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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DARNELL LARRY MORRIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chuschcoff

No. 07-1-01758-7

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant receive a fair trial where the prosecutor's statements were proper comments on the State's own evidence, and defendant received constitutionally effective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Darnell Morris, on April 2, 2007 with one count of burglary in the second degree. CP1-2.

Trial commenced on August 7, 2007 in front of the Honorable Bryan Chuschcoff. RP 4. A CrR 3.5 hearing was held on August 8, 2007 and the court ruled that defendant's statements were admissible. RP 28. On August 13, 2007, the jury found defendant guilty. RP 188, CP 41.

Sentencing was held on October 26, 2007. RP 196. Defendant had an offender score of seven. RP 201, CP 42-53. Defendant's sentencing range was 33-43 months. RP 196, CP 42-53. The court sentenced defendant to the high end of 43 months. RP 205, CP 42-53. Defendant filed this timely appeal. CP 54.

2. Facts

Defendant Darnell Morris entered the Macy's at the Tacoma Mall on March 30, 2007. Defendant went to the watch department. RP 55, 114. An associate in the watch department recognized the defendant because he had been trespassed from the store on a previous occasion. RP 78. The associate called security. RP 78. While he was there, defendant took two watches from the clearance spinner. RP 56, 115. Defendant then proceeded to the handbag department and hid the watches in his jacket. RP 56-57, 116. Defendant proceeded to exit the Macy's store without paying for the watches. RP 58-59, 118. Defendant passed multiple registers on his way out of the store, but never made an attempt to pay for the watches. RP 59, 118, 141.

Defendant was apprehended by store security who had watched him select the watches, hide the watches, and leave the store without paying for the watches. RP 55-60, 114-116, 139. Defendant was detained and read his Miranda rights. RP 61, 71. The watches were recovered from defendant. RP 61, 120, 142. The watches were \$102.51 each. RP 116. Defendant stated that he had fucked up and that he was going to sell the watches. RP 37

Macy's has a policy of trespassing every shoplifter for a period of one year. RP 53-54. Defendant had previously been at the same Macy's location on February 6, 2007. RP 83-84, 121. Defendant was trespassed from the store at that time. RP 83-84. Defendant was verbally trespassed

as the written trespass form was read to him. RP 83-84, 131-2, 145. Defendant could not sign the form because he was handcuffed. RP 83-84, 89, 128. Defendant stated that he understood the trespass form. RP 86, 123, 145. Defendant was given a second trespass notice on March 30th. RP 64-65. The second trespass extended the time period for one year from the new date. RP 65. Some of the loss prevention officers for Macy's were present on both February 6th and March 30th. RP 121, 139, 145.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR WERE COMMENTS ON THE STATE'S OWN EVIDENCE, AND DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

a. The prosecutor's closing argument contained comments on the State's own evidence and did not comment on defendant's right to silence or shift the burden to the defendant.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). To prove that a prosecutor's actions constitute misconduct, defendant must show that the prosecutor did not act in good faith and the

prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

In the instant case, defendant did not object to any statements during the State's closing argument. As such, the statements would have to be found to be so "flagrant and ill-intentioned" that they caused enduring prejudice in order to require a reversal in this case. The arguments made by the prosecuting attorney do not rise to this level.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 883 P.2d 747 (1994), *citing State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

It is proper for the State to comment on its own evidence. *State v. Traweck*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986), *overruled in part by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)(clarifying that *Traweck* was overbroad in ruling that State may never comment on the defendant's failure to call witnesses or produce evidence.). The State may say that "certain testimony is undenied as long as he or she does not refer to the person who could have denied it." *State v. Fiallo-Lopez*, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995), *citing State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). A statement about undenied testimony only becomes a violation of the defendant's right to remain silent if the statement is "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" *Id.* at 728-729, *citing Ramirez*, 49 Wn. App. at 336, quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), *review denied*, 91 Wn.2d 1013 (1979).

When the court gives an instruction to the jury that the defendant does not have to testify and the jury cannot infer any prejudice or guilt

against defendant, the jury is presumed to follow the instruction. See *State v. Kroll*, 87 Wn.2d 829, 837, 558 P.2d 173(1976), citing *State v. Ingle*, 64 Wn.2d 491, 392 P.2d 442 (1964). Comments about undisputed evidence do not have a prejudicial effect on the defendant if the trial court instructs the jury that “Every defendant in a criminal case has the absolute right not to testify. You must not draw any inference of guilt against the defendant because he did not testify.” *State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403 (1969).

Defendant contends that the State argued that there was no evidence to contradict the testimony of the State’s witnesses. Brief of Appellant, page 10. Defendant does not assign error to any particular statement made by the State and does not indicate where the State made the above argument, but instead argues that the State’s whole closing argument violated defendant’s right to silence. When reviewing the arguments in their entirety, the State did not comment on defendant’s right to silence and did not shift the burden to defendant.

The State was arguing about the undisputed evidence in its own case. Contrary to the prosecutor in *Fiallo-Lopez*, the State never argued that defendant should have presented evidence or shifted the burden to defendant to explain his actions. The State instead pointed out that there had been no evidence to contradict that defendant entered Macy’s unlawfully on March 30th as three of the State’s witnesses testified that defendant had previously been trespassed. RP 162.

After the 6th, that invitation is revoked. It is revoked by this, (indicating.) They gave him the trespass warning telling him that you can't come back here. After the 6th, for one year, until 2008, February of 2008, he did not have permission to go inside that store. The moment that he sets foot in Macy's on March 30th, he is entering the building unlawfully. There has been no evidence to contradict that. You have heard three people testify to that.

RP 162. The State argued that the three of the witnesses on this topic testified in a consistent manner. RP 163, 180. Defense counsel did not object to any of the prosecutors statements.

It is proper for the State to comment on its own evidence. The prosecutor continued his theme of consistency in rebuttal closing when he stated that there was no contradiction between the three witnesses as to whether defendant understood that he had been trespassed from Macy's. RP 180, 184. "What you have is, you have one consistent story. If you look at it, it is one consistent story, and that is, he was trespassed. He was informed of the trespass. He understood it. That's the key." RP 180. "There is no contradiction between any of the three witnesses." RP 184. In talking about the actual theft on March 30th, the State indicated that there was no contradiction about that evidence. RP 185. "Less than two months later, he is back stealing watches. There is no contradiction about that." RP 185. The prosecutor's comments were comments on his own evidence, highlighting the consistencies on the elements the State had the burden to prove. The arguments made by the State were proper.

The jury was also properly instructed that the State had the burden of proof, that defendant did not have to prove that reasonable doubt existed and that defendant was not compelled to testify. CP 27-40 (*See* Instructions 2 & 4). The jury is presumed to have followed these instructions.

The State never stated that there had been no evidence to contradict the State's evidence. Also, contrary to defendant's assertions, the record does not show that the State ever told the jury "that it should hold Morris' failure to rebut the evidence against him." Brief of Appellant, page 12. The arguments made by the State were proper arguments about his own evidence. As these statements were not improper, there is no error. The State's arguments refer only to the State's evidence and do not ever reference defendant, his failure to testify or shift the burden to defendant. As such, there is no issue of a constitutional magnitude and the court should affirm defendant's conviction.

Further, defendant cannot show any prejudice flowing from these statements. The evidence was clear that defendant had been to the same Macy's store on both February 6th and March 30th. In February, defendant was given a trespass notice that prohibited him from entering the store, or any Macy's store, for one year. RP 83-84, 131-2, 145. The evidence showed defendant was read the trespass notice by at least one person and most likely two. RP 83-84, 131-2, 145. Defendant could not have signed the notice because he was handcuffed which was noted on the trespass

notice. RP 83-84, 89, 128. Defendant was not given a copy of the notice as that is not the usual practice. RP 85, RP 128-129, 144. It was clear that defendant understood the trespass as he stated he understood and did not ask any questions. RP 86, 123, 145. As the defense was not disputing the theft of the watches, whether or not defendant knew he could not enter Macy's on March 30th was the only real issue in dispute. There was overwhelming evidence that defendant was informed of and understood that he was trespassed from the store for one year. Should the court find any error, there is no evidence the statements were prejudicial to defendant.

b. Defendant received constitutionally effective assistance of counsel.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel

claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81

Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing *Strickland*, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690;

State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. Conduct that can be characterized as legitimate strategy or tactics cannot serve as a basis for a claim of inadequate representation. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

The record shows that despite the overwhelming evidence against defendant, defendant’s counsel was an advocate for her client. Defense counsel made objections on behalf of her client, and advocated for jury instructions for her client. Defendant counsel also made a closing argument that focused on poking holes in the State’s case, showing how the State’s witnesses had contradicted themselves, and arguing that the witnesses had embellished their testimony. RP 163-179. Defense counsel reminded the jury of her client’s innocence and of the State’s burden and argued that based on these contradictions and embellishment, the State had not met their burden of proving her client guilty beyond a reasonable doubt. RP 163-179. The fact that the jury found the State’s witnesses credible does not render defense counsel ineffective. Defense counsel’s closing argument was a legitimate trial technique. Defendant cannot show

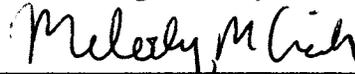
that defense counsel was deficient or that he was prejudiced by her actions. Defendant received effective assistance of counsel.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court to affirm the conviction and sentence below.

DATED: NOVEMBER 18, 2008

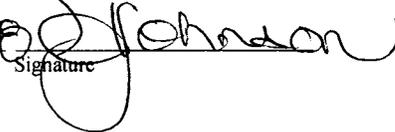
GERALD A. HORNE
Pierce County
Prosecuting Attorney



MELODY M. ERICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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