

No. 36098-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE KNAPP,

Appellant.

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STATE OF WASHINGTON

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

The Honorable Vicki L. Hogan, Judge

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Mr. Knapp's Fifth Amendment and Article I, § 9, rights to remain silent and be free from self-incrimination and his rights to due process were violated when the prosecutor repeatedly elicited testimony regarding appellant's silence in the face of accusation, and then argued that the jury should draw a negative inference from that exercise.

2. Mr. Knapp was deprived of his Sixth Amendment and Article I, § 22, rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The rights to remain silent and to due process are violated whenever a prosecutor elicits or a witness gives testimony about a defendant's pre-arrest silence. Those rights are further violated when a prosecutor implies that a jury should draw a negative inference from exercise of a constitutional right, such as the right to remain silent.

In this case, at trial, the prosecution elicited testimony from a police officer regarding Mr. Knapp's silence when he was confronted, two separate times, with the fact that he had just been physically identified by two witnesses. Then, in closing argument, the prosecutor told the jury that one of the reasons it should find Knapp guilty was because, when Knapp was confronted, he said nothing and did not deny his guilt.

a) Is reversal required for the violations of Knapp's rights to remain silent and to due process where the prosecution cannot meet its burden of proving the constitutional errors harmless beyond a reasonable doubt?

b) Is reversal required for the prosecution's flagrant,

prejudicial misconduct in first eliciting the testimony and exploiting it?

c) Finally, is reversal required because counsel was completely ineffective in failing to move for a mistrial after the improper questioning or otherwise addressing the issue at trial?

2. Counsel was ineffective in failing to object to admission of improper, prejudicial hearsay.

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Kyle C. Knapp was charged by information with residential burglary. CP 1; RCW 9A.52.025. Trial was held before the Honorable Vicki Hogan on March 6-8, 2007, after which the jury found Knapp guilty as charged. RP 1, 13, 100;¹ CP 34.

On March 16, 2007, Judge Hogan imposed a standard range sentence. CP 38-48; SRP 12.

Mr. Knapp appealed and this pleading follows. See CP 53.

2. Overview of relevant facts²

Contractor Darren Blakeslee was working on a home on November 14th when he noticed what he thought were two “suspicious-looking guys” knocking on doors in the neighborhood at about 1:30 or 2 in the afternoon. RP 16-18. He watched as the men, one tall and one short, walked up to a

¹The verbatim report of proceedings consists of 4 volumes, which will be referred to as follow:

the 3 chronologically paginated volumes of pretrial and trial proceedings from March 6-8, 2007, as “RP;”
the volume containing the March 16, 2007, sentencing, as “SRP.”

²More detailed discussion of the facts relating to the issues on appeal is contained in the argument section, *infra*.

door, knocked, got no answer, "kind of looked at each other," then went around the side of the house to the back. RP 19, 24. At that point, Blakeslee used a cellular telephone to call 9-1-1, the police emergency telephone number. RP 19.

The homeowner of the home the men were at said she had not given anyone permission to go into her house and when she went inside she saw her wheeled suitcase and a "duffle" bag in the kitchen. RP 30-36. Inside were some things of hers, such as jewelry, candy and a coin collection. RP 34-36.

Tacoma Police Department (TPD) officer Stephen O'Keefe responded to Blakeslee's call with his partner, Debra Vause. RP 40-45, 56. The officers contacted Blakeslee and then went to the house Blakeslee pointed out. RP 40-45. Officer Vause testified that, as she went around the corner of the house, she could hear voices. RP 56. She then saw a man coming out of the house and another man still inside. RP 56.

The officers drew their guns and ordered the man coming out of the house, later identified as Michael Barton, to halt. RP 56. They also ordered the man inside the house to come out. RP 56. While they were handcuffing Barton, the officers heard noises from inside the house, like a slamming door. RP 56.

TPD Officer Scott Harris arrived as Barton was being put in a patrol car. RP 121-23. Harris went towards the back of the house and saw a screen "pop out from a window" about eight feet above him. RP 122-23. A man then started to crawl out the window, saw Harris and retreated back into the house despite Harris' commands. RP 124. Harris had eye contact

with the man for three to four seconds. RP 124.

Three officers surrounded the house and a SWAT team was called. RP 58. The house was ultimately searched, but no second suspect was found. RP 61.

At some point, the officer driving Barton took him around the block and saw a white Chevy Suburban car parked there. RP 66-67. The officer searched records for the license plate and discovered the owner was Kyle Knapp. RP 68. When officers went to Knapp's home, Knapp was not there. RP 84. Barton's sister was there, as was a man named Scott Law. RP 84-85. Law was similar in appearance to Knapp. RP 86. Another man, Jason Benson, was dating Barton's sister and also had a physical appearance similar to the description of Knapp. RP 88. Benson was not at the home but an officer arranged to have Benson and Barton's sister come to the police station the following date to discuss the case. RP 89. They never showed up. RP 89.

Officer Vause was unable to identify anyone in a photographic montage as the man she had seen inside the house. RP 61-62, 83. The montage included a picture of Knapp. RP 83.

Blakeslee also was unable to identify the second man when shown a montage which included a picture of Knapp, a few days after the incident. RP 20, 28, 71-71, 82. The pictures were all of people who roughly matched Knapp's appearance. RP 82.

Knapp's car had been impounded and, when Knapp called police about it, the officer arranged to meet Knapp at his house to talk about the case. RP 71-72, 84. The officer also arranged to have Blakeslee and

Vause drive by to see if they could identify Knapp in person despite their failures to pick Knapp out of the montage. RP 72. Vause was still unable to make an identification after seeing Knapp at the home. RP 105.

Blakeslee, however, saw Knapp standing right next to an officer and, when asked if that was "the guy," identified Knapp as the second suspect. RP 21, 72. He also identified Knapp in court. RP 22.

Blakeslee admitted he was 125 feet or more away from the men when he saw them knocking on doors, and their backs were turned away from him. RP 26. He said, however, that the men had walked in front of him on the opposite side of street at one point. RP 27. The men did not have anything unique about their appearance but he just thought they were "suspicious looking." RP 27. When Blakeslee was shown Knapp standing next to the officer and asked if he was the suspect, Blakeslee was 40 feet from Knapp. RP 106.

Several days after the show-up with Blakeslee, Officer Harris hid in the bushes while Knapp was brought out of his home, and Harris positive identified Knapp as the person he had seen coming out of the window. RP 124-26. Harris also identified Knapp in court and testified that, when he had been shown a picture of Knapp he had been sure, "[w]ithout a doubt," that he had seen Knapp that day. RP 126. Harris also testified that he had seen pictures of Law and Benson and did not recognize either of them as the second suspect. RP 117-18.

Knapp was arrested just after Harris' identification. RP 77. He freely consented to letting the officers search his house and, at the impound lot, his car. RP 108-11. Nothing of any evidentiary value, such

as burglary tools, was found in Knapp's home. RP 108-109. Inside the car were wrenches, screwdrivers, a hammer and a knife in a sheath, bolt cutters, cable cutters and a pry bar, all of which an officer said he considered "burglary tools." RP 75.

Carman Badgley testified that Knapp was with her when the burglary occurred. RP 136-44. She was sick and he was helping her pack and move. RP 138-48.

Knapp testified that he had stayed with Badgley for two nights, packing. RP 152. During that time, his car was at home. RP 152. Knapp usually left his keys on a hook in the house and let other people living there use his car if there was an emergency or they needed something at the store. RP 154-55. A number of the other people living at the house did not have their own cars. RP 153-55.

Knapp came back to his house about 9 or so in the morning on November 16th and noticed his car keys were not hanging on the hook anymore. RP 149-50, 153. He asked and was told another man who lived there, Michael Bentley, had taken his truck. RP 149-53. Knapp assumed it was just for a quick trip somewhere but an hour went by and then the other people at the home started telling Knapp conflicting stories about when Bentley had left. RP 153.

Knapp then called a towing company to try to find out what had happened and was told that another company had his truck. RP 154. He called that other company and was told the police had a "hold" on the truck and he would need to talk to TPD. RP 154-55. When Knapp called police, he spoke to a lady who gave him a phone number for Detective

Harris as the person Knapp should call. RP 155. Knapp called and, when Harris told Knapp to come in to talk to him, Knapp reminded Harris that Knapp's transportation was gone, so Harris said he would come to Knapp's house. RP 155.

Harris told Knapp his car was impounded because it was "involving a criminal act." RP 156. He did not tell Knapp anything about being a suspect in any crimes. RP 156.

When the officer arrived at Knapp's home, he asked Knapp where he had been at the time of the incident, and Knapp told him. RP 156. Knapp also called Carman and asked her to come over to talk to the officer. RP 156.

The officer was present when Knapp called Carman and met Carman at the door, so that Knapp did not speak to Carman privately at all before the officer spoke to her. RP 157. After the officer spoke to Carman, he asked Knapp if he could "look around," and Knapp had "no problem" with that. RP 157.

Knapp was aware that he was being shown to people when he was outside because the officers said "stand, turn," and otherwise directed him around. RP 159.

On the day the officer went to Knapp's home, the 16th, Knapp gave a statement saying that he took a shower at 4 am Monday 11/13/06, left at about 7:30 am, went to work and went to Carman's after that, stayed the night, got up, came home at 6 am, left about 5 or 8 a m, and worked a little on a roof down the road at 64th and K. RP 166-71. His statement did not include anything about having helped Carman pack or her being sick, but

Knapp was not asked those questions. RP 168-72.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR ELICITED TESTIMONY ABOUT AND DREW A NEGATIVE INFERENCE FROM KNAPP'S EXERCISE OF A RIGHT AND COUNSEL WAS INEFFECTIVE

It is grave misconduct for the prosecutor to argue that the jury should draw a negative inference from a defendant's exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Such argument amounts to a violation of the right in question and also violates due process, because it "chills" the exercise of a right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, this Court should reverse, because the prosecutor first repeatedly elicited testimony designed to draw a negative inference from Mr. Knapp's exercise of his constitutional right against self-incrimination, then relied on that testimony and Mr. Knapp's silence in arguing his guilt. Further, counsel was utterly ineffective in dealing with these serious violations of his client's constitutional rights.

a. Relevant facts

In direct examination of the officer who was with Knapp at the time of the show up identification procedures at Knapp's home, the prosecutor first established that, after Blakeslee made the positive identification of Knapp, the officer told Knapp about that identification.

RP 72-73. The prosecutor then asked, “[w]hat did Mr. Knapp do in response to that, hearing that information?” RP 73. Without defense objection, the officer answered, “Well, he immediately hung his head but did not say anything.” RP 73.

The same officer also testified that, several days later, he did another identification procedure at Knapp’s house, with Officer Harris hiding behind a hedge, on the sidewalk. RP 76. Knapp was asked to go out on his front porch and Harris then viewed him. RP76. Once Harris gave a signal indicating he had identified Knapp, Knapp was arrested. RP 77.

The officer said he told Knapp Harris had identified him. RP 77. The prosecutor then asked Knapp’s reaction to that, and, without objection, the officer said, “[n]one really. Fairly complacent, consistent, seemingly uncaring attitude, but he was cooperative.” RP 77.

In closing argument, the prosecutor argued that, because there was no doubt a burglary occurred, the only question was whether Mr. Knapp was one of the burglars. RP 174. The prosecutor then said he would try to explain to the jurors “why the State believes that Mr. Knapp, here, the defendant, is the one who did the burglary on that day.” RP 174. One of those reasons was Knapp’s failure to deny his guilt when confronted with the fact that Blakeslee had identified him. RP 174. The prosecutor argued:

[A]nother reason to believe that this defendant, Kyle Knapp, did the burglary, both times that it was mentioned to him that Darren Blakeslee identified him and then Officer Harris identified him, what did he do? He put his head down. *Did he say, “No. It wasn’t me?” No.*

RP 179 (emphasis added).

b. Knapp's rights to remain silent and due process were violated and reversal is required

By eliciting the testimony and making the arguments, the prosecutor violated Mr. Knapp's rights to remain silent, against self-incrimination, and to due process.

As a threshold matter, these issues are properly before the Court. Where the prosecution elicits testimony infringing upon the exercise of a constitutional right, that involves a "claim of manifest constitutional error, which can be raised for the first time on appeal" under RAP 2.5(a)(3). State v. Curtis, 110 Wn. App. 6, 9, 11-12, 37 P.3d 1274 (2002). Further, when a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the failure of counsel to object below. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 11292 (1995).

On review, this Court should reverse. Both the state and federal constitutions guarantee the accused the rights to remain silent and to be free from self-incrimination. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9.³ These rights apply not only pre-arrest but also even before a defendant is the subject or suspicion or investigation. See State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235

³The Fifth Amendment, made applicable to the states through the 14th Amendment, provides in relevant part, no person "shall be compelled in any criminal case to be a witness against himself." Article I, § 9 provides, in relevant part, "[n]o person shall be compelled in any criminal case to give evidence against himself."

(1996); see State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). Indeed, the Supreme Court has held, the right to remain silent is liberally construed, intended to “prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” Easter, 10 Wn.2d at 236.

As a result, the government is forbidden from using the defendant’s silence against him, in any way. Easter, 130 Wn.2d at 238. A police officer is not permitted to comment on the defendant’s silence “so as to infer guilt from a refusal to answer questions,” and such comments may compel reversal even if not solicited by the prosecutor. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002), quoting, Lewis, 130 Wn.2d at 705. Further, a prosecutor is not permitted to ask questions designed to elicit such testimony, because the right to silence can be “circumvented by the State ‘just as effectively by questioning the arresting officer’” as by questioning the defendant himself. Easter, 130 Wn.2d at 236, quoting, State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979). In addition, a prosecutor must not make any arguments in closing implying that the jury should draw a negative inference from exercise of the right to remain silent. Romero, 113 Wn. App. at 786; see Doyle, 426 U.S. at 619; Fricks, 91 Wn.2d at 396. Such arguments are violations not only of the right to remain silent but also due process. Fricks, 91 Wn.2d at 396; Doyle, 426 at 619.

Thus, in State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), this Court reversed where a detective testified that the defendant refused to return telephone calls after being told that such failure would result in the

allegations being turned over for prosecution. 86 Wn. App. at 592. In closing argument, the prosecutor referred *once* to the testimony and then told the jury it was their “decision if those are the actions of a person who did not commit these acts.” 86 Wn. App. at 592.

In holding that the testimony and the prosecutor’s brief argument “constituted impermissible comments on Keene’s right to pre-arrest silence,” this Court noted that such a comment occurs when there is even a *suggestion* that silence might mean guilt. 86 Wn. App. at 594. Because the officer’s testimony established that the defendant had not been heard from, and because the prosecutor’s argument asked the jury to consider whether the failure to contact the detective was the act of an innocent man, the comments were impermissible comments on the defendant’s silence, “suggesting it was an admission of guilt.” 86 Wn. App. at 594.

Similarly, in Romero, *supra*, the Court found a trial witness had improperly commented on the defendant’s constitutional right to remain silent. 113 Wn. App. at 783. Mr. Romero was arrested and charged with first-degree unlawful possession of a firearm in an incident that occurred after there was a report of shots fired at a mobile home in the middle of the night. *Id.* An officer using a flashlight had responded and saw Mr. Romero coming around the front of a mobile home holding his right hand behind his body. *Id.* He repeatedly ordered Mr. Romero to show his hands. 113 Wn. App. at 783. Mr. Romero refused and would not step away from the mobile home, instead running around it and later being found inside. 113 Wn. App. at 783.

At trial, a sergeant testified that, when the mobile home was

searched, “they did not respond to our questions.” 113 Wn. App. at 785. The officer also testified that, when Mr. Romero was arrested, he was put in a holding cell and was “somewhat uncooperative.” 113 Wn. App. at 785. In addition, the officer was allowed to testify that, when Mr. Romero was read his rights, “he chose not to waive, would not talk to” police. 113 Wn. App. at 785.

In finding the testimony to be a violation of the rights against self-incrimination and to remain silent, the Romero Court discussed the long line of cases where the courts made it clear that an officer’s comments on the defendant’s decision not to talk to police or answer questions was improper. 113 Wn. App. at 785-89. Indeed, the Romero Court noted, even in cases where the prosecutor did not “harp” on an officer’s testimony about silence in closing and the question and answer were limited, the testimony was still improper because it was “injected into the trial for no discernible purpose other than to inform the jury that the defendant refused to talk to police without a lawyer.” Id., citing, Curtis, 110 Wn. App. at 9. The Romero Court concluded that, even though the testimony was “unresponsive and volunteered,” it was “clearly purposeful” by the officer and was “an attempt by the sergeant to prejudice the defense.” 113 Wn. App. at 793.

In this case, the testimony and the prosecutor’s misconduct was even more egregious than in Keene and Romero. First, the prosecutor repeatedly elicited testimony from the officer that Knapp had remained silent when confronted with being identified by Blakeslee and Harris. RP 72-73, 76-77. Then, the prosecutor specifically exploited that testimony in

closing, telling the jury that Knapp's silence was a "reason to believe" that Knapp was guilty. Indeed, the prosecutor told the jury it should find guilt based upon Knapp's failure to deny having committed the crimes when confronted with the identifications. RP 179 ("[d]id he [Knapp] say, 'No. It wasn't me?' No").

Thus, the error here was even more egregious than in Keene or Romero. Unlike in Keene, here the prosecutor did not simply refer to the improper testimony once and then obliquely suggest that the defendant's acts might not be the "actions of a person who did not commit these acts." See Keene, 86 Wn. App. at 592. Instead, the prosecutor emphasized the testimony and told the jury they *should* rely on Knapp's silence as evidence of his guilt. RP 179. And unlike in Romero, the officer's testimony was not "unresponsive and volunteered" but rather was specifically elicited by the prosecutor twice, once for each witness on the two separate days. RP 72-73, 76-77.

The accused's right to remain silent includes the right "to decline to assist the State in the preparation" of its case. Easter, 130 Wn.2d at 243. Those rights "may not be eroded by permitting the State in its case in chief to call the attention of the trier of fact the accused's pre-arrest silence to imply guilt." Easter, 130 Wn.2d at 243.

Here, there was not a prosecutor *implying* guilt based upon Knapp's pre-arrest silence - the prosecutor was *directly arguing* guilt based upon that silence. This is simply impermissible. As the Supreme Court held in Easter, "[w]hen the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to

silence,” and that “[a] ‘bell once rung cannot be unrung.’” 130 Wn.2d at 238-39, quoting, State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977).

In eliciting the testimony and making the arguments, the prosecutor violated his duty as a “quasi-judicial” officer. See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1989); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). That duty requires a prosecutor to act “impartially and in the interests of justice and not as a ‘heated partisan.’” Huson, 73 Wn.2d at 662 (citation omitted). A prosecutor who departs from this duty and commits misconduct not only deprives a defendant of the due process right to a fair trial, he deprives the system of some of its integrity. See Belgarde, 110 Wn.2d at 508.

Reversal is required. Where, as here, the prosecutor commits misconduct infringing on a constitutional right, and testimony is admitted regarding the exercise of a right, the prosecution bears a very heavy burden in trying to prove those constitutional errors harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

Here, the prosecution cannot meet that burden. Easter, Keene and Romero are instructive. In Romero, in addition to the evidence that Mr. Romero ran from the officers and was seen in the area of the crime just

after the shooting, officers also found a shotgun inside the mobile home where Mr. Romero was hiding and shell casings on the ground next to the mobile home's front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Mr. Romero, and an eyewitness testified to seeing him shooting the weapon. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive the shooter was Mr. Romero, the witness remembered seeing that man wearing a blue-checked shirt, rather than a grey-checked shirt Mr. Romero had on. 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Mr. Romero that night, when shown the shirt Mr. Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

The Romero Court first rejected a challenge based upon insufficiency of the evidence, finding the evidence sufficient to support a finding of guilt for unlawful possession of a firearm. 113 Wn. App. at 797-98. But that same evidence was not sufficient to satisfy the constitutional harmless error test. Even though the prosecution had not exploited the comment in closing and had not even "purposefully elicited" the officer's "unresponsive" answer, there was not "overwhelming evidence" of guilt, because there was conflicting evidence on certain points. 113 Wn. App. at 793. The Court could not "say that prejudice did not likely result due to the undercutting effect on Mr. Romero's defense." 113 Wn. App. at 794. Although there was significant evidence that Mr. Romero was guilty, that was not sufficient to amount to "overwhelming" evidence of guilt, sufficient to find the constitutional error harmless. 113

Wn. App. at 795-96. Indeed, the Court held, because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by the sergeant’s comment, “which insinuated that Mr. Romero was hiding his guilt.” 113 Wn. App. at 795-96.

Similarly, in Keene, the Court reversed despite the strong evidence against the defendant. The untainted evidence consisted of a child’s testimony that she had been improperly touched in May or June of 1990, and evidence that she had told her sister about it in 1991 and her friend, in 1994. 86 Wn. App. at 594-95. There was a dispute about her having told an investigating officer that it occurred when her father spent the night at a motel, because there was testimony he had not spent such a night. Keene, 86 Wn. App. at 594-95. There was also a dispute whether she had, as she claimed, reported the abuse to her teacher. 86 Wn. App. at 595.

Despite the strong evidence of guilt, there was also evidence which disputed it. 86 Wn. App. at 594-95. As a result, the evidence was not “so overwhelming” that it “necessarily” lead to a finding of guilt, and reversal was required. 86 Wn. App. at 594-95.

And in Easter, while the state’s theory regarding Mr. Easter’s guilt was supported by evidence, the evidence “did not overwhelmingly establish” the theory and the “State’s emphasis on Easter’s silence to argue his guilt may well have swayed the jury.” Easter, 130 Wn.2d at 242. In addition, the Easter Court noted, the offending testimony was “elicited to insinuate” the defendant’s guilt, and embodied the officer’s “opinion Easter was hiding his guilt,” an impermissible opinion on guilt under the law. Id. Finally, the Court noted, “the State compounded the error by

emphasizing Easter's pre-arrest silence many times in closing argument." 130 Wn.2d at 243. The Court concluded that Mr. Easter was entitled to a new trial. Id.

Here, just as in Romero, Easter and Keene, there was evidence of Mr. Knapp's guilt. But there was also conflicting evidence, such as Knapp's testimony and the lack of any incriminating evidence in Knapp's home. The testimony and further exploitation of that testimony by the prosecutor in closing certainly caused prejudice to Knapp's defense, by undercutting it in front of the jury. There is thus no way the prosecution can prove to this Court, beyond a reasonable doubt, that the errors here, in violation of Knapp's rights, were "harmless" under the constitutional harmless error standard. This Court should not be swayed by any attempts of the prosecution to claim the repeated, deliberate violations of Mr. Knapp's rights here "harmless," and should reverse.

c. Counsel was ineffective in failing to move for a mistrial or otherwise dealing with the errors

Reversal is also required because of counsel's ineffectiveness in relation to this evidence. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. Counsel is ineffective if, despite a strong presumption of effectiveness, his performance is deficient and that deficiency prejudiced the defendant. Hendrickson, 129 Wn.2d at 78.

Here, counsel was prejudicially ineffective in failing to object or

address these violations of his client's important constitutional rights. While in general, the decision whether to object is usually considered "trial tactics," in egregious circumstances or regarding important testimony a failure to object can be ineffective assistance under both the Sixth Amendment and Article I, § 22. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). In such situations, counsel is ineffective if there is no reasonable tactical reason for the failure to object, the court would likely have sustained an objection if one had been made, and the objection would likely have had an affect on the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1988).

All three of those requirements are met here. There could be no legitimate tactical reason for counsel to sit mute while his client's constitutional rights are so flagrantly violated. First, even before the improper testimony, the prosecutor's lead-in questions clearly telegraphed where the questions were going, so that any reasonable attorney would have known what was coming. Indeed, even the *witness* noted a possible hearsay issue, just before the improper testimony.

The prosecutor was asking the officer about the "show up" for Blakeslee, including where the officer was standing and whether the officer had been next to Blakeslee or contacted him. RP 72. The following exchange then occurred:

Q: All right. And so then Officer Vause then came over and reported what he [Blakeslee] had said; was that correct?

A: Yes, that's correct.

Q: And based on that, did you tell Mr. Knapp what had occurred?

A: Yes, he heard her report to me - -

Q: Okay.

A: - - what his finding was.

Q: Okay. And what was that report?

A: She - - she said that - - that might be hearsay.

Q: Well, go ahead and let him make the objection.

A: She said she reported a positive identification of Kyle Knapp as the second suspect.

RP 73. It was at that point that the prosecutor asked what Knapp did “in response” to hearing of the positive identification. RP 72-73.

Even if the sequence of the questions had provided insufficient warning of where the questions were going and counsel’s failure to object could thus be seen as a “tactical” decision not to emphasize the improper testimony, counsel was still ineffective in failing to ask for a sidebar conference and moving for a mistrial. The objectionable testimony had already invited the jury to imply something negative from Knapp’s failure to speak when told of a positive identification. The constitutional damage had already been done. Unlike objecting, neither a sidebar conference nor a motion for mistrial would emphasize anything in particular, unless the request was made so close after the error as to have that effect. But reasonable counsel would have waited a few beats and then asked for a sidebar. Counsel here did not.

And even if the failure to take such actions initially could be excused, counsel’s subsequent failures could not. When the prosecutor

again started in on similar questions regarding the Harris identification, reasonable counsel would have known it was likely the prosecutor was again going to seek to draw negative attention to Knapp's exercise of his right to remain silent, as he had before.

Further, there could be no legitimate tactical reason to fail to move for a mistrial after the testimony about the Harris identification had been admitted. It could not be reasonable to fail to take some action designed to ensure that the already improper evidence, so deliberately elicited by the prosecutor, was not exploited during closing argument. And finally, when the prosecutor specifically argued for guilt based upon Knapp's silence, it was counsel's last chance to try to mitigate the serious damage already done not only to his client's constitutional rights but also his client's defense. Yet he did nothing.

In Easter, the Court referred to the error as one in which the jury's hearing the improper evidence was akin to a bell, which "once rung cannot be unringed." 130 Wn.2d at 238, quoting, Trickel, 16 Wn. App. at 30 (noting some errors are so egregious that no amount of "curative" action would suffice). But this still does not forgive counsel's failures to make any efforts whatsoever. At the least, he wasted the time of the jury, judge, prosecutor, defendant, and himself by failing to move for a mistrial early. At worst, he essentially ensured that his client's constitutional rights were violated over and over, and that his client was convicted by a jury that thought it was proper to convict a defendant for *failing to deny committing the crime*.

Given the nature of the errors in this case, if counsel had objected

at any one of these points, it would have been reversible error for the trial court to overrule the objections. Further, because there was not “overwhelming evidence” sufficient to meet the constitutional harmless error standard as argued, *infra*, any such objection would likely have affected the result of the trial. Counsel was ineffective in failing to object and move for a mistrial either after the first or second testimony or the prosecutor’s closing argument. This Court should so hold and should reverse.

2. COUNSEL WAS ALSO INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER, PREJUDICIAL HEARSAY WHICH THE PROSECUTION THEN EXPLOITED IN ARGUING GUILT

Reversal is also required because of counsel’s ineffectiveness in failing to object to the admission of improper hearsay which was highly prejudicial to his client.

a. Relevant facts

At trial, without objection, Officer Vause testified that, when the officers were surrounding the house, Officer O’Keefe, Vause’s partner, was talking on the “PA” system, “making announcements to come out of the house,” saying, “Kyle, come out of the house. This is the police.” RP 58-59. O’Keefe himself did not testify about the announcements. RP 40-53.

In initial closing argument, the prosecutor said:

Now, let me get back to why you should find the defendant guilty - - find in that Jury Instruction No. 9, that he is the defendant that did the burglary to the house. Remember that Officer O’Keefe, after he took Michael Barton and put him in the patrol car, before any other officers arrived, before the SWAT team and anybody else, *he was on his PA, saying, Kyle, would you come out of the*

house. Nobody will get hurt, Kyle. Give it up. We've got you surrounded. So, right away, we have the name Kyle associated with this person.

RP 177-78 (emphasis added). Later, in rebuttal closing argument, the prosecutor disputed Knapp's defense that he would not have made the phone call to the police about his car if he was guilty, arguing that Knapp was being smart and creating a "good offense" for his defense by calling the officer with a story. RP 210-11. The prosecutor declared:

He knows, essentially, that they're after him. He's also heard, when he's in the house, Officer O'Keefe on the PA system, saying, Kyle, come out. The jig's up.

RP 211 (emphasis added).

b. Counsel was again ineffective and reversal is required

Once again, counsel was ineffective in failing to object or move for a mistrial on his client's behalf. The statements were inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless it falls within a specific hearsay exception. See ER 802, 803, 804.

Here, Officer Vause's testimony was about what Officer O'Keefe said on the PA system. And it was offered for the matter asserted - to prove that it was Kyle Knapp inside the house and thus tie him to the crime. RP 58-59. Indeed, that is *exactly* what the prosecutor used the testimony for, both in initial and rebuttal closing argument, when he told the jury that the police "right away" had "the name Kyle associated" with the second suspect, the burglar, and that Kyle had known that the "jig's

up” when he heard his name on the PA system and that explained why he craftily called police to pretend not to know his car was involved in a crime. RP 177-78, 210-11.

There could be no reasonable tactical reason for counsel to fail to object after the improper testimony and move for a mistrial at that time. Again, even if the failure to object to the initial testimony could be seen as a reasonable desire not to draw attention to the testimony, there certainly could be no reason to object once the prosecutor specifically relied on that evidence as evidence of guilt. Certainly the officer’s “state of mind” was not at issue. And there was *nothing* in the record indicating why the officer would have used the name Kyle over the PA system. Instead, the testimony was simply hearsay designed to serve as evidence that Knapp *was* the person in the house. As such, it was improper. See, e.g., State v. Johnson, 61 Wn. App. 539, 545-49, 811 P.2d 687 (1991).

Again, counsel’s ineffectiveness compels reversal. The hearsay admitted was a crucial link in the prosecution’s chain of circumstantial evidence. The prosecution specifically relied on that link as implying that the officers already knew that “Kyle” was involved. RP 177-78. Because there was nothing in the record explaining how they would know that, the jury could only speculate that there was some evidence those trained officers had but which jury was being prevented from hearing.

It is Knapp’s position that no curative instructions would have been sufficient to cure the prejudice caused by the introduction and then exploitation of the improper evidence. But again, that does not forgive counsel’s failures. There was no legitimate reason for counsel to fail to

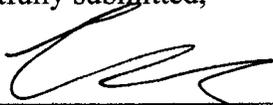
object. There was no exception to the hearsay rule which would have supported the evidence coming in, given its highly prejudicial nature. And given the weaknesses in the state's case and its reliance on the evidence as evidence of guilt not once but twice in closing arguments, had the evidence been excluded, it would likely have affected the outcome of the trial. This Court should also reverse based upon counsel's ineffectiveness in relation to this improper and highly prejudicial hearsay.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 19th day of November 2007.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Kyle Knapp, 523 S. 144th Street, Tacoma, WA. 98444.

DATED this 19th day of November, 2007.


KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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