

No. 36392-5-II

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

STATE OF WASHINGTON,

Respondent,

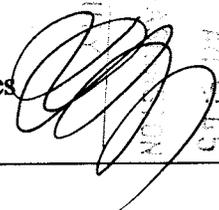
v.

STEPHEN P. SULLIVAN,

Appellant.

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

The Honorable Linda C.J. Lee, and
the Honorable Katherine M. Stolz, Judges



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STATE OF WASHINGTON
BY
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COURT OF APPEALS
DIVISION II

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed prejudicial, improper misconduct affecting Mr. Sullivan's constitutional rights to silence and to be free from self-incrimination, both at trial and in closing argument.

2. Mr. Sullivan did not receive effective assistance of counsel as required by the Sixth Amendment and Article I, § 22.

3. The trial court abused its discretion in failing to grant a motion for mistrial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Sullivan was accused of committing residential burglary for his alleged entry through the front door of a home. He was also accused of making a false or misleading statement to police after his arrest, for giving the wrong name and date of birth. His defense to the burglary was that he accidentally entered the wrong home looking for a couch a friend had told him he could pick up.

After he was advised of his rights, Sullivan answered a few police questions but then invoked those rights and said nothing further.

In rebuttal closing argument, the prosecutor told the jury that Sullivan had "ample time" to correct the name and information he had given to police after his arrest but did not do so. Counsel's motion for a mistrial based upon this comment on Sullivan's silence was denied. Did the court abuse its discretion in denying that motion where only a mistrial would have ensured that Sullivan received his constitutionally guaranteed rights to a fair trial?

2. At trial, the prosecutor also elicited testimony from an officer that Sullivan never gave police the name of the friend who had told

him about the couch. In closing argument, the prosecutor characterized that failure as that Sullivan either could not or would not tell police the name. The prosecutor used that failure as evidence of guilt and to denigrate the defense.

Were these comments improper, prejudicial evidence inviting the jury to draw a negative inference from Sullivan's exercise of his rights where Sullivan's "failure" to give police information was based upon his decision to exercise his constitutional rights to silence and to be free from self-incrimination?

Further, was counsel prejudicially ineffective in failing to object or move for a mistrial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Stephen P. Sullivan was initially charged by amended information with residential burglary, making a false or misleading statement to a public servant and making or having burglar tools. CP 93-94; RCW 9A.52.025; RCW 9A.52.060; RCW 9A.76.175. The residential burglary charge was also alleged to have been aggravated by the presence of the victim in the home. CP 93-94; RCW 9.94A.535(3)(u).

After several continuances including one on March 6, 2007, before Judge Stolz, trial was held before Judge Lee on May 3, 7-9 and 11, 2007. MRP 1; RP 1, 42, 135, 194, 265.¹ After Judge Lee ordered suppression of the alleged burglar tools, the case proceeded only on the residential

¹The verbatim report of proceedings consists of seven volumes, which will be referred to as follows:
motion hearing of March 6, 2007, as "MRP;"
the six chronologically paginated volumes containing the trial and sentencing, as "RP."

burglary and false statement counts, and, on May 11, 2007, the jury found Mr. Sullivan guilty as charged. CP 34-35, 97-100. On June 1, 2007, Judge Lee agreed with the prosecutor that standard-range sentences were appropriate and imposed such sentences on both counts. RP 278-88; CP 101-114.

2. Testimony at trial

Pierce County Sheriff's Department (PCSD) deputy Robert LaTour was working the night shift on January 19, 2007, with his field training officer, PCSD deputy Robert Carpenter, when they got a call indicating there was a burglary at an address on Waller Road. RP 101-103, 144-45. When they arrived in the area, LaTour saw a mountain bike propped up against a fence adjacent to the home. RP 103-104. They contacted the person in the house, Sharon Schaefer, who told them she had taken a bath at about 11 p.m. that night and was warming up something to eat in her kitchen when she heard a noise. RP 104-106, 159-65. She thought it was her granddaughter returning home but then saw something "blue" outside her kitchen window. RP 164-65.

Schaefer ran to grab a bathrobe. RP 165. By this time her dogs were barking. RP 166. She went back down her hallway and saw somebody "backing through" her front door very slowly. RP 167. Schaefer had not locked her door. RP 167.

Schaefer said all she could see was the person crouched down and a gray hood. RP 167. She said the person closed the door and turned around very slowly, so she could see he had curly hair. RP 167. She then yelled, "[w]hat the hell are you doing here?" RP 167. He said he was there looking for a couch. RP 167. Schaefer ran into the kitchen, grabbed

her telephone and called police. RP 168. As she was on the phone with them, she heard a siren begin. RP 169. It was only moments. RP 169.

At trial, Schaefer testified that the man made it about five feet down the hall. RP 174. In her statement to police, however, she said he was just "several feet" inside the house. RP 184.

Schaefer admitted the man never threatened her. RP 182. She told police that he appeared "disoriented." RP 187. In her phone call to police, she also said that he looked "confused." RP 242.

From the kitchen patio where she now stood, Schaefer saw the man walk down her driveway and look back towards the house. RP 169, 181.

When police arrived, Schaefer gave them a description and Carpenter began to drive around a little in the area in his patrol car, conducting a "search." RP 105, 146. The description Schaefer gave was of a white male, approximately six feet tall, with curly hair and a dark, hooded jacket with grey on the sleeves. RP 147.

LaTour said the officers saw a man walking towards Schaefer's property on Waller, and Carpenter told LaTour the man was "a suspect." RP 106. The man was about two blocks north of Schaefer's home, walking. RP 147-48.

Carpenter "confronted" the man "at gunpoint," ordering the man to stop and show his hands, then placing the man in handcuff restraints. RP 148-49. The man, later identified as Stephen P. Sullivan, was asked if he had any weapons and said he did not, which the officers confirmed with a search. RP 107-108.

Sullivan was driven in the patrol car back to Schaefer's home. RP 149-50. Schaefer saw Sullivan in the back of the police car and identified

him as the person she thought was in her house. RP 170, 182.

LaTour testified that, when he asked Sullivan for his name, he said he was Kevin Charles Sullivan, and gave his date of birth of 09/03/59. RP 110. A PCSD deputy who transported Sullivan testified that, at some point, he learned that Sullivan's true name was Stephen Paul Sullivan. RP 94-99. Sullivan had a temporary Washington State identification with that name. RP 100. After learning Sullivan's correct name, LaTour said, he had to change the name in his incident report. RP 116.

No forensic officers were ever called to come out to the house and do any examination of the doorknob or other evidence, to verify if what Schaefer said had actually occurred. RP 114. LaTour denied that this was because they already had Sullivan in custody, claiming that it was instead because LaTour did not believe there was "any evidence needing Forensics callout." RP 115, 129. LaTour admitted, however, that forensics could "certainly get fingerprints off" a doorknob. RP 129.

As part of an arrest, both LaTour and Carpenter admitted, they usually retrieve someone's wallet in a search incident to arrest. RP 122, 156. Carpenter thought he had recovered the wallet, but could not recall if he looked inside. RP 156. LaTour did not recall if the wallet was even retrieved. RP 156.

Sullivan told police the mountain bike was his. RP 111. He said he had gone to the house for a couch his friend had said was available there. RP 109. Sullivan also told police he had obviously gone to the wrong house. RP 122. LaTour noted, however, that Sullivan had not

given the officers his friend's name or tell them who he was. RP 109.²

LaTour asked Sullivan if he had actually entered Schaefer's residence and Sullivan said he had not, noting there were "a million dogs" barking inside. RP 108. LaTour claimed that, when asked how he knew about the dogs, Sullivan "stammered and stuttered as if searching for an answer" and then said he could hear them. RP 109.

LaTour admitted, however, that he was himself able to hear Schaefer's dogs barking from outside the front door, when standing on the porch. RP 117-21.

The stretch of road on which Schaefer lived had several businesses, including an auction house near where the bicycle was found. RP 117-18. It was quite dark that night. RP 118. LaTour was "quite sure," however, that there were streetlights at the corner near the house. RP 127. Morgan Armijo, a private investigator, went to Schaefer's street at night and testified there were no streetlights and no lights in Schaefer's driveway that would have illuminated it. RP 205-209.

D. ARGUMENT

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR'S IMPROPER, PREJUDICIAL MISCONDUCT VIOLATED APPELLANT'S IMPORTANT CONSTITUTIONAL RIGHTS, THE COURT ERRED IN FAILING TO GRANT A MISTRIAL, AND COUNSEL WAS INEFFECTIVE

Prosecutors have special duties not imposed on other attorneys, including a duty to seek justice instead of acting as a "heated partisan" in an effort to win a conviction. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415

²This "failure" occurred after Mr. Sullivan had invoked his rights. See RP 56-58. More discussion on this issue is contained in the argument section, *infra*.

(1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, he or she not only deprives the defendant of his due process right to a fair trial but also denigrates the integrity of the prosecutor's role. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In this case, this Court should reverse, because the prosecutor committed serious, prejudicial misconduct which deprived Mr. Sullivan of his right to a fair trial and directly implicated his other important constitutional rights. Further, the trial court abused its discretion in denying the defense motion for a mistrial. Finally, to the extent that counsel failed to argue the full scope of the error and prejudice to Mr. Sullivan, counsel's ineffectiveness compels reversal.

a. Relevant facts

At the pretrial motion to suppress, Deputy LaTour first testified that Mr. Sullivan had not asked for an attorney or invoked his right to remain silent when he was questioned after his arrest. RP 57. A moment later, the officer corrected himself, stating that Sullivan had, in fact, said he wanted to invoke his right to silence after answering a few questions. RP 57.

In arguing about whether the statements to police should be admitted, counsel presented the alternative argument that, if the court found the statements themselves admissible, it should nevertheless exclude any testimony indicating that Sullivan had invoked his rights to remain silent at some point and the interrogation had thus been stopped. RP 64-65. The court asked the prosecutor to address the issue and the

prosecutor responded that “the jury has the right to see the whole picture.” RP 67. The prosecutor also argued that it was proper to tell jurors that the reason police had stopped interviewing Sullivan was because he did not want to answer any more questions. RP 67.

Initially, the court ruled against Sullivan. RP 67-68. After counsel presented caselaw to the court, it reversed its ruling and ordered the prosecution to instruct its witnesses that they could not testify that Sullivan had invoked his rights. RP 68-70.

At that point, the prosecutor asked if it would be proper to simply say the interview was “terminated,” without stating why. RP 70-71. Counsel objected that such testimony “really does step right up to the line” of an improper comment on Sullivan’s exercise of his rights. RP 72. The court did not agree and ruled in the prosecution’s favor. RP 72.

During trial, the prosecutor asked Deputy LaTour about the interview of Mr. Sullivan after his arrest. See RP 109-10. The prosecutor elicited testimony from the deputy that Mr. Sullivan did not tell police certain information, such as the name of the friend he claimed had told him about the couch and where to find it. RP 109-110.

Then, in closing argument, the prosecutor commented on Mr. Sullivan’s failure to tell police certain information during the brief interview, saying Sullivan “in fact. . .*wouldn’t or couldn’t name the buddy that gave him the wrong address.*” RP 231 (emphasis added).³ The prosecutor then told the jury that a burglar would have done exactly what Sullivan did. RP 232.

³Counsel’s ineffectiveness in failing to object is discussed, *infra*.

In her closing, counsel argued that the Mr. Sullivan had not entered the house with any intent to commit the crime but was just confused, looking for the house where he was supposed to pick up a couch and unfortunately entering the wrong home. RP 244-45. Regarding the false statement crime, she suggested that the officers could have seen the correct name and information and might have done so if they actually looked in the wallet as they testified they usually do. RP 245-46. She also argued that the correct name and information was somehow not “material,” because it simply resulted in rewriting of the report. RP 245-26.

In rebuttal, in arguing that Mr. Sullivan was guilty of the crime of making a false statement, the prosecutor said

the defendant had ample time, although there’s nothing in the instructions about timing when giving a false statement. He is transported by other deputies. There was no testimony at any time he did decide, “You know what? I better give them my real name and real date of birth.”

RP 250-51 (emphasis added).

At that point, counsel told the court she needed to make a motion outside the presence of the jury. RP 251. With the jury gone, counsel moved for a mistrial, arguing that the prosecutor had commented on Mr. Sullivan’s invocation of his right to remain silent by arguing “why didn’t [Sullivan] . . . now tell them [police] X, Y, and Z” and implying guilt based upon that failure to speak. RP 251. She pointed out that Mr. Sullivan had invoked his rights at that point and that was why there was no further information. RP 252. She also noted that Mr. Sullivan did not have a duty to tell police *anything* and had a right to invoke his right to remain silent without the government penalizing that silence at trial. RP 252.

Counsel said she hated to move for a mistrial so late in the trial. RP 252. She did not believe, however, that there was any chance an instruction would be able to cure the error on a “huge, critical issue in a case like this, where the evidence is so equivocable [sp]” as to Sullivan’s “intent to commit a crime inside that house.” RP 252. She also stated her fear that a “curative instruction” would do more harm than good. RP 253.

The prosecutor said he had not meant to make any improper comments and was “merely responding” to counsel’s arguments, which he claimed were that the officers could have found Mr. Sullivan’s ID because it was in his wallet and in his pocket. RP 253. Counsel clarified that she was not saying the prosecutor had deliberately made the comments but that the comments had nevertheless had the improper effect. RP 253. She reiterated her concern that any curative instruction would not be “sufficient to undo what has happened.” RP 253.

In ruling, the court first recognized that the state may not “invite the jury to draw a negative inference from the defendant’s exercise of his right,” but that not all mention of rights amounted to such improper comments. RP 254. The court concluded that the “focus of the statement” the prosecutor had made was not on the exercise of the defendant’s right to remain silent but instead was just a comment on “what evidence or lack of evidence there was.” RP 255.

Although counsel maintained that the curative instruction would not “fully overcome[] the prejudice” caused by the prosecutor’s argument, the court decided to give such an instruction. RP 255-56. With the jury back in, the court told the jurors to “disregard the last statements” made by the prosecutor in rebuttal, that the defendant had a constitutional right to

remain silent and that “no adverse inference” could be drawn from exercise of a constitutional right. RP 257.

b. Reversal is required

This Court should reverse, because the prosecutor’s arguments were serious, prejudicial misconduct which not only violated Mr. Sullivan’s rights to a fair trial but also implicated his rights to remain silent and to be free from self-incrimination. Further, the court erred in failing to grant the motion for mistrial. Finally, reversal is required based on counsel’s ineffectiveness in relation to this issue.

As a threshold matter, where counsel objects to misconduct below, the Court usually reviews in order to determine whether there is “a substantial likelihood that the comments affected the jury’s verdict.” State v. Barrow, 60 Wn. App. 869, 877, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Where counsel fails to object, the Court reviews to determine if the misconduct was so flagrant, prejudicial and ill-intentioned that it could not have been cured by instruction had counsel requested one. State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). Counsel’s ineffectiveness in failing to object may also be raised on appeal. See, e.g., State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Here, counsel objected to some but not all of the prosecutor’s misconduct. See RP 109-10, 231-32, 250-51. But neither the “substantial likelihood” or “flagrant and ill-intentioned” standards apply. Instead, where, as here, the misconduct directly implicates the defendant’s constitutional rights, the “constitutional harmless error test” applies. See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); see also, State

v. Traweek, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986), overruled in part on other grounds by, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Under that standard, reversal is required unless the prosecution can meet the heavy burden of proving that any reasonable jury would have reached the same conclusion, even absent the error. Easter, 130 Wn.2d at 242.

The prosecution cannot meet that burden here, because the comments repeatedly invited the jury to draw a negative inference from Mr. Sullivan's exercise of his pretrial constitutional rights to silence and against self-incrimination.

There were effectively two sets of misconduct in this case. First, there was the misconduct the prosecutor committed by eliciting testimony from the officer about and commenting on Sullivan's failure to tell the police the name of the friend who told him about the couch. Second, there was the misconduct the prosecutor committed in arguing that Sullivan had "ample time" to give the officers his real name and date of birth and did not do so. Counsel failed to object to the first misconduct, but objected to and moved for a mistrial based upon the second.

Taking the second set of misconduct first, the comments were constitutionally improper because they invited the jury to draw a negative inference from Mr. Sullivan's exercise of his pretrial rights to silence and against compelled self-incrimination. There can be no question that Mr. Sullivan enjoyed such rights. See Easter, 130 Wn.2d at 243; see Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). And he was clearly entitled to invoke them at any time. Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R. 974 (1966). That is what he did, according to the officer, after just a few questions. RP

57.

As a result, Mr. Sullivan's silence i.e., his subsequent "failure" to speak to the officers and give them his correct name and information, was constitutionally protected. He had no duty to speak further to police. Indeed, he was constitutionally entitled *not* to. The exercise of the constitutional rights guaranteed under Miranda "must be without penalty." State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002).

An impermissible comment on the accused's silence occurs when that silence is used to the state's advantage either as substantive evidence of guilt or when the state suggests the silence somehow indicates guilt. See State v. Lewis, 130 Wn.2d 700, 706-707, 927 P.2d 235 (1996).

The prosecutor's argument that Sullivan had "ample time" to tell police his correct name and information and the implication that this failure to do so somehow indicated guilt was thus an improper comment on Mr. Sullivan's pretrial rights to be free from self-incrimination and to invoke his right to silence.

The first set of misconduct was equally if not more improper. That misconduct involved the prosecutor 1) eliciting testimony from the deputy that Sullivan did not tell police the name of the friend he said told him about the couch (RP 109-10), and 2) commenting on that failure in initial closing argument by implying guilt based upon the "fact" that Sullivan "*wouldn't or couldn't name the buddy that gave him the wrong address*" when he was interrogated by the police. RP 231 (emphasis added).

There is no question that the prosecutor may properly comment on holes in a defendant's statement to police when the defendant chooses to

waive his rights and gives one. See, e.g., State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001). In such situations, the defendant has waived his rights to remain silent and against self-incrimination and those rights are no longer an impediment to the prosecutor's comments. See State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171, cert. denied sub nom Young v. Washington, 439 U.S. 870 (1978). Put another way, once waived, if not reinvoked, the rights do not immunize a defendant from criticism about holes or weaknesses in a statement he gives after such a waiver. See State v. McFarland, 73 Wn. App. 57, 65, 867 P.2d 660 (1994), affirmed, 127 Wn.2d 322, 899 P.2d 1251 (1995).

But here, the rights *were* reinvoked. RP 57. There was no full statement, or complete questioning. There were only a few questions and answers and then silence. And that silence was the result of Sullivan's exercise of constitutionally protected rights.

The same principles which allow a prosecutor to comment about omissions in a full version of events when the defendant has waived his rights do not apply in these circumstances. When there is a waiver, there is no "silence." Young, 89 Wn.2d at 621. Remarks on omissions in a full version of events are thus not comments on "silence." Id.

Further, in cases where the defendant has waived his rights, there is no possibility that his failure to mention certain things in his version of events was based upon reliance on the Miranda warnings. Id. The U.S. Supreme Court has held that it would be "fundamentally unfair" and a violation of due process for the state to use a defendant's silence against him after promising him that no such use will occur. Doyle, 426 U.S. at

617-18. Where there is a waiver, there is no concern that mentioning omissions would somehow amount to penalizing the defendant for his silence while at the same time assuring him that silence in the face of accusation will “carry no penalty.” Young, 89 Wn.2d at 621 (quoting, State v. Osborne, 50 Ohio St. 2d 211, 364 N.E. 2d 216 (1977), reversed in part and on other grounds sub nom Strodes v. Ohio, 438 U.S. 911, 98 S. Ct. 3135, 57 L. Ed. 2d 1154 (1978)).

But where, as here, there *was* silence and that silence was the direct result of the defendant’s exercise of his constitutional rights, comments on the defendant’s silence are clearly comments on the exercise of his rights. See Curtis, 110 Wn. App. at 11-12. And it would be “fundamentally unfair” to allow the state to argue, as it did here, that the defendant’s silence meant something in relation to guilt. This is especially true because, as the Supreme Court has recognized, the silence which results from invocation of rights is “insolubly ambiguous,” not evidence of guilt. Doyle, 426 U.S. at 617-18.

Put another way, either eliciting testimony or commenting in closing about an arrested persons exercise of his Miranda rights “circumvents the Fifth Amendment right to silence as effectively as questioning the defendant himself.” Curtis, 110 Wn. App. at 11-12.

Unlike in the situation of a full interrogation, the “holes” here were based upon an act which was “insolubly ambiguous”- the exercise of constitutional rights. Yet the state used those “holes” (i.e., the failure to give police the relevant name and the failure to give police correct information when he had the opportunity) to imply guilt and denigrate Mr. Sullivan’s defense.

Reversal is required for both sets of misconduct. For the second set, reversal may be based upon either the misconduct itself or the trial court's abuse of discretion in refusing to grant a mistrial. For the first set, either the misconduct or counsel's unprofessional failures support reversal.

Regarding the misconduct, again, where, as here, the misconduct is a direct comment on the defendant's constitutional rights, the constitutional harmless error standard applies. Easter, 130 Wn.2d at 242. To satisfy that test, the prosecution must meet the heavy burden of showing that any reasonable jury would reach the same conclusion absent the error. Id.; see 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. Guloy, 104 Wn.2d at 425.

Here, the standard is not met. At the outset, it is important to note that the "overwhelming evidence" test is *not* the same as the test used when a defendant argues insufficiency of the evidence. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Instead, the "overwhelming evidence" test requires far more.

Romero, supra, is instructive. In that case, the defendant was charged with first-degree unlawful possession of a firearm after officers responded to a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783-84. An officer using a flashlight saw Romero coming around the front of a mobile home, holding his right hand behind his body. Id. Although the officer repeatedly ordered Romero to show his hands, Romero refused and would not step away from the mobile home. Id. Finally, Romero ran around the side of the home and

disappeared. Id.

Romero was later found inside the mobile home, as was a shotgun. Id. Shell casings were also found on the ground, next to the home's front porch. Romero, 113 Wn. App. at 783.

Descriptions of the shooter seemed to point to Romero, and an eyewitness also identified him. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive about the identification, she also said the shooter was wearing a blue-checked shirt. Id. Romero's shirt was grey-checked, not blue, and another man seen with Romero that night had on a blue-checked shirt. Id. When shown the shirt Romero was wearing, however, the eyewitness identified it as that of the shooter. Id.

On appeal, the defendant argued both that there was insufficient evidence to support a firearm possession conviction and that certain testimony of the officer were constitutional error compelling reversal. 113 Wn. App. at 783-95. The appellate court first found that, taken in the light most favorable to the state, the evidence was sufficient to support the conviction. 113 Wn. App. at 794.

But that very same evidence was insufficient to satisfy the constitutional harmless error test. 113 Wn. App. at 794. Because the state's evidence was disputed and the jury was "[p]resented with a credibility contest," the Court held, the improper comments "could have" had an effect. 113 Wn. App. at 795-96. The Court reversed because it could not say that "prejudice did not likely result due to the undercutting effect on Mr. Romero's defense." Id.

Similarly, here, while it is arguable whether there was sufficient

evidence to support especially the burglary conviction, there is clearly not “overwhelming” evidence on that charge. The prosecution’s claim regarding the essential element that Sullivan had the required “intent to commit a crime” inside the house was based almost completely on the inference that he must have had such intent simply because of his entry. There was no other evidence truly supporting such intent - no threats, no threatening gestures, no mask over Sullivan’s face, etc.

Further, the prosecution’s own main witness - the victim - testified that Sullivan was “disoriented,” appeared confused, and specifically said he was in the home for a couch, all of which supported the defense. See RP 187, 242.

The prosecutor’s repeatedly drawing the jury’s attention to Sullivan’s failure to speak to police - his “failure” to give them the name of his friend who had told him about the couch and its location, and his “failure” to give police the correct name and address when he had the chance - clearly invited the jury to find guilt based upon Sullivan’s exercise of his constitutional rights. It is not possible, on this record, for the prosecution to prove that “prejudice did not result” from the improper comments. The prosecution therefore cannot satisfy the “constitutional harmless error” test regarding the misconduct in this case.

For the first acts of misconduct, reversal can also be predicated on counsel’s ineffectiveness. Both the state and federal constitutions guarantee 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. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason to fail to object. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would likely have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Sullivan can meet all of these requirements here. There was no legitimate tactical reason to fail to object when the prosecutor implies your client's guilt based upon the exercise of a right. Even if there could be a tactical reason to fail to object when the testimony was elicited (i.e., to avoid drawing attention to the misconduct), there could be no such reason to fail to move to preclude further such testimony or its exploitation by the state, once the initial error had occurred.

Further, the comments in this case clearly impugned Sullivan for

failing to give evidence i.e., failing to speak, when he was constitutionally entitled to do so. Had counsel objected, the court would likely have sustained the objection and at least attempted to minimize the prejudice to Mr. Sullivan.

And the exclusion of the “evidence” would likely have affected the result of the trial. Again, the evidence in this case was far from overwhelming. Sullivan’s defense was supported not only by the arguments of counsel but also by Sullivan’s brief answers to the initial questions by police (establishing that he was there for a couch), Sullivan’s statement as reported by Schaefer that he was at the house for a couch, and Schaefer’s admission that Sullivan seemed disoriented and confused about what was happening.

Counsel was ineffective in failing to object to the flagrant, prejudicial misconduct regarding Sullivan’s failure to waive his rights and give a full statement. This Court should so hold and should reverse.

Finally, reversal is required because the superior court abused its discretion in failing to grant the defense request for a mistrial after the second misconduct. In deciding whether to grant or deny a motion for a mistrial, the superior court is tasked with deciding if the complained of trial irregularity (here, the misconduct), deprived the defendant of a fair trial. See State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In making its ruling, the superior court should examine 1) the seriousness of the irregularity, 2) whether the irregularity was “cumulative” of other properly admitted evidence, and 3) whether a curative instruction would be sufficient to cure the prejudice. 99 Wn.2d at 165-66.

Here, the superior court did not address, on the record, the “cumulative” nature of the misconduct, nor its seriousness. See RP 253-55. Instead, after first correctly recognizing that the prosecutor was constitutionally prohibited from drawing a negative inference from exercise of a constitutional right, the court then incorrectly found that the comments here were simply comments on “evidence or lack of evidence.” RP 254.

The court thus missed the point. The “lack of evidence” upon which the prosecutor remarked was not of the “garden variety.” It was the *direct result* of Sullivan’s exercise of his rights to remain silent and be free from self-incrimination. The “lack” was Sullivan’s “failure” to speak. And that “failure” was not a “failure” but instead the exercise of constitutional rights.

Notably, a prosecutor may not comment on a “lack of evidence” at trial if the evidence the prosecutor claims is missing could only have come from the defendant. See, e.g., State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995).

Reversal is required. A trial court’s decision to deny a motion for a mistrial will be overturned if there was a “substantial likelihood” the error affected the jury’s verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). There is more than such likelihood here. The incident was extremely serious, touching on one of Sullivan’s fundamental rights and telling the jury, effectively, that it should find Sullivan guilty for failing to provide police with certain evidence. And as noted, *infra*, the evidence in this case was far from overwhelming.

Further, this is not the kind of error which can be cured by instruction. Division Three and the 9th Circuit have both questioned whether a curative instruction can ever be sufficient to “unring the bell” once the prosecution has commented on the defendant’s exercise of his rights to remain silent and be free from self-incrimination. See Curtis, 110 Wn.2d at 15-16. Here, there were not one but two separate instances of improper comments on those rights, further cementing the prejudice caused to Mr. Sullivan. Either based upon the misconduct, the error in denying the motion for mistrial, or counsel’s ineffectiveness, this Court should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 7th day of January, 2008.

Respectfully submitted,



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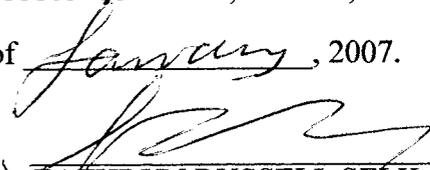
CERTIFICATE OF SERVICE BY MAIL

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. Stephen P. Sullivan, 11105- 33 Ave E., Tacoma, WA. 98445.

DATED this 14th day of January, 2007.


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