

NO. 68150-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK J. NELSON,

Appellant.

2011-07-21 11:2:04
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BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Did the trial court abuse its discretion in denying defendant's motions to sever count three?

2. Was the prosecutor's remark during opening statement a mere reference to not a comment on defendant's right to silence?

3. Did the trial court allow counsel to assert a blanket fifth amendment privilege on behalf of his client and, thereby, violate defendant's right to compel the witness to testify?

4. The State concedes that the trial court erroneously included a conviction in defendant's offender score. Defendant has been resentenced using his corrected offender score and a motion pursuant to RAP 7.2(e) is pending before this court to grant the trial court authority to formally enter the amended judgment and sentence. Does the matter need to be remanded for sentencing?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

On January 14, 2011, Shaun O'Kinsella placed a check, written to the Everett Clinic in the amount of \$47.97, in his mailbox. When O'Kinsella received his bank statement he observed that the check had been changed. The check was now written to Frank

Nelson in the amount of \$447.97. O’Kinsella did not know Frank Nelson and had never written him a check. 2RP 11-15.

Diane McMillian discovered that some unauthorized charges had been made on her Bank of America credit card account in January 2011. She obtained a copy of the checks drawn against her account; convenience checks mailed by the bank to draw funds against her credit card. One check was written to Frank Nelson. McMillian did not know Frank Nelson and had never written him a check. The check was not signed by McMillian. 2RP 16-19.

On or about January 16, 2011, defendant, Frank Joseph Nelson, deposited the \$447.97 check drawn on O’Kinsella’s account and a \$2,000.00 check drawn on McMillian’s Bank of America credit card account at a Chase Bank ATM. Defendant was accompanied by Lori Arisman, a person he did work for. 2RP 42-74; 3RP 58-65, 85, 94-96, 104-107, 116-117.

In January 2011, Curtis Winterroth observed suspicious activity around his mailbox. When he did not receive his bi-weekly disability check Winterroth contacted the Department of Labor and Industry (L&I) and learned that his disability check issued on January 14, 2011, had been cashed at the Marysville Money Tree branch on January 17, 2011. The L&I check had been altered so

the payee read "Frank Joseph Nelson." The check was for \$1,744.26. L&I confirmed that Frank Joseph Nelson had never been issued a check by L&I. 2RP 1-10; 3RP 66.

The person who cashed the check at Money Tree presented photo ID identifying himself as Frank Joseph Nelson. The teller, Maria Angel, confirmed that the photo matched the person presenting the check. Frank Nelson had an existing account with Money Tree, so Angel updated his personal information. To verify the information Angel called the phone number Frank Nelson had provided. Because the check was over \$1,000 Angel had to get her supervisor's approval. Warren Carlton, the supervisor, spoke to Frank Nelson about resolving the outstanding balance on his Money Tree account. Carlton also called the phone number Frank Nelson had provided. The Money Tree employees tentatively picked defendant from a photomontage as the person who identified himself as Frank Nelson. 2RP 20-38, 79-104; 3RP 11-15, 32-33.

Officer Hogue called the phone number that had been provided to Money Tree. The person answering identified himself as Frank Nelson and claimed that he had lost his wallet at Safeway in north Everett and someone must be using his identity.

Defendant admitted receiving a call from Officer Hogue about cashing a check at Money Tree in Marysville and telling Officer Hogue that he had lost his wallet at Safeway in north Everett. 2RP 104-116, 131-133; 3RP 66-67.

B. PROCEDURAL.

Defendant was initially charged with 2nd Degree Identity Theft, count 1, and Forgery, count 2. Prior to trial the State filed the amended information adding count 3, Forgery. Defendant moved to sever count 3. CP 109-111, 198-202; 11/3/11 RP 2-4.

The court heard argument from counsel and reviewed the 70 page transcript of defendant's interview with Everett Police detectives. The court found joinder of the counts was appropriate under CrR 4.3(a)(1). The court denied defendant's motion to sever count 3. CP179-182, 193-202; 11/3/11 RP 2-21, 11/4/11 RP 2-15.

Defendant stipulated that his statements to the police were admissible at trial. CP 124-125, 183-190; 11/4/11 RP 34-38; 2RP 124-125.

On the first day of trial defendant renewed his motion to sever. The court adopted the prior findings and conclusions and denied the motion. 1RP 86-93, 110-112.

Defendant moved to compel Arisman's testimony. Arisman's counsel indicated that Arisman would be asserting her Fifth Amendment privilege if called to testify at defendant's trial. The State moved to exclude Arisman's testimony on the basis that it would be improper to call a witness simply to invoke her Fifth Amendment privilege. Arisman and her counsel were present for the motions. CP 140-143, 152-153; 1RP 1-4, 14-29, 57-65.

Defendant submitted an offer of proof regarding the information he would be eliciting from Arisman's testimony. Arisman's counsel stated that he would be instructing his client to assert her Fifth Amendment right to remain silent if she was asked questions regarding the information contained in the offer of proof. After hearing argument from the parties the court found that the questions proposed by defendant appeared to call for incriminating responses and indicated that the court would allow Arisman to take the Fifth if asked those questions. Defendant inquired about asking Arisman to identify herself in some photographs. Arisman's counsel objected to her testifying about her identity in the photographs. The court found that Arisman identifying herself in the photographs would be incriminating. CP 131-132; 1RP 2, 4, 14-17, 23-25.

The court clarified that its finding did not mean that the evidence could not come in by other means. The court stated that it was permissible for defense to ask Arisman narrow, tailored questions that did not call for an incriminating response and asked if defense wanted Arisman to take the stand. Defendant reserved on the issue. 1RP 22-28, 57-65.

During opening statement, while referring to Officer Hogue's telephone conversation with defendant, the prosecutor said:

Defendant said basically: I'm not sure what you're talking about. Somebody stole my ID. I'll come in and I'll talk to you the following day. I'll let you know about how my wallet was lost and make a statement to you. And he never did show up to make that statement with Officer Hogue.

1RP 188. Defendant did not object to the prosecutor's opening statement.

During Office Hogue's testimony, the court asked whether the State was intending to use defendant's failure to show up for the appointment as evidence of guilt. The prosecutor stated that the purpose was to show that the officer was investigating defendant's statement that he lost his wallet. The prosecutor offered a limiting instruction. At that point defendant objected to Officer Hogue testifying that defendant failed to show up on the

grounds that it would be a violation of his right to remain silent. The court ruled that Officer Hogue could not testify about defendant not showing up for the appointment. 2RP 118-119, 122, 125-128, 131.

Defendant was found guilty on all three counts. Defendant was sentenced to 26 months on count 1 and 18 months on counts 2 and 3, all counts to be served concurrently. CP 15-25, 72-74; 4RP 51-59; 12/13 & 16/11 RP 7-10, 12-13.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SEVER.

Defendant argues that it was an abuse of discretion for the trial court to deny his motions to sever count 3 because the prejudice of joining the counts outweighed any consideration of judicial economy. Appellant's Brief 6-13.

"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." State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101, 1109 (1992) quoting State v. Bythrow, 114 Wn.2d 718, 723, 790 P.2d 154 (1990). Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or

infer a criminal disposition. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747, 772-73 (1994). A trial court's refusal to sever charges is reversible only where it constitutes a manifest abuse of discretion. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747, 773 (1994) citing Markle, 118 Wn.2d at 439; and State v. York, 50 Wn. App. 446, 450, 749 P.2d 683 (1987), review denied, 110 Wn.2d 1009 (1988). The defendant bears the burden of demonstrating such abuse. Russell, 125 Wn.2d at 63; Bythrow, 114 Wn.2d at 720; York, 50 Wn. App. at 450.

In determining whether the potential for prejudice requires severance, a trial court must consider (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. Russell, 125 Wn.2d at 63; State v. Smith, 74 Wn.2d 744, 754–755, 446 P.2d 571 (1968), vacated in part, Smith v Washington, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), overruled on other grounds State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). Any residual prejudice must be weighed against the need for judicial economy. Russell, 125 Wn.2d at 63; Markle, 118 Wn.2d at 439; Bythrow, 114 Wn.2d at 723.

In the present case the court below considered whether 1) defendant would be embarrassed in the presentation of separate defenses, and 2) if a single trial would invite the jury to a) cumulate evidence to find guilt, or b) infer a criminal disposition. The defense theory on counts 1 and 2 was that another suspect signed the checks and defendant merely deposited the checks not knowing they were forged. The defense theory on count 3 was that another person used defendant's identity to cash the check. 11/3/11 RP 7, 10-11. The court concluded that the separate defenses were not particularly antagonistic to one another and that defendant would not become embarrassed or confound in presenting them. CP 180; 11/4/11 RP 6. Defendant argued that the jury could cumulate the evidence in determining guilt and infer guilt from the fact that he was charged with multiple counts. The court concluded, that while an additional count does add some potential prejudice where the jury could cumulate the evidence in determining guilt, in the present case adding the third count did not create a substantial amount of prejudice. CP 180; 11/3/11 RP 8, 11-12; 11/4/11 RP 6-7.

Defendant claims that the denial of his motions to sever prejudiced his ability to present separate defenses because he probably would not have testified on count 3 if the counts had been

severed. Appellant's Brief 9. "A defendant's desire to testify only on one count requires severance only if a defendant makes a 'convincing showing that she has important testimony to give concerning one count and a strong need to refrain from testifying about another.'" Russell, 125 Wn.2d at 65. Defendant did not make a showing that he had important testimony to give in counts 1 and 2 or that he had a strong need to refrain from testifying about count 3. Rather, he merely suggested that he might testify on counts 1 and 2, but not testify on count 3. CP 201; 11/3/11 RP 7-8. Defendant did not meet his burden of demonstrating that a trial involving all three counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.

The court additionally considered the four factors set out in Russell to determine whether the potential prejudice required severance. CP 180-182; 11/4/11 RP 7-14. Considering the first factor the court found that while the evidence might be somewhat stronger on counts 1 and 2, the difference was not substantial. The court concluded this factor did not substantially favor the defendant. CP 181; 11/4/11 RP 8. Regarding the second factor the court concluded that the defense theories did not clash with each other and would be relatively clear to the jury. Id. The court found that

the third factor also did not favor the defendant. CP 181; 11/4/11 RP 8-9. The jury was properly instructed to decide each count separately: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 85 (Instruction 7, WPIC 3.03). The jury was also instructed on the limited use of defendant's other convictions. CP 83 (Instruction 5, WPIC 5.05). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Regarding the fourth factor the court found that defendant's interview with the Everett Police detectives and discussions regarding Lori Arisman were cross-admissible evidence. 11/4/11 RP 10-11. Even where the evidence on one count would not be admissible in a separate trial on the other count, severance is not required. Bythrow, 114 Wn.2d at 720. The court concluded that given the nature of the offenses a jury could compartmentalize the evidence for each count and follow the court's instruction to do so. CP 181; 11/4/11 RP 9-12. Defendant has not met his burden of demonstrating that the court's denial of his motions to sever count 3 constituted a manifest abuse of discretion.

B. THE PROSECUTOR'S REMARK DURING OPENING STATEMENT WAS A MERE REFERENCE TO NOT A COMMENT ON DEFENDANT'S RIGHT TO SILENCE.

Defendant argues that the prosecutor's remark, "he never did show up to make that statement with Officer Hogue," made during opening statement was a violation of his Fifth Amendment right to pre-arrest silence. Appellant's Brief 13-16.

Both the state and federal constitutions protect the right of an accused to remain silent. Griffin v. California, 380 U.S. 609, 614–615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1, 3 (2008). When the defendant's silence is raised, the court must consider "whether the prosecutor manifestly intended the remarks to be a comment on that right." Burke, 163 Wn.2d at 216 quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). The Court has noted that a prosecutor's statement will not be considered a comment on a constitutional right to remain silent if "standing alone, [it] was 'so subtle and so brief that [it] did not 'naturally and necessarily' emphasize defendant's testimonial silence.'" Burke, 163 Wn.2d at 216 (alterations in original) citing Crane, 116 Wn.2d at 331. A remark that does not amount to a comment is considered a "mere reference" to silence and is not reversible error absent a showing of

prejudice. Burke, 163 Wn.2d at 216, citing State v. Lewis, 130 Wn.2d 700, 706–707, 927 P.2d 235 (1996). Thus, the court distinguishes between “comments” and “mere references” to an accused's pre-arrest right to silence by focusing principally on the purpose of the remarks. Burke, 163 Wn.2d at 216, n.7.

1. Prosecutor’s Remark Was A Mere Reference To Defendant’s Silence.

“A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” Lewis, 130 Wn.2d at 707, citing Tortolito v. State, 901 P.2d 387, 391 (Wyo.1995). That did not occur in this case. The prosecutor did not elicit testimony that defendant failed to show up for the appointment with Officer Hogue. 2RP 115-118, 132-133. There was no reference made to defendant’s failure to show up for the appointment during the prosecutor’s closing argument. Nor was there any statement or argument that defendant’s failure to show up for the appointment implied guilt. 4RP 1-15, 30-33.

The single reference heard by the jury regarding defendant’s failure to meet with Officer Hogue was made during the prosecutor’s opening statement. Defendant did not object to that

remark. 1RP 188. During Officer Hogue's testimony, the court inquired whether the State was intending to use defendant's failure to show up for the appointment as evidence of guilt. 2RP 118-119. The prosecutor stated that the purpose was to show that the officer was investigating defendant's statement that he lost his wallet and not just ignoring that claim. The prosecutor offered a limiting instruction. 2RP 122, 125-128. Defendant objected stating it was a violation of his right to remain silent. 2RP 119. The court ruled that Officer Hogue could not testify about defendant not showing up for the appointment. 2RP 131. The prosecutor did not ask, nor did Officer Hogue testify, about defendant not showing up for the appointment. Standing alone the prosecutor's single remark did not emphasize defendant's silence.

"It is well settled that any party may, in opening statement, refer to admissible evidence *expected* to be presented at trial." State v. Whelchel, 115 Wn.2d 708, 727, 801 P.2d 948, 958 (1990). During defendant's interview with the Everett Police detectives defendant acknowledged setting and not coming in for the appointment with Officer Hogue. 2RP 126. The trial court spent a significant amount of time during motions in limine going over the transcript of defendant's interview with the Everett Police detectives

and redacting statements that the parties did not want the jury to hear. 1RP 39-57, 65-76, 113-148. Defendant did not request to have his statement about setting and not showing up for the appointment redacted from the transcript during motions in limine.¹ 2RP 127. Further, defendant had stipulated that his statements to the police were admissible. CP 124-125, 183-190; 11/4/11 RP 34-38; 2RP 124-125. It was reasonable for the prosecutor to *expect* evidence of defendant's statement regarding his failure to show up for the appointment would be presented at trial. The prosecutor's reference to not showing up for the appointment was not intended to be a comment on defendant's right to silence.

2. If Considered A Comment On Defendant's Silence Prosecutor's Remark Was Harmless Error.

Even if the prosecutor's remark is treated as a comment on defendant's pre-arrest silence it was harmless and not reversible error. Since a constitutional error is presumed to be prejudicial, the State bears the burden of showing a constitutional error was harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285, 1292 (1996). A constitutional error is harmless if the appellate

¹ Defendant requested that these statements be redacted from the interview transcript after the court ruled that Officer Hogue could not testify about defendant not showing up for the appointment. 2RP 127.

court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242, citing State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); and Whelchel, 115 Wn.2d at 728. If the error was not harmless, the defendant is entitled to a new trial. Easter, 130 Wn.2d at 242 (testimony characterizing defendant's evasiveness in responding to questions as being a "smart drunk" repeated in closing argument); State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (testimony on defendant's silence was elicited by the prosecutor and commented on during closing argument).

In the present case, the untainted evidence of the defendant's guilt consisted of the testimony, stipulations and exhibits admitted into evidence at trial, including defendant's redacted interview with the Everett Police detectives. The testimony of Winterroth, O'Kinsella and McMillan, clearly established that the checks passed by defendant were forged and defendant did not have permission to possess the checks. 2RP 11-19. Defendant admitted depositing O'Kinsella's McMillan's checks at the Chase Bank ATM. 3RP 58-65, 116-117. Defendant

admitted watching Arisman write his name on checks. 3RP 95-96. The jury did not believe defendant's claim that he did not know the checks were forged. Angel and Carlton identified defendant as the person who cashed Winterroth's L&I disability check at Money Tree. 2RP 20-38, 79-104; 3RP 11-15, 32-33. Officer Hogue called the phone number defendant provided to Money Tree. 2RP 104-116, 131-133. Defendant acknowledged that he answered when Officer Hogue called that phone number. 3RP 66-67. The jury did not believe defendant's claim that he did not cash Winterroth's L&I disability check.

Additionally, prior to opening statements the jury was instructed that "the lawyers' statements are not evidence or the law. ... You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions." 1RP 180 (WPIC 1.01). At the conclusion of the case the court reminded the jury, "It is important, however, for you to remember that the lawyers' statements are not evidence. ... You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 78 (Instruction 1, WPIC 1.02). Jurors are presumed to follow the court's instructions. Stein, 144 Wn.2d at 247.

There was overwhelming evidence in this case to support defendant's convictions for forgery and identity theft apart from the single reference in the opening statement to his failure to show up for the appointment with Office Hogue. The jury was instructed to disregard any statement by counsel that was not supported by the evidence or the law. CP 78; 1RP 180. Therefore, even if the prosecutor's remark in opening statement regarding defendant's failure to show up for the appointment was a comment on defendant's right to remain silent, it was harmless beyond a reasonable doubt.

C. THE TRIAL COURT DID NOT ALLOW COUNSEL TO ASSERT A BLANKET FIFTH AMENDMENT PRIVILEGE ON BEHALF OF THE WITNESS.

Defendant argues that his right to compel Arisman to testify that she paid him for legitimate work refurbishing furniture was violated by the court allowing her attorney to assert a blanket Fifth Amendment privilege on her behalf. Appellant's Brief 16-23. This argument is not supported by the record.

Defendant intended to call Arisman to testify at trial. Arisman had been charged with crimes arising out of circumstances related to defendant charges. Arisman's counsel indicated that Arisman would be asserting her Fifth Amendment privilege if called

to testify at defendant's trial. CP 141; 1RP 2. Defendant filed a motion to compel Arisman's testimony. CP 140-143; 1RP 1-4, 14-29, 57-65. The State moved to exclude Arisman's testimony on the basis that it would be improper to put her on the stand simply to invoke her Fifth Amendment privilege. Defendant submitted an offer of proof to the court regarding the information he would be eliciting from Arisman's testimony; a copy was provided to Arisman's counsel. Arisman and her counsel were present for the motions. CP 152-153; 1RP 1, 57-58.

Arisman's counsel did not assert a blanket Fifth Amendment privilege on her behalf. Rather, in response to the information defense wanted to elicit from Arisman, counsel informed the court that he would instruct his client to assert her Fifth Amendment right to remain silent. The court found that the questions proposed in defendant's offer of proof called for incriminating responses and indicated that the court would allow Arisman to take the Fifth if asked those questions. CP 131-132; 1RP 2, 4, 14-17. The court clarified that its finding did not mean the evidence could not come in by other means and stated that it was permissible for defense to ask Arisman narrow, tailored questions that did not call for an incriminating response. Defendant reserved the right to call

Arisman as a witness. 1RP 22-28, 57-65. Defendant acknowledges that evidence of Arisman's involvement was admitted through the testimony of other witnesses. Appellant's Brief 3-5, 22-23. Defendant did not call Arisman to testify at trial. Claiming a Fifth Amendment privilege is not evidence. State v. Smith, 74 Wn.2d 744, 758, 446 P.2d 571 (1968), vacated in part, Smith v. Washington, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). A party is prohibited from calling a witness, knowing that the witness will exercise her constitutional right. Id. The court did not violate defendant's Sixth Amendment right to compel testimony in the present case.

D. THE TRIAL COURT ERRED IN CALCULATING DEFENDANT'S OFFENDER SCORE.

The State concedes that the trial court erroneously included the out-of-state conviction identified by the defendant in his offender score.

On August 15, 2012, defendant filed a motion in the trial court under CrR 7.8 to correct his sentence. The State agreed that an error had been made in determining his offender score. Since defendant's projected release date was March 19, 2013, and under

his corrected offender score his standard range would be reduced by 5 - 7 months, the motion was set to be heard by the trial court on September 26, 2012. Under RAP 7.2(e), the trial court had authority to hear and determine defendant's motion to correct his sentence. At the hearing the court found that defendant's prior Arizona conviction for Attempted Sexual Assault was not comparable to a Washington felony, and therefore, defendant's correct offender score was 6, with a standard range of 17 - 22 months on count 1 and 12+ - 14 months on counts 2 and 3. The trial court resentenced defendant to 19 months on count 1, and 14 months on counts 2 and 3, all counts to run concurrently and concurrent to misdemeanor sentences in three other cases. Defendant was given credit for time served. All other conditions of the prior judgment and sentence remained the same.

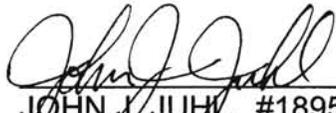
The State by separate motion has requested the Court of Appeals grant the Superior Court authority to formally enter the amended judgment and sentence pursuant to RAP 7.2(e). The court does not need to remand for resentencing.

IV. CONCLUSION

For the reasons stated above defendant's convictions should be affirmed and the appeal denied.

Respectfully submitted on October 22, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
JOHN J. JUHL, #18951
Deputy Prosecuting Attorney
Attorney for Respondent