

NO. 40957-7-II

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

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STATE OF WASHINGTON, Respondent

v.

INNA VYACHESLAVOVNA BOCHKAREVA, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01729-8

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BRIEF OF RESPONDENT

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**A. RESPONSES TO ASSIGNMENTS OF ERROR**

- I. **THE STATE DID NOT IMPERMISSIBLY COMMENT ON MS. BOCHKAREVA'S RIGHT TO REMAIN SILENT OR INVITE THE JURY TO INFER GUILT FROM HER PRE-ARREST SILENCE.**
- II. **MS. BOCHKAREVA WAS EFFECTIVELY REPRESENTED BY COUNSEL.**

**B. B. STATEMENT OF THE CASE**

Victor Gromysh and his wife, Liliya, rented a home to Inna Bochkareva back in July of 2008. RP 35-37. Viktor and his wife were in the construction business. RP 38. They owned a company called Vikon, LLC, in which they specialized in wood cabinets and flooring. Id. Mr. Gromysh often did business with Rob Fallow, the former owner of South American Wood. RP 39, 40. South American Wood supplied South American wood such as Chilean cherry to markets in Portland, Seattle and Los Angeles. RP 39-40.

Mr. Fallow often had extra pieces of high quality wood in small amounts that he wanted to clear out of his inventory. RP 108. He would sell "left over" quantities of wood to Mr. Gromysh at a discounted price. RP 118-19. One such sale involved over 5500 square feet of wood for which Mr. Gromysh paid \$6000, in addition to other considerations (such

as trading other materials) which totaled to make the price for the wood approximately \$2.00 per square foot. RP 117-18. Mr. Gromysh stored the wood in the garage of the house he was renting to the defendant, Ms. Bochkareva. RP 52. On October 1<sup>st</sup>, 2009, within three days of the defendant moving out of the rental home, Mr. and Mrs. Gromysh discovered that the wood had been taken from the garage. RP 53-54. Mr. Gromysh did not give the defendant permission to take the wood out of the garage. RP 57. Mr. and Mrs. Gromysh confronted the defendant and she admitted to stealing the wood and promised to have it returned. RP 55-57, 66-67. The wood was never returned, however. RP 58, 71.

Two police officers were involved in the investigation of this case. The first officer was Miranda Ross from the Vancouver Police Department. Prior to Officer Ross' testimony, the jury heard that the defendant does not speak English. RP 143. Officer Ross testified that Mr. Gromysh placed a call to a number that he claimed was Ms. Bochkareva's, and he handed the phone to her (Officer Ross). RP 223-24. Officer Ross testified that she identified herself as a police officer and said that she wanted to talk to her (Ms. Bochkareva) about the missing wood. RP 224. Officer Ross testified that the person on the other end of the line hung up. RP 224. Officer Ross left a message for Ms. Bochkareva that was not returned. RP 227. About five minutes after Officer Ross left Ms.

Bochkareva arrived to speak to the Gromyshs. RP 61. Mr. Gromysh told Ms. Bochkareva during that conversation that he would cancel his stolen property report with the police if she would just agree to return the wood. RP 61. According to Mr. Gromysh, she agreed. Id.

Officer Ross asked Officer Ilia Botvinnik to take over the case because he is fluent in Russian. RP 230. He interviewed the defendant two weeks after Officer Ross first became involved in the case. RP 252.

During the course of the conversation the defendant acknowledged that there had been wood flooring in her garage, and she admitted to writing and signing the note to Mr. Gromysh in which she admitted stealing the wood. RP 256.

Ms. Bochkareva testified during her case-in-chief, through an interpreter, that she did not hang up on Officer Ross when she called. RP 307. She testified that she talked to Officer Ross and told her (Officer Ross) that she would be there in ten or fifteen minutes to speak with her about the allegation. RP 308. According to the defendant, Officer Ross told her that she (Officer Ross) would no longer be there at that time. Id. Ms. Bochkareva acknowledged writing and signing the note confessing to the theft of the wood. RP 312. She testified that she confessed to the crime because she feared Mr. Gromysh and because he threatened to have her put in jail and deported. RP 300. She said she feared she would be

separated from her children. RP 303. According to the defendant, Mr. Gromysh told her there was a warrant for her arrest but that he would “remove” the warrant if she signed the confession. RP 301. Ms. Bochkareva denied stealing the wood. RP 303.

Appellant, in her Statement of the Case, offers a severely truncated quotation from the prosecuting attorney during closing argument. The full quotation is as follows:

Let’s talk about the credibility of the witnesses. Do you recall during the jury selection process when some of you were up here and some of you were over there, we talked about in most cases there are at least two or more different versions of the events. And, that it is your job to decide which version to accept, which witness to belief [sic] and which witness to disregard in making the determination of your decision. Obviously, we have that in this case. Especially when we have the defendant testify about certain aspects of this case and her recollection about what happened. There are just some minor things I just want to point out.

One of the things that she said that does not make sense to me and that is contradicted by several witnesses is that she said on October 1<sup>st</sup>, when Viktor discovered that the wood material was missing from the garage, that she received a phone call from Viktor that she also talked to the female police officer and that she told the female police officer that she would be there, there meaning the house, in ten to fifteen minutes. Okay. That’s—that’s her testimony. Think about it. Officer Miranda Ross was called out. She contacted Viktor and his wife at the house. Viktor was agitated. He was upset. He reported that his wood floor material was missing from his house. And, he believed the defendant stole it and that he is going to call her cell phone so the police can talk to her. This is a pretty serious crime.

It's a felony. Theft in the first degree is a felony. Officer Ross testified that she was unable to talk to the defendant, the defendant hung up on her. Not once but at least twice. She tried from Viktor's cell phone twice and she had Liliya call twice. All four times not able to reach the defendant. Now, you think that Officer Ross, a Vancouver police officer responding to a call of a theft for this amount of property, if the alleged suspect told her, "Now, I'm going to be there in ten, fifteen minutes. I'm willing to talk to you," you think Officer Ross would say, "Nah. I'm not going to be here when you get here," that she would leave? Does that make any sense? Does that make any sense at all that a police officer on duty responding to investigate this alleged crime and the suspect says, "Okay. I'm coming to talk to you" and the officer says, "No, I'm not going to be here when you get here?" Does that make any sense whatsoever? Absolutely not. Absolutely not. If that had been the case, Officer Ross would have stayed there to take a statement and to talk to Inna. So, I submit to you that that conversation never occurred. That she never agreed to talk to the officer on October 1<sup>st</sup>.

RP 366-68.

During closing argument, defense counsel made several very compelling arguments. He argued that the State was trying to excuse inconsistencies among its own witnesses by pointing to their lack of proficiency in English but nevertheless holding Ms. Bochkareva, who speaks no English, to a higher standard. RP 370. He reminded the jury that Ms. Bochkareva has two small children. RP 371. He argued to the jury that Mr. and Mrs. Gromysh coerced the defendant into signing the confession by threatening to have her arrested and deported. RP 373. He argued that Mr. Gromysh fabricated this theft allegation so that he could

make a false insurance claim for the lost wood, a claim for \$30,000 (five times what he paid for the wood). RP 385. He told the jury:

Let's talk about Viktor a little bit and his love of statements. I think if there is anything we can take away from this trial it is that if Viktor approaches you with a pre-written statement, run. Run as far as you can. Do not sign that document.

RP 376.

Last, with respect to the disagreement about whether Ms. Bochkareva was willing to speak with Officer Ross, he reminded the jury that Ms. Bochkareva arrived at the location where Officer Ross had been speaking to Mr. and Mrs. Gromysh ten to fifteen minutes after Officer Ross left, arguing this evidence clearly suggests that Ms. Bochkareva was willing to talk to Officer Ross. RP 386. Defense counsel suggested there most likely had been a misunderstanding. RP 386.

The jury returned a verdict of guilty on the charge of theft in the first degree and the defendant was given a standard range sentence. CP 68, 73-82.

## C. ARGUMENT

### I. THE STATE DID NOT IMPERMISSIBLY COMMENT ON MS. BOCHKAREVA'S RIGHT TO REMAIN SILENT OR INVITE THE JURY TO INFER GUILT FROM HER PRE-ARREST SILENCE.

It is impermissible for the State to ask the jury to draw an inference of guilt based upon a defendant's exercise of his or her right to remain silent. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996); *State v. Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996); *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008); *see also* Fifth Amendment, U.S. Const.; Article 1, §9, Washington State Constitution. Pre-arrest silence is distinguishable from silence exercised after the issuance of *Miranda* warnings:

The *Fifth Amendment* prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial. Due process under the *Fourteenth Amendment* also prohibits impeachment based on silence after *Miranda* warnings are given, even if the accused testifies at trial. However, no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of *Miranda* warnings.

*Burke* at 217 (internal citations omitted). Here, the alleged comment on the defendant's silence involved pre-arrest silence. Further, the defendant testified. "[W]here the defendant testifies at trial, the State may

constitutionally use his pre-arrest, pre-warning silence to impeach the defendant.” *State v. Knapp*, 148 Wn.App. 414, 420, 199 P.3d 505 (2009).

The better practice is to simply avoid any reference, however slight, to a defendant’s failure (or inability) to speak to law enforcement prior to arrest. The argument can be made that such references are always improper during the State’s case-in-chief because impeachment of the defendant could not have yet occurred. Indeed, the Supreme Court, in *Burke*, implied as much but acknowledged that such a reference could occur during “anticipatory impeachment.” See *Burke* at 217, n. 8. The *Burke* Court, however, did not acknowledge or reconcile the fact that in *Lewis*, the remarks by the police officer which were held *not* to be a comment on the defendant’s pre-arrest silence came in through direct examination of the police officer during the State’s case-in-chief. *Lewis* at 703, 705-06.

Here, the prosecutor’s questions were not designed to comment on Ms. Bochkareva’s pre-arrest silence. A “comment” occurs when the State uses the silence as “to suggest to the jury that the silence was an admission of guilt.” *Lewis* at 707. A mere reference, however, is not reversible error absent a showing of prejudice. *Lewis* at 706-07, *Burke* at 216. A mere reference to silence occurs if the reference is so subtle or brief that it does not “‘naturally and necessarily’ emphasize [a] defendant’s testimonial

silence.” *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991), citing *State v. Crawford*, 21 Wn.App. 146, 152, 584 P.2d 442 (1978). The issue, as stated by the Supreme Court in *Crane*, is whether “the prosecutor manifestly intended the remarks to be a comment on that right.” *Crane* at 331. The *Burke* Court observed: “To determine whether a remark is a mere reference or a comment on silence, the reviewing court must consider the purpose of the remarks, not necessarily their duration. *Burke* at 216.

Here, the remarks by the officer were a mere reference because they were not intended to draw an inference of guilt. The testimony from Officer Ross was a mere reference to the fact that she was unable to reach Ms. Bochkareva. The jury already heard that Ms. Bochkareva did not speak English, so she would not have been able to converse with Officer Ross on the phone in any event. The jury would have expected, however, to hear that the police attempted to do a proper investigation. A proper investigation does not include allowing only one side to present his or her story. A fair police officer allows each side an opportunity to present his or her case. That these remarks were mere references to silence rather than comments is corroborated by defense counsel’s failure to object to them. Defense counsel, who was sitting in the courtroom, clearly felt the remarks were of such little moment that they did not warrant objection.

Further, when the prosecutor gave his closing argument, he did not use this testimony to draw an inference of guilt from the defendant's failure (or inability) to speak to Officer Ross.

Appellant argues that the prosecutor used her lack of communication with Officer Ross as substantive evidence of her guilt during closing argument. This argument is without merit for two reasons: First, the defendant testified on her own behalf and claimed that she in fact did have a conversation with Officer Ross. Second, to bolster her argument Ms. Bochkareva severely truncates the prosecutor's argument in her brief. The actual argument, printed in full above, demonstrates that the prosecutor used this evidence as impeachment evidence rather than substantive evidence. The prosecutor noted that Ms. Bochkareva testified that she did, in fact, converse with the officer and argued, essentially, that Officer Ross' testimony impeached that claim. The prosecutor argued to the jury that the defendant lacked credibility and used her claim that she conversed with Officer Ross (a claim Officer Ross contradicted) as one of several reasons why. During argument the prosecutor used this evidence for a constitutionally permissible purpose—impeachment. The State did not, at any time, use the defendant's pre-arrest silence to suggest to the jury that it was an admission of guilt. The State respectfully asks this Court to reject this claim of error.

Should this Court find that the State improperly commented on Ms. Bochkareva's exercise of her pre-arrest right to remain silent, the State asserts that this error was harmless beyond a reasonable doubt. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke* at 222, citing *Easter* at 242. Such is the case here.

The jury heard that approximately 4000 square feet of wood was stored in Ms. Bochkareva's garage and Mr. Gromysh had seen it there only a few weeks before she moved out. RP 54. Shortly after she moved out it was gone. The jury heard that Ms. Bochkareva first told Mr. Gromysh that her friend took the wood and that it no longer existed. RP 56. The jury heard that she later admitted to Mr. Gromysh that she stole the wood. The jury also saw her written confession to the crime. See Exhibit 6, designated by Appellant. Any error in referencing her silence was neutralized by the fact that the jury heard she did not speak English (which would explain why she hung up on Officer Ross), that she came over to the Gromysh's ten to fifteen minutes after Officer Ross left (suggesting that she had no intention of resisting contact from the police because she went to the location where she believed the officer was), and

that she spoke freely to Officer Botvinnik. If Ms. Bochkareva didn't want to talk to the police, she would not have spoken to Officer Botvinnik. That she spoke to Officer Botvinnik but not Officer Ross corroborates that it was her language barrier, and not a lack of cooperation, which prevented her from speaking to Officer Ross. The overall picture the jury got was that Ms. Bochkareva was willing to cooperate with the police and any failure on her part to do so was easily attributable to either her language barrier or logistics (in other words, just missing Officer Ross before she left the Gromysh's). That the jury nevertheless convicted Ms. Bochkareva is a testament to the strength of the evidence. It is difficult to imagine stronger evidence than a written, signed confession. Ms. Bochkareva testified that she executed this confession under duress. The jury got to hear from both Mr. and Mrs. Gromysh and from Ms. Bochkareva, and they made a credibility determination that Ms. Bochkareva had not been coerced into confessing and that her confession was valid. Last, any error in eliciting a reference to Ms. Bochkareva's silence during the State's case-in-chief was negated by the State's proper use of this evidence during closing argument. Any error in this case was harmless beyond a reasonable doubt and the State asks this Court to affirm the conviction.

II. **MS. BOCHKAREVA WAS EFFECTIVELY REPRESENTED BY COUNSEL.**

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

*Strickland* at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable

effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

There is a legitimate tactical reason for counsel's decision not to object to either the testimony in which the officer remarked that the defendant hung up the phone and couldn't be reached or to the State's closing argument. First, as noted above, the State's closing argument was

not improper in that it did not ask the jury to find the defendant's silence was an admission of guilt. Rather, the State argued that the defendant's account of what occurred that day, which was the opposite of Officer Ross' account, bore upon her credibility in that she was effectively impeached by Officer Ross.

Second, there is a legitimate tactic to be found in not emphasizing evidence in such a way that it appears a defendant would prefer to hide from it. "[D]efense counsel's decision not to object can be characterized as legitimate trial strategy or tactics. Counsel may not have wanted to risk emphasizing the testimony with an objection." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); see also *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447 (1993).

Here, trial counsel made beneficial use out of this testimony. Counsel argued, compellingly, that the prosecutor was trying to have it both ways: When his witnesses faltered it was attributed to their collective language barrier, but when the defendant made the slightest perceived misstep she was accorded no deference for her equal lack of English proficiency. Counsel portrayed the prosecutor as somewhat of a bully in this respect. Counsel's closing argument, on the whole, was not merely good; it was excellent. Defense counsel vigorously cross examined the State's witnesses and made a colorable claim that his client was coerced

into signing her confession. Ms. Bochkareva did not merely receive competent counsel, she received highly effective counsel. That the jury, as the sole judges of credibility, rejected Ms. Bochkareva's claims and found her guilty is, again, a testament to the overwhelming nature of the evidence.

It is because the evidence points overwhelmingly to Ms. Bochkareva's guilty that she suffered no prejudice from defense counsel's claimed deficiencies. The errors complained of, and to which defense counsel did not object, were of minor significance to the overall presentation of evidence. Ms. Bochkareva received competent and highly effective representation and her conviction should be affirmed.

**D. CONCLUSION**

The judgment of the trial court should be affirmed.

DATED this 26<sup>th</sup> day of May, 2011.

Respectfully submitted:

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By:

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

STATE OF WASHINGTON,  
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No. 40957-7-II

v.

Clark Co. No. 09-1-01729-8

INNA VYACHESLAVOVNA  
BOCHKAREVA,  
Appellant.

DECLARATION OF  
TRANSMISSION BY MAILING

STATE OF WASHINGTON )

: ss

COUNTY OF CLARK )

On May 26, 2011, 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.

Jennifer Casey  
Date: May 26, 2011.  
Place: Vancouver, Washington.