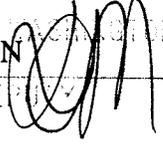


COURT OF APPEALS
DIVISION II

NO. 39262-3-II

10 JUN -7 PM 12:10

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

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, Respondent

v.

BARRY DONALD STRONG, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01245-0

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the Statement of the Case as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR

A. THERE WAS NO VIOLATION OF THE DEFENDANT'S FIFTH AMENDMENT RIGHTS

1. THERE WAS NO VIOLATION OF DEFENDANT'S RIGHT TO REMAIN SILENT

The appellant alleges that his right to remain silent was violated when the officer testified that he refused to give the name of another individual involved in the crime. The defendant waived his right to remain silent and spoke with the police about this incident. As he waived his right, the State may permissibly elicit testimony about what he said and as to what he wouldn't say after waiving those rights.

The Fifth Amendment to the United States Constitution states, in part, no person "shall... be compelled in any criminal case to be a witness against himself." The Washington State Constitution Article I, Section 9 states, "no person shall be compelled in any criminal case to give evidence against himself." The right against self-incrimination is liberally construed. Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814 (1951). It is intended to prohibit the inquisitorial method of investigation

in which the accused is forced to disclose the contents of his mind. Doe v. United States, 487 U.S. 201, 210-12, 108 S. Ct. 2341 (1988). This right prohibits the State from calling the defendant as a witness. State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979). The State also may not elicit comments from witnesses or make closing argument relating to a defendant's silence to infer guilty from the silence. The United States Supreme Court in Miranda v. Arizona, said "the prosecution may not...use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S. Ct. 1602 (1966). The purpose of this prohibition is to prevent the State from circumventing a defendant's right to remain silent. State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

When a defendant chooses not to remain silent and instead talks to the police, the State may comment on what he does not say. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (citing State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978)), *cert. denied*, 534 U.S. 1000 (2001). Appellant alleges the State violated his right to remain silent by eliciting testimony from Officer Brinski on the defendant's refusal to answer a question. The Fifth Amendment right does prohibit the State from commenting on a criminal defendant's invocation of his right to remain silent. The State may not elicit testimony regarding the

defendant's refusal to talk to police, or comment on a defendant's failure to testify. However, if a defendant gives up his right to remain silent and engages in conversation with police, once the State has met its burden in proving the statements were not coerced, those statements may come in under Rule of Evidence 801(d) as non-hearsay statements by a party opponent.

In this case, the defendant did not remain silent. Officer Brinski testified at trial and during the 3.5 hearing to determine admissibility of the statements, that he advised the defendant of his Miranda rights, that he asked the defendant if he understood his rights, and that he asked the defendant if he wanted to speak with him. (2 RP 97). Officer Brinski testified that the defendant said he understood his rights and said yes that he wanted to speak with him. The defendant, therefore, did not invoke his right to remain silent, he did not remain silent, and the State, by asking the Officer to repeat what the defendant told him, did not impermissibly comment on the defendant's silence.

No statements were made during any other testimony, or during closing arguments by the prosecutor, that the defendant refused to talk with the police, nor is there any statement that silence or refusal should imply guilt. Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would

probably derive no implication of guilty from a defendant's silence. State v. Lewis, 130 Wn.2d 700, 706, (1996) (citing Tortolito v. State, 901 P.2d 387, 390 (Wyo. 1995) (citing Parkhurst v. State, 628 P.2d 1369 (Wyo.)).

A comment on an accused's silence occurs when used to the State's advantage as either substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilty. Lewis, 130 Wn.2d at 707 (citing Tortolito v. State, 901 P.2d 387, 391 (Wyo. 1995)). The State never commented on Mr. Strong's refusal to answer the specific question as to what the name of the female associated with him was. Nothing was said during closing, no comment about the refusal was elicited from the Officer, nor was any other testimony elicited from other witnesses regarding this refusal. As this silence as to this question was not used as evidence of his guilty, it did not prejudice the defendant.

2. IF THERE WAS ANY ERROR, IT WAS HARMLESS

This court may find that the error was harmless if it is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995), and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990).

In the case at hand, the State did not use the comment that the defendant refused to say who the female was in its closing argument. Further, the existence of the female or the name or the defendant's refusal to name her do not go to the elements of the crime and do not affect the State's evidence. The appellant's contention that but for the entry of this statement the jury would have acquitted is without merit. The refusal of the defendant to name the female had nothing to do with whether or not the other male involved stole items and the defendant, knowing he stole something, offered assistance as a get-away driver. The State proved this theory through direct testimony of eye witnesses; the defendant's statement regarding refusing to name the female involved did would not affect a trier of fact's determination of this case. Further, the State did not argue the defendant's refusal to name the female in closing, nor was it ever mentioned again in trial.

The statement was not used as substantive evidence of the defendant's guilt. His right to remain silent was not violated.

B. APPELLANT HAD EFFECTIVE COUNSEL

Appellant alleges his defense counsel was ineffective for failing to object to a witness's testimony that the defendant was arrested. Defense counsel moved pre-trial to exclude this testimony (2 RP 47). The Court denied this motion and allowed the prosecutor to elicit testimony that the

defendant was in custody. Defense counsel was not ineffective and this claim should be denied.

In a claim of effectiveness of counsel, the defendant must show deficient performance and prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The court presumes that the defendant's trial counsel performed properly. Hendrickson, 129 Wn.2d at 77. The defendant also has the burden of showing prejudice. Hendrickson, 129 Wn.2d at 78. Concerning ineffective assistance of counsel, in determining whether counsel's performance was deficient, there is a strong presumption of adequate representation at trial. State v. McFarland, 127 Wn.2d at 335. Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993). A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment, and (2) that the defendant was prejudiced by reason of his counsel's actions such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The strong presumption that counsel's representation was effective will be overcome only by a clear showing of ineffectiveness derived from the record as a whole. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). An appellant must satisfy both the

deficient performance and prejudice prongs to prevail on a claim of ineffective assistance of counsel. An appellant satisfies the prejudice prong by showing that there is a reasonable probability the outcome would have been different but for the alleged deficient performance.

As the defense attorney did move to suppress the information elicited by the prosecutor, there was no need to later object to the line of questioning—his objection to it was already preserved. The appellant’s claim that defense counsel was insufficient for failing to object to the question presented is without merit.

Further, appellant claims the State gave an opinion as to the defendant’s guilt by having Officer Brinski testify that the defendant was arrested. A witness at a trial may not invade the province of the jury by stating an opinion as to guilty or innocence, however, Officer Brinski gave no such opinion. Officer Brinski testified that the defendant was “arrested on a warrant, and when I brought him to the jail, booked him to jail...” (2 RP 97). There is no possibility the jury interpreted that statement as an opinion as to the defendant’s guilt. Officer Brinski never testified that he arrested the defendant on the Theft charge, or that he thought the defendant was guilty of Theft. The defendant was arrested on an unrelated warrant and Officer Brinski took that opportunity to question him. Officer Brinski did not, as the appellant alleges, state that he arrested the

defendant on the Theft charges or that he thought the defendant was guilty of Theft. The statement was that the defendant was taken into custody on a warrant and read Miranda and questioned about his involvement in the Theft. In no way did Officer Brinski invade the province of the jury or in any way give an improper opinion. Officer Brinski merely testified to his own actions and to facts within his personal knowledge.

Appellant's assignment of error as to ineffective assistance of counsel should be denied.

C. THE COURT DID NOT IMPROPERLY COMMENT ON THE EVIDENCE

Appellant alleges the Court improperly commented on the evidence by handing a witness a calculator during direct examination by the State. The Court did not make any comment on the evidence. Further, even if the Court's act of handing a calculator is found to be a comment on the evidence, this error was cured by the instruction given to the jury to disregard all comments possibly perceived. Appellant's assignment of error is without merit.

Article IV, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereupon, but shall declare the law." A statement by the court constitutes a comment on the evidence if the court's attitude toward the

merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *See also* State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974) ("To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements."). Also, an instruction improperly comments on the evidence if it resolves a disputed issue of fact. State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997). Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, the courts presume prejudice. Lane, 125 Wn.2d at 838. The burden then shifts to the State to show that no prejudice resulted to the defendant, unless it affirmatively appears in the record that no prejudice could have resulted from the comment. Lane, 125 Wn.2d at 838.

The comment the appellant alleges involves no statement by the court. The comment alleged is the act of handing a witness a calculator. As indicated in the appellant's brief, the witness stated, "I'm sorry, I'm not doing my math correct at all. Excuse me, no. Two headsets. One model was 99.99. The other model was \$119.99." It is after this statement that the court handed the witness a calculator. This act was not a comment on the evidence, as the appellant suggests, that the court

believed the witness should revise his testimony. It was a response to a witness stating he was having trouble with his math and attempting on the stand to do math without the benefit of paper, pen or other tool to assist him. The court in no way commented on the evidence.

Further, the act of handing the witness a calculator in no way prejudiced the defendant or his presentation of his case. The defense theory of the case was that the defendant was “in the wrong place at the wrong time.” (3 RP 193). The theory of the case was not that the value of the stolen merchandise did not add up to the \$250 threshold the State had to prove for the jury to find the defendant guilty of a felony theft. By allowing a witness to correct his math by aid of a calculator did not prejudice the defendant or the presentation of his case in any way.

However if this Court finds it was an impermissible comment on the evidence, the comment was cured by jury instruction number one which instructs the jury to disregard any possible comment it may have perceived.

In State v. Elmore, 139 Wn.2d 250, 985 P.2d 289 (1999), the defendant appealed alleging the Court made an impermissible comment by allowing the defendant to appear in shackles during voir dire, arguing that the trial judge communicated to the jury his belief that the defendant was such a dangerous person that he had to be shackled in the courtroom.

This case is similar to the case before this court in that neither the judge in Elmore, nor the judge here made any actual statements. The “comment” is being construed by behavior. In this case, the appellant alleges the court commented on the evidence by handing the witness a calculator when the witness was having trouble calculating a figure in his head.

In Elmore, the court of appeals found that any “possible misinterpretation by the jury that Elmore’s shackled appearance amounted to a comment on the evidence by the judge was averted by the admonishment included in the jury instructions. Elmore, 139 Wn.2d at 276.

In this case, the court gave a very similar, and in some parts the exact same, admonishment as the court in Elmore gave. Judge Wulle in jury instruction number 1 instructed the jury that, “...A trial judge may not comment on the evidence. It would be improper for me to express by words or conduct my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during the trial or in the giving of these instructions, you must disregard this entirely.” (3 RP 161-62).

As in Elmore, any possible misinterpretation by the jury of the alleged comment was cured by this admonishment.

D. THE CONVICTION WAS PROPER

Appellant alleges there was insufficient evidence presented to the jury to support a conviction for Theft in the Second Degree. The State presented sufficient evidence showing the defendant was an accomplice to Theft in the Second Degree, and the jury had sufficient facts with which to find the defendant guilty. The jury entered a verdict of guilty which the Court accepted. The appellant's claim that his conviction lacked the necessary evidence to support it is without merit.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence, and the reviewing court defers to the trier of fact on issues of witness credibility, conflicting testimony, and the persuasiveness of evidence.

The State must prove every element of the offense charged beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 753, 613 P.2d 121 (1980) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970)).

However, it is not the role of the reviewing court to determine whether or not it believes the evidence at trial established guilty beyond a reasonable doubt; the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221 (616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979)).

To prove a defendant guilty of the crime of Theft in the Second Degree, the State had to prove that 1) On July 15, 2008 the defendant wrongfully obtained the property of another; 2) that the value of the proper exceeded \$250; 3) that the defendant intended to deprive the other person of the property; 4) the acts occurred in the State of Washington.

The State presented evidence that the defendant aided another in committing a Theft in the Second degree. The State presented evidence that the defendant, along with another, went to the store where the theft occurred, talked to the sales associates and then left. Then two hours later they came back again and went inside the store and talked again with the sales associates. The defendant left, leaving the other male inside the

store. A witness testified that the defendant then drove the white Cadillac slowly across the parking lot in front of the store. Then the other male ran out of the store and the defendant driving the white Cadillac circles around, back to the main road. The sale associate chases after the male and the male gets into the white Cadillac as it is still moving and then the defendant drives the car away. The witnesses testified the male left the store with 4 Bluetooth headsets valued at over \$250 and that he did not pay for them prior to leaving the store.

Taking all the evidence the State presented in the light most favorable to the State, allowing for all reasonable inferences that could be drawn therefrom, and allowing the trier of fact to decide credibility and conflicting testimony, there is sufficient evidence that the defendant was guilty of the crime of Theft in the Second Degree by accomplice liability.

E. ANY CLOSURE WAS DEMINIMUS

Appellant alleges his right to a public trial was violated when the Judge, Prosecutor and defense attorney left the courtroom to discuss certain matters. This allegation is without merit. A courtroom closure occurs when the Court excludes persons from the courtroom or holds portions of the trial behind closed doors. No such thing occurred in this case. The defendant's trial, including voir dire, opening, direct and cross examination of all witnesses and closings and jury instructions were

conducted in a public courtroom where members of the public could be present if they so chose. At no time did the Court close the courtroom or exclude members of the public from any part of the trial. The fact the Court brought the prosecutor and defense attorney into the hallway to discuss objections or timelines for witnesses and breaks did not deny the defendant the right to a public trial.

A criminal defendant has a Sixth Amendment right to a public trial. Courts must carefully safeguard a defendant's right to a public trial. However, not every courtroom closure constitutes a violation of the public trial right. Depending upon the factual circumstances in a case, a closure may be so trivial that the defendant's right to a public trial is not implicated.

Recently the court observed that "a trivial closure does not necessarily violate a defendant's public trial right." State v. Brightman, 155 Wn.2d 506, 517, P 19, 122 P.3d 150 (2005). Many courts have recognized a "de minimis" closure standard applies when a trial closure is too trivial to implicate the constitutional right to a public trial. The de minimis standard refers to a courtroom closure that is "too trivial to implicate the Sixth Amendment guarantee," i.e., no violation of the right to a public trial occurred at all. United States v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); *see also* Braun v. Powell, 227 F.3d 908, 918 (7th Cir.

2000) ("there are certain instances in which the exclusion [of persons from the courtroom] cannot be characterized properly as implicating the constitutional guarantee"); Carson v. Fischer, 421 F.3d 83, 92 (2d Cir. 2005) ("[e]ven an unjustified closure may, in some circumstances, be so trivial as not to implicate the right to a public trial"); People v. Webb, 267 Ill. App. 3d 954, 959, 642 N.E.2d 871, 205 Ill. Dec. 6 (1994) ("the defendant's right to a public trial was not violated" by a de minimis closure); People v. Woodward, 4 Cal. 4th 376, 384-86, 841 P.2d 954, 14 Cal. Rptr. 2d 434 (1992) (applying the "de minimis rationale" and concluding that the right to a public trial was not violated); State v. Lindsey, 632 N.W.2d 652, 660-61 (Minn. 2001) (applying a "triviality standard" and concluding that no violation of the right to a public trial occurred); State v. Torres, 844 A.2d 155, 162 (R.I. 2004) (recognizing "that the Sixth Amendment is not violated every time the public is excluded from a courtroom"; "[a]n unjustified closure may, on its facts, be so trivial as not to violate the Sixth Amendment guarantee").

Courts that have found a closure to be de minimis or too trivial to constitute a violation of the right to a public trial have done so after weighing the closure against the values advanced by the right. That is, whether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether closure has infringed on the

"values that the Supreme Court has said are advanced by the public trial guarantee: 1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury." Carson, 421 F.3d at 93 (quoting Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996) (citing Waller v. Georgia, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))). This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure.

The standard has been applied both in cases where the courtroom closure was deliberate, and in cases where it was inadvertent. Numerous appellate courts have applied the de minimis or trivial closure standard when reviewing intentional closures, i.e., closures that resulted from deliberate acts of trial courts. *See, e.g.*, Carson, 421 F.3d at 91-95 (Second Circuit; trial court excluded defendant's mother-in-law from the courtroom during the testimony of a confidential informant); Braun, 227 F.3d at 917-20 (Seventh Circuit; trial court excluded one spectator from the courtroom--a former member of the jury venire who was not selected as juror); Ivester, 316 F.3d at 959-60 (Ninth Circuit; trial court excluded spectators from courtroom during questioning of jury about safety concerns); Woodward, 4 Cal. 4th at 384-86 (trial court permitted bailiff to

lock courtroom doors and post sign, which read "[t]rial in progress-- [p]lease do not enter" and listed break times, during prosecutor's closing argument); Lindsey, 632 N.W.2d at 659-61 (trial court excluded two minors from courtroom); State v. Shaw, 619 S.W.2d 546, 548 (Tenn. Crim. App. 1981) (courtroom closed during closing arguments to prevent people who would be arriving for judge's daily calendar call from distracting from arguments).

The purposes behind the constitutional guarantee to a public trial are to ensure a fair trial; remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; to encourage witnesses to come forward and to discourage perjury. Peterson v. Williams, 85 F.3d 39, 43 (2nd Cir. 1996). None of these purposes are implicated in the alleged closures that occurred in this case. There was no testimony taken or motions heard while the prosecutor and defense attorney and judge were out of the courtroom, therefore it is not possible that perjury was encouraged by a result of the closure. As the courtroom was open to the public during all testimonial phases of the trial, during pre-trial motions, during opening statements and closing arguments, as well as during the instructions given to the jury, it cannot be said that witnesses were discouraged to come forward by any closure or that the prosecutor and judge were not reminded of their responsibility. Finally,

the defendant was given a fair trial, as the record substantially shows his rights were afforded, the evidence against him was properly presented without misconduct and he had the opportunity to remain silent and to confront his accusers. The defendant received a fair trial.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 4 day of January, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

BARRY DONALD STRONG,
Appellant.

No. 39262-3-II

Clark Co. No. 08-1-01245-0

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Jan 4, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
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DOCUMENTS: Brief of Respondent

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

[Signature]
Date: Jan 4, 2010.
Place: Vancouver, Washington.