

No. 35921-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

PM 7-31-09

STATE OF WASHINGTON

v.

JAYCEE THOMPSON

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BRIEF OF APPELLANT

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ORIGINAL

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A. Assignment of Errors

Assignment of Errors

1. The prosecutor committed misconduct when she elicited testimony of Mr. Thompson's post-arrest, post-Miranda invocation of his right to counsel.

2. The prosecutor committed flagrant and ill-intentioned misconduct when she argued facts not in evidence in her closing argument.

Issues Pertaining to Assignment of Errors

Did the prosecutor commit misconduct when she: (a) elicited testimony of Mr. Thompson's post-arrest, post-Miranda invocation of his right to counsel; and (b) argued facts not in evidence in her closing argument?

B. Statement of Facts

The paucity of this record is pronounced, particularly considering the serious nature of the charges. Jaycee Cedric Thompson was charged by amended information with residential burglary and first degree theft. CP, 22. The State called three witnesses. The direct examination of the victim, David Foreman, takes up five pages of the transcript. RP, 37-41.

The arresting detective, Jason Vertefeuille, was questioned on direct examination for eight pages. RP 50-57. Finally, the direct testimony of back-up officer, Carsten Hoyt of Naval Criminal Investigative Service (NCIS), takes up seven pages. RP 59-65. The cross-examination of three witnesses combined adds another eight pages. RP, 42-49, 57, 65-66. Yet even with this scant record, the prosecutor devoted six pages of direct examination, 30 percent of the total, to the topic of Mr. Thompson's invocation of his right to remain silent and his right to an attorney. RP, 53-55, 60-62. Further compounding the prejudice from the prosecutor's misconduct, the prosecutor attributed statements to the defendant that were not testified to. RP, 89.

In the summer of 2006, Mr. Foreman lived in the Bremerton Gardens Apartments when he met a woman on line named Dorothy Scaggs. RP, 38. Their relationship quickly became romantic. RP, 38. On the afternoon of June 30, 2006, Mr. Foreman picked her up and brought her to his apartment. RP, 39. Mr. Foreman, who was scheduled to work that evening for the Navy, left Ms. Foreman alone in the apartment at around four o'clock. RP, 40. When he returned the next morning at nine o'clock, the apartment had been trashed and many items stolen. RP, 41. Most of the stolen items were electronic, such as a television and computer. RP, 41. He estimated the value of the stolen items at around

\$20,000. RP, 41. Mr. Foreman testified he does not know Mr. Thompson and did not give him permission to be in the apartment. RP, 41. He did not, however, specifically tell Ms. Scaggs that she was prohibited from inviting guests to the apartment. RP, 49.

On July 21, 2006, Detective Vertefeuille and Agent Hoyt questioned Mr. Thompson. RP, 51. Detective Vertefeuille read him his Miranda warnings. RP, 51. Mr. Thompson acknowledged his rights and agreed to speak to the detective. RP, 52. In response to questions, Mr. Thompson said that Dorothy Scaggs was his girlfriend and he saw her every day. RP, 52-53.

When Detective Vertefeuille asked about the Foreman apartment burglary, Mr. Thompson requested an attorney. RP, 53, 60. There was no objection to this testimony. At that point, Detective Vertefeuille terminated the interview and stood to leave. RP, 53. Mr. Thompson then said he wanted to talk to the NCIS agent, but not the detective. RP, 53. Detective Vertefeuille said that he would need to make arrangements to speak with an attorney first, but Mr. Thompson wanted to speak without an attorney. RP, 54. Detective Vertefeuille then had Mr. Thompson write out a note saying that he wanted to speak without an attorney. RP, 54, 61. The statement said, "I would like to talk to you guys without my lawyer. July 21, 2006." RP, 55, CP, 16. The statement was introduced into

evidence as an exhibit. RP, 54, CP, 17. Mr. Thompson signed and dated the statement. RP, 54. Agent Hoyt then produced a military advisement of rights for civilians, which is similar to a Miranda form, and read the form to Mr. Thompson, who signed the form. RP, 55, 61.

Agent Hoyt then took over the interview. Mr. Thompson admitted going into Mr. Foreman's residence with Ms. Scaggs and another individual he knew as Little Memphis. RP, 63-64. When they arrived, Ms. Scaggs had suitcases with property that she had packed. RP, 66. It is unclear from the record whether Ms. Scaggs packed the suitcases in front of Mr. Thompson or whether they were already packed when he arrived. Mr. Thompson said he made one trip into the residence and removed two suitcases, carrying one in his hand and one under his arm. RP, 64, 66. Mr. Thompson and Little Memphis removed the suitcases from the residence and put them into a car. RP, 64. The following colloquy then took place:

Q: Did he say how many [suitcases] he saw Little Memphis remove?

A: I do not know the exact number that Memphis had.

Q: Did the defendant indicate what happened to the stolen property removed from Mr. Foreman's residence.

A: Once it was removed, he said that they placed it in the vehicle, VW GTI.

Q: Did he say where the property was taken after that?

A: I do not recall that he indicated at the time. Excuse me, I'm incorrect. He did indicate that they were taken to a storage unit.

Q: And this would be Mr. Foreman's property?

A: That's how I understood it, yes.

RP, 64-65.

On July 26, 2006, Detective Vertefeuille visited a storage unit at Shurgood Storage in Bremerton. RP, 56. The storage unit was rented to Dorothy Scaggs and Jaycee Thompson. RP, 56. The storage unit was searched pursuant to a search warrant, but it was empty. RP, 57.

In its closing argument, the State twice made reference to a statement allegedly made by Mr. Thompson, but not testified to. The State made the following argument, “[Mr. Thompson] also told the NCIS agent who testified here today that he may know where the stolen property was. Those were his words, stolen property. He knew the property was stolen and the property he was referring to was the property he helped Ms. Scaggs remove from Mr. Foreman’s residence.” RP 89-90.

Defense counsel tried to diffuse the State’s argument, “Now, the State has indicated that, well, how come he knew there was stolen property when he talked to NCIS people. He might have known there was stolen property when – from NCIS and detectives from Bremerton. That’s what they were asking questions about, burglary and stolen property. He said maybe this stolen property that you’re talking about, it might be at this storage unit that I know about.” RP, 97.

The last time the issue came up was during the State’s rebuttal argument. The State said, “He also told NCIS that he knew where the

stolen property was. He knew it was stolen, knew it wasn't Ms. Scaggs' and knew it was the property he helped remove from the residence." RP, 106.

The jury found Mr. Thompson guilty of first degree theft, but acquitted him of residential burglary. CP, 53. He was sentenced to middle of the standard range, 38 months. CP, 59. He appeals.

C. Argument

1. The prosecutor committed misconduct when she elicited testimony of Mr. Thompson's post-arrest, post-Miranda invocation of his right to counsel.

The use of silence at the time of arrest and after the Miranda warnings is fundamentally unfair and violates due process. Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). A prosecutor who comments on a defendant's post-Miranda silence commits prosecutorial misconduct. State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988).

A prosecutor's comment on a defendant's post-arrest, post-Miranda silence may be raised for the first time on appeal. State v. Modica, 18 Wn. App. 467, 569 P.2d 1161 (1977). Errors may be raised for the first time on appeal when they are manifest errors affecting a

constitutional right and a direct comment on silence -- such as a statement that a defendant refused to speak to an officer when contacted -- is always a constitutional error. State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004); RAP 2.5(a).¹ The Ninth Circuit has reached the same result. Guam v. Veloria, 136 F.3d 648 (9th Cir. 1998).

The applicable case law does not differentiate between a prosecutor's comment on the defendant's silence and the prosecutor's comment on the request for an attorney. Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986) (footnote 13) (Doyle "includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted."). See also Jacks v.

¹ There has been some inconsistent analysis on this question, as the Washington Supreme Court recently noted. State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) (footnote 24). In one case, the Court stated that claims of prosecutorial misconduct may only be raised for the first time on appeal when the comments are "flagrant and ill-intentioned," but then reversed for an improper comment on the defendant's silence without even applying its own standard. State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). The Belgarde Court seems to imply that comments on the right to remain silent are fundamentally different than other forms of prosecutorial misconduct because the issue is grounded on the Fifth Amendment right to remain silent and the Fourteenth Amendment right to due process. It appears, however, that despite disagreement about the correct approach Doyle claims are manifest error affecting a constitutional right within the meaning of RAP 2.5(a) and may be raised for the first time on appeal. State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004); State v. Romero, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002).

Duckworth, 857 F.2d 394, 401 (7th Cir. 1988). It constitutes prosecutorial misconduct for a prosecutor to comment on a suspect's silence unless done for the purpose of impeachment. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (2000).

The State committed prosecutorial misconduct by commenting on Mr. Thompson's post-Miranda silence. Detective Vertefeuille read Mr. Thompson his Miranda rights, which he initially waived. When the questioning turned to the topic of the Foreman apartment burglary, Mr. Thompson invoked his right to an attorney. This statement was inadmissible and the State committed prosecutorial misconduct by asking the question.

A Doyle violation may occur when a prosecutor comments on a defendant's decision to answer some questions but not others. As one Court put it, "[W]hen a defendant answers some questions and refuses to answer others, or in other words is "partially silent," this partial silence does not preclude him from claiming a violation of his due process rights under Doyle." United States v. Canterbury, 985 F.2d 483, 486 (10th Cir. 1993). Yet another Court commented as follows: "We do not believe, however, that the Supreme Court in *Doyle* intended that a defendant remain *completely* silent following arrest in order to rely on the protection of the due process clause." United States v. Laury, 985 F.2d 1293, 1304

(5th Cir. 1993) (emphasis in original). In a sense, Mr. Thompson invoked his right to remain “partially silent” when he invoked his right to counsel when initially asked about the burglary, but later answered questions about the topic. While Mr. Thompson does not claim that his post-waiver statements about the burglary are inadmissible, the prosecutor committed misconduct by eliciting detailed testimony about Mr. Thompson’s invocation and subsequent waiver.

Nor does Mr. Thompson’s subsequent waiver of his Miranda rights render admissible the prosecutor’s comment on his silence. United States v. Velarde-Gomez, 269 F.3d 1023, 1034 (9th Cir. 2001) (en banc). In Velarde-Gomez, the interrogation began with the arresting officer telling the suspect that 53 pounds of marijuana had been found in his gas tank. According to the officer, the defendant did not respond, but instead acted as if he was neither surprised nor upset. The officer then read him his Miranda warnings, which the defendant waived. The defendant then gave an accounting of his travels and claimed he did not know the contents of the trunk. After first determining that the prosecutor’s questioning about the defendant’s pre-Miranda demeanor constituted a comment on his silence, the Court turned to the question whether the subsequent Miranda waiver cured the error. The Court held that the prosecutor’s questioning about the defendant’s pre-Miranda silence was improper despite the

subsequent waiver, that the error was not harmless, and reversed. Accord United States v. Hernandez, 948 F.2d 316 (7th Cir. 1991).²

An improper comment on the defendant's invocation of his right to remain silent may only be deemed harmless when the reviewing court is convinced beyond a reasonable doubt that no 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. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (2000). As pointed out in the Statement of Facts, the record in this case is extremely thin. The total testimony is a mere 38 pages, 30 pages of direct testimony and 8 pages of cross-examination. The prosecutor devoted 6 pages of her direct examination of the two police officers to establishing the invocation of Mr. Thompson's right to counsel and the subsequent waiver. This was 30 percent of the total direct testimony.

Nor can the State claim that the defendant opened the door to this testimony. Mr. Thompson did not testify. He did not cross-examine

² There is a split in the federal circuits about the permissibility of commenting on post-arrest, pre-Miranda silence. See United States v. Salinas, 480 F.3d 750 (5th Cir. 2007), petition for cert. pending, and citations therein. The split is not relevant to Mr. Thompson's case, however, because it is well-established law that comments on post-arrest, post-Miranda silence are impermissible. Doyle v. Ohio. Velarde-Gomez and Hernandez are cited as authority for the proposition that a subsequent waiver of Miranda does not render admissible the earlier silence.

Detective Vertefeuille at all and his cross-examination of Agent Hoyt consisted of three questions, although confusion by the witness required him to repeat two of the questions. Those questions were whether Mr. Thompson indicated that the property might be in a storage unit, whether Ms. Scaggs had packed the suitcases, and whether he went back into the residence. RP, 65-66. Nothing about these questions raised an issue that opened the door to inadmissible and improper testimony about Mr. Thompson's right to remain silent. The error is not harmless beyond a reasonable doubt.

2. The prosecutor committed flagrant and ill-intentioned misconduct when she argued facts not in evidence in her closing argument.

Twice in her closing argument, once during her initial argument and once in her rebuttal argument, the prosecutor argued facts not in evidence. Arguing facts not in evidence constitutes misconduct and, absent an objection, is reversible error when the argument is so flagrant and ill-intentioned that an enduring prejudice resulted such that a curative instruction could not have been effective. State v. Gregory, 158 Wn.2d 759, 844, 147 P.3d 1201 (2006).

The prosecutor argued that Mr. Thompson described the property that he took from the Foreman apartment as "stolen property," saying,

“Those were his words, stolen property.” RP, 89. The clear import of the State’s argument was that Mr. Thompson was confessing to knowing that the property was stolen when he removed the property from the residence. The State emphasized this again on rebuttal, “He also told NCIS that he knew where the stolen property was. He knew it was stolen, knew it wasn’t Ms. Scaggs’ and knew it was the property he helped remove from the residence.” RP, 106.

The problem with this argument is that no one testified that Mr. Thompson described the property as “stolen property.” The closest was from this question and answer from the prosecutor’s direct examination:

Q: Did the defendant indicate what happened to the stolen property removed from Mr. Foreman’s residence.

A: Once it was removed, he said that they placed it in the vehicle, VW GTI.

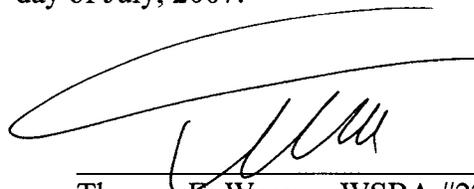
RP, 64-65. This question and answer does not constitute evidence that Mr. Thompson described the property as “stolen.” Technically, the question is probably objectionable because it assumes facts not in evidence, but it is a reasonable inference that the property removed from the residence was Mr. Foreman’s stolen property. What is not a reasonable inference from the question is that Mr. Foreman described the property as “stolen property” in his own words.

The jury heard very little testimony in this case. They acquitted the defendant of residential burglary. They apparently concluded that Mr. Thompson, either as a principal or an accomplice, intentionally stole property from Mr. Foreman. The Court instructed the jury that an accomplice is someone who, "with knowledge that it will promote or facilitate the commission of the crime," encouraged or aided another person in committing the crime. CP, 36. If he removed property from the residence knowing that it was "stolen property," then the likelihood that he knowingly aided in the theft was significantly higher. The prosecutor committed flagrant and ill-intentioned misconduct when she argued facts not in evidence. Reversal is required.

D. Conclusion

Mr. Thompson's case should be reversed and remanded for a new trial.

DATED this 31st day of July, 2007.

A handwritten signature in black ink, appearing to read 'T. E. Weaver', is written over a horizontal line. The signature is fluid and cursive.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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DIVISION II

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

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| STATE OF WASHINGTON, |) | Case No.: 06-1-01172-2 |
| |) | Court of Appeals No.: 35921-9-II |
| Respondent, |) | |
| |) | AFFIDAVIT OF SERVICE |
| vs. |) | |
| |) | |
| JAYCEE CEDRIC THOMPSON, |) | |
| |) | |
| Defendant. |) | |

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| STATE OF WASHINGTON |) |
| |) |
| COUNTY OF KITSAP |) |

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On July 31, 2007, I sent an original and a copy, postage prepaid, of the BRIEF OF APPELLANT to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

On July 31, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

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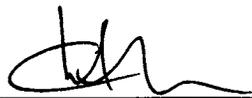
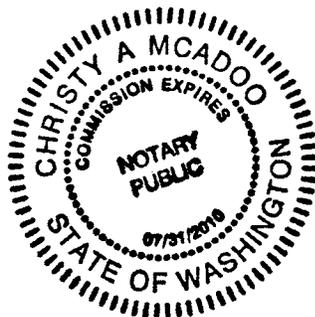
1 On July 31, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to Mr.
2 Jaycee Cedric Thompson, DOC# 773389, Washington State Penitentiary, 1313 N. 13th Ave.,
3 Walla Walla, WA 99362.

4 Dated this 31st day of July, 2007.



5
6
7 Thomas E. Weaver
WSBA #22488
Attorney for Defendant
8

9 SUBSCRIBED AND SWORN to before me this 31st day of July, 2007.



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12 Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 07/31/2010
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