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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Ewing a fair trial where Officer Miller improperly commented on Ewing's constitutional right to remain silent.
02. The trial court erred in permitting Ewing to be represented by counsel who provided ineffective assistance by failing to object to Officer Miller's improper comments on Ewing's right to remain silent.
03. The trial court erred in calculating Ewing's offender score by counting his current convictions for theft of a firearm and theft in the second degree as separate offenses.
04. The trial court erred in permitting Ewing to be represented by counsel who provided ineffective assistance by failing to argue that his current convictions for theft of a firearm and theft in the second degree encompassed the same criminal conduct for purposes of calculating his offender score.
05. The trial court erred in instructing the jury that it must be unanimous before returning a verdict on the firearm enhancement.
06. The trial court erred in permitting Ewing to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 22 that it must be unanimous before returning a verdict on the firearm enhancement and by failing to propose an accurate instruction and special verdict form.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Officer Miller improperly commented on Ewing's constitutional right to remain silent by testifying that Ewing failed to attend a scheduled appointment for the purpose of providing a statement to the police? [Assignment of Error No. 1].
02. Whether Ewing was prejudiced as a result of his counsel's failure to object to Officer Miller's testimony that Ewing failed to attend a scheduled appointment for the purpose of providing a statement to the police? [Assignment of Error No. 2].
03. Whether the trial court erred in calculating Ewing's offender score by counting his current convictions for theft of a firearm and theft in the second degree as separate offenses? [Assignment of Error No. 3].
04. Whether the trial court erred in permitting Ewing to be represented by counsel who provided ineffective assistance by failing to argue that his current convictions for theft of a firearm and theft in the second degree encompassed the same criminal conduct for purposes of calculating his offender score? [Assignment of Error No. 4].
05. Whether the trial court erred in instructing the jury that it must be unanimous before returning a verdict on the firearm enhancement? [Assignment of Error No. 5].
06. Whether the trial court erred in permitting Ewing to be represented by counsel who provided ineffective assistance by failing to object to the court's instruction 22 that it must be unanimous before

returning a verdict on the firearm enhancement and by failing to propose an accurate instruction and special verdict form? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Charles M. Ewing (Ewing) was charged by first amended information filed in Thurston County Superior Court on April 17, 2009, with theft of a firearm, count I, unlawful possession of a firearm in the second degree, count II, and theft in the second degree while armed with a firearm, count III, contrary to RCWs 9A.56.300(1), 9A.41.040(2)(a), 9A.56.040(1)(a), 9A.56.020(1)(a), 9.94A.602 and 9.94A.533(3). [CP 13-14].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7-8]. Trial to a jury commenced on April 20, the Honorable Carol Murphy presiding. The parties stipulated that Ewing “had previously been convicted of a felony and, as such, was prohibited by law from being in possession or control of a firearm.” [RP 518]. Neither objections nor exceptions were taken to the jury instructions. [RP 545].

Ewing was found guilty as charged, sentenced within his agreed standard range, and timely notice of this appeal followed. [RP 05/01/09 23-24; CP 64-68 73-81]

02. Substantive Facts¹

At approximately 10:00 in the morning on August 18, 2008, Stephen Quesenberry woke to the sound of Ewing entering the apartment the two shared. [RP 87, 97, 101, 134-35, 143, 171].

Quesenberry fell back to sleep (“in and out”) for about 30 minutes before getting up to get ready to go to work, at which time he discovered several items missing from the apartment, including his computer, his iPod, his watch, his personal game system, his digital camera and his semi-automatic handgun, which was in good working condition. [RP 122, 146-153, 175, 501-02]. The missing items exceeded \$250.00 in value. [RP 27, 124, 154-56].

Several months later, in October, Amber Osburn ran into Ewing at a local mall. [RP 205-06]. In subsequent e-mails, Ewing admitted to Osburn that he had borrowed some of Quesenberry’s “stuff” and that he had taken Quesenberry’s gun. [RP 221, 224, 238].

Evidence was presented that e-mails received by Osburn were sent from a Comcast account in the name of Nicholas Gonzales [RP 408, 411-17, 420, 445, 478-79], who told police he did not know Ewing. [RP 258, 408, 411-17, 420]. Gonzales used an unsecured wireless router located in his apartment [RP 253-54], which was the same apartment complex where

¹ All references to the VRP are to the transcripts entitled Jury Trial – Volumes I-IV.

Ewing said he was staying at the time the e-mails were sent to Osburn. [RP 222, 261-62]. An unsecured router is easily accessed by a computer within range of the router, such as a person in the apartment complex where Ewing was staying. [RP 260, 423-24]. There was also evidence that another account was accessed to send an e-mail to Osburn that was also within the range of where Ewing was staying. [RP 411-12, 424, 476-77]. The State's expert could not say for certain that Ewing was the author of the e-mails at issue, in addition to admitting that it was possible Quesenberry could have written the e-mails. [RP 446, 456-59, 467, 486]. Quesenberry denied ever writing any e-mails on Ewing's behalf. [RP 500].

Tanya Wurl, who lived in the same apartment complex as Gonzales, testified that Ewing had asked her to lie by giving him an alibi defense. [RP 272, 283]. She also said she could access the internet through a neighbor's wireless connection to a router named "Penguin House," which was the name of Gonzales's router. [RP 254-55, 270]. She, and her roommate, Amanda Rice, had observed Ewing accessing the Internet in their apartment about September or October 2008. [RP 271, 274, 316-17, 322, 367].

Ewing admitted to Rice that he had stolen the computer and personal game device from Quesenberry. [RP 317-18, 323, 369, 376-77,

469]. He had also asked her to testify that she didn't receive any type of Internet service in her apartment. [RP 320].

Ewing was arrested on November 13, and denied the charges, saying he was being framed. [RP 52, 68-69].

D. ARGUMENT

01. OFFICER DAVE MILLER IMPROPERLY COMMENTED ON EWING'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.

The privilege against self-incrimination, or the right to remain silent, is based upon the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). "The purpose of the right is ... 'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or having to share his thoughts and beliefs with the Government.'" State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (quoting Doe v. United States, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)). A defendant's constitutional right to silence applies in both pre- and post-arrest situations. State v. Easter, 130 Wn.2d at 243. Even without an explicit reference to Miranda, a prosecutor may be deemed to have purposely elicited the fact of silence in the face of arrest. In the Ninth Circuit case of

Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), the court held the following exchange between the prosecutor and the arresting officer was the sort of inquiry forbidden by the Supreme Court in Miranda and Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

- Q. Who arrested Mr. Douglas?
- A. I did.
- Q. Did he make any statements to you?
- A. No.

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) (quoting Douglas v. Cupp, at 267.

It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. State v. Easter, 130 Wn.2d at 241. Likewise, it is constitutional error for the State to purposefully elicit testimony as to a defendant's silence. State v. Curtis, 110 Wn. App. at 13. Ewing can raise this issue, which is a manifest error affecting a constitutional right, for the first time on appeal. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing State v. Curtis, 110 Wn. App. at 11; State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a)(3)).

The State bears the burden of overcoming the presumption that a constitutional error is prejudicial. State v. Easter, 130 Wn.2d at 242.

In this case, Office Miller, in response to questions from the prosecutor, testified about Ewing's failure to keep his appointment to discuss the case and give his version of what happened after agreeing to do so during a phone conversation.

Q. Okay. And can you tell us how that conversation went?

A. I just told Mr. Ewing he was a suspect and I needed to come in and talk to him face to face.

Q. Okay. And did he agree to do that?

A. Yes, he did.

Q. Okay. So what arrangements did you make, if any, at that point in time?

A. I set a date and time for him, and he said he would come to Lacey Police Department and come and talk to me.

Q. Okay. And so at the date and time that you set, did he come to the department?

A. He did not.

Q. Did he come at any point after that?

A. No.

Q. So then I take it after a certain amount of time, you inferred that he wasn't coming; is that true?

A. Yes, yes.

[RP 41].

As previously indicated, in Easter, our Supreme Court held it is a violation of a defendant's right to silence for a police officer to testify that the defendant refused to talk to him or her. Easter, 130 Wn.2d at 241 (defendant's "right to silence was violated by testimony he did not answer and looked away without speaking" when questioned by officer). In State v. Lewis, 130 Wn.2d 700, 705-07, 929 P.2d 235 (1996), on the other hand, where the officer testified that the defendant only told him he was innocent, not that the defendant refused to talk to him, the court held this indirect reference to the defendant's silence is not constitutional error absent additional comment implying guilt. Thus if the comment is direct, constitutional error exists requiring a constitutional harmless error analysis. Easter, 130 Wn.2d at 241. Conversely, if the comment is indirect, three questions should be considered before determining whether the comment rises to constitutional proportions.

First, could the comment reasonably be considered purposeful, meaning responsive to the State's questioning, with even slight inferable prejudice to the defendant's claim of silence? State v. Curtis, 110 Wn. App. 6, 13-14, 37 P.3d 1274 (2002). Second, could the comment reasonably be considered unresponsive to a question posed by either examiner, but in the context of the defense, the volunteered comment can reasonably be considered as either (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense? Douglas, 578 F.2d at 267. Third, was the

indirect comment exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant? State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Answering “yes” to any of these three questions means the indirect comment is an error of constitutional proportions meriting review using the constitutional harmless error standard, whether or not objection is first made at the trial court See Easter, 130 Wn.2d at 241-42. On the other hand, if “no” is the answer to all three questions and appeal is taken, a non-constitutional error standard of review applies. See Sweet, 138 Wn.2d at 481; Lewis, 130 Wn.2d at 706-07.

State v. Romero, 113 Wn. App. at 790-91.

Applying this framework, it can be concluded that Miller’s testimony constitutes error of constitutional proportions. First, the prosecutor clearly elicited the testimony, and Miller’s comments were responsive to the questioning: “no,” he did not come into the agreed appointment. Secondly, Miller’s answers were unmistakably purposeful and intended to denigrate Ewing and undermine his defense, thus failing the second inquiry. And while it appears the prosecutor did not violate the principle supporting the third question, a constitutional harmless error analysis is applicable, i.e., the error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.

State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986).

The direct implication of Miller's testimony is that Ewing was refusing to give a statement, which appears more egregious than the silence followed by looking away in Easter or the assertion of innocence in Lewis, especially in consideration of State v. Keene, 86 Wn. app. 589, 594, 938 P.2d 839 (1997), in which this court held that a defendant's right to silence was violated when the officer testified that she made an appointment to meet with the accused, he missed the appointment, and that he did not return any of her phone calls. "The detective's comment violated the defendant's right to silence." Id.

There was no probative value in Miller's testimony. Rather, the only value was the inference that only a person who had something to hide would fail to attend a scheduled appointment for the purpose of providing a statement to the police. The questions and answers served no purpose other than to imply that the fact that Ewing missed the appointment "was more consistent with guilt than with innocence." See Curtis, 110 Wn. App. at 14.

The State's evidence against Ewing was not overwhelming, with the verdict ultimately turning on the credibility of the witnesses on the issue of whether Ewing had unlawfully taken Quesenberry's property.

The State needed to convince the jury that he did and, for the most part, its case rested on the credibility of its key witnesses, especially regarding the identity of the person who had generated the e-mails at issue. Presented with a credibility contest, the jury may well have been swayed by Miller's testimony, which clearly insinuated that Ewing was hiding his guilt. Since Ewing's denial of the theft was undoubtedly undermined by Miller's impermissible testimony, it cannot be said the error was harmless beyond a reasonable doubt. See Easter, 130 Wn.2d at 242-43.

02. EWING WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO OFFICER'S MILLER'S COMMENT ON EWING'S RIGHT TO REMAIN SILENT.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below.

State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court determine that Officer Miller's improper comments on Ewing's right to remain silent does not constitute constitutional error and that counsel waived the issue by failing to object to the testimony, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to this testimony. Since Miller's testimony, for the reasons previously argued herein, violated Ewing's right to remain silent, had counsel objected, the trial court would

have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident. Again, since the State's case against Ewing was not overwhelming, the only value in Miller's comments was the inference that only a person who had something to hide would fail to attend a scheduled appointment for the purpose of providing a statement to the police. The questions and answers served no purpose other than to imply that the fact that Ewing missed the appointment was more consistent with guilt than with innocence, which denigrated Ewing and undermined the credibility of his denial that he had committed the theft of Quesenberry's property.

Counsel's performance was deficient because he failed to object to the testimony here at issue for the reasons previously agued herein, which was highly prejudicial to Ewing, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

03. EWING'S CONVICTIONS FOR THEFT OF A FIREARM AND THEFT IN THE SECOND DEGREE ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

In sentencing Ewing, the trial court calculated his offender score, in part, by counting his convictions for theft of a firearm and theft in the second degree as separate offenses, except for his conviction for unlawful possession of a firearm because of the applicability of RCW 9.94A.589(1)(c) to the computation of the offender score for this offense. [CP 69-72, 76, 78].

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), reviewed denied, 143 Wn.2d 1010 (2001) (quoting State v. Tili, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a); State v. Dunaway, 109 Wn.2d 207, 215-17, 743 P.2d 1237 (1987). This analysis may include whether the crimes were part of the same scheme or plan and whether the criminal objectives changed. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995). Separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or use in a single, uninterrupted criminal episode over a short period of time. State v. Porter, 133 Wn.2d 177, 183, 942 974 (1997).

Here, the two theft offenses occurred at the same time and place and the victim was the same. Additionally, as previously noted, theft of a firearm and theft share the mental element defined in RCW 9A.56.020 because the Legislature specifically so provided in RCW 9A.56.300(4), which provides that the “definition of ‘theft’ ... under RCW 9A.56.020

shall apply to the crime of theft of a firearm.” And the unavoidable inference is that the criminal intent, objectively viewed, did not change from one crime to the next. The purpose was the same: the theft of property from the residence. Accordingly, the matter must be remanded for resentencing based on an offender score that does not include both convictions.

04. EWING WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO ARGUE THAT HIS CURRENT CONVICTIONS FOR THEFT OF A FIREARM AND THEFT IN THE SECOND DEGREE ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.²

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the counting of Ewing’s two current convictions for theft of a firearm and theft in the second degree as separate offenses because he agreed with the standard range [RP 05/01/09 23-24], then both elements of ineffective assistance of counsel have been established.³

² While it has been argued in the preceding section of this brief that this issue can be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

³ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly make the argument for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly made the argument, the trial court would not have imposed a sentence based on an incorrect offender score.

05. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST BE UNANIMOUS BEFORE RETURNING A VERDICT ON THE FIREARM ENHANCEMENT.

As instructed in Court's Instruction 22, the jury was told that it had to be unanimous to return a verdict on the firearm enhancement. [CP 62]. But this is incorrect. As explained in Goldberg, unanimity is not required for a special verdict to be final. State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). Because there is a third possible answer to a special verdict, that of "not unanimous," it was error to instruct the jury that it had to be unanimous as to whether or not Ewing was or was not armed with a weapon.

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer no.

[Court's Instruction 22; CP 62].

Consider a similar situation—the penalty phase in a death penalty case. In such a case, after guilt has been established, the jury then determines whether to impose a death sentence based on whether there were sufficient mitigating factors to warrant leniency. See WPICs 31.05, 31.06, 31.08. The jury is instructed that the proof must be beyond a reasonable doubt and that it must be unanimous to impose a death sentence, but there are two other possibilities: (1) the jury is unanimous not to impose death or (2) it is not unanimous and life without the possibility of parole is the sentence. See WPICs 31.05, 31.06, 31.08. More importantly, the special verdict form specifically sets forth the three options of “yes,” “no,” and “no unanimous agreement.” See WPIC 31.09.

Like the penalty phase in a death penalty case, the firearm enhancement is only considered by the jury once guilt has been found. Like the penalty phase in a death penalty case, the firearm enhancement must be proved beyond a reasonable doubt. Like the penalty phase in a death penalty case, the jury must be unanimous in order for the firearm enhancement to be imposed. Based on these similarities, there is no reason why the jury is not instructed when considering a firearm enhancement that “not unanimous” is a valid verdict, as the jury is instructed in a death penalty case.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object to Court's Instruction 22 and the accompanying special verdict form relating to the firearm enhancement or propose an accurate instruction and verdict form for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected and/or proposed an accurate instruction and special verdict form, there is every likelihood under the facts of this case that the court would have upheld the objection and the jury would have been instructed and would have issued a verdict of "not unanimous" as to the firearm enhancement, with the result that the firearm enhancement would not have been imposed.

E. CONCLUSION

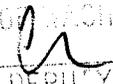
Based on the above, Ewing respectfully requests this court to reverse and dismiss his convictions and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 6th day of November 2009.

Thomas E. Doyle
THOMAS E. DOYLE
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 7th day of November 2009.

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