For these reasons, the State cannot show the prosecutor's improper comment on Montgomery's silence was harmless. The trial court therefore abused its discretion by denying Montgomery's new trial motion. See Burke, 163 Wn.2d at 223 (having found comment on silence not harmless, Court concluded trial court abused its discretion by denying motion for new trial based on same claim). This Court should reverse Montgomery's convictions and remand for retrial.

2. THE FORGERY CONVICTION MUST BE REVERSED BECAUSE THE STATE ADDED THE CHARGE AFTER THE STATUTE OF LIMITATIONS EXPIRED.

a. Summary of argument

The State charged Montgomery August 16, 2007, with first degree theft and first degree identity theft committed May 8, 2006, in cause number 07-1-06235-8 SEA. CP 83-86. Because Miles was purportedly out of the country and the expiration date loomed, the trial court on April 7, 2008, granted the State's motion to dismiss without prejudice. CP 87-88.

Miles eventually returned and the state filed an information December 17, 2009, under present cause number 09-1-07532-4 SEA. CP 1-5. In addition to the original charges, the state added a forgery charge, alleging it, too, was committed May 8, 2006. The statute of limitations for forgery is three years. RCW 9A.04.080(1)(h). The state therefore added the forgery charge after the limitations period expired. Because the forgery does not "relate back" to the original, timely filed 2007 information, the conviction for that crime must be reversed and dismissed with prejudice.

b. Why forgery does not relate back

The timely filing of an information tolls the limitations period for the charges alleged in the information. RCW 9A.04.080(4);<sup>6</sup> State v. Warren, 127 Wn. App. 893, 112 P.3d 1284 (2005), review denied, 156 Wn.2d 1022 (2006). Because of this provision, the theft and identity theft charges fell within the limitations period.

The new forgery charge, however, was permissible only if it related back to the date of the original information. An amendment relates back "[w]henver the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]" CR 15(c); see State v. Eppens, 30 Wn. App. 119, 123, 633 P.2d 92 (1981) (applying CR 15 in criminal context).

This rule applies only if the amendment does not "broaden or substantially amend the original charges." In re Personal Restraint of Thompson, 141 Wn.2d 712, 729, 10 P.3d 380 (2000). In Eppens, the state

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<sup>6</sup> RCW 9A.04.080(4) provides:

If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

filed an amended information after the limitations period expired, charging "in four counts what had been charged as one count" in the original timely filed information. 30 Wn. App. at 125. The state did this by breaking up the single charging period into four smaller charging periods. 30 Wn. App. at 121-22.

The court found the defendant faced a possible longer period of incarceration and "substantially increased stigma" because he was convicted on all four counts rather than the earlier single count. Eppens 30 Wn. App. at 125. The amendments thus impermissibly broadened the charges and did not relate back to the timely filed information under CR 15. Id. Consistent with these findings, the court vacated the convictions on the added counts. Eppens, 30 Wn. App. at 130.

This Court distinguished Eppens in Warren. The issue was whether an untimely amendment adding an alternative negligent driving charge impermissibly broadened the original charge of driving under the influence. Warren, 127 Wn. App. at 896. The Court found it did not because it: (1) did not expose the defendant to additional convictions; (2) did not rely on different evidence; and (3) did not cause a potential for a greater stigma or penalty. Id. at 898.

Montgomery's scenario is distinguishable from Warren and similar to Eppens. The added forgery charge resulted in a third conviction and its attendant stigma. See Eppens, 30 Wn. App. at 125 ("[W]e also consider the heavy stigma which attends each conviction. This stigma is one of the reasons our courts require proof beyond a reasonable doubt before imposing it."); see also State v. Zumwalt, 119 Wn. App. 126, 132-33, 82 P.3d 672 (2003) (double jeopardy problem not avoided by imposing concurrent sentences and finding same criminal conduct; "[t]he punitive aspects of multiple convictions-stigma and impeachment value-go beyond the loss of freedom."), aff'd., State v. Freeman, 153 Wn.2d 765 (2005). Further, although the forgery did not rely on different evidence, neither did the added counts in Eppens rely on new evidence. The improper broadening of the information resulted from the additional convictions and resulting potential consequences.

For these reasons, this Court should follow Eppens and find that by adding the forgery charge, the state improperly broadened the timely original information. The forgery conviction should be reversed and dismissed with prejudice.

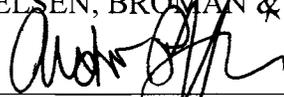
D. CONCLUSION

For the above reasons, this Court should find the prosecutor's comment on silence requires reversal of Montgomery's convictions and a remand for retrial. Montgomery's forgery conviction should be dismissed with prejudice.

DATED this 23 day of September, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66778-5-1
	)	
SHELLISE MONTGOMERY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF SEPTEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHELLISE MONTGOMERY  
1428 MLK JR WAY  
SEATTLE, WA 98122

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2011.

x *Patrick Mayovsky*

2011 SEP 23 PM 4:24  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

