FILED
Aug 27, 2014
Court of Appeals
Division I
State of Washington

No. 90708-1
Court of Appeals No. 71968-8-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN R. S. SMITH,

Petitioner.

FILED
SEP - 8 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

PETITION FOR REVIEW

On review from the Court of Appeals, Division One (transferred from Division Two),
and the Superior Court of Pierce County, No. 12-1-03176-4

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER. 1

B. COURT OF APPEALS DECISION. 1

C. ISSUES PRESENTED FOR REVIEW. 1

D. STATEMENT OF THE CASE. 2

1. Procedural facts. 2

2. Overview of facts regarding incident. 3

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED. 3

1. COUNSEL'S FAILURE TO ELICIT TESTIMONY IN DIRECT EXAMINATION ABOUT A PRIOR CONVICTION WHEN COUNSEL IS AWARE THAT THE PROSECUTION IS GOING TO INTRODUCE THAT EVIDENCE WAS INEFFECTIVE ASSISTANCE AND COUNSEL'S FAILURE WAS EXPLOITED BY THE PROSECUTOR AS EVIDENCE OF THE DEFENDANT'S CREDIBILITY. 3

2. UNDER THE RIGHT TO BE FREE FROM SELF-INCRIMINATION THERE IS NO DUTY TO GO "TELL YOUR VERSION" TO POLICE AND IT IS MISCONDUCT TO ARGUE THAT "FAILURE" TO DO SO IS EVIDENCE OF GUILT. 9

F. CONCLUSION. 15

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). 9

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990). 3

State v. Breitung, 173 Wn.2d 393, 267 P.3d 1012 (2011). 7

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008). 10-13, 15

State v. Easter, 130 Wn.2d 228, 922 P.3d 1285 (1996). 10, 12

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed.2d 482 (2006). 3

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010). 7

State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996). 12

State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003). 8

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002). 7

State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984). 9

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). 6

WASHINGTON COURT OF APPEALS

State v. John Smith, __ Wn. App. __, ___ P.3d ___ (2014 WL 3743104). . . . . *passim*

State v. Johnson, 40 Wn. App. 371, 699 P.2d 221 (1985). 12

State v. Knapp, 148 Wn. App. 414, 199 P.3d 505 (2009) 13

State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008). 13

FEDERAL CASELAW

Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 l. Ed. 2d 91 (1976). . . . 10

Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). 9

Jenkins v. Anderson, 497 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). 11, 12

Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). 3

United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). 9

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

RAP 13.4(b)(3). 1, 7

RAP 13.4(b)(1) 1

RCW 9.94A.010. 2

RCW 9.94A.535. 2

RCW 9A.36.021. 2

RCW 9A.56.068. 2

RCW 9A.56.140. 2

A. IDENTITY OF PETITIONER

John R.S. Smith, appellant below, petitions this Court to grant review of a portion of the unpublished decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1) and (3), Petitioner asks this Court to review a portion of the unpublished decision of the court of appeals, Division One, in State v. John Smith, __ Wn. App. __, ___ P.3d ___ (2014 WL 3743104), filed July 28, 2014.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Is counsel prejudicially ineffective in failing to ask the defendant about his prior convictions on direct examination so as to "pull the sting" from the evidence where the prosecutor specifically moves to introduce the evidence and counsel's failure was exploited as evidence of the defendant's credibility?

2. Is it an improper comment on a defendant's state and federal rights to be free from self-incrimination when the prosecutor faults the defendant for failing to go to police to tell his story?

   Further, do such comments amount to misconduct regardless whether the "failure" to speak to police occurs before police start investigating a crime so that it is improper to fault the defendant for failing to go to police to

[1]A copy of the Opinion is submitted herewith as Appendix A (hereinafter "App. A").

tell them his side of the story at any point, or only after an investigation has started, as the court of appeals here held?

Should review be granted because this Court's clarity is needed to establish the proper scope of the state and federal rights to be free from self-incrimination?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner John R. S. Smith was charged by amended information in Pierce County with and convicted of second-degree assault with aggravating circumstances of a "presumptive sentence that is clearly too lenient" due to prior unscored misdemeanors and "multiple current offenses." CP 4-5, 69; RCW 9.94A.010; RCW 9.94A.535(2)(b) and (c); RCW 9A.36.021(1)(a); RCW 9A.56.068; RCW 9A.56.140.[2] A standard-range sentence was imposed and Smith appealed. RP 407-412; CP 86-99. The case was transferred from Division Two to Division One due to caseload and, on July 28, 2014, the court of appeals affirmed in an unpublished opinion. See App. A. This Petition follows.

---

[2]The verbatim report of proceedings in this case consists of 9 volumes, which will be referred to as follows:

September 28, 2012, as "1RP"
December 11, 2012, as "2RP"
December 27, 2012, as "3RP"
the 6 chronologically paginated volumes containing the proceedings of January 8, 9, 10 and 14 and February 1 and 28, 2013, as "RP."

2. Overview of facts regarding incident

The charge arose as a result of an altercation between Petitioner and a man named Jeff Morvel. RP 157-88. Morvel claimed Smith attacked him but Smith said it was Morvel who hit first and that Smith had acted in self-defense. RP 157-291.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. COUNSEL'S FAILURE TO ELICIT TESTIMONY IN DIRECT EXAMINATION ABOUT A PRIOR CONVICTION WHEN COUNSEL IS AWARE THAT THE PROSECUTION IS GOING TO INTRODUCE THAT EVIDENCE WAS INEFFECTIVE ASSISTANCE AND COUNSEL'S FAILURE WAS EXPLOITED BY THE PROSECUTOR AS EVIDENCE OF THE DEFENDANT'S CREDIBILITY

Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed.2d 482 (2006). To show ineffective assistance, a defendant must show that, despite a presumption of effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

In this case, over defense objection, the trial court granted the prosecutor's motion to admit a 2002 "crime of dishonesty" to impeach Mr. Smith. RP 7-16, 147-48. The prosecution had tried to admit more than 10 such prior convictions but the court ruling limited it to one. RP 13-14.

Despite this pretrial motion and the trial court's ruling, however, when Smith took the stand, his attorney did not ask him *anything* about the prior conviction the prosecution was going to be allowed to introduce. RP 281-89. The prosecutor then established the prior offense in cross-examination. RP 289.

In closing argument, counsel tried to address the crucial issue of credibility and then tried to minimize the impact of the prior conviction, for "false statement," by telling jurors that it "can only be used" for credibility and by declaring that he had been truthful on the stand and had admitted "that he has this prior false statement" conviction, presumably trying to convince the jury of Mr. Smith's credibility. RP 367-68.

In rebuttal closing argument, the prosecutor then declared:

> Defense counsel tells you – - essentially tells you how honest the defendant is because he comes in here and tells you, "Yeah, I lied to the police," and[,] "[y]eah I have a conviction for false statement." **Except when did you find out about that? When did you find out that he had a conviction for false statement. When I asked him about it. He didn't share that with you. He didn't voluntarily share that with you.**

[DEFENSE COUNSEL]: Objection, Your Honor. I think that's burden shifting.

[PROSECUTOR]: Your honor, this is closing argument.

THE COURT: Overruled.

[PROSECUTOR]: And then he - - when did he admit that he lied to the police? Again he didn't volunteer that to you. I had to ask that. **As defense counsel told you, this case is all about credibility.**

RP 381 (emphasis added).

On review, the court of appeals held first that counsel was not ineffective, because it was somehow "legitimate trial strategy" for counsel to fail to elicit the damaging testimony first from his client in order to minimize its impact. App. A at 3. The court speculated that counsel "may have hoped" that the prosecution would not bring up the prior conviction because its age would "make the State appear harsh and unfair" and thus failing to raise it was not ineffective. App. At at 4. But the prosecution had already moved to admit more than 10 prior convictions which were significantly older and was clearly thus planning on raising them at trial. It was only because the court limited the evidence to one conviction that the prosecution was not able to elicit evidence about *all* of the prior convictions. The court of appeals did not explain how it could be "tactical" to simply hope that a party who has won a pretrial motion to

admit damaging evidence will somehow forget to admit it, or decide not to use it, despite its clear relevance to the central issue at trial. App. A at 4.

The court of appeals also speculated that counsel might have thought that bringing it up himself would be outweighed by the prejudice of having the evidence discussed again in cross-examination. App. A at 4. But as this Court has held, counsel's tactical decisions must still be *reasonable*, i.e., those which a reasonably competent counsel would make under the circumstances of the particular case. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Given that the prosecution had argued for admission of even *more* convictions and had been limited to only one, reasonably competent counsel would not have assumed that the prosecution would suddenly abandon its desire to impeach the defendant.

This is especially true in this case, because credibility was the *sole* issue. Both Smith and Morvel had credibility issues but the case boiled down to which man had attacked first and thus was not entitled to claim self-defense. No reasonably competent counsel would assume that a prosecutor would be so foolish as to abandon evidence which went directly to the crucial issue of the defendant's credibility. Even if Division One's speculation about counsel's motive or belief is correct, that motive or belief was still not reasonable.

Nor would reasonably competent counsel have failed to realize that, by not bringing it up in direct examination, counsel was actually creating an advantage for the prosecution by giving the prosecutor the ability to claim that the defendant was hiding his criminal history from the jury - and thus should not be believed. Prosecutors routinely engage in this kind of "pull the sting" practice when they present *good* evidence in direct examination, before the defense has a chance to challenge credibility. See, e.g., State v. Ish, 170 Wn.2d 189, 199 n. 199, 241 P.3d 389 (2010). This "anticipatory rehabilitation" is allowed, although it has been suggested that it should be limited to circumstances where there is "little doubt" the damaging evidence will come out, in order to avoid bolstering in advance. See id.

This Court should grant review under RAP 13.4(b)(3). The question of whether reasonably competent counsel would have "pulled the sting" and taken certain steps to mitigate the damage to his client from a prior conviction the prosecution is allowed to use is an issue of substantial constitutional weight. This Court has repeatedly granted review to determine the limits and scope of counsel's competence. See, e.g., Ish, supra; see also, State v. Breitung, 173 Wn.2d 393, 267 P.3d 1012 (2011) (review on counsel's failure to request a lesser included instruction); State

v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002) (review on whether counsel must object to inconsistent verdicts); State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) (review as to ineffective assistance for counsel's failure to present a certain defense or call certain witnesses). Review should be granted in this case to address the similar question of whether counsel is reasonably competent in failing to "pull the sting" of the prior conviction the prosecution is planning to use to impeach the defendant.

Further, counsel's ineffectiveness was then unfairly exploited by the prosecutor, who used *counsel's* failure as evidence of *Smith's* credibility. It is undisputed that the prosecutor told the jury, in rebuttal closing argument, that Smith had only told them about his prior conviction "[w]hen I asked him about it" and that Smith "didn't share that with you" and "didn't voluntarily share that with you." RP 381. It is also undisputed that counsel specifically objected. RP 381. And the prosecutor made these arguments knowing that, in fact, it was *counsel* who had failed to ask the right question and thus "hid" the prior conviction from the jury, not *Smith.* Yet the prosecutor used counsel's unprofessional failure as evidence of the *defendant's* credibility.

In finding this argument to be permissible, the court of appeals

simply said the comment "was not an inappropriate response to the defense argument that Smith should be regarded as credible." App. A at 5. The court did not address the fact that counsel actually objected, because it found the comments proper. The Court also did not further address the prosecutor's remarkable argument and how it impacted the crucial issue of credibility. App. A. This Court should grant review to determine if it is misconduct for the prosecutor to later attribute *counsel's* failure to elicit testimony with *the defendant's* credibility and use counsel's failure to act as evidence of the defendant's guilt.

2. THERE IS NO DUTY TO GO "TELL YOUR VERSION" TO POLICE AND IT IS MISCONDUCT TO ARGUE THAT "FAILURE" TO DO SO IS EVIDENCE OF GUILT

When a prosecutor comments in a way which invites the jury to draw a negative inference from a defendant's exercise of a constitutional right, it "chills" the defendant's free exercise of that right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore not just serious but "grave" misconduct for a prosecutor to make such arguments. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, the relevant rights at issue are the right to remain silent and be free from self-incrimination, both of which are enshrined not only in the federal but also the state constitution. See State v. Easter, 130 Wn.2d 228, 242, 922 P.3d 1285 (1996); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 l. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9. As part of these rights, a defendant need not speak to police and his "failure" to do so may not be used as evidence against him. See State v. Burke, 163 Wn.2d 204, 213-14, 181 P.3d 1 (2008).

In this case, at trial, the prosecutor repeatedly elicited testimony that Smith had "failed" to call police and tell them his version of events, asking Smith if he had called police "that night," "the next day" or "ever" about his claim that Morvel had assaulted him, not the other way around. RP 289-90. In closing argument, the prosecutor told the jury that they should rely on that "failure" as evidence of guilt:

> The defendant claims to you that he was assaulted by Jeff, **except that the defendant never called the police to report an assault.** And when he was contacted by the police, he said, "I wasn't in a fight with Jeff. I wasn't in a fight with anyone." Consider that in deciding whether he's credible or not. If he in fact was the victim of an assault, would he not have told the officer that? **Would he not have reported the assault to the police if he was the victim?**

RP 383 (emphasis added).

Later, in rebuttal closing argument, the prosecutor criticized the defense for having pointed out inconsistencies in Morvel's version of events, stating:

> That's smoke and mirrors. That's a red herring. They're trying to push you off in a different direction. I'm asking you to look at the instructions your given and decide whether or not I've proven this case. Jeff Morvel, unlike the defendant, stands nothing to gain by coming in here and testifying. **Jeffrey Morvel voluntarily contacted police.** Met with them, I believe it was the day later on in the day that this happened. Or maybe it was the next day this happened. **If he is the assailant, if he's the one committing the assault, he's having nothing to do with the police. Just like the defendant was having nothing to do with the police. Wouldn't tell them what happened. When he claims he was the victim.** That's something you have to look at when deciding Jeff's credibility versus the defendant's credibility.
>
> **When the police talked to Jeff, Jeff did what a victim does, which is to tell them what happened.**

RP 387 (emphasis added).

In Burke, this Court addressed the federal Supreme Court's holding in Jenkins v. Anderson, 497 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), establishing the constitutional floor in relation to pre-arrest silence. The Jenkins Court had held that there was no violation of the Fifth Amendment or due process when a defendant's pre-arrest, pre-Miranda silence is used against him. See 497 U.S. at 240. But the Court also held that each jurisdiction was free to determine whether to allow admission of

evidence of pre-arrest silence in its courts. Id.

That is what this Court did, in Burke. See Burke, 163 Wn.2d at 208. The Court looked at Jenkins and its own line of cases, including Easter, which had held that the accused is constitutionally spared "from having to reveal, directly or indirectly his knowledge of facts relating him to the offense or from having the share his thoughts and beliefs with the Government." Easter 142 Wn. App. at 594-95. This Court decided that it was improper and misconduct for the prosecutor to elicit testimony, make argument or even imply that the jury should apply any negative inference of guilt based on the defendant's pre-arrest silence. See, e.g., State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Where the "silence" in question - here, the "failure" to contact police to tell his version of the story - occurs before arrest, this Court decided, it may be used in impeachment purposes in very limited circumstances but may never be used as evidence of guilt. See Burke, 163 Wn.2d at 217.

Here, instead of engaging in any analysis, the court of appeals simply declared the prosecutor's arguments "proper," because "[t]he prosecutor was discussing Smith's conduct before the police became involved, not his conduct during the police investigation." App. A at 5.

Division One cited no caselaw for this proposition that the

defendant's rights depend upon whether a police investigation is afoot. App. A at 4-5. But this Court did not hold, in Burke, that prearrest silence is somehow "fair game" for prosecutor's to use against a defendant so long as the "failure to come forward with your story" occurs prior to police getting involved. See, Burke, 163 Wn.2d at 217.

The decision of the court of appeals should be reviewed by this Court, because Division One's cursory declaration of what appears to be a novel new theory of constitutional law appears to be in direct conflict with Burke and is an issue upon which this Court should pass.

Notably, this is not the first time a prosecutor from this same prosecutor's office has commented on a defendant's "failure" to contact police to give his version of the story as evidence of his guilt. See State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008) (same office: prosecutor repeatedly saying that an innocent man would have spoken to police and given his version of events); State v. Knapp, 148 Wn. App. 414, 199 P.3d 505 (2009) (same office: officer said that defendant had "hung his head but" not said anything when told someone had identified him; prosecutor in closing said that the jury should believe in guilt because the defendant "put his head down" and did not deny guilt).

Here, instead of limiting himself to the permissible comment on why Smith would not have told the police he was assaulted and acted in self-defense when he spoke to them, the prosecutor specifically relied on the fact that Smith "never called the police to report an assault," something the prosecutor suggested he would have done if he was, in fact, "the victim." RP 383. Further, in rebuttal closing argument, the prosecutor effectively bolstered Morvel and denigrated Smith by pointing out that Morvel had "voluntarily" contacted the police. RP 387. The prosecutor then told the jury that the person who was the "assailant" would be the one who had wanted nothing to do with the police, "just like the defendant" was doing, in contrast to Morvel who "did what a victim does" by talking to police and giving them his version of events. RP 387.

Review should be granted to address whether a citizen has a right to silence, to be free from self-incrimination and not have to go "tell his story" to police regardless whether officers are already investigating a case. The court of appeals holding to the contrary is in error and the misconduct cannot be deemed "harmless" under the demanding constitutional harmless error standard which applies. The evidence was conflicting and credibility was the sole issue. The prosecutor's misconduct - to which counsel actually *objected* - was improper, and this

Court should grant review to so hold, in order to ensure that the rights to prearrest silence and this Court's holding in Burke are honored.

F. CONCLUSION

For the foregoing reasons, this Court should accept review of the decision of Division One of the court of appeals in this case

DATED this 27th day of August, 2014.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via the upload portal at the Court of Appeals, Division One, at their official service address, pcpatcecf@co.pierce.wa.us, and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: John Smith, DOC 921557, Olympic CC, 11235 Hoh Main Line, Forks, WA. 98331.

DATED this 27th day of August, 2014.

/s Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

FILED
Aug 27, 2014
Court of Appeals
Division I
State of Washington

RUSSELL SELK LAW OFFICES

August 27, 2014 - 1:52 PM

Transmittal Letter

Document Uploaded: 719688-Petition for Review.pdf

Case Name: State v. John Smith
Court of Appeals Case Number: 71968-8

Party Respresented: Appellant
Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): ________
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: ________

Comments:

No Comments were entered.

Sender Name: K A Russell Selk - Email: karsdroit@aol.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us

FILED
Aug 27, 2014
Court of Appeals
Division I
State of Washington

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL 28 AM 11:50

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	No. 71968-8-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JOHN ROGER SHERMAN SMITH,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 28, 2014

BECKER, J. — The duty to provide effective assistance to a defendant does not necessarily require defense counsel to elicit on direct examination the fact of a prior conviction that has been ruled admissible for impeachment. And when a defendant asserts self-defense in a prosecution for assault, it is not misconduct for the prosecutor to question in argument why the defendant failed to report the assault to the police.

Appellant John Smith got into a fight with Jeffrey Morvel, his girl friend's ex-boyfriend, on the afternoon of August 19, 2012, in front of a motor home. Both landed blows. Late that night, Morvel reported the incident to the police. Smith did not report the incident to the police. When police contacted Smith to investigate Morvel's report, he denied having been involved in any kind of fight.

Morvel received treatment at a hospital for extensive fractures to his facial bones. Smith suffered a cut lip and a swollen hand and eye.

The State charged Smith with second degree assault. Smith asserted self-defense. Morvel and Smith each claimed that the other person started the fight. Assessing credibility was the key issue for the jury.

Before trial, the court ruled that if Smith testified, the State could impeach Smith using his prior conviction for making a false statement to a public servant.

Smith testified. In his account of the fight, Morvel threw the first punch. Smith's attorney did not ask him about the prior conviction.

On cross-examination, the prosecutor began by asking Smith about the prior conviction. Smith admitted the conviction. The prosecutor asked Smith if he had ever contacted the police to report the assault. Smith testified that he had not. The prosecutor asked Smith if he told the detective that he had not been involved in any fight. Smith admitted making that statement to the detective and agreed it was not a true statement. On redirect, Smith testified he was not being honest with the detective because, having just been put in handcuffs, he was scared. He testified that he understood that in court he was testifying under oath. He said he was telling the truth in everything that he said in court.

In closing argument, the prosecutor summarized the evidence that Smith committed the assault with unlawful force. He did not mention Smith's prior conviction for making a false statement or the fact that Smith admitted being untruthful with the detective.

Smith's closing argument urged the jury to "look at the bigger picture" and believe his version of events despite his prior conviction and misstatements to police. Defense counsel pointed out that the prior conviction was 10 years old.

He mentioned that Smith had admitted being dishonest with the detective about the fight, but everything else he told the detective "was the truth" and Smith had been cooperative rather than argumentative when the detective questioned him.

In rebuttal, the State argued that Smith's failure to volunteer the conviction in his initial testimony undermined his credibility:

> Defense counsel tells you—essentially tells you how honest the defendant is because he comes in here and tells you, "Yeah, I lied to the police," and "Yeah, I have a conviction for false statement." Except when did you find out about that? When did you find out that he had a conviction for false statement? When I asked him about it. He didn't share that with you. He didn't voluntarily share that with you.

The jury convicted Smith as charged. This appeal followed. Smith alleges ineffective assistance of counsel and prosecutorial misconduct.

To show ineffective assistance, a defendant must show that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If an action can be seen as legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Smith contends that competent counsel would have elicited the fact of the prior conviction on direct examination to prevent the State from bringing it out as a damning revelation. The State responds that omitting the question on direct examination can be seen as a legitimate trial strategy under the circumstances. We agree with the State. The conviction was 10 years old. Counsel may have hoped that bringing up such a remote event to cast Smith in a bad light would

make the State appear harsh and unfair. Counsel may have hoped that to avoid such an appearance, the State would decide not to mention the prior conviction at all. Counsel may also have decided that any advantage gained by bringing the prior conviction out in direct examination would be outweighed by the prejudice incurred by having it discussed for a second time in cross-examination.

Because the challenged conduct can be viewed as a legitimate trial strategy, it was not ineffective assistance.

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). In closing argument, the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

The first alleged instance of misconduct occurred during the State's rebuttal argument. The prosecutor, arguing that Smith was not credible, mentioned that Smith did not admit his prior conviction until cross-examined about it:

> When did you find out that he had a conviction for false statement? When I asked him about it. He didn't share that with you. He didn't voluntarily share that with you.

Smith contends the State improperly implied that it was Smith himself, rather than defense counsel, who was responsible for failing to introduce evidence of the prior conviction during direct examination. He cites Miller v.

Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967). In Pate, the prosecutor's argument referred to underwear as stained with blood, even though he knew the stains were actually paint. Pate, 386 U.S. at 6. The comment here is not at all like the argument decried in Pate. It was not an inappropriate response to the defense argument that Smith should be regarded as credible.

The second alleged instance of misconduct also occurred during the State's rebuttal argument. The prosecutor contrasted Smith, who did not report the assault to police, to Morvel, who did:

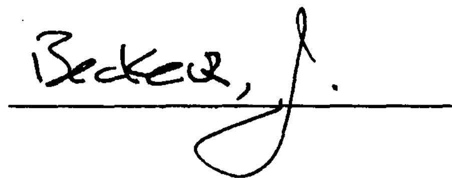
> The defendant claims to you that he was assaulted by Jeff, except that the defendant never called the police to report an assault. And when he was contacted by police, he said, "I wasn't in a fight with Jeff. I wasn't in a fight with anyone." Consider that in deciding whether he's credible or not. If he in fact was the victim of an assault, would he not have told the officer that? Would he not have reported the assault to the police if he was the victim?
>
> . . . .
>
> . . . If he is the assailant, if he's the one committing the assault, he's having nothing to do with the police. Just like the defendant was having nothing to do with the police. Wouldn't tell them what happened. When he claims he was the victim. That's something you have to look at when deciding Jeff's credibility versus the defendant's credibility.

Smith claims this argument impermissibly drew a negative inference from his exercise of the constitutional right to remain silent and be free from self-incrimination. Smith relies on cases holding that a defendant's prearrest silence in response to police inquiries may not be used as evidence of guilt. E.g., State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996); State v. Burke, 163 Wn.2d 204, 217-18, 181 P.3d 1 (2008); State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). A prosecutor may not argue that the defendant's refusal to talk to investigating officers is evidence of guilt. State v. Thomas, 142 Wn. App. 589,

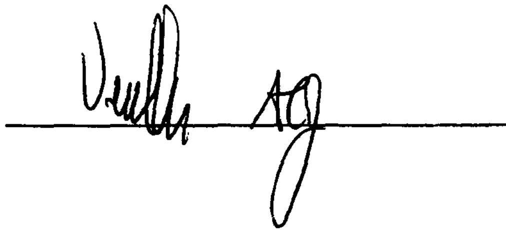
596, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008) (improper for State to convey to the jury the message that if the defendant was not guilty, he would have returned to the crime scene to tell his side of the story).

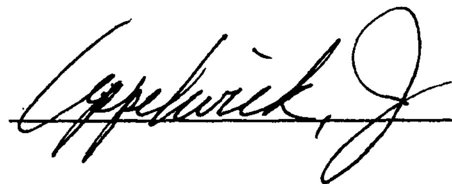
Here, the prosecutor was discussing Smith's conduct before the police became involved, not his conduct during the police investigation. The argument was not misconduct.

Affirmed.



WE CONCUR:





RUSSELL SELK LAW OFFICES

August 27, 2014 - 1:53 PM

Transmittal Letter

FILED
Aug 27, 2014
Court of Appeals
Division I
State of Washington

Document Uploaded: 719688-smithj.opinion.pdf

Case Name: State v. John Smith
Court of Appeals Case Number: 71968-8

Party Respresented: Appellant

Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Statement of Additional Authorities
- ☐ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): ________
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ◉ Other: Appendix A to Petition for Review

Comments:

No Comments were entered.

Sender Name: K A Russell Selk - Email: karsdroit@aol.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us