NO. 45876-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MAHDI SHARRIEFF,

Appellant.

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

The Honorable Thomas P. Larkin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Comments on appellant's post-arrest silence violated his Fifth Amendment rights.

2. The prosecutor committed flagrant misconduct by using appellant's testimony from the CrR 3.5 hearing during closing argument, violating appellant's due process right to a fair trial.

3. The court improperly included a misdemeanor conviction in appellant's offender score.

4. The Judgment and Sentence contains a scrivener's error which must be corrected.

Issues pertaining to assignments of error

1. At trial, a law enforcement witness commented on appellant's invocation of his right to remain silent by testifying that appellant had refused to talk to the police after he was arrested. Other law enforcement witnesses repeatedly referred to interviews with the two other people detained at the scene, even though the statements in those interviews were inadmissible, highlighting the fact that there was no interview with appellant. Does this violation of appellant's constitutional rights to due process and to remain silent require reversal?

2. At the CrR 3.5 hearing, the court advised appellant that by testifying at the hearing he was not waiving his right to remain silent at trial, and the jury would not learn of his pretrial testimony if he did not testify at trial. Appellant testified at the CrR 3.5 hearing but invoked his right to remain silent at trial. Nonetheless, in closing argument, the prosecutor referred to statements appellant had made at the pretrial hearing, relying on those statements to argue that appellant was guilty. Did the prosecutor's misconduct violate appellant's due process right to a fair trial?

3. Did the trial court err in including appellant's prior conviction for attempted second degree taking a motor vehicle without permission in his offender score?

4. Where the Judgment and Sentence contains a scrivener's error, is remand for correction of the error the proper remedy?

B. STATEMENT OF THE CASE

1. Procedural History

On June 20, 2013, the Pierce County Prosecuting Attorney charged appellant Mahdi Sharrieff as an accomplice with one count of first degree trafficking in stolen property and one count of first degree theft. CP 1-2;

RCW 9A.82.050(1); RCW 9A.56.020(1)(c)[1]; RCW 9A.56.030(1)(a). The case proceeded to jury trial before the Honorable Thomas P. Larkin, and the jury returned guilty verdicts. CP 94-95. The court calculated Sharrieff's offender score as 8 and imposed a standard range sentence. CP 209; RP 707. Sharrieff filed this timely appeal. CP 216-17.

2. Substantive Facts

On June 6, 2013, Mahdi Sharrieff and Joseph Warren walked into Robi's Camera in Lakewood. RP 299. They spoke with a sales clerk, asking to see two particular cameras. The clerk took the cameras out of the case and described the features. RP 286-87. Then Sharrieff, who had been doing most of the talking, said he needed to get something from the car, and he turned and left the store. RP 288, 290. Warren asked some more questions and pointed to a lens on the counter behind the clerk. When the clerk turned toward the lens, Warren grabbed the cameras he had been looking at and ran from the store. RP 290. Although the clerk and the manager tried to chase Warren, they were not able to locate him. They did not see Sharrieff again either. RP 231, 291, 296.

[1] Although the statutory citation in the Information and in the Judgment & Sentence is to RCW 9A.56.020(1)(c) (theft by means of appropriating lost or misdelivered property), the information alleged that Sharrieff committed theft by means of wrongfully obtaining or exerting unauthorized control of property, as specified in RCW 9A.56.020(1)(a). CP 1-2. The jury was instructed on the means described in the information. CP 86-87.

Lakewood Police Investigator Russell Martin was assigned to the case. RP 472-73. The manager of Robi's Camera, Tod Wolf, provided a copy of the store's surveillance video, which captured the conversation between Sharrieff, Warren and the clerk as well as Warren's theft of the cameras. RP 239-40. Martin obtained still photos from the surveillance video to identify Sharrieff and Warren. RP 536. Wolf identified the stolen items as a Cannon 5D Mark III camera, which retails for $3400, a Cannon 6D camera, valued at $2100, and lenses for each camera, valued at $2000 and $1400. RP 236.

Over the years Wolf has developed a procedure for tracking down stolen merchandise, which includes monitoring Craigslist for postings regarding similar cameras. RP 235-36. In this case, Wolf found a Craigslist posting listing Cannon equipment, and he called the number on the listing. He had a conversation about identifying the items for sale and determined they sounded like the stolen items, so he arranged a meeting with the suspect. RP 250-51. Wolf contacted Martin, and Martin planned to take Wolf's place at the meeting. RP 476.

On the day of the arranged meeting, Wolf spoke to the suspect more than once. He told the suspect that he had to meet his ex-wife to pick up his children, so they arranged to meet by the McDonalds play land at the 512 Park and Ride. RP 251-52. The meeting did not occur at the

arranged time, but the suspect called Wolf several times saying he was on his way. Wolf relayed this information to Martin, who was waiting at the McDonalds. RP 253, 486-87. Finally, Martin told Wolf to tell the suspect to meet him at his black Jeep Liberty parked near the flagpole in front of McDonalds. RP 254, 504, 541.

Before heading to the arranged meeting, Martin held a briefing with the other officers who would participate in the operation. RP 476-77. He explained that Wolf had been in contact with the suspect and arranged a meeting to purchase the cameras, and the suspect communicated what he would be wearing. RP 354, 477. Martin also showed the other officers the still photos of Warren and Sharrieff from the surveillance video. RP 398, 479.

While Martin was waiting inside McDonalds, other officers put out on the radio that a man resembling one of the suspects in the photos from Robi's was walking toward McDonalds. RP 336, 350, 402, 592. Martin headed outside as Sharrieff walked in. RP 540. Sharrieff did not stop at the Jeep by the flagpole, nor did he attempt to contact Martin. RP 371, 380, 458-59. Instead, he went inside and walked toward the line at the counter. RP 490.

A few officers entered the restaurant, grabbed Sharrieff by the arm, and told him he was being detained. RP 338. He was placed in handcuffs

and taken outside, where Martin contacted him. RP 338, 544. While standing about six feet away from Sharrieff, Martin showed his Sergeant the photos from the surveillance video for comparison. RP 545, 595. When he did so, Sharrieff commented, "You don't have me on video stealing any cameras." RP 495.

Meanwhile, other officers searched the parking lot for a vehicle Sharrieff might have arrived in. RP 403. While they were doing so, a black Mazda came to their attention. It was backed into a parking stall. A woman, later identified as Nina Ricketts, was in the driver's seat and a man, later identified as Warren, was sitting in the back passenger seat. RP 342-43. When Ricketts and Warren noticed a police officer walking through the parking lot, Ricketts started pulling out, and Warren ducked down in the seat. RP 344, 404. The police thought the behavior was suspicious, so they stopped the vehicle. RP 345.

Ricketts identified herself and said the car belonged to her. RP 346, 365. While police were talking to Ricketts, Warren tried to conceal a camera on the floor of the vehicle. RP 348. Warren was removed from the car and detained for investigation. RP 406. In a later search of the car, Martin located several cameras, including the ones stolen from Robi's Camera. RP 256, 507-08.

At trial, the defense established that Sharrieff did not take anything when he walked out of the camera store; he was never found in possession of any cameras or equipment; it was Warren's voice, not Sharrieff's, in the phone calls with Wolf; Sharrieff was not wearing the clothing described by the suspect; he never attempted to contact Martin; he was never seen in the car where the cameras were found; and there was no physical evidence placing him in the car. RP 254, 307, 316, 356, 371, 377-79, 392, 419, 426, 458-59, 542, 546, 564.

Defense counsel argued that the State had proven that Warren was guilty of theft and possibly trafficking, but it had failed to prove that Sharrieff was guilty of anything. RP 643. His presence at Robi's Camera was not enough to establish his guilt, and there was no evidence that he knew of or assisted in the crime. RP 645. And while it was clear from the evidence that Wolf had been in contact with Warren about the Craigslist ad, there was no evidence linking Sharrieff to the calls, to Warren, or to Ricketts' car. There was evidence that Sharrieff walked into the McDonalds where Martin had been waiting but no evidence he approached the Jeep by the flagpole where the meeting was supposed to occur. RP 650-51.

C. ARGUMENT

1. IMPERMISSIBLE COMMENTS ON SHARRIEFF'S EXERCISE OF HIS RIGHT TO REMAIN SILENT REQUIRE REVERSAL.

When Sharrieff was arrested, investigator Martin advised him he had the right to remain silent. CP 248, 239-40. At trial, Investigator Kenneth Henson testified that he assisted taking Sharrieff into custody. When the prosecutor asked if he was present for any statements by Sharrieff, Henson testified that "[Sharrieff] made a few little statements. I'm not sure about the statement that he made. He essentially said that he didn't have anything to say to us." RP 339. Defense counsel did not object to this testimony at the time.

Henson further testified that he and Martin interviewed both Ricketts and Warren, and another officer testified that he operated the audio/video equipment while Martin and Henson interviewed Warren and Ricketts. RP 347, 409. Prior to trial, defense counsel had moved to preclude officers from mentioning their interviews with Warren and Ricketts, since neither would be testifying. RP 186-87. Counsel objected when the State's witnesses referred to these interviews and asked that the jury be instructed to disregard all references to them. RP 410-11. Counsel argued that the repeated reference to interviews of Ricketts and Warren highlighted the fact that there was no interview with Sharrieff. That,

together with Henson's testimony that Sharrieff told arresting officers he had nothing to say, constituted a comment on the exercise of Sharrieff's right to remain silent. RP 411-13. The court overruled counsel's objection, stating that the jury would be instructed they cannot use Sharrieff's exercise of rights against him. RP 413.

The Fifth Amendment to the United States Constitution guarantees that a criminal defendant shall not be compelled to be a witness against himself. U.S. Const. amend V. Nor may the State comment on a defendant's exercise of that right. Griffin v. California, 380 U.S. 609, 613-15, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). The Washington Constitution guarantees the same protections. Wash. Const., art. I, § 9; State v. Earls, 116 Wn.2d 364, 374-74, 805 P.2d 211 (1991) (federal and state protections coextensive).

"The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citations omitted). Thus, it is constitutional error for the State to elicit testimony or make closing argument as to the defendant's silence to infer guilt. Easter, 130 Wn.2d at 236. Further, it is well settled that comments on the defendant's post-arrest silence violate due process, because the Miranda

warnings constitute an assurance that the defendant's silence will carry no penalty. Easter, 130 Wn.2d at 236; State v. Romero, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); State v. Fricks, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979). Comments on a defendant's exercise of his right to remain silent may be reviewed for the first time on appeal. Romero, 113 Wn. App. at 786.

"It is a violation of the defendant's right to silence for a police officer to testify that the defendant refused to talk to him or her." Romero, 113 Wn. App. at 787 (citing Easter, 130 Wn.2d at 241). A remark that does not directly comment on the defendant's exercise of his rights, however, is not reversible absent a showing of prejudice. State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008); Romero, 113 Wn. App. at 787 (citing State v. Lewis, 130 Wn.2d 700, 705-07, 927 P.2d 235 (1996)).

In Lewis, an officer testified that he told the defendant "that if he was innocent he should just come in and talk to me about it." Lewis, 130 Wn.2d at 703. The Supreme Court held that the officer's statement did not constitute an improper comment and instead was a mere reference to the defendant's exercise of his right to remain silent. Id. at 705–06.

In Romero, by contrast, the arresting officer testified that the defendant was somewhat uncooperative and that, "I read him his Miranda

warnings, which he chose not to waive, would not talk to me." Romero, 113 Wn. App. at 785. The Court of Appeals held this was an impermissible direct comment on the defendant's exercise of his constitutional rights. Romero, 113 Wn. App. at 793. See also Easter, 130 Wn.2d at 233 (officer's testimony characterizing defendant as a "smart drunk" because he refused to answer questions at accident scene was direct comment); State v. Curtis, 110 Wn. App. 6, 9, 13-16, 37 P.3d 1274 (2002) (conviction reversed where officer testified that he read defendant Miranda rights and defendant refused to talk to him); State v. Nemitz, 105 Wn. App. 205, 213-15, 19 P.3d 480 (2001) (reversible error for testifying officer to describe attorney's business card defendant had given him, which explained the holder's rights if stopped by law enforcement).

Here, there were both direct and indirect comments on Sharrieff's exercise of his constitutional right to remain silent. Just like in Romero, Henson directly commented on Sharrieff's exercise of his constitutional right to remain silent when he testified that after Sharrieff was taken into custody he told the police he had nothing to say to them. A direct comment on the defendant's exercise of rights is constitutional error. Romero, 113 Wn. App. at 790.

In addition, the repeated references to police interviews with the two other people detained at the scene constitute an indirect comment on

Sharrieff's invocation of his right to remain silent. It is not constitutional error for a police witness to make an indirect reference to the defendant's silence absent further comment. Romero, 113 Wn. App. at 790 (citing Lewis, 130 Wn.2d at 706-07). Here, however, the references to Warren's and Ricketts' interviews were accompanied by Henson's direct comment on Sharrieff's silence. Taken together, this testimony highlighted the fact that there was no interview with Sharrieff and constituted constitutional error.

When an indirect comment on a defendant's exercise of constitutional rights could "reasonably be considered purposeful—meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence," the indirect comment is constitutional error. Romero, 113 Wn. App. at 790-91. Here, the prosecutor intentionally elicited information about the interviews with Warren and Ricketts, despite the fact that the court had ruled all statements made in the interviews inadmissible. The explanation given for pursuing this testimony was that the State needed to explain how Wolf had identified Warren's voice. RP 412. The prosecutor admitted there was no excuse for referencing Ricketts' interview. RP 413. Ultimately, the parties reached a stipulation regarding Warren's voice exemplar. RP 417. If the State had pursued this before eliciting repeated testimony about the

interviews, the improper comments on Sharrieff's silence would have been avoided. Because the testimony was purposeful—responsive to the State's questioning—even slight inferable prejudice to Sharrieff's claim of silence is constitutional error.

A reviewing court will find "a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error" and "where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Easter, 130 Wn.2d at 242. Constitutional error is presumed prejudicial, and the State bears the burden of proving it was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The State cannot meet that burden in this case. It is important to note that, despite the evidence against Warren, the State's case against Sharrieff was not strong. He was never seen stealing or in possession of the stolen cameras. It was not his voice on the phone making arrangements to sell the cameras. It was Warren, not Sharrieff, who was wearing the distinctive shoes the suspect said he would be wearing to the arranged meeting. Although Sharrieff entered the McDonalds, he made no attempt to look for or contact Martin, instead getting in line at the counter. Sharrieff was never seen in the car where Warren was attempting to hide the stolen cameras, and there was no evidence connecting him to that car.

Thus, reference to Sharrieff's exercise of his right to remain silent when placed under arrest could easily have been the evidence which caused the jury to believe he was guilty. The improper comments on Sharrieff's exercise of his constitutional right were not harmless beyond a reasonable doubt, and Sharrieff's convictions must be reversed.

2. THE PROSECUTOR'S USE OF SHARRIEFF'S TESTIMONY FROM THE CrR 3.5 HEARING DURING CLOSING ARGUMENT CONSTITUTED FLAGRANT MISCONDUCT AND VIOLATED SHARRIEFF'S DUE PROCESS RIGHT TO A FAIR TRIAL.

At the CrR 3.5 hearing, the trial court advised Sharrieff that by testifying at the hearing he was not waiving his right to remain silent at trial. The court explained that this meant that if he testified at the hearing, neither that fact nor the testimony could be mentioned to the jury unless he testified concerning the statement at trial. RP 121-22; CrR 3.5(b)[2]. Based on that advisement, Sharrieff decided to testify at the hearing. RP 122. Despite the court's assurance that if Sherriff exercised his right to remain silent at trial his pre-trial testimony would not be used against him, the prosecutor did precisely that in closing argument. Not only was this

[2] CrR 3.5(b) provides as follows: "It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial."

misconduct by the prosecutor, but it was also a violation of Sherriff's due process and 5th Amendment rights. Because this error was not harmless beyond a reasonable doubt, reversal is required.

Sharrieff testified at the CrR 3.5 hearing that both Nina Ricketts and Joseph Warren were friends. Warren is a close friend, and Ricketts was a woman with whom he had an understanding. RP 124-25. On June 19, 2013, Warren asked Ricketts for a ride to the 512 Park and Ride. Ricketts agreed, and Sharrieff went with them. Warren did not say why he needed to go there, just that he was meeting someone. RP 124-26. They first went to Best Buy, then to the Tacoma Mall, and Warren was receiving text messages during that time. After the mall they went to the Park and Ride. RP 127-28. While Warren was waiting for his meeting, Sharrieff went into McDonalds to get something to eat. RP 129-30. He was standing in line to buy some food when he was detained by two officers, then taken outside and placed under arrest. RP 133-34.

Sharrieff did not testify at trial. Moreover, the State presented no evidence of any relationship to Ricketts, how long or even whether Sharrieff had been with Ricketts and Warren that day, or why he said he was going to McDonalds. Nonetheless, when arguing in closing that circumstantial evidence tied Sharrieff to the trafficking charge, the prosecutor argued,

> Mr. Sharrieff we know is acquainted with Mr. Warren because we've seen them together in the video. We're told that Mr. Sharrieff has a relationship of some type with Ms. Ricketts, who's apparently the owner of this vehicle though it may actually be in someone else's name. He's the only one that got hungry?

RP 639. The comments about the relationship between Sharrieff and Ricketts and Sharrieff's explanation for going to McDonalds both refer to Sharrieff's testimony from the CrR 3.5 hearing.

The prosecutor again referred to Sharrieff's CrR 3.5 hearing testimony in rebuttal argument. The prosecutor acknowledged that Wolf had spoken to Warren, not Sharrieff, to set up the meeting. He argued, however, that the jury could infer Sharrieff and Warren arrived together based on Ricketts' relationship with Sharrieff, the empty front passenger seat, and Warren sitting in the back seat. RP 655. The prosecutor argued that this evidence was sufficient to remove any doubt that Sharrieff was guilty. RP 655.

The prosecutor's repeated references to facts garnered from Sharrieff's pre-trial testimony but not in evidence at trial constituted misconduct. It is a fundamental premise of our system of justice that the State obtain convictions based on the strength of the evidence adduced at trial and not on considerations external to the record. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). While attorneys have latitude to argue in closing reasonable inferences from the evidence presented at

trial, counsel may not mislead the jury by misstating the evidence or arguing facts not in the record. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.2d 432 (2003); State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). When the prosecutor argues facts outside the record, he becomes an unsworn witness against the defendant. Belgarde, 110 Wn.2d at 507 (conviction reversed because prosecutor essentially "testified" during argument regarding terrorist organization where no evidence to support argument).

A prosecutor's misconduct in closing argument may deny a defendant his right to a fair trial as guaranteed by the Sixth Amendment and Article I, Section 22, of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict based on reason and free from prejudice. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). The Supreme Court has noted the importance of impartiality on the part of the prosecution:

> [The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse....

State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Here, by referring to facts not in evidence, the prosecutor committed misconduct. More significantly, however, the prosecutor's conduct also denied Sharrieff his due process right to a fair trial, because he had been assured that the jury would not learn of his pretrial testimony if he chose not to testify at trial. See Easter, 130 Wn.2d at 236 (comments on post arrest silence violate due process because Miranda warnings assure defendant that silence will carry no penalty). Although trial counsel did not object to the prosecutor's improper argument, Sharrieff may raise this issue on appeal because his constitutional right to a fair trial was impacted by the prosecutor's misconduct. See State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, review denied, 131 Wn.2d 1018 (1997); RAP 2.5(a).

Prosecutorial misconduct requires reversal if there is a substantial likelihood the misconduct affected the jury's verdict. Even where defense counsel fails to object, request a curative instruction, or move for mistrial, reversal is required if the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice.

State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); Belgarde, 110 Wn.2d at 507.

What the prosecutor's extraneous "facts" do in closing argument is fill in the gaps for the jury. As much as the prosecutor tried to argue that the State had proved Sharrieff guilty of trafficking, without the reference to Sharrieff's relationship to Ricketts the State was unable to connect Sharrieff to the car where stolen property was located, much less to the charged crime. And the prosecutor's attempt to make Sharrieff's pre-trial testimony that he was getting something to eat sound unreasonable was equally problematic. By asking, "He's the only one that got hungry?" the prosecutor implied that at some point Sharrieff admitted being with Warren and Ricketts. But the jury did not have that information until the prosecutor introduced it in closing argument. With these added facts, the prosecutor was able to make the State's case against Sharrieff more compelling. The prosecutor's conduct went well beyond the wide latitude afforded counsel in closing argument. Once these additional facts were introduced, no instruction could have cured the prosecutor's flagrant and ill-intentioned misconduct. Sharrieff was denied his right to a fair trial, and his convictions must therefore be reversed.

3. THE COURT ERRONEOUSLY INCLUDED A MISDEMEANOR CONVICTION IN SHARRIEFF'S OFFENDER SCORE.

The State filed a sentencing memorandum in support of its sentencing recommendation. CP 99-192. In the memorandum, the State asserted that for purposes of calculating the offender score, Sharrieff's criminal history includes three counts of possession of a stolen firearm, one count of burglary in the first degree, and one count of taking a motor vehicle without permission from 2003; second degree assault, first degree unlawful possession of a firearm, and first degree theft from 2006; and second degree burglary from 2012. CP 100. The State attached documents pertaining to the prior convictions. These documents indicate that, contrary to the State's assertion, Sharrieff's conviction for taking a motor vehicle had never before been included in his offender score. See CP 152-55, 177-80, 189.

At the sentencing hearing, defense counsel argued that the conviction for taking a motor vehicle should not be included in the offender score because it was a misdemeanor offense. RP 708, 716. The State responded that second degree taking a motor vehicle without permission is a class C felony. RP 709. Without attempting to determine why the conviction had never before been included in Sharrieff's felony history, the court included it in Sharrieff's offender score. RP 710.

The documents submitted with the State's sentencing memorandum clear up any confusion as to the classification of this conviction. The minutes from the disposition hearing for the 2003 offenses indicates that Sharrieff was found guilty of "TMVWOP Attempted". CP 105. Under RCW 9A.28.020(3)(d), an attempt to commit a class C felony is a gross misdemeanor. Misdemeanors are not included in the offender score. RCW 9.94A.525.

The State has the burden of proving the defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500; State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719 (1986). Given the description of the second degree taking a motor vehicle charge as an attempted offense in the 2003 disposition documentation, as well as the inclusion of that offense in the list of misdemeanor criminal history in all subsequent sentencing documents, the State has not proven that the offense may be included in Sharrieff's criminal history. The court's offender score calculation must be reversed and the case remanded for resentencing.

4. A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

At the sentencing hearing, the court determined that Sharrieff had an offender score of 8. RP 707. The score written on the Judgment and

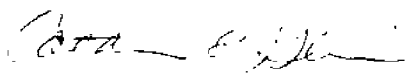
Sentence form is 9, although the form lists the standard range associated with a score of 8. CP 206. This error must be corrected. Sharrieff maintains that resentencing is required to correct the offender score calculation, as addressed above. In addition, remand for correction of the scrivener's error is required. See In re Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

D. CONCLUSION

Impermissible comments on Sharrieff's exercise if his right to remain silent and prosecutorial misconduct in closing argument violated Sharrieff's right to a fair trial, and his convictions must be reversed. In addition, the court's miscalculation of his offender score requires remand for resentencing, and a scrivener's error in the judgment and sentence must be corrected.

DATED August 25, 2014.

Respectfully submitted,



CATHERINE E. GLINSKI
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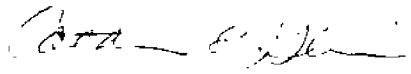
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in *State v. Mahdi Sharrieff,* Cause No. 45876-4 as follows:

Mahdi Sharrieff DOC# 302735
Washington Corrections Center
PO Box 900
Shelton, WA 98584

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



Catherine E. Glinski
Done in Port Orchard, WA
August 25, 2014

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