

66778-5

66778-5

NO. 66778-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHELLISE MONTGOMERY,

Appellant.

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2012 JAN -5 PM 3:39

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. While the State may not use a defendant's exercise of the right to remain silent as evidence of guilt, a prosecutor may touch upon a defendant's silence if the remarks are not manifestly intended to be a comment on that right. The prosecutor's closing argument focused on the victim's credibility, and only briefly touched upon Montgomery's failure to contact police. Did the trial court properly deny Montgomery's request for a new trial based on the State's reference to her failure to contact police?

2. Expiration of the statute of limitations does not necessarily foreclose amendment of charges, because an amendment generally relates back to the timely complaint. An amended criminal charge will relate back to the original charge for purposes of the statute of limitations so long as it arises out of the same facts, and does not substantially broaden the original charge. The State added one count of forgery that relied on the same facts. Moreover, because it was part of the same course of conduct it did not increase Montgomery's punishment. Was the State properly permitted to file an additional charge that related back to the original information?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Shellise Montgomery, was charged with theft in the first degree and identity theft in the first degree on August 16, 2007. CP 83-84. The State alleged that Montgomery fraudulently obtained Joseph Miles's tax return on May 8, 2006. CP 85. Since Miles was frequently out of the country for long periods of time, he was unavailable for trial, and the State requested that the charges be dismissed without prejudice. CP 87-88. The trial court granted the dismissal without prejudice on April 7, 2008. CP 87-88.

The State refiled the charges on December 17, 2009. CP 1. The State charged Montgomery with theft in the first degree and identity theft in the first degree as in the original information, and the State also charged one count of forgery. CP 1-2. The forgery charge was based on the same facts as the theft in the first degree.

Montgomery was convicted of all charges. CP 21-23. At sentencing, the State conceded that the forgery should be considered the same criminal conduct as the theft. CP 47-48. The forgery charge was thus not included in Montgomery's offender score. CP 79. The court sentenced Montgomery to 9 months for identity theft in the first degree, 6 months for theft in the first

degree, and 3 months for forgery. CP 79. All terms were to be served concurrently. CP 79.

2. SUBSTANTIVE FACTS

Joseph Miles operated several small businesses. 3RP 315-16¹. He imported and exported seafood and his business required him to spend months each year overseas. 3RP 315-16. Therefore, he needed assistance to file his personal and business taxes. In March of 2005, Miles was preparing to travel to Asia and he hired Montgomery to prepare and file his taxes. 3RP 317-18.

Miles met Montgomery through a business partner named Joseph Irving. 3RP 319. Irving and Montgomery were engaged to be married. 3RP 506. Irving operated a barber shop and Montgomery had a tax preparation and check cashing business. 3RP 321, 337.

Miles gave Montgomery his receipts and bookkeeping data and left on his trip. 3RP 321. He left Montgomery contact information so she could call him if she needed any further

¹ The verbatim report of proceedings consists of five volumes, which will be referred to in this brief 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), 5RP (11/29/10 afternoon closing arguments) and 5RP (1/5/11, 3/4/11).

assistance to prepare his tax return. 3RP 322-24. Montgomery never contacted Miles, so he assumed she properly prepared his tax return. RP 325. She did not notify him of any potential refund from the Internal Revenue Service (IRS). 3RP 325, 337.

When Miles returned from his trip in August of 2006, he found notices from the IRS indicating that there was a problem with his taxes and that they had frozen his accounts. 3RP 326, 351. Miles made numerous attempts to contact Montgomery but she would not return his calls. 3RP 327. He tried to wait outside her office but was unable to locate her. 3RP 328. Finally, on his way to meet with the IRS, Miles found Montgomery at Irving's barber shop and she returned his paperwork to him. 3RP 330. Miles was surprised to see that Montgomery had claimed he had two dependents named Joseph Elliot and Kenny Shrouding. 3RP 333. Miles did not know who Joseph Elliot and Kenny Shrouding were.² 3RP 333. Miles never gave Montgomery authorization to prepare an application for a "refund anticipation loan." 3RP 333. Miles learned there was a refund of over \$5,000 that he had never

² Miles had four children, but they lived in California and he had never claimed them as dependents on his tax returns.

received. The refund check was forged and cashed at Montgomery's check cashing business. 3RP 541, 561.

Detective Alfred Thompson obtained bank records for Miles. 3RP 299-300. Thompson found a check from the IRS to Joseph Miles for approximately \$5,200. 3RP 300. The check was endorsed with a signature purporting to be Joseph Miles; however, Miles testified that it was not his signature. 3RP 319, 336-37. Miles did not receive any refund from Montgomery. 3RP 337. Montgomery had inflated Miles's tax refund by including the fictional dependents. 3RP 464. She then obtained a "refund anticipation loan" from Chase Bank to gain access to the fund quickly. Chase issued a check and Miles's endorsement was forged. Montgomery cashed the refund check at her check cashing business. 3RP 561.

Montgomery testified at the trial. 3RP 504. She claimed that she had prepared the tax return with information provided by Miles and his "business partner" Irving.³ 3RP 537. During Montgomery's testimony she accused Miles of perpetrating a fraud.

³ Montgomery repeatedly referred to Irving as Miles's "business partner." However, the issues arose from Miles's personal tax return, not his business taxes. Furthermore, Irving was Miles's business partner for the limited purpose of Irving's barber shop that Miles had invested in. 3RP 319.

Montgomery said Miles's tax information appeared inaccurate or fraudulent, and that she initially refused to prepare his taxes:

And when I was doing his taxes, I noticed that he only made \$12,000 for that year, but he had an exorbitant -- over \$20,000 worth of expenses. I didn't -- it just didn't click to me how, you know -- and he received unemployment benefits. I did not understand -- I didn't understand. It just didn't feel right to me to do his taxes.

3RP 534.

Montgomery claimed that she returned Miles's documentation to Irving, but Irving persuaded her to complete the taxes to help "straighten out" Miles. 3RP 535. Montgomery again accused Miles of fraud:

I did not add the dependents to the tax -- it was the information that he gave to me. I just entered all the information he gave to me. The only information that I thought at the time was fraudulent was all the expenses. I couldn't justify how he could have all these expenses when he's receiving unemployment, when he has three different part-time jobs. It just didn't add up. That was the part I thought was suspect.

3RP 537.

Montgomery testified that she obtained the refund and gave the check to Irving, and he returned within hours with Miles's signature on the check. 3RP 539-40. Montgomery admitted that she cashed the check and deposited the money into her check

cashing business's account. 3RP 541-42. She claimed to have given the money to Irving and believed he would give it to Miles. 3RP 540-41. However, Montgomery could not produce any documentation to support her claims. 3RP 518. She was required by the IRS to maintain copies of the tax returns and loan documentation signed by a client. 3RP 555, 558. She did not have any of the documents that she claimed Miles had signed. 3RP 545. Montgomery claimed she had given the signed documents back to Miles because he appeared at her business and was menacing her and her child. 3RP 518, 545. She testified that Miles "is a very dangerous person. I felt my safety of my child [sic], the safety of me was in jeopardy." 3RP 519. Soon after, Montgomery's relationship with Irving ended. 3RP 546. She claimed, "I was distraught, because I felt that it was -- the two of them [Miles and Irving] doing something to me." 3RP 547.

During closing arguments the defense attacked Miles's credibility, calling him dishonest and evasive. 4RP 29, CP 65⁴. Montgomery's counsel argued she had "misgivings" about Miles's claimed expenses and that she did Miles's taxes "based on the

⁴ When referring to closing arguments Montgomery cites to a transcript in the court file designated as CP 46-72. There are minor discrepancies between that transcript and the

information given to him [sic] by Miles." 4RP 22, CP 60. Defense counsel implied that it was Miles who fraudulently claimed fictional dependent children to obtain a tax refund. She accused Miles of harassing her. 4RP 27, CP 64. Montgomery's counsel accused Miles of lying during his testimony. 4RP 29, CP 65. She claimed Miles was inconsistent and testified to things that were "not true." 4RP 29, CP 65. Montgomery's counsel concluded, "I don't know why he's being evasive. Maybe there's no reason for it. I don't know. But he was being evasive and he was being dishonest." 4RP 29, CP 65.

In rebuttal, the prosecutor responded to counsel's remarks, noting initially that "potentially, what Counsel has been talking to you about for the majority of her argument is credibility." 4RP 34, CP 69. The prosecutor then addressed Miles's credibility and Montgomery's accusations:

And what you should ask yourselves is, if, as Counsel says, he [Miles] was, quote, lying or being dishonest, why? Why would he do that? Why would he come here from California, sit in that chair, and tell you utter nonsense? Why would he call the police when he finds out there is a problem with his tax return, and only after he gets no response from the defendant, and by extension, Mr. Irving because he at that point was no longer responding to Mr. Miles either?

verbatim report of proceedings. The State will quote from the verbatim report of proceedings but provide citations to both for the Court's convenience.

If Mr. Miles was somehow involved, why did he call the police on himself? Why did he contact the IRS to say 'I think there is a problem. What do I do about it?' Why would Mr. Miles, if he were involved, then hire Mr. Walkden to fix it, pay him \$500, take up to three and a half years of his life dealing with the IRS to fix it? Why would he bring that on himself? And remember, the defendant, there is 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.

4RP 38, CP 71-72. Montgomery did not object. 4RP 38-39, CP 71-72. Montgomery was convicted of all counts. CP 21-23.

Montgomery requested a new trial based on the prosecutor's closing argument. The trial court denied the motion. 5RP 41-42. The trial court concluded that the prosecutor's remark was improper because the State "touched" on the right to remain silent. 5RP 41. However, the trial court described the comment as "brief," "limited," and made in the context of discussing Miles's credibility. 5RP 41. The court did not believe the "limited remark in any way affected the outcome of the jury's decision." 5RP 41. The trial court determined "I am convinced beyond a reasonable doubt that the evidence was overwhelming and -- on all three counts and -- thus any improper nature of the comment was harmless in the court's opinion." 5RP 41-42.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED MONTGOMERY'S MOTION FOR A NEW TRIAL.

Montgomery argues that she should have received a new trial because the State impermissibly commented on her right to remain silent⁵. Montgomery is incorrect. The prosecutor's passing remark was made in response to the defense arguments, and did not prejudice Montgomery. The trial court properly denied Montgomery's motion for a mistrial.

This Court reviews the denial of a motion for a new trial for abuse of discretion. State v. Marks, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). Discretion is abused 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. Braam v. State, 150 Wn.2d 689, 706, 81 P.3d 851 (2003); State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1, 5 (2008).

The State may not ordinarily comment on a defendant's Fifth Amendment right to remain silent, including a defendant's pre-arrest silence. State v. Gregory, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006); State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235

(1996). "A comment on an accused's 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, 130 Wn.2d at 707. But a prosecutor may touch upon a defendant's exercise of a constitutional right, provided the prosecutor does not "manifestly intend the remarks to be a comment on that right." Gregory, 158 Wn.2d at 807 (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). A prosecutor's statement is not considered a comment on the constitutional right to remain silent if the remark was so subtle and so brief that it did not "naturally and necessarily emphasize defendant's testimonial silence." Burke, 163 Wn.2d at 216 (quoting Crane, 116 Wn.2d at 331). Furthermore, the State is permitted to use a defendant's pre-arrest silence to impeach his credibility without violating his constitutional rights. Jenkins v. Anderson, 447 U.S. 231, 238, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). See also State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1989); State v. Hamilton, 47 Wn. App. 15, 20-21, 733 P.2d 580 (1987).

⁵ It is not clear that Montgomery's Fifth Amendment right to silence is implicated when there is no government questioning or investigation.

Review standards differ depending on the nature of the comment on a defendant's right to remain silent. Prejudice from a direct comment is reviewed using the constitutional beyond a reasonable doubt standard. State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). Prejudice resulting from an indirect comment is reviewed using the lower, non-constitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome.⁶ Id. at 791-92. Even if improper, a prosecutor's remarks do not require reversal when "they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995). Allegedly improper argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

a. The Prosecutor's Closing Argument Was Not Improper.

⁶ The trial court applied the beyond a reasonable doubt standard. 5RP 41-42.

The trial court erred in finding the prosecutor's remarks were improper. 5RP 41. The prosecutor's comment merely touched upon Montgomery's silence and did not seek to imply that her failure to contact police was substantive evidence of guilt. Rather, the prosecutor was responding to the arguments made by Montgomery, remained focused on Miles's credibility, and at most sought to impeach Montgomery's claim that she was duped by Miles and Irving.

While it is improper to argue that the exercise of the right to remain silent is substantive evidence of guilt, it is not improper to argue evidence of silence to impeach the credibility of a defendant's statement. Jenkins, 447 U.S. at 238. See also Watkins, 53 Wn. App. at 273; Hamilton, 47 Wn. App. at 20-21. The prosecutor did not argue that Montgomery's silence was evidence of her guilt. Instead, she argued that Montgomery's allegation that she suspected Miles was perpetrating a fraud was not credible because Montgomery did not behave in a manner consistent with a victim of fraud. The prosecutor simply pointed out that Montgomery's failure to go to the police undermined her claim that she was duped by

Miles and Irving. The argument was focused on credibility, not substantive evidence of guilt.⁷ This was not misconduct.

The State is permitted to touch upon a defendant's exercise of a constitutional right as long as the comment is brief or subtle and is not intended to be a comment on that right. Gregory, 158 Wn.2d at 807; Burke, 163 Wn.2d at 216. The trial court correctly described the prosecutor's comments as brief, limited and merely touching upon Montgomery's failure to contact police. 5RP 41-42. The argument was focused on Miles's credibility. The prosecutor's passing comment was the only reference to Montgomery's silence and at no time did the State argue that Montgomery's silence was evidence that she must be guilty. The single comment was in response to Montgomery's attacks on Miles's credibility and her accusations that he perpetrated the fraud. The remark does not require reversal.

Montgomery argues that the prosecutor saved the remark for rebuttal argument to maximize the damage. Montgomery is incorrect. Rather than "saving" the argument for rebuttal, the

⁷ Montgomery argues that the prosecutor did not ask during cross-examination about her failure to contact police. However, Montgomery explained that she was unaware that there was any problem until she was contacted by the police. 3RP 538.

prosecutor was responding to Montgomery's attacks on Miles's credibility and the implication that Miles and Irving committed a fraud. A prosecutor's remarks do not require reversal when they were invited or provoked by defense counsel. Gentry, 125 Wn.2d at 643-44. The defense suggested that Miles and Irving had conspired against Montgomery; the prosecutor noted that Miles's actions were not consistent with that theory, and that it was Miles who contacted the police and the IRS. If Miles had committed a fraud, he would not likely wish to alert the authorities. As the trial court pointed out, the remark was made in the context of Miles's credibility. 5RP 41.

Montgomery cites several cases as examples of improper comments on the right to remain silent. Each case is far more egregious and involved direct comments on the right to silence when faced with accusations by the police. In State v. Knapp, 148 Wn. App. 414, 420, 199 P.3d 505 (2009), the prosecution explicitly relied upon the suspect's silence as substantive evidence of guilt. In Romero, 113 Wn. App. at 793, 749, an officer commented on post-Miranda⁸ silence and testified that a defendant invoked his

⁸ Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

rights, characterizing him as uncooperative. In State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), a detective testified that he told a defendant that if he did not call him, the detective would submit charges of child rape to the prosecutor's office. The prosecutor referred to this testimony in closing argument, implying that an innocent person would have returned the detective's call. Id. at 592. In State v. Holmes, 122 Wn. App. 438, 444-45, 93 P.3d 212 (2004), the prosecution impermissibly elicited testimony that the defendant failed to proclaim his innocence upon arrest.

In the present case, the prosecutor's remarks were brief, limited, and focused on Miles's credibility. To the extent that the prosecutor referenced Montgomery's failure to call the police when she suspected Miles of fraud, the implication was limited to her credibility. The prosecutor's rebuttal was focused on the arguments made by the defense during closing arguments. The remarks were clearly in response to Montgomery's attack on Miles's credibility.

b. Any Error Was Harmless.

Even if the prosecutor's passing comment was improper, the trial court correctly found any error harmless beyond a reasonable doubt. 5RP 41-42. A direct comment on the right to remain silent

is reviewed using the harmless beyond a reasonable doubt standard. Romero, 113 Wn. App. at 790. An indirect comment is reviewed using the non-constitutional harmless error standard that no reasonable probability exists that the error affected the outcome. Id. at 791-92. The trial court properly determined that the prosecutor's remarks were brief and limited. 5RP 41-42. There was only one passing reference to Montgomery's failure to contact the police during the entire trial. The non-constitutional standard should apply, and there was no reasonable probability that this single passing remark affected the verdict.

It appears that the trial court used the constitutional harmless error standard when denying Montgomery's motion for a new trial. The court stated, "I'm convinced beyond a reasonable doubt that the evidence was overwhelming and -- on all three of the counts and -- thus any improper nature of the comment was harmless in this court's opinion." 5RP 41-42. Even applying the higher standard, any error was harmless. Montgomery prepared the tax return that included the fictional dependents that inflated Miles's refund. 3RP 537. Montgomery cashed the forged tax refund check from her own account. 3RP 561. The trial court noted the extensive evidence of her guilt. 5RP 41-42. The

evidence against Montgomery was overwhelming. 5RP 42.

Furthermore, Montgomery claimed that she was not aware of any problem with the tax return until the police contacted her. 3RP 538.

If the jury found her credible, the prosecutor's reference was of no moment. The trial court did not abuse its discretion by denying the motion for a new trial.

2. THE STATUTE OF LIMITATIONS DID NOT BAR THE STATE FROM CHARGING FORGERY BECAUSE IT RELATED BACK TO THE ORIGINAL CHARGES.

Montgomery argues that her forgery charge was barred by the statute of limitations. Montgomery is incorrect. The forgery charge related back to the original information and did not substantially broaden the charges; thus, it was not barred by the statute of limitations.

The statute of limitations for forgery is three years. RCW 9A.04.080(1)(h). The timely filing of a complaint tolls the limitations period for the charges contained in that complaint. State v. Klump, 61 Wn. App. 911, 914, 813 P.2d 131 (1991); see also RCW 9A.04.080(3). A criminal statute of limitations is jurisdictional and cannot be waived. State v. Glover, 25 Wn. App. 58, 61-62,

604 P.2d 1015 (1979). Expiration of the limitation period for the new charge does not necessarily foreclose amendment, because an amendment generally relates back to the timely complaint “[w]henever 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 also State v. Eppens, 30 Wn. App. 119, 123, 633 P.2d 92 (1981) (CR 15 applies to criminal proceedings). An amended criminal charge will relate back to the original charge for purposes of the statute of limitations so long as it arises out of the same facts, and does not substantially broaden the original charge. State v. Warren, 127 Wn. App. 893, 895, 112 P.3d 1284 (2005).

In Eppens, the State timely charged first degree theft and grand larceny. The State later amended the charges, splitting what was one count of grand larceny over a period of time into four counts. Eppens, 30 Wn. App. at 120-21. Division Two held that the potential for a longer sentence and increased stigma impermissibly broadened the original charge.⁹ Id. at 125.

⁹ The defendant in Eppens was sentenced on each count to concurrent time. Id. at 124-25.

In Warren, the defendant was charged with driving under the influence. Warren, 127 Wn. App. at 895. After the statute of limitations had passed, the State added an alternative charge of negligent driving, arising out of the same incident. Id. This Court held that the amended information related back to the original filing because the new charge relied upon the same evidence. Id. at 898. Warren could articulate no prejudice flowing from the amendment, and the amendment did not significantly alter the “tactical scope” of the defense. Id.

In the present case, the crime occurred on May 8, 2006. CP 85. The State initially filed charges on August 16, 2007, within the statute of limitation for theft in the first degree and identity theft in the first degree. CP 83-84. The charges were dismissed without prejudice, then refiled on December 17, 2009 with the additional forgery charge. CP 1.

The forgery charge related back to the timely filing, and did not expand the scope of the charges. The same facts were alleged to support the original theft in the first degree charge and the additional count of forgery. The State conceded that both crimes constituted the same criminal conduct and, hence, did not increase Montgomery's punishment. The forgery conviction did not count as

part of her offender score. Because the trial court ruled that the forgery was the same course of conduct, it would not score as criminal history for any cases in the future. The only prejudice articulated by Montgomery, the additional stigma of an additional charge, is not persuasive. If the stigma of an additional charge alone were sufficient to bar the amendment, then the only charge that could relate back to the original information would be an alternative means. That is not the rule articulated in Warren and Eppens. The addition of the forgery charge in this case did not substantially broaden the original charges. State v. Warren, 127 Wn. App. 893, 895, 112 P.3d 1284 (2005).

This Court should reject Montgomery's claim that the statute of limitations barred the addition of the forgery charge and affirm her conviction.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Montgomery's convictions.

DATED this 5th day of January, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SHELLISE B. MONGOMERY, Cause No. 66778-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

1/5/12
Date 1/5/12