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COURT OF APPEALS
DIVISION II

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No. 39258-5-II

STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHARLES EWING

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 08-1-02066-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Detective Miller's testimony constituted an improper comment on Ewing's right to remain silent, whether the issue is reviewable, and whether, if there was an error, it was harmless.
2. Whether Ewing waived the issue of his offender score by failing to raise it in the trial court.
3. Whether Jury instruction 22 provided a basis for reversible error, whether the issue is reviewable, and whether, if there was error, it was harmless.
4. Whether Ewing received ineffective assistance of counsel

B. STATEMENT OF THE CASE.

The State accepts Appellant's statement of the case.

C. ARGUMENT.

1. The admission of Detective Miller's testimony is not reversible error because the issue is not reviewable on appeal, the testimony was not an improper comment on Ewing's right to remain silent, and if the testimony was improper, the error was harmless.
 - a. The issue of whether Detective Miller's testimony constituted an improper comment on Ewing's right to remain silent is not reviewable because there is no manifest error.

Ewing's trial counsel did not object to the portion of Detective Miller's testimony wherein Ewing claims there was constitutional error.¹ Errors not raised at trial may not be raised for the first time

¹ The testimony at issue is as follows:

on appeal. RAP 2.5(a). The courts will not review on appeal an alleged error not raised at trial unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellant must show actual prejudice in order to establish that the error is "manifest." State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Lynn, 67 Wn. App. at 345. In the present case, there is no manifest error. The evidence against Ewing was so strong that he would have been convicted even without that brief portion of testimony.² Therefore, the issue is not reviewable.

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

A. (Detective Miller) 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.

² Please see Respondent's brief pages 9-10 for a brief summary of the evidence against Ewing.

- b. Detective Miller's testimony did not constitute an improper comment on Ewing's right to remain silent.

If this court determines that the issue is reviewable on the merits, Detective Miller's testimony regarding Ewing's missed appointment with police did not violate Ewing's constitutional right to remain silent. The right to remain silent is guaranteed by the 5th Amendment to the United States Constitution and by the Washington constitution Article I, Section 9. The Washington Supreme Court has interpreted the two provisions equivalently. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). In Washington, "a defendant's pre-arrest silence, in answer to the inquiries of a police officer, may not be used by the State in its case in chief as substantive evidence of guilt." State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996) (citing State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)). Thus, "a police witness cannot comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." Lewis, 130 Wn.2d at 705. In addition, it is improper for a prosecutor to make closing arguments relating to the defendant's silence to infer guilt from that silence. Easter, 130 Wn.2d at 236.

The Washington Supreme Court has articulated other principles to apply in analyzing an alleged comment on the right to remain silent. For example, the Lewis Court took note of the difference between a “comment” and a “reference” to silence. Id. at 706-707 (citing Tortolito v. State, 901 P.2d 387, 390-91 (Wyo. 1995)); see also State v. Burke, 163 Wn.2d 204, 217-218, 181 P.3d 1 (2008) (“Thus, focusing largely on the purpose of the remarks, this court distinguishes between ‘comments’ and ‘mere references’ to an accused prearrest right to silence”). “A comment on an accused’s silence occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” Lewis, 130 Wn2d at 707. In contrast, a reference to silence is not reversible error absent a showing of prejudice. Id. at 707 (citing Tortolito, 907 P.2d at 390).

In the present case, the testimony of Detective Miller constitutes no more than a “mere reference” to silence and not an impermissible comment. This case is similar to others where no impermissible comment was found. For example, in Lewis, the court held that there was no improper comment on Lewis’s right to remain silent where the detective testified that Lewis essentially said he was innocent, but the detective did not reveal that Lewis

missed appointments or refused to speak with police. Lewis, 130 Wn.2d at 706. There was no other testimony or argument by the prosecutor regarding Lewis's silence. Id. Although Detective Miller testified in the present case that Ewing missed an appointment to talk with police, the reference was very brief, no opinion was expressed or implied by either the prosecutor or Detective Miller that a missed appointment was evidence of guilt, and there was no more testimony regarding silence. Significantly, the prosecutor made no arguments in closing about the appointment or Ewing's silence.

The present case is also similar to State v. Sweet where a police officer testified that "I asked him if he would want to take a polygraph examination when he returned to our jurisdiction, He indicated that he would be willing to do that when he got back" and "I asked him if he would provide me with a written statement, and he said that he would do that after he had discussed the matter with his attorney." 138 Wn.2d 466, 480, 980 P.2d 1223 (1999). Like the police in Sweet, Detective Miller did not testify that Ewing refused to answer questions, nor did he infer that Ewing's actions were evidence of guilt. Finally, neither the prosecutor in Sweet, nor the prosecutor in the present case argued in closing that the police

officers' testimony was evidence of the defendants' guilt. Neither prosecutor made any reference to the defendants' silence in closing.

The present case is distinguishable from cases where improper comment was found. For example, in Easter, the officer testified that Easter was a "smart drunk," by which he meant that Easter "was evasive, wouldn't talk to me, wouldn't look at me, wouldn't get close enough for me to get good observations of his breath and eyes, I felt that he was trying to hide or cloak." 130 Wn.2d at 233. The prosecutor then repeatedly argued in closing that Easter was a smart drunk and the smart drunk theory answered every question in the case. Id. at 234. The court found that the combination of the testimony and closing argument used Easter's silence as substantive evidence of guilt. Id. at 235. Detective Miller did not make such judgmental comments suggesting that the missed appointment was evidence of Ewing's guilt. The prosecutor made no arguments about Ewing's pre-arrest silence and did not refer to the missed appointment in any way.

The present case is also distinguishable from State v. Keene, a case where an improper comment on the defendant's silence was found. 86 Wn. App. 589, 938 P.2d 839 (1997). In

Keene, the detective called the defendant several times to discuss the case and they had an appointment scheduled that the defendant missed. Id. at 592. The detective testified as follows: “I returned several phone calls throughout the next following weeks indicating that if I hadn’t heard from him by the 22nd I would need to turn it over to the prosecuting attorney’s office.” Id. The comment by this detective indicates this detective’s belief that if the defendant did not return phone calls and speak to police, he was probably guilty. In contrast, Detective Miller made no such inference of guilt; rather, he simply relayed the fact that Ewing missed the appointment. Further, during closing argument, the prosecutor in Keene argued:

[Pea and the defendant] played phone tag for a little bit and Detective Pea had to leave several messages for him, finally leaving a message she would turn it over to the Prosecutor if she did not hear from him and she never heard from Terry Keene again. It’s your decision if those are the actions of a person who did not commit these acts.

Id. This comment infers guilt from the defendant’s silence. The prosecutor in the present case made no such comments. Detective Miller’s testimony was a mere reference to silence and not an improper comment on it.

Another principle the Washington Supreme Court will consider is the intent of the prosecutor, and “whether the prosecutor manifestly intended the remarks to be a comment on that right.” State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991) (superseded on other grounds by In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981). The Crane Court further noted that where a prosecutor’s statement, “standing alone, was ‘so subtle and so brief that [it] did not ‘naturally and necessarily’ emphasize defendant’s testimonial silence,’” there was no comment on the right to remain silent. 116 Wn.2d at 331 (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), review denied, 91 Wn.2d 1013 (1979)). There is no indication in the present case that the prosecutor intended Detective Miller’s testimony to be substantive evidence of guilt. At most, the testimony in question merely provided background information and explanation of the steps Detective Miller took in investigating the case. The brief statements of Detective Miller, which were never mentioned again, do not constitute an improper comment on Ewing’s right to remain silent.

- c. If Detective Miller’s testimony did constitute a comment on Ewing’s right to remain silent, the error was harmless.

If this court were to find that Detective Miller's testimony was admitted in error, any such error is harmless.

It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.

State v. Guloy, 104 Wn.2d 412, 425; 705 P.2d 1182 (1985) (internal citations omitted). Washington Courts apply the "overwhelming untainted evidence test" in harmless error analysis. Id. at 426. Applying this test, "the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Id.

The amount and nature of the untainted evidence in this case would have convinced a reasonable jury that Ewing was guilty of the charges. The victim, Stephen Quesenberry, provided compelling and direct evidence that incriminated Ewing. [RP 92]. Quesenberry notified Ewing that the police were looking for him [RP 137] and just days later the theft of Quesenberry's property occurred. On the morning of the theft, Quesenberry awoke to Ewing

entering his apartment. [RP 142-143]. Quesenberry went back to sleep and eventually got up and took a shower. [RP 144-149]. After getting ready for the day, Quesenberry discovered that his computer was missing, his book bag was in Ewing's room and the electronics that were in the bag were missing. [RP 149-151]. He also discovered that the handgun he kept in his closet was missing. [RP 153]. Other evidence of Ewing's guilt was the incriminating e-mails between Ewing and Amber Osburn. [RP 213]. In these e-mails, Ewing admitted to the theft of Quesenberry's laptop, other possessions, and the firearm. [RP 221-224].

Ewing's own actions support a finding of guilt. Ewing asked his girlfriend Tanya to testify falsely on his behalf. [RP 272]. Ewing also admitted to Amanda Rice that he stole Quesenberry's laptop and PSP; he later made some statements to Rice from which she inferred he stole the firearm. [RP 318]. Ewing asked Rice to testify falsely on his behalf. [RP 320]. Finally, immediately after the theft, Ewing fled to California without telling Quesenberry or his girlfriend [RP 269]; he never returned Quesenberry's messages regarding the stolen items. [RP 150]. All of these behaviors are indicative of guilt. In light of all this incriminating evidence, Detective Miller's

brief testimony regarding Ewing's missed appointment was of no importance to the jury's finding of guilt. Any error is harmless.

2. Ewing waived the issue of his offender score by failing to raise it in the trial court.

Ewing did not challenge his offender score in the trial court; therefore, the issue is waived. Issues not raised at trial may not be raised for the first time on appeal. RAP 2.5(a). Although generally a defendant cannot waive a challenge to a miscalculated offender score, there can be a waiver where "the alleged error involves an agreement to facts, later disputed, or where alleged error involves a matter of trial court discretion." In re Goodwin, 136 Wn.2d 861, 874, 50 P.3d 618 (2002). "[A]pplication of the same criminal conduct statute involves both factual determinations and the exercise of discretion." State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000) review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000). The Sentencing Reform Act (SRA) of 1981 allows the sentencing court to rely on information that is admitted or acknowledged at the time of sentencing. RCW 9.94A.530(2). A defendant waived the same criminal conduct issue by failing to raise it below and admitting or acknowledging the offender score calculation during sentencing. Nitsch, 100 Wn. App. at 519; see also State v. Wilson, 117 Wn.

App. 1, 31-32, 75 P.3d 573 (2003) (holding that where a defendant failed to challenge the calculation of his offender score below and did not request the court make a "same course of criminal conduct" determination at sentencing, the issue of offender score was waived).

In the present case, Ewing's defense counsel did not raise the issue of "same criminal conduct" in the trial court. In addition, at the Ewing's sentencing hearing, the court asked Ewing's defense counsel,

I want to make sure and get on the record the criminal history information that we've talked about yesterday and today. I do not have in front of me certified copies indicating these judgments and sentences that are on the prosecuting attorney's statement of criminal history, but my understanding is that you have agreed to the statement of criminal history. You and your client agree; is that correct.

[5-1-09, RP 24]. Defense counsel responded: "My client is not denying that these were, in fact, convictions, so you know, we certainly can push and ask for certified copies, but ultimately, from my conversations with Mr. Ewing, he's not denying these convictions occurred." [5-1-09, RP 24]. Thus, defense counsel did not dispute the offender score and made no request for a "same

criminal conduct” inquiry. Regardless of whether Ewing’s argument on the “same criminal conduct” issue has merit, the issue is waived.

3. Jury instruction 22 does not provide a basis for reversal because the issue is not reviewable on appeal, there is no error in the jury instruction, and if there was error, it was harmless.
 - a. Ewing’s assignment of error to jury instruction 22 is not reviewable because it was not raised at trial.

Ewing did not raise an objection to the jury instruction 22 at the trial court. Issues not raised at trial may not be raised for the first time on appeal. RAP 2.5(a). The courts will not review on appeal an alleged error not raised at trial unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Ewing does not claim that this error meets any of the qualifications for exceptions to the general rule that issues not raised at trial will not be reviewed on appeal. Ewing’s issue regarding jury instruction 22 is therefore not reviewable.

- b. There is no error in jury instruction 22 because there is no authority that unambiguously holds that unanimity is not required for special verdicts.

It was not error for the court to instruct the jury that it had to be unanimous in its answer to the special verdict for the crime of theft in the second degree while armed with a firearm. The court

instructed the jury as follows: “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 to this question, you must answer ‘no.’” [CP 62]. Washington requires unanimous jury verdicts in criminal cases. Wash. Const. art. I, § 21; State v Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Ewing cites State v. Goldberg for the proposition that “unanimity is not required for a special verdict to be final.” Brief of Appellant, 18; 114 Wn.2d 888; 72 P.3d 1083 (2003). However, the complete holding of Goldberg is stated as follows: [U]nder instruction 16, unanimity is not required in order for the verdict to be final.” 149 Wn.2d at 894. Goldberg interpreted the requirements of one jury instruction, and found that in a specific case, that particular instruction did not require unanimity. See State v. Bashaw, 144 Wn. App. 196, 201, 182 P.2d 451 (2008). Therefore, Goldberg is not controlling in the present case.

Ewing cites to no other authority, and the State can find none, that would support a finding that the jury instruction was reversible error. Ewing’s analogy to jury instructions in a death penalty case is not instructive because the procedure and purpose of death penalty proceedings are very different than those of the

present case. A death penalty jury's verdict can result in the death of the defendant; thus, there is very good reason for the difference in unanimity requirements. See State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) ("the death penalty is qualitatively different from all other punishments"). Furthermore, even if the instruction contained an error, the error would be harmless. The jury was polled and unanimity was confirmed. [CP 649]. Bashaw, 144 Wn. App. at 203.

4. Ewing's defense counsel did not render ineffective assistance in his handling of the Ewing's assignments of error 2, 4, and 6.

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert.

denied, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). In the present case, there is no evidence that Ewing's trial counsel's performance was deficient, especially given the strong presumption that counsel was effective.

- a. Ewing was not prejudiced by his counsel's failure to object to Detective Miller's testimony.

Defense counsel was not ineffective in regards to the improper comment on the evidence issue. As explained above, given the wealth of evidence presented at trial of Ewing's guilt, Ewing has not made a showing that if his counsel had objected to the testimony, the outcome of the trial would have been different. Therefore, there is no prejudice and Ewing cannot show ineffective assistance.

- b. Ewing's counsel did not provide ineffective assistance by not arguing that Ewing's convictions for theft of a firearm and theft in the second degree were same criminal conduct for purposes of calculating Ewing's offender score.

Ewing has failed to establish either prong of the ineffective-assistance test. Merely asserting that “the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly make the argument . . .” [Brief of Appellant, 18] does not satisfy his burden. There is no way of knowing why defense counsel did not make the argument because there is nothing to that effect in the record. Ewing has further failed to establish prejudice in that he has not shown a likelihood that, if he had raised the issue below, that the court, taking into consideration that crimes involving firearms are treated more harshly by the legislature, would not have exercised its discretion to find that the two crimes did not constitute the same criminal conduct. Prejudice is not “self-evident.” [Brief of Appellant 18]

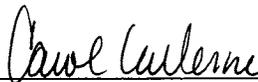
c. Ewing’s trial counsel’s failure to object to jury instruction 22 did not create prejudice to Ewing.

As explained above, even if the instruction were an error, the error would be harmless. The jury was polled and unanimity was confirmed. [CP 649]. Bashaw, 144 Wn. App. at 203.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this court affirm Ewing's convictions.

Respectfully submitted this 7th day of January, 2010.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

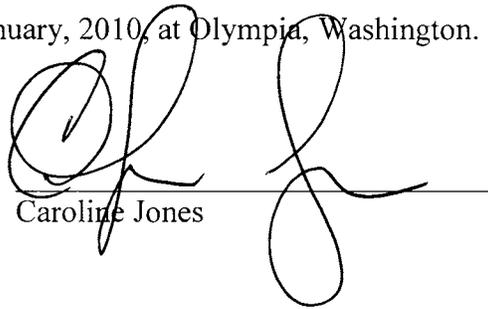
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BY _____
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of January, 2010, at Olympia, Washington.



Caroline Jones