Supreme Court No. 98525-1

In the

Supreme Court of the State of Washington

STATE OF WASHINGTON,

Respondent,

v.

HAROLD J. MURPHY, JR.

Appellant.

PETITION FOR REVIEW

Court of Appeals No. 78231-2-I; King County Superior Court No. 16-1-04401-4 KNT

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I. IDENTITY OF PETITIONER

Harold J. Murphy, Jr. ("Mr. Murphy") is the Petitioner in this Petition for Discretionary Review. Mr. Murphy was charged by Information with offenses related to allegations of a course of conduct stated to be in furtherance of an attempt to obtain unauthorized control over bank funds. CP 1-2. By Second Amended Information, Mr. Murphy was charged with six offenses, 01.10.2018 Verbatim Report of Proceedings 2:19 – 3:12 ("VRP," hereinafter), to wit, Count 1: Attempted Theft In The First Degree - with a firearm enhancement; Count 2: Assault In The Second Degree - with a firearm enhancement; Count 3: Unlawful Possession of a Firearm in the First Degree; Count 4: Attempted Theft In The First Degree [different date]; Count 5: Attempted Theft In The First Degree [different date]; and Count 6: Attempted Theft In The First Degree [different date]. CP 16-18

II. DECISION

Mr. Murphy seeks this Court's review of the decision of the Court of Appeals, Division I, in Case No. 78231-2-I, dated April 13, 2020, affirming Mr. Murphy's convictions. A true copy of the Court of Appeals' decision is appended hereto as ***Attachment "A"***.

III. ISSUE PRESENTED FOR REVIEW

Mr. Murphy seeks review of the Court of Appeals' decisions

pursuant to RAP 13.4 based on the following issues:

1. WHETHER THE COURT ERRED AND VIOLATED MR. MURPHY'S DUE PROCESS RIGHTS BY FAILING TO BIFURCATE OR SEVER COUNT 3 AND ALLOWING IMPERMISSIBLE REFERENCE TO MR. MURPHY'S CONSTITUIONALLY PROTECTED RIGHT TO SILENCE AT TRIAL.

2. WHETHER THE COURT ERRED IN FINDING THAT MR. MURPHY RECEIVED EFFECTICE ASSITANCE OF COUNSEL.

3. WHETHER THE COURT ERRED AND VIOLATED MR. MURPHY OF HIS RIGHT TO A FAIR TRIAL DUE TO THE ACCUMULATION OF ERROR AND INSUFFICIENT EVIDENCE TO SUSTAIN CONVICTION.

IV. STATEMENT OF THE CASE

1. Background

On July 11, 2016, Mr. Murphy was charged by Information with three offenses related to allegations of a course of conduct stated to be in furtherance of an attempt to obtain unauthorized control over bank funds, to wit, Count 1: Attempted Theft In The First Degree; Count 2: Assault In The Second Degree; and Count 3: Unlawful Possession of a Firearm in the First Degree. CP 1-2. A First Amended Information was filed in the case on January 4, 2017, CP 10-11, and on January 10, 2018 the Court accepted a Second Amended Information charging six offenses, VRP 2:19 – 3:12, to wit, Count 1: Attempted Theft In The

First Degree - with a firearm enhancement; Count 2: Assault In The Second Degree - with a firearm enhancement; Count 3: Unlawful Possession of a Firearm in the First Degree; Count 4: Attempted Theft In The First Degree [different date]; Count 5: Attempted Theft In The First Degree [different date]; and Count 6: Attempted Theft In The First Degree [different date]. CP 16-18.

2. The Investigation

The offenses arose from investigations of the King County Sheriff's Office prior to June 30, 2016 into what was believed to be a "Bank Lick" scheme targeting Boeing Employees Credit Union (BECU) since approximately April 2016. CP 6-8. Mr. Murphy became a target of these investigations through an individual who became a cooperating witness for the prosecution. The State alleges that Mr. Murphy recruited young women whom he reportedly hired as promoters or models. The State alleges that Mr. Murphy paid these women in advance, but needed to utilize their bank accounts because his was "full." The State further alleges that Mr. Murphy would provide these women with a fraudulent check for more than their payment, which they were to deposit into their BECU accounts. They would immediately withdraw the cash and give the amounts over their share, to Mr. Murphy.

3. The Trial Court Proceedings.

The theory of the prosecution was that the Defendant was a recruiter of young women who he used to persuade to deposit fraudulent checks into their bank accounts and then withdraw money from the checks for his benefit. 02.22.2018 VRP at 4:14-19.

The prosecution further painted a picture of the Defendant as dangerous gun toting manipulator who pressured the State's cooperating witnesses into doing his bank fraud bidding. 02.22.2018 VRP at 4:20 – 5:7. The prosecution relied heavily on witness statements for the State's case, a fact emphasized to the jury in closing arguments, but the prosecution did not emphasize to the jury in closing how leading questions had played an inappropriate role in developing that testimony in court. 02.22.2018 VRP at 16:7–8.

As noted by the defense, the cooperating witnesses had substantial motivation to cooperate with the State, and their testimony was not reliable. 02.22.2018 VRP at 80:11–82:15.

Additionally, the prosecution repeatedly emphasized Mr. Murphy's decision to exercise his Constitutional right to remain silent. See, e.g., VRP 535:16-537:10; 538:8-540:21; 542:1-544:5. This is improper, according to long-established Washington case law. See, e.g., State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); State v.

Henderson, 100 Wn. App. 794, 798, 998 P.2d 907 (2000). The State however, attempted to downplay the significance of the prosecutor's conduct at trial, arguing that contrasting the cooperating witnesses' testimony with Mr. Murphy's silence was "unremarkable." See States Response at 25. But it is not only improper to comment on a defendant's right to remain silent; it is improper to invite the jury to draw negative inferences from the failure to speak. See, e.g., United States v. Caruto, 532 F.3d 822, 824-27 (9th Cir. 2008). The State cannot demonstrate, as it must, that the prosecutor's commentary in this case was harmless beyond a reasonable doubt. Id. at 827. Here, the jury would, and did, "naturally and necessarily" interpret the prosecutor's remarks as a comment on Mr. Murphy's silence, and his convictions should be reversed for the prejudiced caused therefrom.

4. The Verdict and Sentence

In its closing argument, the State emphasized the statements of the cooperative witnesses, inherently emphasizing that Mr. Murphy was exercising his right to not testify in a transparent attempt to encourage the jury to infer guilt from his silence. See, e.g., 022.22.2018 VRP at 7:17. Ultimately, the jury convicted Mr. Murphy as charged. He was subsequently sentenced to 170 months of confinement.

Mr. Murphy timely appealed his convictions, and the Court of Appeals affirmed. CP 215. Mr. Murphy now respectfully requests this Court's review of the Court of Appeals' decision pursuant to RAP 13.4

V. ARGUMENT

A. The Trial Court Denied Mr. Murphy Due Process Based on Unfair Prejudice to his Defense against the State's Accusations.

1. The Trial Court abused its discretion in failing to apply the balancing test required by ER 403 in denying Mr. Murphy's Motion for Bifurcation or Severance.

Mr. Murphy appealed on the ground that the trial court abused its discretion when it denied his motion to sever Count 3, Unlawful Possession of a Firearm in the First Degree (the "UPFA Charge") without adjudicating the issue under a balancing test standard as required by the Washington Rules of Evidence which provide:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403. Relying on Washington's liberal joinder rule, the trial court allowed the jury to hear and consider the unfairly prejudicial UPFA Charge while unrelated to other counts, merely for the sake of judicial efficiency, noting that "bifurcation would be really difficult." VRP at 418:23-24. Failing to see the specific prejudice against Mr. Murphy, the

Court of Appeals affirmed the trial court noting that the stipulation of identifying Mr. Murphy's prior conviction as a "serious offense" eliminated the potential prejudice from introduction of the specifics of his prior conviction.

Contrary to the Court of Appeals analysis, "Washington cases are in agreement, stating that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors." Carson v. Fine, 123 Wn. 2d 206, 223-24 (Wash. 1994). Accordingly, an ambiguous "serious offense" is more likely to arouse suspicions and curiosity among the jury, falsely shaping the narrative that Mr. Murphy is simply a career "bad guy." "[T]rying a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges i.e. convict the defendant because he is a 'bad guy' or convict because 'he committed a crime before and probably did this one too.'" United States v. Nguyen, 88 F.3d 812 (9th Cir. 1996).

In addition, the jury instructions provided by the trial court repeatedly emphasized the prejudice, noting Mr. Murphy's bad character related to his "prior conviction for a serious offense" and asserting that he

"has previously been convicted of a serious offense." CP at 119 and 122. The Court of Appeals placed a very heavy reliance on the jury's ability to separate the prejudice, noting that the trial court instructed the jury to "decide each count separately" and that their verdict on one count "should not control" their verdict "on any other count." But even in the best of circumstances, jury instructions may compound he problem and confuse the analysis. In this case, the repeated emphasis in the instructions on the Unlawful Possession of a Firearm count, which would necessarily focus the jury's attention on the Defendant's "prior conviction for a serious offense" and bad character, created an unacceptably high likelihood of a verdict tainted by improper considerations, and resulted in this Defendant's wrongful convictions.

2. The Prosecution Committed Misconduct by Improperly Referencing Mr. Murphy's Constitutionally Protected Silence at Trial.

The Court of Appeals also incorrectly found of the prosecution's references to Mr. Murphy's silence, that "[t]here was no attempt to use the evidence to imply consciousness of guilt." See Court of Appeals Opinion at 11. To establish prosecutorial misconduct, a defendant must demonstrate that the conduct was both improper and prejudicial in the context of the entirety of the record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

Although dismissed by the Court of Appeals, the prosecutor, on multiple occasions throughout the trial emphasized and reemphasized the Miranda rights that were given to Mr. Murphy and his right to remain silent in the face of the state's accusations. The prosecutor contrasted Mr. Murphy's constitutionally protected exercise of that right with the cooperating witnesses who did not exercise that right: VRP at 448:23-449:17 (Ms. Stewart waived her right); 535:16-537:10, 538:8-540:21, 542:1-544:5 (Mr. Murphy now silent, but initially spoke post-Miranda warning).

When a defendant briefly speaks to the police, but then invokes the right to remain silent, and (at trial) the prosecution brings attention to Miranda rights, the jury has improperly been invited "to draw meaning from silence," which penalizes the defendant for invoking the Fifth Amendment right to remain silent. See Curato. In it's Response Brief, the State attempts to distinguish the findings of Caruto, wherein the Ninth Circuit concluded that the prosecutor's argument violated due process because it "emphasized omissions from Caruto's post-arrest statement that resulted from her invocation of her Miranda rights and this invited the jury to draw meaning from silence." Caruto at 831. Even while citing the record, the Court of Appeals specifically disregarded the prejudicial effect of the prosecution's emphasis on Mr. Murphy's discussion with Detective

Fry. While Mr. Murphy "provided some details of the incidents," he did not wish to continue the interrogation if it was going to be recorded or taped. See Court of Appeals Opinion at 10. By inviting the jury to infer guilt from Mr. Murphy's silence, the prosecutor improperly shifted the burden of proof to Mr. Murphy. Accordingly, Mr. Murphy was deprived of a fair trial and is entitled to reversal of his convictions.

B. Mr. Murphy Received Ineffective Assistance of Counsel.

1. Defense Counsel failed to object to the prosecutor's misconduct of improperly inviting the jury to infer guilt from Mr. Murphy's silence.

"Under the sixth amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings." To successfully challenge the effective assistance of counsel:

> Petitioner must show that '(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

Pers. Restraint of Davis, 152 Wn. 2d 647, 672-73 (Wash. 2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" In re the Personal Restraint of Crace, 174 Wash. 2d 835,

840 (Wash. 2012) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

As the Court of Appeals improperly dismissed the prosecutor's misconduct with regard to comments on Mr. Murphy's constitutionally protected right to remain silent, it did not recognize the prosecutors misconduct as necessary of objection, and therefore provided no analysis on the effectiveness of counsel in this regard.

A defendant claiming ineffective assistance based on trial counsel's failure to object to improper evidence or argument must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

As there can be no conceivable tactical reason for allowing the State to ask the jury to infer guilt from Mr. Murphy's exercise of his right to remain silent and the trial court would have likely sustained such an objection, it is reasonably likely, based on the weakness of the State's case, that the prosecutor's misconduct pushed the jurors toward entering guilty verdicts when it would otherwise have acquitted.

2. Defense Counsel's representation was deficient for failing to object to the prosecution's leading questions.

The brief of the appellant or petitioner should contain, "[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue." RAP 10.3. Based on the prodigious examples of the prosecutions use of leading questions, Mr. Murphy provided numerous citations in his Opening Brief, including citations spanning seven, eleven, eleven, and twenty-two pages. While these are admittedly larger than average spans of the record, the Court of Appeals flatly declined to "search the broad citations to the record for evidence of leading questions." Court of Appeals Opinion at 12. Because said references were necessary to establish the nature of the testimony and to identify questions as leading, the Court of Appeals erred in failing to analyze the adequately provided citations.

Had the Court of Appeals examined the referenced citations, it would have seen the persistent use of leading questions, which have the effect of suggesting desired answers and therefore misleading the jury. The defense counsel's failure to object to this improper leading placed a higher burden on the Mr. Murphy for establishing reversible error.

As with the prosecutorial misconduct above, there can be no conceivable tactical reason for allowing such leading questions and the trial court would have likely sustained such an objection. Without the leading examination of the prosecutor, the State's evidence against Mr. Murphy was based on the conflicting and uncertain testimony of cooperating witnesses, without any fingerprint or DNA evidence. This ultimately left a reasonable probability that the outcome of the trial would have been different had the proper objections been made.

C. Cumulative Errors Deprived Mr. Murphy of his Right to a Fair Trial and his Convictions are Not Supported by Sufficient Evidence

1. Cumulative Error

"Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); see State v. Alexander, 64 Wash. App. 147, 150-51, 822 P.2d 1250, 1253 (1992) (holding that "the cumulative effect of all the errors, preserved and not preserved, denied [the defendant] his constitutional right to a fair trial") (citing State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). In this case, the errors described above would each, individually, warrant reversal of Mr. Murphy's convictions; however, based on the Court of Appeals treatment of the foregoing errors, it simply notes that Mr. Murphy has failed to

"demonstrate any errors, [and] he cannot avail himself of the cumulative error doctrine." Court of Appeals Opinion at 13. Despite the Court of Appeals erroneous treatment of the foregoing errors, Mr. Murphy was denied his right to a fair trial by the cumulative errors in this case, necessitating reversal of his convictions and remand for a new trial

2. Sufficiency of the Evidence

"A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). If there is insufficient evidence to prove an element of a crime, reversal is required. State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). Accepting the above in spite of the existing errors, the Court of Appeals notes that the "State presented overwhelming evidence of Mr. Murphy's guilt." Court of Appeals Opinion at 14. A review of the above errors however, would include an exclusion of the improper evidence and argument discussed hereinabove. Accordingly, the convictions against Mr. Murphy were not supported by sufficient evidence because they depended entirely upon the testimony of unreliable cooperating witnesses seeking leniency from the prosecutor's office, the unfair prejudice of violating ER 403 and 404(b), and the violation of the Constitutional right of the Defendant to remain silent.

Direct evidence was not the prosecution's case and as such, the Jury Verdict and subsequent sentences should be vacated and remanded,

VI. CONCLUSION

For the foregoing reasons, Mr. Murphy respectfully requests that this Court grant discretionary review of the Court of Appeals' decision pursuant to RAP 13.4 and reverse the Jury Verdict and remand the matter for a new trial.

Respectfully submitted this 13th day of May, 2020.

LAW OFFICE OF COREY EVAN PARKER

Corey Evan Parker

Corey Evan Parker, WSBA #40006
Attorney for Petitioner, Harold J. Murphy, Jr.

Attachment "A"

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

THE STATE OF WASHINGTON, Respondent, v. HAROLD JOHN MURPHY, Appellant.	)	No. 78231-2-I UNPUBLISHED OPINION

BOWMAN, J. — Harold John Murphy raises several issues on appeal of his multiple convictions stemming from a bank fraud scheme. We conclude Murphy's claims have no merit, and affirm.

FACTS

The State charged Murphy with one count of attempted theft in the first degree and one count of assault in the second degree with firearm enhancements for each. The State also charged Murphy with unlawful possession of a firearm (UPFA) in the first degree. By amended information, the State added three counts of attempted theft in the first degree. The charges stemmed from a "bank lick"[1] operation; a bank fraud scheme involving deposits of worthless checks into an account and withdrawals from the account of

[1] Also known as "bank liq" or "bank liquidation."

provisional funds before the bank discovers the deception. Murphy attempted to perpetrate three sets of bank licks targeting Boeing Employees Credit Union (BECU).

In June 2016, Murphy met Samantha Tinoco and her friend Taya Sneed and recruited them to work for him. Murphy told Sneed he wanted to hire her to promote him as a rapper. Tinoco thought she would be working as a model for Murphy's rap videos. Murphy told the women he would pay them in advance but first they needed to deposit checks in their BECU accounts because his account was "full."

Sneed testified Murphy told her that "they weren't able to get their money, so they put those checks in our name so that we could get it for them, and were also saying that it's going to, like, turn into ours." Tinoco and Sneed also gave Murphy their debit cards and PINs.[2] Murphy claimed he needed the debit cards "because he was doing a show" in Portland, Oregon.

Murphy and a friend showed the women an "envelope full of" checks. The checks were from businesses like Seattle City Light and Aerotek and made payable to Tinoco and Sneed. Murphy drove the women to several BECU branches to deposit the checks and withdraw the cash for him. While in Murphy's car, both Sneed and Tinoco saw a gun in the glove compartment. When Sneed asked about the gun, Murphy said he "[o]nly uses it when he needs it."

[2] Personal identification numbers.

Between June 10 and 13, Tinoco deposited four checks, immediately withdrew the cash, and gave it to Murphy. Sneed attempted to deposit checks on three occasions. On the third attempt, the teller refused the transaction because too much money had gone through Sneed's account. Later that day, Sneed and Tinoco spoke with a friend who alerted them to the fraudulent scheme. Sneed and Tinoco went to BECU to report the fraud on June 13. By that time, Sneed had deposited and withdrawn almost $5,000 for Murphy. Tinoco had deposited and withdrawn nearly $9,800.

Celeste Barker-Henry testified about her role in a similar incident around the same time. Barker-Henry was experiencing financial troubles and Murphy and his friend told her they could help. They sat in Murphy's car in a parking lot and Murphy offered to write her a check for the money she needed. Barker-Henry gave Murphy her debit card and PIN. While she was in Murphy's car, Barker-Henry saw a gun in the center console.

The next day on June 15, Murphy gave Barker-Henry a check from Swedish Hospital made payable to her. He told her to deposit the check in her BECU account. Murphy explained that he would withdraw some of the money and leave the amount she needed in her account. When Barker-Henry attempted to deposit the check, the teller informed her the check was "fake." A bank security employee told Barker-Henry to return the next day to discuss the incident. When Barker-Henry left BECU approximately 20 minutes after she entered the bank, Murphy was gone.

Barker-Henry returned to BECU the next day as instructed. The BECU fraud investigator showed her evidence that Murphy had used her debit card to deposit a fraudulent check at an ATM[3] and withdraw cash. A month later, Barker-Henry met with King County Sheriff's Detective Robin Fry and identified Murphy from a photomontage.

Murphy's younger cousin Rolazja Stewart-Satterwhite also testified about her involvement in his scheme. On June 30, Stewart-Satterwhite and her cousin Alysha Stevens[4] met Murphy, who told Stewart-Satterwhite she needed to go into a bank to deposit a check for him. Stewart-Satterwhite refused, but Murphy took a gun from the glove compartment of his car and pressed the barrel into her side. At that point, Stewart-Satterwhite agreed. At Murphy's direction, Stevens then drove Stewart-Satterwhite to a BECU branch in his car.

Initially, Stewart-Satterwhite attempted to deposit the check at the drive-through teller. The teller told them the large amount of the check required deposit inside the bank. Stewart-Satterwhite texted this information to Murphy, who told her to "remain calm" and delete their messages. When Stewart-Satterwhite and Stevens went into the bank, they were escorted into an office to speak with two BECU employees, including financial crime investigator Trichell Avaava. Eventually, Stewart-Satterwhite explained the situation.

Stewart-Satterwhite was worried about returning to Murphy without the cash. In response, Avaava enacted a plan. Avaava wrote Stewart-Satterwhite a

[3] Automated teller machine.

[4] Stevens and Murphy are not related.

false receipt that showed the deposit was pending in her account and would be available after the upcoming July 4 holiday. Stewart-Satterwhite showed the receipt to Murphy and told him that BECU wanted her to go into the branch after July 4 to sign for the large amount of money. Murphy told Stewart-Satterwhite to comply.

On July 7, the day the money was supposed to be available, Stewart-Satterwhite was with Detective Fry and exchanged messages with Murphy. When Murphy met Stewart-Satterwhite to pick up his money, officers arrested him.

The State charged Murphy with one count of attempted theft in the first degree and assault in the second degree with firearm enhancements related to the incident involving Stewart-Satterwhite. The State charged him with three additional counts of attempted theft in the first degree stemming from the activities with Tinoco, Sneed, and Barker-Henry. Due to his criminal history, the State also charged Murphy with UPFA in the first degree. A jury convicted Murphy as charged. With an offender score of 10, the court imposed a concurrent high-end standard-range sentence of 170 months of confinement.

ANALYSIS

Severance

Murphy argues the trial court erred when it denied his motion to sever the UPFA charge from the other five charged crimes. The State contends Murphy waived his right to appeal this issue and failed to demonstrate specific prejudice

requiring separate trials. We conclude that Murphy did not waive his right to challenge the court's ruling and the court did not err in denying his motion.

Waiver

The State claims Murphy waived his right to challenge severance "because he did not renew [the motion to sever] before or at the close of the evidence." Under CrR 4.4(a)(1),

> [a] defendant's motion for severance of offenses . . . must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

If the trial court denies a pretrial severance motion, the defendant may renew the motion before or at the close of evidence. CrR 4.4(a)(2). Failure to renew the pretrial motion results in waiver. CrR 4.4(a)(2).

Here, Murphy did not make a pretrial motion to sever. He made his motion to sever the UPFA charge during jury selection. A motion to sever made on the morning of the trial is not a motion made "before trial" under CrR 4.4(a)(1). State v. Hernandez, 58 Wn. App. 793, 797, 794 P.2d 1327 (1990); State v. Harris, 36 Wn. App. 746, 748-49, 677 P.2d 202 (1984). Because Murphy moved for severance at trial, he did not need to renew his motion to prevent waiver.

Prejudice

We review a trial court's refusal to sever counts for manifest abuse of discretion. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). "To show that the trial court abused its discretion in denying severance, 'the

defendant must be able to point to specific prejudice.' " State v. Huynh, 175 Wn. App. 896, 908, 307 P.3d 788 (2013) (quoting Bythrow, 114 Wn.2d at 720).

" 'Severance' refers to dividing joined offenses into separate charging documents." State v. Bluford, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017); see CrR 4.4(b). On a motion by either party, the court may sever offenses if it "determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b); Bluford, 188 Wn.2d at 306.

Washington disfavors separate trials. State v. Medina, 112 Wn. App. 40, 52, 48 P.3d 1005 (2002). "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718. In assessing whether severance is appropriate, the trial court considers

> (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.

State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

Here, the factors support the trial court's decision. The State had compelling evidence on each of the counts. Each of the women Murphy induced to participate in the fraud testified about Murphy's orchestration of the schemes and that he kept a firearm in his vehicle. Stewart-Satterwhite testified in detail about Murphy forcing her to participate in the fraud at gunpoint. Murphy employed a "general denial" defense for all charges. And, as the trial court noted, the "vast majority" of the evidence was cross admissible.

Murphy contends that evidence of his prior felony conviction in support of the UPFA charge was not cross admissible and resulted in undue prejudice. However, even where evidence of one count would not be admissible in a separate trial on the other counts, severance is not necessarily required. See Bythrow, 114 Wn.2d at 720. The defendant must "point to specific prejudice." Bythrow, 114 Wn.2d at 720 (citing State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982)).

Murphy fails to point to specific prejudice. The parties stipulated to identifying Murphy's prior conviction as a "generic" "serious offense," eliminating the potential prejudice from introduction of the specifics of his prior conviction. The trial court also explicitly instructed the jury to use the evidence of the prior conviction solely for the limited purpose of the UPFA charge and not "for any other purpose." Finally, the trial court instructed the jury to "decide each count separately" and that their verdict on one count "should not control" their verdict "on any other count." We presume the jury follows the court's instructions. State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012).

Murphy fails to demonstrate that he was manifestly prejudiced by the trial court's failure to sever his UPFA charge from the other charges. The trial court did not abuse its discretion.[5]

[5] Murphy also claims the trial court erred in failing to bifurcate the UPFA charge. We review a trial court's decision on bifurcation for abuse of discretion. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Because Murphy is unable to show prejudice, the court did not abuse its discretion.

Prosecutorial Misconduct

Murphy claims the prosecutor committed misconduct by improperly commenting on his constitutional right to remain silent. According to Murphy, the prosecutor emphasized that he invoked his right to silence and contrasted his silence with the cooperating witnesses who spoke freely with the police. We disagree.

To establish prosecutorial misconduct, a defendant must demonstrate that the conduct was both improper and prejudicial in the context of the entirety of the record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Where, as here, the defendant fails to object at trial, he waives the error absent misconduct so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. To demonstrate this level of misconduct, the defendant must show "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

A defendant's exercise of his Fifth Amendment right to silence may not be introduced at trial as substantive evidence of guilt. U.S. CONST. amend V; State v. Gauthier, 174 Wn. App. 257, 264, 298 P.3d 126 (2013). "A comment on an accused's silence occurs when [the invocation is] 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." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Detective Fry testified that she advised Murphy of his constitutional rights using a standardized "Explanation of My Constitutional Rights" form that she read aloud as Murphy followed along. The form includes the right to remain silent. Murphy acknowledged that he understood his rights and signed the form. Detective Fry then read Murphy the waiver of constitutional rights section of the form. The waiver section states:

> "I have read the above explanation of my constitutional rights, and I understand them. I have decided not to exercise these rights at this time. The following statement is made by me freely and voluntarily, without threats or promise of any kind."

Murphy then "provided some details" of the incidents.[6] Detective Fry asked Murphy if "he wanted me to document that, that it could be recorded or taped." Murphy declined. Detective Fry testified that Murphy did not provide additional details.

Murphy contends the prosecutor contrasted his choice not to give additional details with the choice of other witnesses to talk freely with the police. Murphy misconstrues the evidence. Of the witnesses, only Stewart-Satterwhite was advised of her Miranda[7] warnings. At the time, she was a suspect in criminal activity. Detective Fry testified she advised Stewart-Satterwhite of her constitutional rights and she waived those rights and agreed to speak to

[6] Murphy stated Stewart-Satterwhite was "a friend" and insisted he was not involved in the deposit with BECU and did not have a gun.

[7] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Detective Fry. The record does not show that Sneed, Tinoco, or Barker-Henry ever received Miranda warnings. There is no support for Murphy's claim that the prosecutor's use of the statements from any of these witnesses inherently emphasized Murphy's decision not to elaborate on his statement.

Furthermore, neither Detective Fry nor the prosecutor emphasized Murphy's choice not to give further details or have his statement recorded. Detective Fry described her interaction with Murphy and his answers to her questions. She also explained that he declined to have his statement recorded and did not provide further details. There was no attempt to use the evidence to imply consciousness of guilt. Murphy's claim of prosecutorial misconduct fails.

Ineffective Assistance of Counsel

Murphy raises several grounds for ineffective assistance of counsel, all stemming from defense counsel's failure to raise various objections. To prove ineffective assistance of counsel based on failure to object, a defendant must show that not objecting "fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." In re Pers. Restraint Petition of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).[8] Courts engage in a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). For a successful claim of ineffective assistance of counsel, a defendant must establish both objectively deficient performance and resulting prejudice. Emery, 174 Wn.2d at 754-55.

[8] Footnotes omitted.

Failure To Object to Leading Questions

Murphy claims his counsel failed to object to leading questions by the prosecutor. However, Murphy does not provide specific examples of improper questions. His citations to the record span dozens of pages of the trial transcript. As a result, Murphy's briefing does not satisfy RAP 10.3(a)(6) requiring "references to relevant parts of the record." We decline to search the broad citations to the record for evidence of leading questions. See State v. Brousseau, 172 Wn.2d 331, 353, 259 P.3d 209 (2011).

Failure To Object to Comment on Silence

Murphy also alleges ineffective assistance because his attorney did not object to the prosecutor's alleged comment on his right to remain silent. As discussed above, the prosecutor did not improperly comment on Murphy's silence. No objection was required and counsel was not deficient.

Additional Claims

Murphy makes several allegations of ineffective assistance due to his attorney's failure to object but neglects to include legal analysis as required by RAP 10.3(a)(6). For example, he contends counsel did not object when the prosecutor made statements during closing argument that were inconsistent with the jury instruction about intent and possession of a firearm. However, Murphy provides no analysis of this alleged error. Similarly, Murphy also claims counsel did not object to irrelevant expert testimony but fails to explain why admission of the evidence was erroneous and prejudicial. Because Murphy does not comply with RAP 10.3(a)(6), we decline to address these allegations.

Cumulative Error

Murphy argues the cumulative errors of denying his motion to sever, prosecutorial misconduct, and ineffective assistance of counsel deprived him of his right to a fair trial. Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of several errors denies the defendant a fair trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." Weber, 159 Wn.2d at 279. Because Murphy has failed to demonstrate any errors, he cannot avail himself of the cumulative error doctrine.

Sufficiency of the Evidence

Murphy argues sufficient evidence does not support his convictions because they rest on "unreliable" witnesses, prejudicial evidence, and violation of his right to remain silent.[9] We conclude sufficient evidence supports the convictions.

"Evidence is sufficient to support a conviction if, after viewing the evidence in a light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all

[9] In his reply brief, Murphy argues for the first time that the State failed to provide evidence sufficient to meet the threshold $5,000 necessary to convict him of attempted theft in the first degree. See RCW 9A.56.030(1)(a). We will not consider issues raised for the first time in the reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

reasonable inferences therefrom. DeVries, 149 Wn.2d at 849. Review for sufficiency of the evidence is highly deferential to the jury's decision and we do not consider issues of credibility, persuasiveness, and conflicting testimony. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

The State presented overwhelming evidence of Murphy's guilt. All the women involved in the incidents testified as to Murphy's role in the bank fraud scheme. As discussed above, they all provided specific evidence of Murphy's orchestration of the deposits and withdrawals of cash from their BECU accounts. All of the women testified that Murphy stored a firearm in his car. Stewart-Satterwhite described the incident in which Murphy obtained the gun from the glove compartment and held it to her side. Additionally, BECU financial crime investigator Avaava testified about her investigation of the bank fraud incidents involving Stewart-Satterwhite, Sneed, Tinoco, and Barker-Henry. Avaava also described and produced documents related to "over-the-counter teller deposits and withdrawals" and debit card ATM transactions, as well as photographs pertaining to the account holders, Murphy, and their bank activities.

Viewing this evidence in a light most favorable to the State, we conclude any rational trier of fact could find all the elements of the charged crimes beyond a reasonable doubt.

Statement of Additional Grounds

Murphy submitted a statement of additional grounds for review. He claims he received ineffective assistance of counsel when his attorney improperly proposed a special jury instruction on the firearm enhancements in count 1,

attempted theft in the first degree; and count 2, assault in the second degree. Murphy asserts the instruction relieved the State of its burden to prove a nexus between the firearm and the crime. The jury instruction states:

> For purposes of the special verdicts, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crimes charged in Count 1 and Count 2.
>
> For purposes of the special verdicts, a "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

This jury instruction was not erroneous. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (4th ed. 2016) (WPIC) provides the pattern jury instruction for firearm enhancement special verdicts. WPIC 2.10.01 states, "For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime [in Count __]."[10] The instruction contains a second paragraph with "nexus" language that states, "The State must prove beyond a reasonable doubt that there was a connection between the firearm and the crime." WPIC 2.10.010.[11] The "Note on Use" of this instruction specifies, "Do not use the second paragraph in a case in which the weapon was actually used and displayed during the commission of the crime." WPIC 2.10.010.

The firearm enhancements as charged in counts 1 and 2 are based on the incident in which Murphy held a gun to Stewart-Satterwhite and attempted to defraud BECU. Because Murphy used a firearm in the commission of the crime,

[10] Boldface omitted; alteration in original.

[11] Boldface omitted.

the nexus language was not used in the jury instruction. The Washington Supreme Court has held that a special verdict instruction with the same language at issue here properly "informs the jury that it must find a relationship between the defendant, the crime, and the deadly weapon." State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005). We conclude defense counsel was not deficient in proposing the instruction.

We affirm the jury convictions of attempted theft in the first degree and assault in the second degree with firearm enhancements, UPFA in the first degree, and three additional counts of attempted theft in the first degree.

Brunner, J.

WE CONCUR:

Andrus, A.C.J.

Dwyer, J.

CERTIFICATE OF SERVICE

I, Dave Evanson, certify under penalty of perjury under the laws of the United States and of the State of Washington that on May 13, 2020, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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