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COURT OF APPEALS
NOV 14 2017
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STATE OF WASHINGTON
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No. 38064-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT JAMES ALLMAN
(aka JEFFERY RYAN ALLMAN),

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-05664-7
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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10/15/17

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I. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct during closing statements when he repeatedly argued that an innocent person would have provided information to the arresting police officers, thereby commenting on Appellant's decision to exercise his constitutional right to remain silent.
2. The prosecutor committed misconduct during closing statements when he repeatedly argued that an innocent person would have provided information to the arresting police officers and questioned Appellant's failure to call an exculpatory witness to testify at trial, thereby shifting the burden of proof to Appellant.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the prosecutor commit prejudicial misconduct during closing statements when he repeatedly told the jury that an innocent man would have provided exculpatory information to the arresting officers, and when he questioned Appellant's failure to call an exculpatory witness to testify at trial?
(Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

While on routine patrol in South Tacoma on the night of November 3, 2007, Tacoma Police Officers Sean Ovens and Eric Scripps observed a 1988 Toyota MR-2 two-door sedan. (TRP 115, 119, 120, 148)¹ The officers noted nothing unusual or suspicious about the Toyota or its occupants, but they nevertheless ran a records check on the vehicle's license plate number. (TRP 117, 127, 149, 158) The officers learned that the Toyota had been reported stolen. (TRP 119, 149)

The officers immediately pursued the Toyota, which had turned into a Safeway parking lot. (TRP 119, 140) The officers saw Robert James Allman (aka Jeffery Ryan Allman) exit the driver's side of the Toyota, and saw Dedra Caldwell (aka Dedra Browning) exit the passenger side.² (TRP 120, 126, 199) The officers immediately took Allman and Caldwell into custody. (TRP 123, 149-50)

When he conducted a weapons pat-down, Officer Ovens found a flat-head screwdriver in Allman's jacket pocket. (TRP 124)

¹ The trial transcripts, numbered volumes 1 thru 4, will be referred to as "TRP." The transcript labeled "Sentencing Hearing" will be referred to as "SRP."

² In court documents, Allman is referred to as Jeffrey. However, when he testified at the CrR 3.5 hearing, Allman stated that his name is actually Robert, but that he sometimes goes by Jeffrey. (TRP 43)

Ovens also searched the Toyota, and found several keys on the driver's side floorboard and on the floor between the two front seats. (TRP 125) The keys had names of different automobile manufacturers printed on them. (TRP 139-40)

The officers also noticed that the teeth on the various keys appeared to have been shaved down. (TRP 125) Officer Scripps testified that a shaved key can be used to open the doors and start the ignitions of different cars. (TRP 125, 144-46) He explained that a shaved key can be used to defeat the door lock and ignition of a car, and is one method used to steal cars. (TRP 144) Scripps also testified that a screwdriver can be used to turn an ignition cylinder and start a car. (TRP 144-45)

When asked to explain why he was driving the Toyota, Allman told Officer Scripps that he got the vehicle from a woman named Crystal, and that he was preparing to install a stereo in the car. (TRP 151-52) Allman could not provide any additional information about Crystal or her whereabouts.³ (TRP 151-52)

Anthony Fischer testified that he owned a Toyota MR-2. (TRP 170) On the night of November 3, 2007, he parked his car on

³ Allman's custodial statements were deemed admissible by the trial court following a CrR 3.5 hearing. (TRP 78-81; CP 195-97)

the street outside a friend's home in South Tacoma, then left with his friend. (TRP 170-72) When he returned several hours later, the Toyota was gone. (TRP 171-72) He contacted the police and reported that the Toyota had been stolen. (TRP 172)

Later that night, the police notified Fischer that his car had been located. (TRP 173) Fischer went to the Safeway parking lot, and retrieved his car. He noticed that the car's T-tops and stereo were missing. (TRP 173) He noticed no other damage to the vehicle or to the ignition. (TRP 174, 177-78) He was able to start the car without a problem using his key. (TRP 174)

The State charged Allman with one count of unlawful possession of a stolen vehicle (RCW 9A.56.068, .140). (CP 1, 4) At trial, Caldwell testified that she stole the Toyota. (TRP 201) According to Caldwell, she needed to pick up Allman at their friend Crystal's house. (TRP 201, 226) She could not find a car to borrow, so she took the Toyota using one of the shaved keys. (TRP 201) She also used the screwdriver to remove the stereo, and sold it before she went to get Allman. (TRP 203-04)

Caldwell testified that she and Allman were arguing on the drive home. (TRP 204) Caldwell was driving erratically, so Allman decided to drive. (TRP 205) When Caldwell saw the police

officers, she told Allman to turn into the Safeway parking lot. (TRP 208)

Caldwell did not tell Allman that the car had been stolen. (TRP 208) Instead, Caldwell told Allman that the car belonged to Crystal, and that she had agreed to install a stereo into the car for Crystal. (TRP 204) She did not tell Officers Ovens and Scripps this information because she was afraid of going to jail again. (TRP 210-11)

The jury convicted Allman as charged. (TRP 307) At sentencing, Allman requested a continuance in order to obtain a transcript of the prosecutor's closing statements, because he believed the prosecutor made improper arguments. (TRP 317-19) The trial court denied the continuance. (TRP 321)

The trial court denied Allman's request for a DOSA, and sentenced Allman within his standard range to 57 months of confinement. (SRP 9-11; CP 54, 57) This appeal timely follows. (CP 191)

IV. ARGUMENT & AUTHORITIES

To prevail on a claim of prosecutorial misconduct, Allman has the burden of showing both improper conduct and its prejudicial effect. *In re Personal Restraint Petition of Pirtle*, 136 Wn.2d 467,

481, 965 P.2d 593 (1998). In this case, the prosecutor committed misconduct during closing statements when he repeatedly argued to the jury that Allman would have given information to the arresting officers if he were innocent, and when he commented on Allman's failure to call Crystal as a trial witness to corroborate his account.

The State bears the burden of proving every element of its case beyond a reasonable doubt, and it may not shift any part of that burden to the defendant. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Fleming*, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996); *Mullaney v. Wilbur*, 421 U.S. 684, 701-02, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). A prosecutor therefore commits misconduct if he attempts to shift the burden of proof to the defendant. *State v. French*, 101 Wn. App. 380, 4 P.3d 857 (2000); *Fleming*, 83 Wn. App. at 215.

Furthermore, defendants have a constitutional right to remain silent that derives from the Fifth Amendment to the United States Constitution. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). The Fifth Amendment places the burden to obtain evidence on law enforcement, and a defendant has no affirmative duty to provide exculpatory evidence, as a defendant may assert the right to remain silent at any time. *See State v. Heller*, 58 Wn.

App. 414, 418-21, 793 P.2d 461 (1990).

In a criminal proceeding, the State may not make closing arguments relating to a defendant's pre- or post-arrest silence to infer guilt from such silence. *Easter*, 130 Wn.2d at 243. A direct comment on a defendant's silence occurs when the State uses the comment as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. See *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002) (quoting *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). The State may not focus on the defendant's failure to make a statement in such a way as to imply guilt. See *State v. Belgarde*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988).

For example, in *State v. Heller*, the defendant challenged the prosecutor's questions regarding whether the defendant had ever gone to the police after her original interrogation. 58 Wn. App. at 418-19. The court found this questioning impermissible because it suggested the defendant's silence during her freedom from custodial interrogation should be interpreted as implying guilt or as a comment on her right to remain silent. 58 Wn. App. at 421 (quoting *State v. Apostle*, 8 Conn. App. 216, 226-27, 512 A.2d 947 (1986)).

Likewise, in *State v. Keene*, the detective testified that she called the defendant several times to talk and warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again. 86 Wn. App. 589, 592-94, 938 P.2d 839 (1997). The prosecutor subsequently argued that the jury could decide if the defendant's failure to contact the detective was the act of an innocent man. 86 Wn. App. at 594. The appellate court found that the prosecutor's statement was an impermissible comment on Keene's silence, and reversed the conviction. 86 Wn. App. at 594-95.

During closing statements in this case, the prosecutor made the following arguments to the jury:

- And what evidence is there to indicate that the defendant knew the car was stolen? Well, let's look at the facts. He tells the officers he got the car from Crystal. But the officers can't get any information out of him about who Crystal is. What does an innocent man do in the same situation? "Well, I was just driving the car, and I borrowed it from a friend. I was going to put a stereo in it for her. As you can see there is a stereo missing." "Who's your friend." "Crystal Smith. You know, she lives over in Tillicum on XY Street." (TRP 260-61, emphasis added)
- So an innocent person would tell the officer who the car is from, why he had it, and actually know who the person is that he supposedly borrowed the car from. (TRP 261, emphasis added)
- Is it reasonable to believe that the defendant didn't know the

car was stolen under these circumstances, when he tells one story to the officers, refuses to give full information to the officers. (TRP 266, emphasis added)

- The defendant tried to talk his way out of a crime, and he got it wrong, because he didn't give the officers information that somebody telling the truth would give them. "And Crystal is my friend who lives in Tillicum, I have known her for so long, her last name is such and such, you can reach her this way. Call her, ask her, because I just got the car from her, or my friend did." . . . That's what somebody telling the truth does. (TRP 287-88, emphasis added)
- Why would somebody innocent tell the officers somebody else's name? And then use a story that his girlfriend supposedly gave him and then not be willing to fill in the details that an innocent person would naturally provide to the officers. (TRP 288-29, emphasis added)
- [H]e doesn't tell the officers any more information about Crystal aside from her first name. I don't know if Crystal exists. Who knows? It's awfully convenient. If she does exist, why isn't she here? (TRP 296, emphasis added)
- Innocent people provide that information who Crystal is, what her last name is, how to [reach] her. Innocent people don't provide false names. (TRP 297, emphasis added)
- [T]he refusal to provide information about the story regarding Crystal It just doesn't make sense. (TRP 302, emphasis added)

The prosecutor here made repeated comments implying that Allman had an affirmative duty to provide exculpatory evidence or witnesses, and that his failure to do so was evidence of his guilt. By interjecting Allman's silence into closing argument and by relying on Allman's refusal to give additional information as substantive

evidence of guilt, the prosecutor impermissibly commented on Allman's right to remain silent. See *Romero*, 113 Wn. App. at 790 (citing *Easter*, 130 Wn.2d at 236; *Lewis*, 130 Wn.2d at 705).⁴

Absent a proper objection, Allman is required to show the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). However, the cumulative effect of repeated instances of misconduct may be so flagrant that no instruction can erase the error. *State v. Henderson*, 100 Wn. App. 794, 805, 998 P.2d 907 (2000). Misconduct materially affects the outcome of trial if the evidence of guilt is not overwhelming. *Henderson*, 100 Wn. App. at 805.

The prosecutor unequivocally and repeatedly told the jury that an innocent person would have provided additional information to the arresting officers, and that Allman's failure to provide such information proved his guilt. The numerous comments were flagrant and intended to draw attention to Allman's silence and to

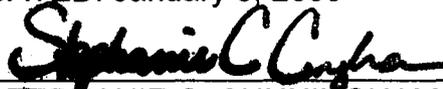
⁴ Allman's trial counsel did not object during closing arguments, but later requested an opportunity to obtain the transcripts of closing arguments in order to bring a motion for new trial. (TRP 317-19) The trial court denied the request, and suggested that because the issue was brought to the court's attention, it would not be deemed waived on appeal. (TRP 321) Nevertheless, because the prosecutor commented on Allman's right to remain silent, constitutional error exists. *Easter*, 130 Wn.2d at 242. The issue may therefore be raised for the first time on appeal. RAP 2.5(a).

imply to the jury that he should have proved his innocence. Because the only evidence of Allman's guilt was his presence in the stolen car, the prosecutor's argument clearly affected the outcome of trial, and no instruction could have cured the error.

V. CONCLUSION

As in *Heller* and *Keene*, Allman had the right to remain silent and had no duty to provide exculpatory information to the arresting officers. The prosecutor's repeated comments that an innocent person would provide information or call a corroborating witness improperly commented on Allman's right to remain silent, and improperly shifted the burden of proof to the defense. The repeated instances of misconduct were prejudicial, and require reversal of Allman's conviction.

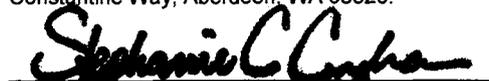
DATED: January 3, 2009



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CERTIFICATE OF MAILING

I certify that on 01/03/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Robert J. Allman, DOC#726410, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.


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