

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JORDAN DIXON,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF GRAYS HARBOR  
COUNTY OF THE STATE OF WASHINGTON

The Honorable F. Mark McCauley

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APPELLANT'S OPENING BRIEF

---

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## **A. ASSIGNMENTS OF ERROR**

1. In Mr. Dixon's trial on a charge of complicity to attempted robbery, the trial court admitted hearsay evidence in violation of Mr. Dixon's confrontation rights.

2. The jury instruction on accomplice liability misstated the law.

3. The prosecutor impermissibly commented on the defendant's pre-arrest silence, and his failure to testify at trial.

4. The prosecutor committed misconduct in closing argument.

5. Cumulative error denied Mr. Dixon a fair trial.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Mr. Dixon was prosecuted as an alleged accomplice to an attempted robbery committed by Jason Thomas, who was convicted in a separate proceeding and did not testify at trial. The complainant testified that the robbery attempt was perpetrated by two males, including the defendant. Mr. Dixon told police in a Mirandized<sup>1</sup> statement that he left the area when Mr. Thomas assaulted the complainant and tried to take his money, and he was not involved in the crime. However, on direct examination, a police officer testified twice that Mr. Thomas stated that Mr. Dixon was with him on the night of the incident, and named him as the other suspect involved.

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<sup>1</sup>Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

(a) Did the officer's hearsay testimony violate Mr. Dixon's Sixth Amendment and Article 1, § 22 confrontation rights?

(b) Does a non-testifying perpetrator's out-of-court accusation naming the defendant as his accomplice constitute "manifest constitutional error" under RAP 2.5(a)(3) for purposes of preservation of the error for appeal?

(c) Does the error require reversal in a trial where the untainted evidence that the defendant participated as an accomplice in the perpetrator's crime was not overwhelming?

2. The jury instruction on accomplice liability entirely failed to include the requirement of RCW 9A.08.020 that an accomplice must act "with knowledge that [his conduct] will promote or facilitate" the principal's commission of the crime.

(a) Did the instruction misstate the law of accomplice liability?

(b) Was the error invited by trial counsel where the court, sua sponte, drafted the instruction because neither party had submitted an accomplice liability instruction?

(c) May Mr. Dixon appeal the instructional error under RAP 2.5(a)(3) as "manifest constitutional error"?

(d) In the alternative, was trial counsel ineffective for failing to object to the erroneous instruction?

(e) Does the error require reversal where the defective

instruction allowed the jury to convict Mr. Dixon as an accomplice based solely on his brief presence at the scene and knowledge that the crime was occurring, despite the fact that he did not associate himself with Mr. Thomas's criminal undertaking, participate in it as something he desired to bring about, or seek by his presence to make it succeed, as required by law?

3. In closing argument, the prosecutor pointed out that the complainant had testified, and then contrasted this fact with Mr. Dixon's conduct after the alleged incident of leaving the area instead of waiting for the police in order to explain what happened, and waiting three hours before coming to the police station to talk with an officer. After arguing that these were not the actions of an "innocent person," the prosecutor again emphasized that the complainant had taken the witness stand.

(a) Did the prosecutor impermissibly comment on the defendant's pre-arrest silence, in violation of the Fifth Amendment and Article 1, § 22?

(b) Did the prosecutor impermissibly comment on the defendant's failure to testify at trial, in violation of the Fifth Amendment and Article 1, § 22?

(c) Was this prosecutorial misconduct, and was it so flagrant and incurable that Mr. Dixon may challenge the State's closing

argument on appeal despite the absence of an objection by counsel?

(d) Did the State's closing argument constitute manifest constitutional error under RAP 2.5(a)(3)?

(e) Does the misconduct require reversal because it had a prejudicial effect on the outcome of trial, or, under a constitutional error standard, because the evidence was not overwhelming?

4. The defendant did not testify or call witnesses. Did the prosecutor commit misconduct in closing argument by telling the jury that persons who are willing to take the witness stand are entitled to a presumption that they are telling the truth?

5. Did the prosecutor commit misconduct in closing argument by arguing that Mr. Dixon was intoxicated by alcohol on the night in question, where no such facts were in evidence, and by responding to the defense objection to this argument by telling the jury that they would actually never know if the defendant was intoxicated or not, because he failed to wait for the police at the scene of the incident?

6. If none of the errors assigned above individually require reversal, did the cumulatively prejudicial effect of these errors, including the prejudice caused by those, if any, that were inadequately preserved for appeal, render Mr. Dixon's trial fundamentally unfair under the due process clause of the Fourteenth Amendment?

### C. STATEMENT OF THE CASE

(1). **Procedural history**. According to the affidavit of probable cause, on April 13, 2009, Eric Calloway told the police that two males had attempted to rob him as he walked from the Hoquiam public library to his residence at the Econo Lodge motel. CP 4. Mr. Calloway believed that Jordan Dixon, someone he had met once in the past, was one of the perpetrators. CP 4. The other perpetrator, Jason Thomas, was arrested in front of the police station after the complainant, Mr. Calloway, pursued him through downtown Hoquiam to that location. CP 4.

Mr. Thomas admitted to following Mr. Calloway to the Econo Lodge, and then pushing him. CP 4-5. At the same time, however, he claimed, according to the affidavit, that Mr. Dixon was the perpetrator of the crime. CP 4-5. He did not testify at Mr. Dixon's trial, apparently because he could not be located. 6/10/09RP at 86.

Mr. Dixon came to the police station on his own initiative a few hours after the incident. 6/10/09RP 66, 75-76. He told police that he had been with Jason Thomas on the evening in question, but then a confrontation began between Mr. Thomas and Mr. Calloway. CP 5. Mr. Dixon denied being involved in any attempted robbery. CP 5. The evidence at trial regarding Mr. Dixon's post-Miranda interrogation

statements was entirely consistent with his statements as reported in the affidavit of probable cause. 6/10/09RP at 76-77; Supp. CP \_\_\_\_, Sub # 28 (Exhibit list, State's exhibit 1).

Mr. Dixon was charged with attempted robbery pursuant to RCW 9A.56.210 and RCW 9A.28.020. CP 1-2.

During trial, a police officer testified twice that Jason Thomas told him at the police station that Mr. Dixon was the other alleged perpetrator who had been with him that night during the incident. 6/10/09RP at 73-75. Defense counsel objected to the first instance of this testimony, on grounds of hearsay. 6/10/09RP at 73.

In discussion of jury instructions, the trial court remarked upon the parties' failure to propose any jury instruction on accomplice liability, and gave the jury an instruction the court crafted at the bench or which was inadvertently mistyped by the court clerk, that did not include the essential requirement that an accomplice must have "knowledge" that his assistance of the principal will promote that person's commission of the crime. 6/10/09RP at 83-86; CP10 (Jury instruction no.10). Mr. Dixon's trial counsel did not object to this jury instruction.

In closing argument, the deputy prosecutor contrasted the testifying complainant (Mr. Calloway) with the non-testifying defendant (Mr. Dixon). The prosecutor argued that all persons who had been

willing to take the witness chair were entitled to a presumption of credibility, while Mr. Dixon, in contrast, had left the area of the attempted robbery instead of waiting around for officers to arrive so he could tell them what happened. The prosecutor also argued that Mr. Dixon had kept silent for three hours before finally coming down to the station to talk to the police. 6/10/09RP at 87-89. Trial counsel did not object to this argument. The jury convicted the defendant. CP 12

Mr. Dixon was sentenced to 7 months incarceration, which represented the approximate middle of the standard range. CP 18-25; 6/22/09RP at 4-5. He timely filed a notice of appeal. CP 26-27.

**(2). Facts.** The complainant Eric Mr. Calloway, who resided with his father at the Econo Lodge motel in Hoguam, believed he had met Mr. Dixon once casually in the past, but did not know him.

6/10/09RP at 4-5. Mr. Calloway was walking home from the public library when he saw Mr. Thomas and Mr. Dixon walking toward him from across a parking lot. 6/10/09RP at 11-12. Mr. Calloway testified that "they" said, "Hello. What's up." 6/10/09RP at 12. Mr. Calloway responded similarly and kept walking. He said that he then heard someone say, "Empty your pockets." 6/10/09RP at 13.

Mr. Calloway was not sure who had spoken, but he believed he recognized the voice as Mr. Dixon's. 6/10/09RP at 13. He turned

around and said, "Fuck you." 6/10/09RP at 14. At that point, he claimed, one of the males swung at him -- he was unsure which male swung first, but eventually they both did. 6/10/09RP at 14.

Mr. Calloway backed up from the males and started dialing his cell phone. 6/10/09RP at 14-15. He stated, "I believe one of them hit me during that time." 6/10/09RP at 16. Despite repeated efforts to clarify his testimony, he could not say who swung at him first, or which male he was asserting struck him. 6/10/09RP at 47.

Mr. Calloway dialed 911. 6/10/09RP at 16. He claimed that he was yelling for help as he was on the line with police, although no 911 tape was ever offered. 6/10/09RP at 16-17. He also ran toward his motel room and banged on the window, trying to get his father's attention. 6/10/09RP at 17. The window broke. 6/10/09RP at 17.

At this point, the two males started running away from the scene, and Mr. Calloway gave chase. 6/10/09RP at 17. Mr. Calloway pursued Mr. Thomas down the street, and caught up with him near the Bank of the Pacific, where he tried to knock him down. 6/10/09RP at 17-18. No explanation was offered for where the alleged second perpetrator disappeared to.

During the chase, when a man in a truck stepped out of his vehicle to see what was going on, Mr. Thomas tried to get the man to help get him away from Mr. Calloway, but Mr. Calloway told the man

to leave. 6/10/09RP at 19. Mr. Calloway continued to pursue Mr. Thomas, and tried to tackle him twice, as they ran down 8th Street in downtown Hoquiam. 6/10/09RP at 19. Mr. Calloway and Mr. Thomas began "trading blows;" they found themselves right next to the Hoquiam police station on 8th Street and K Street, and officers arrived. 6/10/09RP at 19, 51.

In cross-examination, Mr. Calloway admitted that he had previously stated in a defense interview that the male who spoke to him at the beginning of the incident had actually asked him a question, saying, "What's in your pockets?" 6/10/09RP at 20-21. Mr. Calloway admitted he was completely unsure "who it was that said whatever it is they said," and later continued to refer to this statement or question about his pockets as having been uttered by "they." 6/10/09RP at 21, 25.

Hoquiam police officer Dennis Luce encountered two males yelling and screaming at each other in front of the police station. 6/10/09RP at 61. One of them, Jason Thomas, was intoxicated by alcohol. 6/10/09RP at 65. Mr. Thomas was screaming that Mr. Calloway had assaulted him. 6/10/09RP at 61. Specifically, Officer Luce testified that Jason Thomas was "screaming the other guy assaulted me, [and] the other one [Mr. Calloway] was pointing like he had been robbed or tried to have been robbed." 6/10/09RP at 61.

The court sustained Mr. Dixon's hearsay objection to the portion of the officer's testimony repeating Mr. Calloway's claim that he had been robbed, and instructed the jury to disregard Mr. Calloway's immediately subsequent testimony to the same effect. 6/10/09RP at 61. The prosecutor stated he would lay a foundation for admission as an excited utterance, but never offered legal argument, and the trial court never ruled that Mr. Calloway's statements to the police were admissible. 6/10/09RP at 61. The court also sustained additional defense objections to similar hearsay testimony from Officer Luce, and Officer Shane Krohn.<sup>2</sup> 6/10/09RP at 69, 72-73.

After Mr. Thomas was arrested, Officer Krohn assembled a photomontage based on Mr. Calloway's description of the person he claimed was with Mr. Thomas when he was allegedly assaulted. 6/10/09RP at 72. Mr. Calloway apparently identified someone who turned out to be uninvolved in the incident. 6/10/09RP at 72.

Officer Krohn testified that the montage was assembled when "the subject that was in custody [Mr. Thomas] did give a name of a second party involved which [was] Mr. Dixon ." 6/10/09RP at 72. Mr. Dixon objected to this testimony as "hearsay" and the jury was told to

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<sup>2</sup>Not having been admitted, the out-of-court claim by Mr. Calloway that he was robbed or "tried to have been robbed" is not part of the evidence considered for purposes of Mr. Dixon's reversible error analyses. See Part D, *infra*.

disregard it. 6/10/09RP at 73. Officer Krohn later testified that a second montage was assembled "after the person in custody [Jason Thomas] gave a name of who he was with." 6/10/09RP at 75; Supp. CP \_\_\_\_, Sub # 28 (Exhibit list, State's exhibit 2).

Later on the same evening of the incident, Jordan Dixon arrived at the police station of his own accord. 6/10/09RP at 66. He wanted to know "why [the police] were looking for him." 6/10/09RP at 66. Officer Krohn stated that Mr. Dixon came to the police department, and after the defendant was advised of, and expressly waived, his Miranda rights, he told the officer that he had been with Jason Thomas on the night concerned. 6/10/09RP 75-76. Mr. Dixon informed the police that it was Mr. Thomas who had "started something with Mr. Calloway," by having words with him, approaching, and then swinging at him. 6/10/09RP at 76. Mr. Dixon left the area when Mr. Thomas tried to rob Mr. Calloway, and was not involved in the crime. 6/10/09RP at 76. Mr. Dixon executed a written statement to this same effect. 6/10/09RP at 77; State's exhibit 1.

## D. ARGUMENT

1. THE ADMISSION OF HEARSAY REPEATING MR. THOMAS'S ASSERTIONS TO POLICE THAT MR. DIXON WAS WITH HIM DURING THE ATTEMPTED ROBBERY AND WAS "INVOLVED" AS HIS COMPATRIOT VIOLATED THE DEFENDANT'S RIGHT TO CONFRONTATION.

a. The admission of Mr. Thomas's out-of-court assertion that the defendant was an accomplice to his attempted robbery violated Mr. Dixon's confrontation rights. In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that admission of testimonial hearsay uttered by a non-testifying declarant implicating the accused violates the defendant's Sixth Amendment right to confrontation. Crawford v. Washington, 124 S.Ct. at 1364, 1369. The Court held that the confrontation clause "commands, not that evidence be reliable [under hearsay principles], but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (Emphasis added.) Crawford, 124 S.Ct at 1370. This Sixth Amendment<sup>3</sup> doctrine represents at least the defendant's minimum protection against accusatorial hearsay now guaranteed by

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<sup>3</sup>The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

the Washington State Constitution, Article 1, § 22.<sup>4</sup> State v. Davis, 154 Wn.2d 291, 312 n. 9, 111 P.3d 844 (2005).

Confrontation is a “bedrock” protection for the defendant in a criminal case, and it now is understood to specifically require that testimonial evidence must be tested by the adversarial process. Crawford, 124 S.Ct at 1354, 1359. The Confrontation Clause grants a defendant the right “to be confronted with witnesses against him,” and since a “witness” is defined as a person giving testimony, the Clause requires in-person testimony, or a full prior opportunity for cross-examination, in order to admit out-of-court statements as “testimonial evidence.” Crawford, 124 S.Ct. at 1364.

In the present case, the admission of Mr. Thomas’s out-of-court assertion naming Mr. Dixon as an accomplice to his crime violated Crawford. Officer Shane Krohn testified that one of the photo montages shown to the complainant had been assembled because “the subject that was in custody [Mr. Thomas] did give a name of a second party involved which [was] Mr. Dixon.” 6/10/09RP at 72.

Mr. Dixon's counsel objected to this testimony as "hearsay" and

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<sup>4</sup>Article I, § 22 of the Washington State Constitution provides that “[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.”

the jury was told to disregard it.<sup>5</sup> 6/10/09RP at 73. However, there was no defense objection, on any basis, when Officer Krohn later testified that a second montage was assembled the next day, "after the person in custody [Jason Thomas] gave a name of who he was with." 6/10/09RP at 75; State's exhibit 2.

It was again made fully clear to the jury by this testimony that Mr. Thomas had named Mr. Dixon, the defendant, as the second person involved, because the officer immediately thereafter testified that the police followed up on Thomas's statement by contacting "the mother of the defendant that is sitting there" in order to arrest "Jordan Dixon." 6/10/09RP at 75.

The admission of Mr. Thomas's accusatorial hearsay testimony in this case squarely violated Mr. Dixon's right of confrontation. The State cannot during a criminal investigation take statements from a witness, and then introduce these statements as evidence against the defendant in the form of the inculpatory hearsay statements at a trial from which the declarant is absent. This would, and this case does, violate the Sixth Amendment framers' original understanding of the confrontation guarantee as recognized by Crawford. Crawford, 124

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<sup>5</sup>This objection was unfortunately inadequate to preserve the confrontation clause error. United States v. Chau, 426 F.3d 1318, 1321-22 (11th Cir. 2005) (general hearsay objection does not preserve a Confrontation Clause issue brought pursuant to Crawford v. Washington).

S.Ct. at 1360-61, 1364 (confrontation guarantee was intended by the framers to preclude accusing declarant from avoiding the scrutiny of the public courtroom).

Mr. Thomas's statements fall squarely within Crawford's exclusion of "testimonial" hearsay. The Supreme Court made it clear that statements "taken by police officers in the course of interrogations are . . . testimonial even under a narrow standard." Crawford, 124 S.Ct. at 1364. The Court explained that it was using the term "interrogation" in its colloquial sense. Crawford, 124 S. Ct. at 1365 n. 4 (comparing colloquial definitions of interrogation with technical definition applicable for purposes of Miranda).

Mr. Thomas was being questioned pursuant to Miranda when he named Mr. Dixon as his compatriot. Under an objective standard, a declarant in Mr. Thomas's position "would reasonably expect" his statements to be used prosecutorially; therefore his statements are testimonial. Crawford, 124 S. Ct. at 1364, 1374. The Court also stated definitively that the "[i]nvolvement of government officers in the production of testimony with an eye toward trial" renders out-of-court statements testimonial. Crawford, 124 S. Ct. at 1367 n. 7. Additionally, numerous courts have concluded that a witness statement made in response to police questioning is testimonial. See,

e.g., State v. Clark, 598 S.E.2d 213 (N.C.App. 2004) (non-testifying witness's statement provided for identification of defendant was testimonial under Crawford because made in response to police questioning); United States v. Nielsen, 371 F.3d 574, 578, 581 (9th Cir. 2004) (government conceded oral statement made by wife in response to a questions by FBI agent during search of defendant's home was testimonial); see also State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009).

Because Mr. Thomas's statements to the police in these circumstances were "testimonial," their admission at trial as hearsay through Officer Krohn violated Mr. Dixon's confrontation rights. Crawford, 124 S.Ct. at 1364.

**b. The manifest constitutional error may be challenged on appeal under RAP 2.5(a)(3), and requires reversal in the absence of overwhelming untainted evidence.** Admission of Mr. Thomas's statements was manifest constitutional error under RAP 2.5(a)(3), and requires reversal. Of course, this violation of the Sixth Amendment and Article 1, § 22 was constitutional error. Crawford, 124 S.Ct. at 1354, 1359 (Sixth Amendment's guarantee of confrontation is a "bedrock" principle of due process). And denial of the right of confrontation is a manifest constitutional error that may be raised for

the first time on appeal, certainly where the statements admitted are implicatory of the defendant and therefore carry identifiable prejudice. See RAP 2.5(a)(3); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999). An error is “manifest” under RAP 2.5(a)(3) if the defendant demonstrates that it had practical and identifiable consequences in the trial. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The effect of the court’s admission of these statements was material prejudice, and the standard for reversal is the requirement that the State prove the error was harmless. A violation of the confrontation clause by admission of hearsay contrary to Crawford requires reversal unless the error was harmless “beyond a reasonable doubt.” Davis, 154 Wn.2d at 304 (citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)); see also State v. Smith, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002). To determine whether constitutional error is harmless, the Washington Courts utilize “the ‘overwhelming untainted evidence’ test.” Smith, 148 Wn.2d at 139. Under that test, the error is harmless only where the State proves the untainted evidence is so overwhelming as to necessarily lead to a finding of guilt. Davis, at 304 (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

Here, Mr. Dixon had entered a defense of general denial,

placing every element of the offense into dispute. CP 9.<sup>6</sup> He informed the police on the night in question that it was Mr. Thomas who had "started something with Mr. Calloway," by having words with him, approaching, and then swinging at him. 6/10/09RP at 76. Mr. Dixon left the area when Mr. Thomas tried to rob Mr. Calloway, and he was not involved in the crime. 6/10/09RP at 77; State's exhibit 1.

But the introduction of Mr. Thomas's hearsay in violation of Mr. Dixon's right to confrontation directly contradicted his assertion of non-involvement. By naming Mr. Dixon, Mr. Thomas identified him as the person who was with him during what the complainant described as a two-man robbery attempt, thereby accusing him of being there, of not leaving the area when the robbery commenced, and ultimately of being "involved" as his accomplice in the crime.

The prejudice to Mr. Dixon caused by Mr. Thomas's hearsay accusations would have been tremendous in the jury's eyes. In Bruton v. United States, 391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court recognized that admitting a non-testifying co-defendant's confession that implicates the defendant violates the accused's confrontation rights, and may be

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<sup>6</sup>A defense of general denial places every element of the charged offense into dispute, including identity and, where it is part of the State's theory of guilt, criminal liability as an accomplice. See State v. Sexsmith, 138 Wn. App. 497, 157 P.3d 901 (2007).

so damaging that even a limiting instructing to the jury to use the confession only against the co-defendant is insufficient to cure the resulting prejudice. Bruton, 391 U.S. at 127; see also State v. McIntyre, 3 Wn. App. 799, 803, 478 P.2d 265 (1970) (effect of admitting the co-perpetrator's implication of the accused is "highly prejudicial"). Being named as an accomplice by Mr. Thomas was likely taken by Mr. Dixon's jury as "powerfully incriminating" evidence against him. In re Hegney, 138 Wn. App. 511, 546, 158 P.3d 1193 (2007) (citing Bruton, 391 U.S. at 135-36); State v. Dent, 123 Wn.2d 467, 486-87, 869 P.2d 392 (1994) (same).

Furthermore, here, of course, the prejudice caused to Mr. Dixon by being "fingered" by Mr. Thomas was exacerbated even beyond the degree recognized in a typical Bruton case, because Mr. Thomas appeared to be admitting his own guilt to the police at the same time, and he was not on trial such that his accusation would be dismissed by the jury as that of a charged co-defendant who was trying to deflect guilt onto someone else.

In the face of this constitutional error, the untainted evidence that Mr. Dixon participated in Mr. Thomas's robbery attempt is far from overwhelming, as would be required to affirm. Smith, 148 Wn.2d at 139; Davis, 154 Wn.2d at 304; Guloy, 104 Wn.2d at 426. The State's evidence was thin to begin with. No hearsay claims by the

complainant, such as a contemporaneous excited utterance, were admitted to corroborate his robbery story. Other facts, including the fact that it was, curiously, Mr. Thomas who the complainant was found chasing after and punching, and Mr. Dixon's voluntary appearance at the police station to give a statement, supported a conclusion that he was, in fact, truly not involved in Mr. Thomas's crime. Indeed, Mr. Calloway initially identified someone in a photomontage as the alleged second perpetrator who turned out to be uninvolved in the incident. 6/10/09RP at 72. Given all of these circumstances, the violation of Mr. Dixon's Sixth Amendment and state constitutional rights compels reversal of his attempted robbery conviction.

**2. THE JURY INSTRUCTION ON ACCOMPLICE LIABILITY DID NOT INCLUDE THE ESSENTIAL REQUIREMENT THAT AN ACCOMPLICE MUST ACT WITH KNOWLEDGE THAT HIS CONDUCT WILL PROMOTE OR FACILITATE THE COMMISSION OF THE CRIME.**

Jury instruction no. 10 misstated the law of accomplice liability. In the circumstances under which the error of the defective instruction arose, this Court should review the error on direct appeal pursuant to RAP 2.5. Because there was evidence pursuant to which the jury could have found Mr. Dixon was present at the scene and was aware of the principal's crime, the defective instruction, which erroneously

permitted conviction as an accomplice under these legally insufficient facts, requires reversal of his attempted robbery conviction.

**a. Instruction No. 10 Misstated the Law of Accomplice**

**Liability.** The accomplice liability instruction was erroneous because it failed to include the essential language that an accomplice, in order to be criminally liable under a theory of complicity, must encourage or aid the principal "with knowledge that [his conduct] will promote or facilitate" the principal's commission of the crime. (Emphasis added.) RCW 9A.08.020(3)(a). The Washington accomplice liability statute, RCW 9A.08.020, correctly defines when a person is liable for another's crime by virtue of being an accomplice, providing as follows:

**RCW 9A.08.020. Liability for conduct of another--  
Complicity**

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

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(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it[.]

(Emphasis added.) RCW 9A.08.020. The pattern jury instructions

provide an instruction which tracks the above statutory requirements for complicity, including the "knowledge" requirement. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51, at 217 (3d ed.2008) (referred to hereafter as "WPIC" 10.51).

The knowledge requirement along with the subsequent language regarding mere presence effectively sets out what was formerly referred to as the "overt act" requirement of accomplice liability. As explained in State v. Matthews, 28 Wn. App. 198, 624 P.2d 720 (1981), previous accomplice liability law expressly required that any person complicit in a crime must have committed an "overt act." State v. Matthews, 28 Wn. App. at 203 (citing former RCW 9.01.030 (1974)<sup>7</sup> and State v. Baylor, 17 Wn. App. 616, 565 P.2d 99 (1977)). The "more than mere presence" language of WPIC 10.51 clarifies that "mere presence and knowledge of the criminal activity of another" is not enough to find accomplice liability, and accomplishes the same result - emphasizing the knowledge requirement full. WPIC 10.51; see State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (presence and knowledge can be enough for accomplice liability only if by being present one stands ready to assist in the crime).

The accomplice liability instruction given to the jury in Mr.

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<sup>7</sup>The former statute was superseded for offenses committed after July 1, 1976 by RCW 9A.08.020.

Dixon's case read as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she either:  
(1) solicits, commands, encourages, or requests another person to commit the crime; or  
(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 10 (Jury instruction no. 10). This instruction included the "mere presence" language, but outright failed to include the essential requirement that an accomplice must encourage or aid the principal "with knowledge that it will promote or facilitate the commission of the crime." WPIC 10.51. This underscored language was entirely missing from the jury instruction in Mr. Dixon's case. CP 10.

As a result, the instruction was a misstatement of the law. Alleged legal errors in jury instructions are reviewed de novo. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). "Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Here, the accomplice

instruction was deficient in its statement of the law. Although an accomplice need not have specific knowledge of every element of the crime committed by the principal, he must have general knowledge of that specific crime. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000); see State v. Sweet, 138 Wn.2d 466, 980 PO.2d 1223 (1999). The knowledge requirement means that the accomplice must know that his encouragement or aid will promote or facilitate the principal's commission of the crime. State v. LaRue, 74 Wn. App. 757, 875 P.2d 701 (1994) (citing State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987)); see RCW 9A.08.020. Instruction no. 10 failed to make this standard manifestly apparent to the jury.

**b. Instruction No. 10 was not invited error.** Mr. Dixon did not invite the error of instructing the jury with instruction no. 10. The invited error doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). To be invited, the error must be the result of an affirmative, knowing, and voluntary act. In Re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001).

Here, during discussion of jury instructions, the trial court noticed that the parties had not proposed jury instructions on

accomplice liability, which the court correctly deemed necessary to Mr. Dixon's conviction. 6/10/09RP at 83-84. There was some brief discussion about the State emailing the pattern instruction or a proposed instruction to the court, but the court stated, "I'm just going to add this accomplice instruction[.]" 6/10/09RP at 85. The court may actually have instructed the court clerk to "quickly type it up." 6/10/09RP at 85. Whatever the mechanics of the error, the court ultimately gave the jury an instruction on accomplice liability that suffered from the defect noted above. 6/10/09RP at 85-86; CP 10.

Mr. Dixon unsuccessfully argued that there should be no accomplice instruction at all, because the State was required to allege accomplice liability in the information. 6/10/09RP at 84; see State v. Rodriguez, 78 Wn. App. 769, 771, 774, 898 P.2d 871 (1995) (accomplice liability need not be alleged in charging document). However, this was the extent of the defense argument pertaining to the accomplice liability instruction. Mr. Dixon therefore in no way set up the instructional error by seeking this specific action of the court upon which he is, now properly, requesting reversal. See State v. Meggyesy, 90 Wn. App. 693, 707, 958 P.2d 319 (1998) (finding no invited error where defendant did not seek the particular error he raised on appeal). Neither party nor the court apparently recognized

the instructional error; but for the fact that the verbatim report of proceedings indicates parenthetically that the instructions were read to the jury, a party could quite colorably contend that it was actually unaware of it. 6/10/09RP at 86. See In Re Pers. Restraint of Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000) (declining to apply invited error doctrine where it appeared neither party nor the court was aware of error).

**c. Mr. Dixon may challenge the erroneous instruction under RAP 2.5(a)(3) or under the doctrine of ineffective assistance of counsel.** Mr. Dixon's counsel did not object to the accomplice liability instruction. However, first, less egregious error in accomplice liability instructions has been deemed appealable under RAP 2.5(a)(3). Instructional error with regard to accomplice liability has been addressed most frequently in the familiar line of cases addressing instructions which erroneously required merely that the alleged accomplice act with knowledge his conduct will promote the commission of "a" crime, instead of "the" crime. See State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) and State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000).

In Roberts, the State argued that Roberts could not challenge the accomplice instruction, which was defective on the above basis,

for the first time on appeal. The Supreme Court emphatically rejected the state's claim, stating that "[e]xtensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal." Roberts, 142 Wn.2d at 500-01 (citing State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988)). In State v. Stein, the Court again held that similarly defective instructions could be challenged for the first time on appeal. State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001); see also State v. Mangan, 109 Wn. App. 73, 76 n.1, 34 P.3d 254 (2001) (citing Stein and Roberts and specifically rejecting the State's claim that the defective accomplice instruction error could not be challenged for the first time on appeal).

The instruction at issue here did not merely misstate the knowledge requirement as occurred in Roberts and Cronin; instead, it entirely omitted the knowledge requirement from the statute and the pattern instruction. Effectively, Jury instruction no. 10 was erroneous because it relieved the State of the burden of proving the mens rea element of the offense charged against Mr. Dixon. U.S. Const., amend. XIV; Wash. Const. art. I, § 3; State v. Brown, 147 Wn.2d 330,

338, 58 P.3d 889 (2002). In such cases, the constitutional harmless error standard applies. Brown, at 338 (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

In addition, Mr. Dixon's counsel was ineffective for failing to object to the erroneous instruction. To sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel's performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); U.S. Const. amend. VI.

Where an appellant argues that a jury instruction was erroneous, the Court of Appeals will review an assignment of error based on that instruction, despite it being raised for the first time on appeal, if appellant raises the issue under the doctrine of ineffective assistance of counsel. State v. Gerdts, 136 Wn. App. 720, 726, 150 P.3d 627 (2007).

**d. Reversal is required under either a constitutional, or non-constitutional error standard.** A well-settled body of law holds that constitutional error is presumed prejudicial unless the State shows that it is harmless beyond a reasonable doubt. Stein, 144 Wn.2d at 241; State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State

v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002); see also Guloy, supra, 104 Wn.2d at 426. Certainly, omitting an element of the offense from the instructions rises to that level of error and requires application of the constitutional harmless error standard. Brown, 147 Wn.2d at 338 (citing Neder, 527 U.S. at 9).

Alternatively, to demonstrate prejudice in the context of deficient attorney performance, Mr. Dixon must show that there was a “reasonable probability” that the outcome of the trial would have been different absent the alleged deficient performance. State v. Townsend, 142 Wn.2d 838, 844, 15 P.3d 145 (2001); In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” means “a probability sufficient to undermine confidence in the outcome.” Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Given the circumstances of the present case, reversal is required under either standard, because the jury instruction completely omitted RCW 9A.08.020(3)(a) – that the accomplice must act “with knowledge that [his conduct] will promote or facilitate the commission of the crime.” It is always true that instructional error will be “presumed prejudicial” unless it affirmatively appears harmless. State v. Gallagher, 112 Wn. App. 601, 608, 51 P.3d 100, review

denied, 148 Wn.2d 1023, 66 P.3d 638 (2002) (erroneous accomplice instruction) (citing State v. Stein, 144 Wn.2d at 246; State v. Jennings, 111 Wn. App. 54, 63-64, 44 P.3d 1 (2002)).

Here, the absence of the knowledge language in jury instruction no. 10 allowed Mr. Dixon to be convicted on the basis of his own Mirandized statement to police that he was briefly present when Mr. Thomas started to try to rob Mr. Calloway. Such conviction was secured without a jury finding of the requirement that an accomplice who encourages or aids the principal must "know" that his encouragement or aid will promote or facilitate the principal's commission of the crime. State v. LaRue, 74 Wn. App. at 757 (citing State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987)). This knowledge requirement means that an accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed - mere presence at the scene and even "assent" to the crime are not enough. In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); Amezola, 49 Wn. App. at 89.

For example, under this standard, in Amezola, the defendant Ramirez could not be convicted as an accomplice to several principals who were manufacturing heroin in a house in South Seattle, where

she cooked food and washed dishes for the house's occupants and was aware of their activities. State v. Amezola, 49 Wn. App. at 88. Citing RCW 9A.08.020(3)(a), supra, and State v. Bockman, 37 Wn. App. 474, 491, 682 P.2d 925 (1984), for the rule that an accomplice must have knowledge that her activity will promote or facilitate the commission of the crime, and contrasting this requirement with the warning in In re Wilson, supra, that physical presence and assent alone are insufficient to establish participation in the offense as something she desires to bring about, the Court of Appeals concluded that the evidence was insufficient to support Ramirez's conviction as an accomplice. State v. Amezola, 49 Wn. App. at 89-90.

In this case, there is no reason to believe that the error in the accomplice liability instruction was harmless, and every reason to conclude that this is a textbook example of interlock between an instructional error and the facts of the case. The jury in Mr. Dixon's trial heard evidence that he came to the Hoquiam Police Department several hours after the incident involving Mr. Calloway and Mr. Thomas, to explain what had happened. Mr. Dixon indicated that it was Mr. Thomas who had "started something with Mr. Calloway," by having words with him, approaching, and then swinging at him. 6/10/09RP at 76. Mr. Dixon told the police that he did not play any

part in Thomas's attempt to rob Mr. Calloway, instead, he quit the scene, and he executed a written statement to this same effect which the prosecutor read to the jury. 6/10/09RP at 77; State's exhibit 1.

This evidence established that Mr. Dixon was present at the scene of Mr. Thomas's crime and was aware of what Thomas was attempting to perpetrate. But this does not satisfy the requirement of accomplice liability that the defendant encouraged or aided the principal with knowledge that his conduct will promote or facilitate the principal's commission of the crime. RCW 9A.08.020(3)(a). A properly instructed jury would have deemed Mr. Dixon's police statement to establish his lack of guilt under accomplice liability, and if the fact-finder credited the defendant, it would then have issued a verdict of not guilty. But the defendant's jury did not have the benefit of being instructed pursuant to law. The erroneous accomplice liability instruction in this case caused precisely the problem that if the jury believed Mr. Dixon's police statement, as it may have, he would and was nonetheless convicted of attempted robbery. Because the erroneous instruction allowed conviction based on these facts, it was prejudicial to "the final outcome of the case." State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970); State v. Walden, 131 Wn.2d at 478. Certainly, the instructional error in this case was not "trivial, or

formal, or merely academic.” State v. Golladay, 78 Wn.2d at 139; see also State v. Walden, 131 Wn.2d at 478. It cannot be said beyond a reasonable doubt that the same verdict would have resulted absent the instructional error, State v. Brown, 147 Wn.2d at 338, and there is a reasonable probability that Mr. Dixon would have been found not guilty but for his lawyer’s failure to object to the defective instruction. Strickland v. Washington, 466 U.S. at 694. Reversal is required.

**3. THE PROSECUTOR COMMITTED MISCONDUCT BY CALLING NEGATIVE ATTENTION TO BOTH THE DEFENDANT’S PRE-ARREST SILENCE, AND TO HIS DECISION NOT TO TESTIFY AT TRIAL, EACH ERROR INDEPENDENTLY REQUIRING REVERSAL.**

The State in a criminal case may not call attention in closing argument (or otherwise) to the defendant’s pre-arrest silence, or to his failure to testify at trial, in such a way that suggests that these lawful exercises of his constitutional right to silence show that he is guilty. In this case, the prosecutor in closing argument violated these long-standing proscriptions directly, emphatically, and at length. The State’s misconduct may be appealed despite the absence of contemporaneous objection, because it was flagrant and incurable, and also because it constituted manifest error affecting the defendant’s constitutional rights. In addition, the misconduct requires

reversal of Mr. Dixon's conviction, given that no admonition to the jury could have erased the material prejudice it engendered, and because the evidence, as already argued, was far from overwhelming.

**a. The State's closing argument.** Mr. Dixon did not testify, and indeed all of the trial witnesses were State's witnesses. It was in this context that the prosecutor, in closing argument, stated that the complainant had taken the witness chair, and as with all those persons who had been willing to do so, the jury should therefore presume that he was telling the truth:

Mr. Calloway has sat before you in this chair and told you a story and every person that sits in this chair deserves to be believed until the [sic] prove themselves uncredible.

6/10/09RP at 87-88. The prosecutor then contrasted Mr. Calloway's willingness to take the witness chair, with the defendant's conduct after the alleged incident. First, after reading from the defendant's police statement in which Mr. Dixon explained that he ran from the scene when Mr. Thomas started trying to rob Mr. Calloway, the prosecutor argued that a person who had done nothing wrong would not have left the area:

Why would he [Jordan Dixon] leave if he wasn't guilty of something?

6/10/09RP at 89. The prosecutor urged the jury to conclude that an innocent person would have waited around at the scene for the police.

6/10/09RP at 89. In addition, the prosecutor then stated that a person who had done nothing wrong certainly would not have waited three hours before coming to the police department to give his account of what happened. 6/10/09RP at 89.

Flight is the ultimate evidence of guilt. Only after three hours does the defendant decide to come in and tell his version of the story. Time enough to think up a version of the story. Time enough to get it straight in your head. Innocent people stay on scene and cooperate with the police. They don't wait around to see if the police actually have developed them as a suspect. They don't wait around until they find out that the police, in fact, knows his name. Innocent people wait on scene and help the police. So that's what you have, you have a credible person [Mr. Calloway] sitting in this chair and his credibility is open for you to determine.

6/10/09RP at 89. Mr. Dixon's counsel did not object to any of the above statements. However, the prosecutor's argument, in addition to being misconduct, was flagrant, unconstitutional, and "manifest" error.

**b. The State in a criminal case may not equate the defendant's silence with guilt.** The right to be silent exists even prior to arrest and Miranda warnings, and extends through to the right to not testify at trial. These rights have their practical protection in the rule that the State may not invite the jury to draw a negative inference against a defendant who exercises them.

The Fifth Amendment states that no person “shall . . . be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V.<sup>8</sup> The Washington Constitution, article 1, § 9, contains almost identical language, and the Washington Supreme Court has determined that the two provisions are to be interpreted equivalently. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); see Wash. Const. art. 1 § 9. These constitutional guarantees are intended to prohibit the inquisitorial method of investigation or prosecution in which the accused is forced to disclose the contents of his mind, or speak to his guilt or innocence. State v. Easter, 130 Wn.2d at 235 (citing Doe v. United States, 487 U.S. 201, 210-12, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)).

More practically, these provisions proscribe the State’s attempts, at trial, to use a defendant’s silence against him by implying to the jury that such silence shows that he is guilty. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240 (1976); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). Thus, the Fifth Amendment and the state constitution not only prohibit the State from compelling the defendant to speak, but also prohibit the State from using the

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<sup>8</sup>The Fifth Amendment applies as against the States through the Fourteenth Amendment’s due process clause. Malloy v. Hogan, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); U.S. Const. amend XIV.

defendant's decision to not speak against him. Easter, 130 Wn.2d at 238-39.

***i. Comments on pre-arrest silence.***

The right to silence applies in pre-arrest situations. State v. Burke, 163 Wn.2d 204, 206, 223, 181 P.3d 1 (2008); Easter, 130 Wn.2d at 243; Doe v. United States, 487 U.S. at 213. In Easter, the Supreme Court noted prior cases ruling pre-arrest silence to be inadmissible under ER 403, because of its unfair prejudice and low probative value. Easter, at 235 n. 5. But the Easter Court concluded that a constitutional bar applied, because “[t]he use of pre-arrest silence as substantive evidence of guilt implicates the Fifth Amendment” right to silence. Easter, at 235.

In Easter, the defendant had not spoken to the police at the scene nor did he testify at trial. An officer described Easter's pre-arrest silence as that of someone who cleverly knew better than to cooperate with police, and more importantly, this became a theme of the prosecutor in argument that the Court deemed violative of Easter's constitutional rights. Easter, at 233-34 (and reversing conviction).

Mr. Dixon's jury was subjected to closing argument that faulted the defendant for not proclaiming his innocence at the earliest opportunity. When the prosecutor argued that Mr. Dixon did not

immediately speak up – i.e., that he did not wait at the scene for police to arrive and explain what happened - this was an argument that substantively equated that initial silence with guilt. Like in Easter, the State in this case described Mr. Dixon's pre-arrest silence as crafty and purposeful; worse than Easter, the prosecutor here expressly stated to the jury that the defendant had behaved differently than an innocent person would have. 6/10/09RP at 89 (arguing twice that "innocent people" speak up immediately).

It is difficult to imagine an argument that could be more offensive to the Fifth Amendment rule prohibiting the State from urging the jury to engage in the prohibited reasoning that pre-arrest silence equals guilt. The State's argument was far more egregious than the argument that compelled reversal in Burke. There, the defendant was charged with rape of a child in the third degree, and did not dispute the victim's age or deny intercourse, but raised the statutory defense that he "reasonably believed the alleged victim to be [16 years old]." Burke, 163 Wn.2d at 8-10; see RCW 9A.44.030(2). In examination of police witnesses and in closing argument, the prosecutor placed significant emphasis on the fact that, prior to arrest, the defendant never asserted to police that the complainant had claimed she was 16. Burke, 163 Wn.2d at 211. The Supreme Court

stated that "[t]he crux of the State's argument [was] that when given the opportunity to tell his side of the story during the prearrest interview with Detective Richardson, Burke did not mention that J.S. told him she was 16." Burke, at 218.

Here, the prosecutor similarly argued that Mr. Dixon had an opportunity to tell police what happened right after the incident, but remained silent instead of doing so. But it was Mr. Dixon's right to remain silent. The State may not attempt to prove guilt by commenting in front of the jury on the defendant's decision to exercise his constitutional privilege. Griffin v. California, 380 U.S. 609, 613, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Because the argument invited the jurors to conclude from this evidence that the defendant was guilty, it was an improper comment on his pre-arrest silence, in violation of the Fifth Amendment and the state constitution. Burke, at 222-23.

Importantly, this Court should reject the likely effort by the Respondent to contend that this entire argument was merely an invitation to the jury to infer guilt based on the defendant's alleged flight from the scene. In isolation, and in the appropriate case, such an argument would be permissible. See State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). But the interjection of an isolated remark which viewed alone is not objectionable, into a prosecutor's

broader improper argument that violates the defendant's rights, did not divert the jury's attention from the State's overall theme that Mr. Dixon's failure to come forward immediately or earlier showed that he was guilty. Neither should it divert this Court's attention from the State's flagrant violation of Mr. Dixon's Fifth Amendment rights.

***ii. Comments on failure to testify at trial.***

It is also well-established that prosecutorial comment in closing argument on the accused's failure to testify at trial is strictly forbidden. State v. Reed, 25 Wn. App. 46, 48, 604 P.2d 1330 (1979) (citing Griffin v. California, 380 U.S. at 613); State v. Bennett, 20 Wn. App. 783, 786, 582 P.2d 569 (1978); U.S. Const. amend. V; Wash. Const. art. I, § 9. The State is prohibited from putting forward an inference of guilt on this basis, which necessarily flows from implications that the accused has 'failed' to testify, because as a matter of federal and state constitutional law, he is not required to do so. Reed, 25 Wn. App. at 48 (citing State v. Charlton, 90 Wn.2d 657, 662, 585 P.2d 142 (1978); State v. Tanner, 54 Wn.2d 535, 538, 341 P.2d 869 (1959)). Yet this is precisely what the State did in this case.

The State's extended remarks in closing were not mere passing references to Mr. Dixon's silence. The Supreme Court has said that when an appellant challenges the State's closing argument

on the basis of alleged Fifth Amendment violations, the question is “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). Similarly, the Court of Appeals has stated that “[t]he test employed to determine if a defendant’s Fifth Amendment rights have been violated is whether the prosecutor’s statement was of such character that the jury would naturally and necessarily accept it as a comment on the defendant’s failure to testify.” State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987).

The prosecutor’s extensive remarks in closing demonstrate a specific, and successful, intent to equate Mr. Dixon’s failure to testify at trial with obvious guilt. Well beyond just an implication that Mr. Dixon’s silence was incompatible with innocence, the prosecutor specifically urged the jury to draw that conclusion. 6/10/09RP at 89. The State devised an argument that was a cleverly and plainly purposeful effort to establish an overall theme that first contrasted the fact that the complainant testified at trial and submitted himself to examination and the jury’s gaze, while the defendant’s conduct, in contrast, was about avoiding scrutiny from the first instance onward. These coordinated arguments cannot be deemed “so subtle and so brief that [they] did not ‘naturally and necessarily’ emphasize

defendant's testimonial silence." Crane, 116 Wn.2d at 331 (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)).

**c. The State's comments above, independently, and also in the context of closing argument which included additional and related improper remarks, amounted to prosecutorial misconduct.** Allegedly improper comments are reviewed "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). Thus a prosecutor's remarks may not be grounds for reversal if "they were invited or provoked by defense counsel and are in reply to his or her acts and statements." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

These are not the circumstances here. The prosecutor's invitation to the jury to equate Mr. Dixon's silence with guilt were made primarily in the State's opening argument, and were not made in response to any implications by defense counsel during examination of the State's witnesses. The State did return to improper emphasis on Mr. Dixon's pre-arrest silence in the State's rebuttal argument, but even that was not provoked by any argument by the defense in closing. The defense examination of witnesses involved inquiry into

their ability to observe events, the consistency of their testimony and conflicts with prior statements, the absence of physical evidence, the demeanor of the complainant and Mr. Thomas, and the like.

6/10/09RP at 44-46, 59, 63. There is no possible argument that the State's improper use of the defendant's pre-arrest silence and failure to testify was a response, fair or otherwise, to any theme hinted at during the testimony phase, or any argument of counsel.

In fact, when closing argument is viewed as a whole, the prosecutor's improper comments on the defendant's silence were intertwined with additional instances of related misconduct that exacerbated the enduring prejudice caused. First, although the gravamen of the State's misconduct in the present case inheres primarily in the express violation of Fifth Amendment principles, the prosecutor's initial argument that the testifying complainant and the State's witnesses should be presumed to be telling the truth was also error. State v. Faucett, 22 Wn. App. 869, 875, 593 P.2d 559 (1979) (a general instruction regarding a presumption of witness credibility is inappropriate, particularly in a criminal case where the defendant does not put on an affirmative case). This argument, which was the launching point for the prosecutor's theme impugning the defendant

for not being willing to assume the stand, was improper in and of itself.

In addition, in rebuttal argument, the prosecutor again faulted Mr. Dixon for not waiting around for the police. Defense counsel had noted in his closing argument that the evidence showed Mr. Thomas was intoxicated, so the prosecutor told the jury that counsel was merely “assuming” his client was not:

He said that Mr. Thomas was intoxicated. I guess he is assuming that Mr. Jordan – Jordan Dixon wasn't, but you will never know that because he [Dixon] left the scene of the crime.

6/10/09RP at 102. The prosecutor engaged in speculation well past the point of reasonable inferences, when he asserted that “we probably could determine whether Mr. [Dixon] was intoxicated” if Mr. Dixon “would not have left the scene of the crime.” 6/10/09RP at 101. The defendant’s objection to this comment was overruled. 6/10/09RP at 101. His subsequent objection was sustained when the State continued, “Often people who are wandering downtown drunk with another person had been drinking together.” 6/10/09RP at 101-02.

This was additional misconduct, as there was no evidence to support any claim that the defendant had been drinking. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Portraying the defendant as a drunk or general abuser of alcohol or drugs is, of course, highly prejudicial. See State v. Crane, 116 Wn. 2d at 333;

State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974). It is certainly forbidden, even in a case where the prosecutor contends the defendant was intoxicated during the charged crime, where the evidence does not support the claimed fact. State v. Rose, 62 Wn.2d 309, 312, 315, 382 P.2d 513 (1963) (reversing conviction based on prosecutor's characterization of defendant as "drunken homosexual" in absence of evidence of alcohol use) (stating that "[c]ounsel, in his closing argument to the jury, cannot make prejudicial statements not sustained by the record") (citing State v. Heaton, 149 Wash. 452, 271 P. 89 (1928)).

More importantly, the State's primary effort here was to remind the jury again of Mr. Dixon's overall failure to speak up before arrest or at trial. These remarks are, like the improper claim that Mr. Calloway and the police witnesses should be presumed to be telling the truth, were part and parcel of the State's egregious Fifth Amendment violations throughout closing argument.

**d. The State's misconduct was flagrant, amounted to manifest constitutional error, and requires reversal.** The Court of Appeals in Reed closely interlinked the prohibition on drawing negative inferences from an accused's exercise of his right to silence with prosecutorial misconduct of the "flagrant" variety, requiring no

objection to be challenged on appeal. Reed, 25 Wn. App. at 48-50. Appellate challenge to a prosecutor's improper comments on the defendant's exercise of his right not to testify at trial have also been premised on RAP 2.5(a)(3), as manifest constitutional error. State v. French, 101 Wn. App. 380, 387, 4 P.3d 857 (2000); see, e.g., State v. Fleming, 83 Wn. App. 209, 213-15, 921 P.2d 1076 (1996) (comments on failure to testify, and improper argument that acquittal required jury to conclude State's witnesses were lying, established manifest constitutional error, which was not harmless beyond a reasonable doubt). Either analysis permits Mr. Dixon to appeal the State's misconduct in closing.

As a general principle, when prosecutorial misconduct is alleged, the defendant bears the burden of establishing its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). To prevail on the claim, a defendant must show that the improper conduct prejudiced the outcome of his trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137 , 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). A defendant establishes prejudice by demonstrating a "substantial likelihood" that the misconduct affected the jury's verdict. Weber, 159 Wn.2d at 270.

Misconduct in closing argument that is flagrant, as argued herein, is deemed so because it is incurable. The prosecutor in this case ignored one of the most well-established rights of all criminal defendants, and tried to secure conviction of the accused by implying to the jury that a defendant who remains silent must be guilty. The State executed a flanking assault on both the defendant's exercise of his right to silence prior to arrest, and on his right as the accused not to testify at his subsequent trial, managing to run the gamut of most of the possible ways in which it is possible in closing argument to violate the constitutional right of the accused against self-incrimination.

The State's purposeful crafting of these arguments exacerbated the gravamen of the misconduct to the level of ill-intentioned and flagrant. More importantly, once the theme that silence equaled guilt had been securely lodged in the minds of Mr. Dixon's jury, no admonition by the trial court could have cured the resulting prejudice to the defendant. The prosecutor set out a narrative that began with Mr. Calloway taking the witness chair, and contrasted this with the defendant's silence at the time of the incident, then concluded by again praising the complainant for testifying, thus drawing full circle a pointed comparison to the one person who had not taken the stand. 6/10/09RP at 89. The outcome of the case

depended upon which version of events the jury deemed credible – either Mr. Calloway’s testimony, or the defendant’s statement to the police. In this context, the State’s repeated improper references to the defendant’s silence were material to the jury’s decision to reject the defendant’s account.

Furthermore, as previously cited authorities establish, negative attention paid in closing argument to the defendant’s failure to testify is a constitutional wrong. See also State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002) (stating generally that it is constitutional error for State to “inject the defendant’s silence into its closing argument”). Under the constitutional error standard, it is the State that bears the burden of convincing the reviewing court beyond a reasonable doubt that any reasonable jury would have reached the same result even absent the error that occurred here. Easter, at 242; State v. Guloy, 104 Wn.2d at 422. Broadly, the untainted evidence must be so overwhelming that it necessarily would lead to a finding of guilt. Easter, 130 Wn.2d at 242.

Here, the State’s comments infused the entire trial. The State’s improper theme of boosting its witnesses and deprecating the defendant’s failure to be a witness ended up as the lens through which the jury viewed the entire proceeding. As previously noted, the

State's evidence was nowhere near overwhelming. Mr. Calloway actually identified someone in a photomontage as the second perpetrator who was uninvolved in the incident. 6/10/09RP at 72. No hearsay claims by the complainant were admitted to corroborate the claim he made at trial that he was robbed. Other facts, including the fact that it was Mr. Thomas who the complainant was found chasing after and punching, and Mr. Dixon's voluntary appearance at the police station to give a statement, supported a conclusion that he was not involved in the crime. Given all of these circumstances, the State's extended disquisition to the jury urging it to find guilt based on the defendant's exercise of his Fifth Amendment and article 1, § 9 right to silence, compels reversal of the attempted robbery conviction.

**4. IN THE ALTERNATIVE, MR. DIXON'S  
ATTEMPTED ROBBERY CONVICTION  
SHOULD BE REVERSED UNDER THE  
CUMULATIVE ERROR DOCTRINE.**

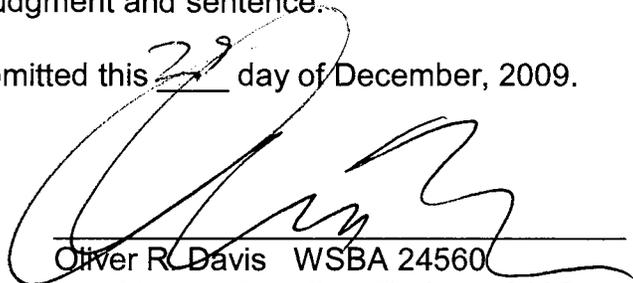
In the event this Court concludes that none of the above errors warrant reversal individually, Mr. Dixon argues that reversal is still required because of the cumulative effect of the trial court errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

To determine whether cumulative error exists, the reviewing court examines the nature of the errors: constitutional error -- as shown in the present case in several instances -- is more likely to contribute to cumulative error than multiple non-constitutional errors. Russell, 125 Wn.2d at 94. This is a case where the prejudice from multiple errors went to the heart of the question of whether Mr. Dixon was involved in Mr. Thomas's robbery attempt, and they require reversal. Russell, 125 Wn.2d at 93-94. This Court also has discretion under RAP 2.5(a)(3) to review all errors, preserved and inadequately preserved, as part of a cumulative error analysis to ensure that Mr. Dixon received a fundamentally fair trial. State v. Alexander, 64 Wn. App. at 150-51; U.S. Const. amend. XIV. Mr. Dixon urges this Court to determine that he did not receive a fair trial.

#### **E. CONCLUSION**

Based on the foregoing, Mr. Dixon respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 29 day of December, 2009.



Oliver R. Davis WSBA 24560  
Washington Appellate Project - 9105  
Attorneys for Appellant

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

STATE OF WASHINGTON, )  
 )  
RESPONDENT, )  
 )  
v. )  
 )  
JORDAN DIXON, )  
 )  
APPELLANT. )

NO. 39466-9-II

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DIVISION TWO  
SEATTLE, WA  
DEC 30 2009

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| MONTESANO, WA 98563-3621             |     |               |
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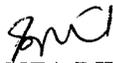
**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF DECEMBER, 2009.

X \_\_\_\_\_ 

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Grays Harbor County Superior Court Clerk's Office**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the **Court of Appeals – Division One** under **Case No. 39466-9-II**, and each attorney or party or record for  respondent **Gerald Fuller - Grays Harbor County Prosecuting Attorney**,  appellant and/or  other party, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

  
MARIA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: December 31, 2009

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