

NO. 41987-4-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ALLEN E. MCCAIN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Buckner

No. 10-1-04508-4

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the prosecutor's statements were either improper or prejudicial where the prosecutor's argument was a fair response to an argument made by defendant?
2. Should this Court decline to consider defendant's issue regarding the forfeiture of property when defendant failed to object to the trial court's order and has not made any effort to recover any of the property to which he might be entitled?

B. STATEMENT OF THE CASE.

1. Procedure

On October 25, 2010, the State charged ALLEN E. MCCAIN, hereinafter "defendant," with one count of possession of a firearm in the first degree (Count I), one count of vehicle prowling in the second degree (Count II), and one count of theft in the third degree (Count III). CP 1-2.

On February 8, 2011, defendant filed his own motion to dismiss for speedy trial violation. CP 9, 10-11; RP 16-18. The following day, defendant's trial counsel requested a thirty day continuance as she was not

yet prepared for trial. RP (2/9/11) 3-5. The court agreed to set the matter over for thirty days. RP (2/9/11) 6-7. Defendant did not sign the order continuing trial. CP 131; RP (2/9/11) 8.

On March 14, 2011, the case was called for trial before the Honorable Rosanne Buckner. RP 1. The court determined that defendant's statements to the investigating officer were admissible after a CrR 3.5 hearing. CP 74-77; RP 49-51. Prior to the close of the State's case-in-chief, defendant entered a stipulation admitting that he had been convicted of a serious offense prior to October 23, 2010. CP 42-43; RP 197-98.

The jury found defendant guilty as charged. CP 67, 68, 69. The court imposed the middle of a standard-range<sup>1</sup> sentence for 102 months on Count I, which was the only felony charge. CP 81-93; RP 266. For Counts II and III, the court imposed 365 days in custody, with all counts running concurrent. CP 94-98; RP 266. The court also required defendant to "forfeit all property in evidence including firearms." CP 81-93.

Defendant filed a timely notice of appeal. CP 100-103.

## 2. Facts

On October 22, 2010, Jorge Melgar-Acosta was pulled over while driving his 1992 red Ford Explorer in Pierce County, Washington. RP

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<sup>1</sup> Defendant had an offender score of nine, giving him a standard range of 87-116 months on Count I. CP 81-93.

144-45. As one of his passengers possessed marijuana, Mr. Melgar-Acosta was arrested and his car was left to be impounded. RP 146. Prior to leaving, the arresting officer assured Mr. Melgar-Acosta that the Explorer was locked and Mr. Melgar-Acosta took his keys with him. RP 146-47. The Explorer had no damage at the time Mr. Melgar-Acosta was arrested. RP 156-57.

Mr. Melgar-Acosta had working JBL speakers and a 600-watt amplifier in the Explorer. RP 147-48. The amplifier was unique because it had "California" inscribed on them which would light red when the speakers were turned on. RP 149; 158-59. Mr. Melgar-Acosta had purchased the speakers from a friend for \$80.00 and the amplifier was given to him as a gift. RP 152. When Mr. Melgar-Acosta left his Explorer on the side of the road, the speakers and amplifier were hooked up to the stereo system in the car. RP 148, 154. Mr. Melgar-Acosta and his passenger also had backpacks which they left in the Explorer the night they were arrested. RP 154.

The following day, another officer came to Mr. Melgar-Acosta's house and told him that the Explorer had been broken into the night before and that they had arrested defendant for stealing his amplifier and speakers. RP 147, 156. He identified his speakers and amplifiers from photographs taken by the officer. RP 149-50. When he finally got the car back, he saw that the contents of the backpacks were spilled onto the floor,

and the passenger side door was scratched and the lock was broken. RP 151, 154, 161.

Pierce County Sheriff's Deputy Adam Pawlak was dispatched to a report of a vehicle prowler for Mr. Melgar-Acosta's<sup>2</sup> Explorer on October 23, 2010. RP 163-64, 172. When he arrived at the scene, he observed defendant and another person standing outside of a white car which was parked directly behind Mr. Melgar-Acosta's Explorer. RP 164-65. Deputy Pawlak described the color of Mr. Melgar-Acosta's Explorer as maroon. RP 178. When Deputy Pawlak approached defendant, defendant immediately started telling Deputy Pawlak that he believed the Explorer belonged to him, because his own Explorer had been stolen the night before. RP 165. Defendant did not know the license number of his Explorer. RP 165.

During his contact with defendant, Deputy Pawlak discovered that defendant was a convicted felon. RP 165-66. Deputy Pawlak asked defendant if he had any weapons on his person, defendant responded that he did not. RP 166. Deputy Pawlak asked defendant if he could frisk him for weapons and defendant agreed. RP 166. Deputy Pawlak immediately found a hard object in defendant's left front jacket pocket. RP 166. As

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<sup>2</sup> The Explorer was actually owned by Mr. Melgar-Acosta's mother, Martha Melgar-Acosta. RP 144, 172. Mr. Melgar-Acosta was the car's primary driver. RP 145, 172.

soon as he touched the object, defendant stated, "Okay, it's a gun." RP 166. Deputy Pawlak secured defendant with handcuffs and removed the loaded gun from defendant's pocket. RP 166. The deputy also found a pair of wire cutters in defendant's right front jacket pocket. RP 167.

Defendant told Deputy Pawlak that he needed the gun for protection. RP 167. He stated that his car had been stolen at gun point the night before. RP 167. Defendant acknowledged that he was not supposed to have any firearms because he was a felon. RP 167.

Defendant claimed that he thought the Explorer belonged to him. RP 168. He claimed that the passenger door of the Explorer was unlocked when he got there, and that he had looked inside to find paperwork to identify whether or not it was his. RP 168, 170. Defendant was unable to find any paperwork. RP 168. Defendant told Deputy Pawlak that he could not confirm that the Explorer belonged to him and that he did not know who the owner was. RP 169. Defendant admitted he removed a stereo speaker and amplifier from the Explorer and placed them in the white car. RP 168-69. He never explained to the deputy why he removed the speaker and amplifier. RP 169.

Deputy Pawlak observed the speaker in the white car's trunk and the amplifier was in the back seat. RP 170. He also found a flathead screwdriver on the back seat, near the amplifier. RP 170, 176. Deputy

Pawlak saw that the lock on the passenger door of the Explorer had been pried out. RP 170. The damage could have been caused by a flathead screwdriver. RP 178-79. Deputy Pawlak had the Explorer towed and he contacted the Melgar-Acostas to let them know of the incident. RP 172. Deputy Pawlak did confirm that defendant had reported the theft of a Ford Explorer the previous day. RP 182, 185.

Defendant did not testify on his own behalf, but he did call his mother, Geraldine Houff. RP 198-99. Ms. Houff testified that she owned a “dark brown maroon-looking” Ford Explorer. RP 199. On September 10, 2010, Ms. Houff purchased her Explorer and was making payments to a private party. RP 211-12. She bought the car for defendant to get back and forth to work. RP 213. Her Explorer had been stolen on October 22, 2010. RP 216. When she got it back, she found that the stereo system, GPS, and speakers had been torn out and a laptop computer was missing. RP 215, 217. Ms. Houff testified that defendant had large grey or black speakers in the car and something that looked like an amplifier. RP 225. She testified that the speakers and amplifier found in the white car might have been from her Explorer, but acknowledged that all stereo equipment looks the same to her. RP 225-26, 227.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR'S ARGUMENT WAS IMPROPER WHERE THE PROSECUTOR MADE A FAIR RESPONSE TO DEFENDANT'S ARGUMENT IN CLOSING.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks are both improper and prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Prejudice is established only if there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be

sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

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, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence does not support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

A comment on a defendant’s right to remain silent occurs when the State uses the defendant’s exercise of his Fifth Amendment rights as either substantive evidence of guilt or to suggest that the silence was an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Not every reference to silence constitutes a “comment on silence.” *Id.*, 130 Wn.2d 706-707; *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999).

In *State v. Pavelich*, 150 Wash. 411, 420, 273 P. 182 (1928), the Washington Supreme Court held that a prosecuting attorney may comment on a lack of defense evidence so long as the prosecuting attorney does not directly refer to the defendant’s decision not to testify. Accord *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). Similarly, a “prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to

deny it, and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his' is still good law." *State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403, 407 (1969), quoting *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926).

Here, the defendant claims that the prosecutor committed misconduct in closing argument by commenting on his Fifth Amendment privilege against self incrimination. As defendant did not object to the argument to which he now assigns error, he must show that the argument is not only improper, but that it was flagrant or ill-intentioned and an instruction could not have cured any potential error. A review of the record shows that the prosecutor's argument was proper.

Defendant argued in closing that his "intent was to get his own property, and the only property he could get that night were the valuables in the car, the speakers." RP 251. In rebuttal, the prosecutor addressed defendant's argument:

And one thing that Mr. McCain, toward the end of the conversation, a dialog with the officers, he said, I thought the vehicle was mine; it could have been mine. He never told the officer, [o]h these are my speakers. And the question is, [w]here did that evidence come from?

[Defense counsel] just stood before you and stated that he wasn't committing theft because he was removing his own speakers. Where does that evidence come from? Who testified to that? His own mother? I showed her speakers. I said, [a]re these your son's? And she tried to hedge a little bit and said, [o]h, it could be. I don't know. No one

testified that Mr. McCain was removing his own speakers, no one. So how did [defense counsel] get to stand up before you and tell you that when it's not supported by the evidence? Or another question is, [w]hy would someone tell you that when it's not supported by the evidence, when the court's instructions tell you that the evidence in this case are the exhibits that are admitted and the testimony? So if it's not supported by the testimony or the evidence, what do you have to do? You have to disregard it.

RP 254. When read in the context of the entire argument, it was clear that these statements were not a comment on defendant's right against self incrimination, but was a fair response to defendant's closing argument. The prosecutor's comments do not reference defendant's failure to testify. It was the defense who claimed that defendant's intent was to safeguard his own property and he just had a mistaken belief that the speakers belonged to him. The prosecutor pointed out that defendant did not tell the investigating officer that he believed the speakers belonged to him and that defendant's mother did not testify that defendant had a set of speakers identical to those in evidence. This directed the jury to persons or information other than defendant who might have provided such evidence. Finally, the argument does not ask the jury to interpret the lack of evidence as to what defendant knew or was thinking as providing substantive evidence of his guilt. Rather the argument asks the jury to reject the defense arguments that are unsupported by evidence. It is the use of a defendant's exercise of his Fifth Amendment rights *as either substantive evidence of guilt or to suggest that the silence was an*

*admission of guilt* which makes it an improper comment on the right to remain silent. *State v. Lewis, supra*. The prosecutor's arguments did not violate this rule. Defendant has failed to show improper comments.

As defendant has not met his burden<sup>3</sup> of showing misconduct and prejudicial effect, this Court should reject his claim of prosecutorial misconduct.

2. THIS COURT SHOULD DECLINE TO CONSIDER DEFENDANT'S ARGUMENT REGARDING FORFEITURE OF THE PROPERTY HELD IN EVIDENCE AS HE FAILED TO OBJECT TO THE FORFEITURE BELOW AND HAS NOT ATTEMPTED TO RECOVER ANY OF THE PROPERTY TO WHICH HE MIGHT BE ENTITLED.

In this case, the defendant asserts that the court-imposed condition of forfeiting all property in evidence exceeds the statutory authority of the court. The only record of property in evidence is the list of exhibits received in the vault of the Superior Court Clerk's Office. CP 129-130.

The court had statutory authority to impose forfeiture of the firearm under RCW 9.41.098(1)(c). Defendant has no claim to the photographs taken by the investigating officer or the speakers and amplifier owned by Mr. Melgar-Acosta. See *State v. Alaway*, 64 Wn.

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<sup>3</sup> Defendant asserts that a constitutional harmless error standard is appropriate in this case, yet the burden of proving constitutional misconduct remains with the defense except those instances where the prosecutor appeals to racial bias. Compare *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011), with *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011).

App. 796, 798, 828 P.2d 591, *rev. denied*, 119 Wn.2d 1016, 833 P.2d 1390 (1992) (“A court may refuse to return seized property no longer needed for evidence . . . if the defendant is not the rightful owner[.]”). Similarly, defendant does not have an ownership claim to the photographs taken by the defense investigator nor to the copies of the documents relating to the stolen car which belonged to his mother.

The only property to which defendant *may* claim rightful ownership are the wirecutters and screwdriver. *See* CP 129-130. Defendant did not claim ownership of either item at trial. The screwdriver was found inside a car that apparently did not belong to defendant. While the wirecutters were found in defendant’s pocket, the record is silent as to whether the tool belonged to him. Either of these tools could have belonged to the person at the scene with defendant, or they could have been stolen, or they could have been taken from the victim’s vehicle. As defendant did not object below, the court was unable to make a factual finding of ownership.

Finally, nothing in the record indicates that defendant has sought the return of these items or that he has any interest in the return of the tools.

Defendant has recourse to claim the property by requesting a hearing in the Superior Court for the return of the wirecutters and screwdriver. If the court refuses their return, he could appeal that

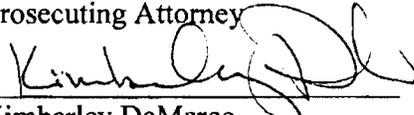
decision. Until defendant seeks return of this property, any issue arising from their forfeiture is entirely speculative.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's convictions and the conditions of his sentence.

DATED: January 12, 2012.

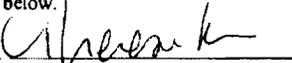
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.12.11

  
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# PIERCE COUNTY PROSECUTOR

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