

No. 39140-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

CAMERON EDDY,

Appellant.

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

The Honorable Rosanne Buckner, Judge

APPELLANT'S OPENING BRIEF

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MSC-4 111d

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A. ASSIGNMENTS OF ERROR

1. Cameron Eddy's Fifth Amendment and Article I, § 9, rights to pre-arrest silence were violated during the prosecutor's cross-examination and closing argument.

2. The prosecutor committed flagrant, prejudicial misconduct and violated Eddy's rights to pre-arrest silence by inferring that a negative inference should be drawn from Eddy's exercise of those rights.

3. The prosecution cannot meet its heavy burden of proving that any of the constitutionally offensive misconduct was constitutionally harmless, because there was not overwhelming evidence of Eddy's guilt and the case required the jury to evaluate credibility.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Eddy was alleged to have committed burglary after he and two other young men were arrested at a school in the middle of the night. The window on the door to the school's exercise room was broken out and several "burglary tools" were found in one of the boys' backpacks.

Eddy said they had been at the school in order to run a race and had seen that the window was broken out. One of the others had gone into the exercise room and found a crowbar, and other items were found outside and put into a backpack to take and give to police. Eddy also said he only went into the school in order to get the other young man to come out so they could leave. Another person with Eddy that night, Charles Smith, corroborated this version of events.

At trial, the prosecutor repeatedly elicited testimony that Eddy had not spoken to police and given them this version of events when the police

arrived and sent their K-9 after him and had not spoken to police until just before he was arrested. The prosecutor cross-examined Eddy about this failure to speak, implying that it indicated his guilt. In initial and rebuttal closing argument, the prosecutor again used this pre-arrest silence as evidence of Eddy's guilt.

Is reversal required because 1) this cross-examination and argument amounted to improper comments on Eddy's exercise of his state and federal rights to pre-arrest silence, 2) the cross-examination and argument was constitutionally offensive misconduct and 3) the prosecution cannot show the cross-examination and argument were constitutionally harmless because the untainted evidence is not so overwhelming that it necessarily leads to a conclusion of guilt, given that credibility was the crucial issue?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Cameron Eddy was charged by amended information with second-degree burglary. CP 8; RCW 9A.52.030(1). Pretrial and trial proceedings were held before the Honorable Rosanne Buckner on February 17-19, 23-27, 2009, after which the jury found Eddy guilty as charged.¹ CP 73-74.

Sentencing was held before Judge Buckner on March 13, 2009,

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

the volume containing the proceedings of February 17, 2009, as "1RP;"
the volume containing the proceedings of February 18, 2009, as "2RP;"
the two chronologically paginated volumes containing the proceedings of February 19, 23-27 and March 13, 2009, as "RP."

and Eddy sentenced to serve 30 days in jail. RP 468; CP 77-87.

Eddy appealed and this pleading follows. CP 94-105.

2. Testimony at trial

On July 27, 2008, at about 11:37 p.m., Mark Ugland, a school patrol officer at Foss High School, received information from the school's alarm company that there was a "glass break alarm with audio" coming from the weight room at the school. RP 4-11. When he was on his way to the school, Ugland spoke to the alarm company and was told they could hear voices, glass breaking and something banging on something. RP 12. There was no report of a door open at the time. RP 12.

Ugland contacted the Tacoma Police Department and a "K-9" officer was requested. RP 13. When Ugland arrived at the school at 11:42, he waited outside for the K-9 to arrive. RP 14. Ugland's partner went up onto a hill. RP 28. Ugland, the K-9 officer and the K-9's handler, Wendy Haddow-Brunk, then went to the gate of the school, where Ugland "fumbled" in getting the gate open. RP 15, 85. After a moment, he got it open and let the dog and her handler in. RP 15. He then heard her announce "Tacoma Police K-9" and saw her go in the door of the weight room. RP 15.

Haddow-Brunk said that she coming around the corner of the building with her K-9 when three males walked out of the door to the gym and she yelled, "police." RP 92, 116. They turned and she said, "[s]top or you are going to get bit." RP 92. According to Haddow-Brunk, the males then ran back in the door and shut it. RP 92. Haddow-Brunk went up to the door and could see the glass on the window was broken out, so she

opened the door, which led into a weight room. RP 93. She had by then released the dog and the dog ran after the males. RP 95.

Tacoma Police Department Officer John Moses did not see anyone coming out and going back in but just heard Haddow-Brunk announce herself, let her dog go inside and then go in, with Moses following behind. RP 35-41.

The young men went out a door on the opposite side of the weight room with the dog following. RP 96. One of the males stopped for a moment on the other side of the door and the dog stopped, too, but a moment later the male began running again. RP 96. Haddow-Brunk then made it through the door herself and ran after the males and her dog, who was loose. RP 97. She was panicking about other officers arriving and potentially running over her dog, so she broadcast a message warning the dog was out. RP 97-98. She heard her dog barking and approached, seeing Moses holding one of the young men at gunpoint. RP 98. The male was on top of a cement railing and Moses said he had rounded the corner, seen the young man, ordered him to show his hands and told him to come down. RP 45. Haddow-Brunk countermanded that order, concerned about her dog possibly biting the male. RP 97-98. Once she restrained her dog, the officers told the young man to come down and he was then taken into custody. RP 48. That suspect was identified as Joshua Johnson. RP 48. He was 19 at the time and was wearing a blue hooded sweatshirt, blue jeans, a red belt and black shoes. RP 48.

Ugland, meanwhile, had run around the outside of the building to the east double doors of the school. RP 16, 44. Ugland said several

suspects ran out of the doors and Ugland yelled, “[p]olice, get on the ground.” RP 16. One male ultimately complied and Ugland held him at gunpoint while Ugland’s partner handcuffed him. RP 16. That suspect was a boy, aged 18, named Charles Smith. RP 16-18.

Smith had a backpack with him that had in it a crowbar, a small knife and black leather sheath, a black nylon case containing a “multi-tool pliers,” a length of wire with a wax string cord wrapped around it, a black glass cutter and a “Leatherman type” tool. RP 58. Smith was wearing a dark sweatshirt and jeans. RP 25.

Although they did not see anyone else running, Haddow-Brunk and the K-9 started searching for another person. RP 46, 122. They were going along a fence line down an embankment when the officer heard someone speak. RP 100. At trial, she testified that she had heard someone say, “okay, I give up. Please don’t let the dog bite me.” RP 100. In her report, however, Haddow-Brunk had specifically written that the person said, “[o]kay. I am here. Please don’t let the dog bite me.” RP 124. A young man came out of the brush and was taken into custody. RP 100, 124. He was identified as Cameron Eddy, then 18 years old. RP 49-50. Eddy was wearing a blue-green shirt, blue jeans and brown sandals. RP 49-50.

Although the door to the weight room had the glass broken out of its window, there was never any determination made that anything was taken from the weight room or any other part of the school. RP 21, 22. Nothing was damaged on or in the school, other than that window. RP 22, 39. Moses admitted he was unaware of any loss to the school other than

the broken glass in the door and that he was not told about anything having been taken. RP 76, 78.

Ugland never had any fingerprint testing done on the window or any other area of the school. RP 29. Moses admitted that he never considered taking fingerprints from the door or from the items in the backpack, which he booked into evidence. RP 79. Haddow-Brunk said it was not part of her job to have such prints ordered done. RP 126.

Cameron Eddy testified that he, Smith and Johnson, who was a “new acquaintance,” were playing video games at Eddy’s house on the night of July 27 when a friendly dispute arose about whether or not a video game could determine the race of the person who was playing the game, based upon the way they played. RP 266-59. This dispute, which started at about 10 at night, was, as Eddy admitted, “really stupid,” and involved a question about the programming and whether a computer game could be racially biased. RP 269. Smith explained that he had created a level to this particular game where there were “some pretty interesting instances where both players should move at the same speed, but inherently do not because of physics or other factors built into the game.” RP 211. Smith, who is black, did not think a game could be racially biased because it did not have a way to “distinguish who was black and who was white by playing characteristics like how a person approaches a problem,” and they talked about that theory for awhile. RP 213.

From there the discussion led to a question about whether black people or white people were faster, with Smith saying he thought black people were and Eddy, who was white, not really taking a position. RP

213-18, 270. The young men decided that they would race each other and Eddy was going to measure time, distances and other things, to get the answer to the question. RP 270. Because Foss High School had a “smoother surface” for running, they decided they would go there to conduct the test. RP 270. Smith admitted that they were really bored, having been at Eddy’s house most of the day. RP 192. Indeed, he said, they really did not have anything else to do. RP 192.

Eddy’s house was about 9-10 blocks from the school and it took the young men about 20-25 minutes to walk over. RP 272. When they arrived, it was about 11:40 p.m. RP 272. They climbed over the fence and went towards the track, passing the weight room. RP 272. As they were headed there they saw that there were puddles on the track and ultimately they decided not to run. RP 273-74. Smith said it was too dark and there was usually much more light when he went over to the school at night, because there was usually a game or something going on there. RP 194-96.

Eddy freely admitted he was wearing sandals and explained that it was because he had loaned his black shoes to Johnson, who had been wearing slippers which were not good on wet ground. RP 290. Eddy, who was not “rich,” did not have any more pairs of running-type shoes. RP 317. He was planning on switching shoes with Johnson once they got to the track so he could then have “the upper hand” on Smith. RP 290. Eddy was also wearing jeans and said he did not have special running clothes. RP 290-95.

Eddy and Smith were still talking about when and where they

would have the race as they walked away, again passing the weight room. RP 275. Smith said Johnson then noticed that there was glass on the ground and the glass on the window of the door to the weight room was broken. RP 194, 275.

Johnson started walking directly towards the weight room and said something like “looks like somebody tried to break in,” after which he elbowed the glass to make the rest fall in. RP 194, 277. Johnson opened the door and took a couple of steps inside. RP 277.

At that point, Smith said, he thought about leaving but he did not really trust Johnson and thought if he left him there and Johnson did something to the school, he would implicate Smith and Eddy, falsely, if he was later caught. RP 195.

After a moment, Johnson came out with a crowbar in his hand, saying something like, “yeah, somebody was trying to break in.” RP 199, 277. Eddy said he was pretty shocked and did not know what to say or do, so he took a second to try to think. RP 278. Smith then told Johnson to put the crowbar into the backpack so they could take it to Eddy’s home and call police. RP 195, 278. Smith conceded that, in hindsight, it was a “really stupid” thing to do, but at the time he thought the police would be less likely to be suspicious that the boys were themselves doing something wrong if they had the crowbar and called from Eddy’s house to report the break-in. RP 195-97. There were also some other things on the ground outside the weight room door, next to a tilted over trash can, and they put those things in the backpack, too. RP 278-80. Eddy thought the piano wire thing looked pretty strange and he had not seen anything like it

before. RP 280. He was also unfamiliar with the glass cutter. RP 281, 335. Smith said the knife in the backpack was his, as were the utility knives, and that he used them when he did yard maintenance with his dad or worked on computers and wiring. RP 200. None of the young men had a cell phone with them so they were going to call police from Eddy's home. RP 205.

At that moment, however, Johnson then went back inside the school, with Smith and Eddy following, saying, "[h]ey, man, what are you doing? This is what seems to be a crime scene." RP 279. Johnson said maybe the guy who had tried to break in was still there because it looked like he left his tools. RP 279. At the time, it seemed to make some sense to try to see what they guy looked like so they could describe him to the police and it would "seem as if we had the best intentions." RP 279.

Eddy said his intent in going into the school was to get Johnson out of the building. RP 280.

Eddy and Smith started trying to convince Johnson that they should go. RP 280. Smith said he was also telling Eddy he did not trust Johnson. RP 196. Johnson then walked towards the back of the room, where a door was open. RP 280. He was looking into the gym when Eddy and Smith grabbed towards him, trying to get him away from the door. RP 281. Eddy was scared because he thought the guy who had broken in might be coming back. RP 282.

At that point, Eddy thought they were all leaving, so they were headed back towards the door with the broken-out window. RP 282, 322. As they got closer to it, Eddy heard a "crackling" noise which he thought

was from the glass on the ground. RP 282. Suddenly, Eddy saw a glaring light to his left and he thought it was probably the burglar, so he stepped back into the room. RP 282. At that point, he heard someone say, “[p]olice, stop.” RP 283. A moment later, he thought he heard someone say something like, “sic ‘em” or “get ‘em.” RP 283. Haddow-Brunk testified, however, that she never said anything of the kind. RP 100-122.

Eddy thought he was going to be attacked by the dog, so he ran. RP 283. Eddy made it clear he was not trying to avoid the police but just was trying to keep the dog from biting him. RP 284. He ran through the gym and out the door. RP 285. He then ran along a driveway which seemed like it was an entrance to Cheney Stadium. RP 286. Still scared about the dog, he jumped over the fence and ended up in some bushes, where he stopped. RP 287. Eventually, he heard some noises and he called out so that, if it was the dog, he would not get bitten. RP 287. The officer told Eddy to go directly towards her and he asked if he could go a different way because there were bushes in the way. RP 288. At one point he slipped and he told them it was an accident so there would not be any “misunderstandings.” RP 288. When he got to the officers, they had him get on the ground and he was searched. RP 288. He had a watch in his pocket which had a broken strap and could not remember what it was when asked, so the officer took it out. RP 289.

Eddy made it clear he did not plan on entering the high school when they left his house. RP 289. He also did not plan on stealing anything, wrecking the place or doing anything like that. RP 289. Smith also said the young men had no intent to go into the school when they

went there. RP 193. They never discussed breaking into the school as they walked there or anything like that. RP 202-205. Eddy admitted that, several years earlier, when he was a juvenile, he had been arrested for being at a community college on a charge of burglary. RP 336.

Eddy and Smith had known each other and been good friends for a long time, since elementary school. RP 271. Eddy had only just met Johnson the week before, when Eddy was in the backyard using his laptop. RP 271. Johnson asked if he could check his “MySpace” page and Eddy let him, after which they started talking and hanging out. RP 271. He introduced Johnson to Smith a few days before the incident, at an ethnic fair. RP 318.

D. ARGUMENT

REVERSAL AND REMAND FOR A NEW TRIAL IS
REQUIRED BECAUSE THE PROSECUTOR COMMITTED
CONSTITUTIONALLY OFFENSIVE MISCONDUCT BY
COMMENTING ON AND DRAWING NEGATIVE
INFERENCES FROM EDDY’S EXERCISE OF HIS RIGHTS TO
PRE-ARREST SILENCE

It is well-settled that, as quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely “to produce a wrongful conviction.” State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Because

of her role, the words of a prosecutor carry great weight with the jury, so that a prosecutor's misconduct does not just violate her duties but may also deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22. In addition, when a prosecutor's comments invite the jury to draw a negative inference from a defendant's exercise of a constitutional right, those comments are constitutionally offensive misconduct because they "chill" the defendant's free exercise of that right. 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). As a result, it is grave misconduct for the prosecutor to make such arguments. 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).

In this case, reversal is required, because the prosecutor committed serious, prejudicial misconduct and violated Eddy's rights to pre-arrest silence when the prosecutor commented on Eddy's exercise of those constitutional rights. Further, the prosecution cannot meet its heavy burden of showing that these acts of constitutionally offensive misconduct were harmless beyond a reasonable doubt, because the case depended upon a credibility determination.

a. Relevant facts

During cross-examination of Eddy, the prosecutor repeatedly asked Eddy about his failure to speak to police prior to his arrest. First,

the prosecutor asked whether Eddy had told police when they arrived, “[h]ey, we are right here; we were just wondering what’s going on[.]” RP 325. The prosecutor then asked if Eddy had said anything to police when he stopped for a moment after the dog started chasing him, “to make it clear that you were stopping,” or if Eddy had told police “anything to indicate that you were the good guys.” RP 326. Next, the prosecutor asked if, when Eddy and the others were in the weight room and the K-9 was outside, Eddy had said anything to police like “[w]e’ll stop. Just don’t let the K-9 bite us,” or “we give up,” and whether, at that point, again, Eddy had said anything to police to explain were “the good guys.” RP 329-30. Regarding when Eddy was on top of the fence and climbing over, the prosecutor asked Eddy if he called out to police and told them where he was at that time or explained to police that he was not “trying to elude” them. RP 331-32. Finally, the prosecutor asked if Eddy had said anything to police when he was in the bushes or if he had only spoken to them when they appeared about to find him. RP 331-32.

.. In initial closing argument, in arguing that Eddy was guilty, the prosecutor reminded the jury that, when Eddy was running through the school and out to where he was found,

at no point does he say to anyone, Hey, I’ll stop; I’m not trying to flee from you guys. Hey, I’m the good guy. Hey, I’m going to be cooperative. Please don’t let the dog bite me. He could at any point say that to the police, but he is not interested in doing that.

RP 398. Later, in rebuttal closing argument, the prosecutor told the jury that defense counsel’s arguments explaining what Eddy said had occurred “didn’t address the fact that at no point did Mr. Eddy say anything [to

police] that he would submit, and that's important. As he is running away, he has every opportunity to yell back, Please stop. I'll stop. Don't let the dog bite me." RP 449.

b. The arguments and cross-examination were constitutionally offensive misconduct and violated Eddy's rights to pre-arrest silence

With both the cross-examination and the arguments, the prosecutor violated Mr. Eddy's rights to remain silent and against self-incrimination. 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 right 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, § 9.² As part of that right, a defendant has a constitutional right to remain silent in the face of accusation. See State

²The 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."

v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

As a result, it is completely improper, impermissible and misconduct for the prosecution to even suggest that a negative inference be drawn from the defendant's pre-arrest silence. Easter, 130 Wn.2d at 243; see State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979). This prohibition applies not only to closing argument but also to testimony, whether deliberately or unintentionally elicited by the state. Romero, 113 Wn. App. at 787; see also, State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

Indeed, it is not required that the state deliberately exploit an improper comment for reversal to be required. See Romero, 113 Wn. App. at 787. Put simply, "[a]n accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded" by permitting the prosecution to "call the attention of the trier of fact the accused's pre-arrest silence to imply guilt." Easter, 130 Wn.2d at 243; see State v. Knapp, 148 Wn. App. 414, 199 P.3d 505 (2009).

Thus, even unemphasized mention of and allusion to a defendant's exercise of his right to remain silent may be constitutionally offensive. See State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997). The question is whether the mention is "so subtle and so brief" that it did not draw attention to the defendant's exercise of his rights, or whether it was more and was, therefore, an improper comment on those rights. See State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008), quoting, State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991)

(quotation omitted). For example, a statement by a witness that a defendant told an officer when she answered a witness' phone that he did not want to talk to her was nothing more than a passing reference to silence. State v. Thomas, 142 Wn. App. 589, 596, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008). In contrast, a comment by an officer saying that a defendant was "evasive" when speaking to police was an improper comment on the right to remain silent because that comment clearly made the inference that the evasiveness was evidence that the defendant "was guilty of the allegation against him." State v. Hager, 152 Wn. App. 134, 143-44, 216 P.3d 438 (2009).

In this case, there was not just a brief, unsolicited passing reference to Eddy's pre-arrest silence. Instead, the prosecutor repeatedly, deliberately and flagrantly elicited in cross-examination that Eddy had failed to speak 1) when the officers arrived, 2) when they entered the building, 3) when Eddy started to run, 4) when he stopped briefly and looked at the dog in the gymnasium, 5) when he was scaling the fence or 6) when he was hiding in the bushes. Even more egregious, the cross-examination made it clear that the prosecutor was faulting Eddy not just for failing to speak but for *failing to proclaim his innocence* by failing to explain that he was "one of the good guys" or "the good guy." RP 326, 329-30. The clear, obvious and unmistakable implication was that, if Eddy *was* innocent, he would have told police just that, instead of remaining silent. Yet Eddy had a constitutional right to remain silent and not tell police *anything*.

Further, in case the jurors missed the message that Eddy's failure

to speak was evidence of his guilt, the prosecutor made sure that the implication was driven home in both initial and rebuttal closing arguments. First, in arguing Eddy's guilt in initial closing argument, the prosecutor reminded the jurors that Eddy had "at no point" told police that he was not trying to flee, or that he would cooperate or that he was "the good guy," even though he could have "at any point" said those things. RP 398. Indeed, the prosecutor declared, Eddy had not said any of those things because he was "not interested in doing that." RP 398. Then, in rebuttal closing argument, the prosecutor faulted counsel's arguments on Eddy's behalf as if they were insufficient to rebut the state's case showing Eddy's guilt because counsel's closing "didn't address the fact that at no point did Mr. Eddy say anything" to police even though he had "every opportunity" to do so as he was running away. RP 449.

Thus, the prosecutor committed egregious, constitutionally offensive misconduct, both in cross-examining Eddy and in closing argument. Two recent cases in which this Court reversed are instructive. In Thomas, supra, when police arrived, Thomas was not there but his ex-girlfriend, Bonds, was holding a bloody towel to her face. 142 Wn. App. at 591-92. Thomas called several times over the next few days and tried to speak to Bonds but was not allowed to do so. Id. At one point, an officer answered the phone and Thomas said he wanted to talk to Bonds, not the officer. Id. At trial, the prosecutor elicited the officer's testimony that Thomas had not wanted to talk to the officer on the phone and said as such. 142 Wn. App. at 593. Then, in closing argument, the prosecutor reminded the jurors that Thomas had not wanted to talk to the officers to

tell them his “story” even though he knew that he was being accused of a crime. 142 Wn. App. at 594.

On appeal, Thomas argued that the prosecutor had improperly commented on his pre-arrest silence when the prosecutor argued that point and also when the prosecutor declared that Thomas had fled the scene and not returned to deny Bonds’ accusations to the police even though he knew police were there talking to Bonds. 142 Wn. App. at 595.

In reversing, this Court first noted that a mere “reference” to silence was not reversible error absent a showing of prejudice, but that the crucial question was whether the state uses such a reference “as evidence of the defendant’s guilt.” 142 Wn. App. at 595. The “crucial distinction,” this Court noted, “is whether the State uses the accused’s silence to its advantage, either as evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Id.* While the comment of the officer that Thomas did not want to talk to her was “no more than a passing reference to Thomas’ [] silence,” this Court found, the prosecutor’s arguments in closing converted that testimony into something far more - and violated Thomas’ constitutional rights:

[I]n closing argument, the prosecutor turned Officer Peterson’s testimony into more than a passing reference to Thomas’ [] decision not to talk with the officer. The prosecutor emphasized that although he had been accused of a crime, Thomas would not return to tell his story, . . . and “didn’t go back” to explain [his version of events]. . . **These comments plainly conveyed the message that if Thomas was not guilty, he would have returned to the crime scene to tell his side of the story.**

142 Wn. App. at 596 (emphasis added).

Just as in Thomas, here the prosecutor’s acts plainly conveyed the

message that if Eddy was not guilty he would have spoken to police - not just by staying when they arrived and speaking to them then, but at every single point during the incident and before Eddy's arrest. Even more, unlike in Thomas, the initial evidence on silence was not a passing comment by an officer but rather repeated, deliberately elicited testimony that Eddy had been silent pre-arrest from the moment the officers arrived up until the time when they found him in the bushes. Thus, unlike in Thomas, the prosecutor had already exploited the evidence of silence as evidence of guilt, even before the closing argument. And that argument only reiterated the prosecutor's improper examination, emphasizing it to the jury and making it clear that Eddy's pre-arrest silence should be relied on by the jury as evidence of his guilt.

Also instructive is Knapp, supra. Knapp was accused of committing a residential burglary. 148 Wn. App. at 420. At trial, the prosecutor asked the arresting officer what Knapp had said when the officer told him that an eyewitness had identified Knapp as being involved. 148 Wn. App. at 419. The officer responded that Knapp had "hung his head" but not said anything in response. Id. Similar testimony was elicited during direct examination of the officer about Knapp's acting "complacent" when told another witness had also identified him. Id. In closing argument, the prosecutor argued *once* that one of the reasons to believe Knapp was involved in the burglary was his behavior when told he had been identified, i.e., his failure to say to the officer, "No, it wasn't me." 148 Wn. App. at 420.

On appeal, Knapp argued that the testimony and closing argument

violated his constitutional rights to pre-arrest silence. 148 Wn. App. at 420. This Court - and the prosecution itself - agreed. Id. The officer's testimony, they admitted, was an improper comment on Knapp's silence because the prosecutor improperly "implied that an innocent person would have denied the accusation." Id.

Just as in Knapp, here the evidence elicited on cross-examination was clearly a comment on Eddy's exercise of his right to pre-arrest silence i.e., his failure to speak to officers before his arrest. Even more egregious than in Knapp, however, the prosecutor did not make the implication only once in closing. Instead the implication was made over and over, both in the tenor of the cross-examination and the initial and rebuttal closing arguments. If Eddy was not guilty of burglary, the questions, answers and arguments conveyed, Eddy would have spoken to police and explained that he was a "good guy," not intending to "elude" police. The fact that he failed to speak was thus used as evidence of his guilt, in violation of his rights to pre-arrest silence.

In response, the prosecution may attempt to justify the improper comments by claiming that they were nothing more than an effort at "impeachment." Any such claim, however, should fail. Under certain circumstances, when a defendant testifies, his pre-arrest silence may be used to impeach him. See, e.g., Lewis, 130 Wn.2d at 705-706. Even so, the silence may only be used for impeachment and must not be used by the state as substantive evidence of guilt. Id.; see Easter, 130 Wn.2d at 237; Burke, 163 Wn.2d at 218.

Here, the evidence was so used. Thomas, supra, is instructive. In

Thomas, the prosecution claimed that it was simply using Thomas' failure to speak to police when he called his girlfriend's home and his failure to return to her home after the incident to tell his side of the story as "impeachment" of Thomas' exculpatory testimony about what he said occurred. 142 Wn. App. at 596. This Court disagreed. While some of the comments simply disputed Thomas' claims about how many times he had called and whether he had threatened anyone when he called, the Court noted, other comments had exceeded that permissible scope:

[T]he prosecutor went beyond impeaching Thomas'[] story about the number and nature of the phone calls. He described Thomas'[] statements as "[y]eah, I don't want to talk to you" and "I don't want to talk to you [about] my story," and his motive for them as "[h]e's just been accused of a crime. I mean he knows that that's what's going on. The cops showed up there for a reason". . .
[T]he prosecutor's argument plainly invited the jury to infer Thomas'[] guilt from his refusal to talk with Officer Peterson and to return to the scene to tell the police his story.

142 Wn. App. at 597 (emphasis added).

Similarly, in Burke, supra, the Supreme Court rejected the prosecution's claim that the defendant's silence was used only for impeachment when it was elicited and used in a way suggesting that the silence was evidence of guilt. Burke was accused of having nonconsensual sex with a younger girl at a party. 163 Wn.2d at 207. Police went to Burke's home, where he told them the sex was consensual and that he did not know her age but knew she was in high school. At that point, Burke's father asked if his son was going to be charged with something. When officers said it was "very possible," the father told his son not to talk to police until he had consulted with counsel. Id. As police were leaving, Burke made a comment that "this was a bunch of

shit” and that girls at a certain high school “were always trying to get guys in trouble.” Id.

At trial, the prosecutor asked an officer if Burke had ever explained his last comment to police. Id. Unsolicited, the officer then declared that Burke had already at that point “asked pretty much to talk to an attorney” so the officer did not ask any more questions because the interview had been stopped. Id. In cross-examination, the prosecutor asked Burke to explain why he never told police that he thought the victim was 16. 163 Wn.2d at 209. And in opening and closing, the prosecutor argued that Burke’s defense that the victim told him she was 16 and he thus thought she was of legal age was not credible because if that had really happened “he would have said so either to the police at the first interview” or when talking to the victim’s sister the next day on the phone. 163 Wn.2d at 208. The prosecutor also told the jury that the police “were there to gather the defendant’s side of the story” but he only “chose to give them” a little before his father ended the interview “perhaps sensing that it wasn’t necessarily okay to have sex” with the victim. Id.

On appeal, Burke argued that the trial court erred in failing to grant a motion for a mistrial, which he had asked for based upon his argument that the prosecutor had improperly invited the jury to infer his guilt based upon his exercise of his right to remain silent. 163 Wn.2d at 210. The prosecutor responded, *inter alia*, that it was proper impeachment for the prosecutor to draw attention to “what Burke did say and what he did not say by remaining silent during the interview” to

“imply his guilt.” 163 Wn.2d at 218.

In rejecting that argument, the Supreme Court noted that it had joined “other courts in being skeptical of the probative value of impeachment based on silence.” Id. Silence is inherently ambiguous” under these circumstances, the Court held, because “an innocent person may have many reasons for not speaking,” including the awareness of the right not to speak, a belief that any attempts to do so would be futile, explicit instructions not to speak from counsel, mistrust of law enforcement officers and the simple unwillingness of a citizen to speak to police “not because they are guilty of some crime, but rather because ‘they are simply fearful of coming into contact with those whom they regard as antagonists.’” Burke, 163 Wn.2d at 219, quoting, People v. DeGeorge, 73 N.Y.2d 614, 618-19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989) (citations omitted in original).

As a result, our Supreme Court concluded, “[i]n most cases it is impossible to conclude that a failure to speak is more consistent with guilt than with innocence,” so that a failure to speak is not particularly probative as impeachment. Burke, 163 Wn.2d at 219. Put another way, the Court said, to be relevant to impeachment, the silence must somehow bear on the defendant’s truthfulness, rather than just being used based on the theory that the defendant showed his guilt by failing to speak. Id. The prosecutor in Burke had “intentionally invited the jury to infer guilt from Burke’s termination of his interview” by suggesting that Burke did so because he had done something wrong, so the prosecutor had violated Burke’s right to silence. 163 Wn.2d at 221-22.

Similarly, in Keene, after the defendant was charged with rape of a child and warned by a detective that failure to return police calls would result in charges being filed, the evidence that the defendant failed to call back and the prosecutor's argument asking once whether those were the actions of an innocent man were not proper "impeachment" by pre-arrest silence but rather improper use of that silence as evidence of guilt. 86 Wn. App. at 592-93. The officer's comment suggested guilt based upon the defendant's failure to call back and speak to police, while the prosecutor's argument suggested that failure was an effective admission of guilt. 86 Wn. App. at 593. As a result, this Court held, the prosecution had the burden of proving the constitutional error harmless. Id.

Here, just as in Burke, Thomas and Keene, the prosecutor was not using Eddy's pre-arrest silence to somehow impeach his truthfulness but rather as evidence of Eddy's guilt. It was not that Eddy gave a story which did not include crucial facts and thus his current story was unbelievable - it was Eddy's failure to speak which was the evidence being used against him. By repeatedly using Eddy's pre-arrest silence against him, urging the jury to rely on that silence as evidence of guilt, the prosecutor committed serious, constitutionally offensive misconduct and violated those rights. This Court should so hold. Further, because both Thomas and Knapp came from the very same prosecutor's office, this Court should consider ordering that office to conduct remedial training of all of its prosecutors as a result of its failure to ensure that they do not engage in this type of clearly constitutional misconduct, already condemned by this Court repeatedly, again.

c. The prosecution cannot prove the misconduct was harmless

Reversal and remand for a new trial is required, because these constitutional errors cannot be proven harmless by the prosecution.

Where, as here, the prosecutor commits misconduct infringing on a constitutional right, the prosecution bears a very heavy burden in trying to prove that constitutional error 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, absent 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 for any of the constitutionally offensive misconduct in which the trial prosecutor engaged. As a threshold matter, it is important to note that this Court uses a different standard and test for review of this issue than those employed when the issue on review is the sufficiency of the evidence to support a conviction. Where the question is sufficiency of the evidence, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The burden is on the defendant to prove that the evidence was so deficient that

no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error “harmless,” the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. Easter, 130 Wn.2d at 242. Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for constitutional harmless error, the “overwhelming evidence” test, requires the Court to reverse unless it is convinced beyond a reasonable doubt that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a “sufficiency of the evidence” challenge, that is not enough to meet the “overwhelming evidence” test. See, e.g., Romero, 113 Wn. App. at 783-85. Romero is instructive. In Romero, the defendant was accused of having shot a gun in a mobile home park. 113 Wn. App. at 783. 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 Romero, the witness remembered seeing that man wearing a blue-checked shirt, rather than a grey-checked shirt Romero

had. 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Romero that night, when shown the shirt Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

In reversing, the Court rejected Romero's argument that the evidence was insufficient, taking the evidence in the light most favorable to the state. 113 Wn. App. at 794. But the same evidence the Court found adequate to support the conviction against a sufficiency challenge was *not* enough when the constitutional harmless error standard applied. 113 Wn. App. at 793. The officer had testified that Romero had not cooperated or spoke with police, although the prosecution had not exploited the comment in closing and had not even "purposefully elicited" the officer's "unresponsive" answer. 113 Wn. App. at 793. Nevertheless, the Court held, it could not "say that prejudice did not likely result due to the undercutting effect on Romero's defense." 113 Wn. App. at 794. Although there was significant evidence that 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 Romero was hiding his guilt." 113 Wn. App. at 795-96.

The Romero decision serves to highlight the differences between the amount of proof of guilt required to be sufficient to support a conviction on review and the amount required to be "overwhelming

evidence” which renders a constitutional error harmless. 113 Wn. App. at 797-98. Further, it indicates that, even when there is strong evidence of guilt, a reviewing court will not affirm a conviction tainted by constitutional error if the jury’s decision could have been affected by the error. See also, Easter, 130 Wn.2d at 242 (reversing based on the failure to prove constitutional error harmless because, while the state’s theory regarding Easter’s guilt was supported by significant evidence, there was disputing evidence so that the evidence did not “overwhelmingly establish” guilt in light of the emphasis on his silence as evidence of guilt).

Put another way, where, as here, the evidence of silence is introduced and exploited by the prosecutor used to indicate the defendant’s guilt, that impermissible argument may “sway” the jury so that reversal is required under the constitutional harmless error standard even when there is evidence supporting the state’s theory of guilt. Easter, 130 Wn.2d at 242-43.

Thus, in Burke where the “trial boiled down to whether the jury believed or disbelieved Burke’s story that the victim told him she was 16,” the constitutional error of commenting on Burke’s silence was not harmless, because it “had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury’s consideration.” Burke, 163 Wn.2d at 222-23. And in Romero, where there was strong evidence of guilt but the jury nevertheless had the conflicting testimony of the defendant and had to decide credibility, the Court could not say that the error in commenting on Romero’s silence was

harmless, because the jury could have been “swayed” by the improper inference. Romero, 113 Wn. App. at 795-96.

Here, just as in Romero, Easter and Burke, there was evidence of Mr. Eddy’s guilt. But there was also conflicting evidence, such as the lack of fingerprints, Smith’s testimony and Eddy’s testimony. The jury’s determination on guilt could not have been unaffected by the repeated comments and arguments telling the jury that Eddy would not have remained silent if he were innocent. The untainted evidence in this case was not so overwhelming that it necessarily led to a finding of guilt. The very grave errors and misconduct here cannot be deemed “harmless” and reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for further proceedings, with new appointed counsel.

DATED this 5th day of April, 2010.

Respectfully submitted,



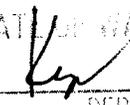
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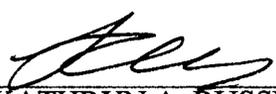

DEPUTY

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,
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TO: Cameron Eddy, 1813 S. Washington, Tacoma, WA. 98405.

DATED this 5th day of April, 2010.


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