

NO. 43208-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

ZANE CAVENDER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly Grant

No. 11-1-02164-7

Brief of Respondent

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Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
1.	Whether the defendant has demonstrated prosecutorial misconduct which prejudiced the outcome of his trial?	1
2.	Where the defendant did not object below, whether the defendant has demonstrated prosecutorial misconduct that was flagrant, ill-intentioned, and incurable by instruction?	1
3.	Whether the prosecutor committed misconduct where his argument was confined to the evidence, testimony and issues?	1
4.	Whether the prosecutor personally opined on the defendant's guilt?.....	1
5.	Whether the prosecutor vouched for a witness' credibility with extrinsic evidence?	1
6.	Whether the prosecutor elicited a comment of the defendant's silence where he asked a police officer witness about the defendant's post- <i>Miranda</i> statement?	1
7.	Whether the prosecutor elicited a comment on the defendant's silence where he asked a follow-up question resulting in the unsolicited answer that the defendant chose not to answer further questions?	1
8.	Whether the prosecutor committed misconduct where he did not repeat, remark on, or argue the defendant ceasing police questioning?	2
9.	Whether there is overwhelming evidence in this case?.....	2
10.	Whether the defendant has demonstrated deficiency of counsel and prejudice thereby?.....	2

11.	Where the defendant failed to object, request the court to recuse itself, or request a new hearing below, whether the defendant may raise appearance of fairness of the trial court for the first time on appeal?	2
12.	Whether the defendant demonstrates that the trial court's actual or potential bias?	2
B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure	2
2.	Facts.....	3
C.	<u>ARGUMENT</u>	7
1.	THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN EXAMINING WITNESSES OR IN CLOSING ARGUMENT	7
2.	THE DEFENDANT MAY NOT RAISE AN APPEARANCE OF FAIRNESS ISSUE FOR THE FIRST TIME ON APPEAL.....	21
3.	THE DEFENDANT DOES NOT DEMONSTRATE THAT THE TRIAL VIOLATED THE APPEARANCE OF FAIRNESS RULE.....	21
D.	<u>CONCLUSION</u>	23

Table of Authorities

State Cases

<i>City of Bellevue v. King County Boundary Review Board.</i> , 90 Wn.2d 856, 863, 586 P.2d 470 (1978).....	21
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 717, 101 P.3d 1 (2004).....	20
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	20
<i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995).....	12, 19
<i>State v. Burke</i> , 163 Wn.2d 204, 217, 181 P.3d 1 (2008).....	13
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	19
<i>State v. Crane</i> , 116 Wn.2d 315, 331, 804 P.2d 10 (1991).....	13
<i>State v. Curtis</i> , 110 Wn. App. 6, 67 P. 3d 1274 (2002).....	16
<i>State v. Dhaliwal</i> , 150 Wn. 2d 559, 578, 79 P. 3d 432 (2003).....	9, 13
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	7, 8, 13, 15, 16, 18
<i>State v. Emery</i> , 174 Wn. 2d 741, 756, 278 P. 3d 653 (2012).....	7, 8
<i>State v. Fleming</i> , 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).....	9
<i>State v. Fricks</i> , 91 Wn.2d 391, 396–97, 588 P.2d 1328 (1979)	7, 13
<i>State v. Gamble</i> , 168 Wn.2d 161, 187, 225 P.3d 973 (2010).....	22
<i>State v. Gentry</i> , 125 Wn.2d 570, 641, 888 P. 2d 1105 (1995)	8
<i>State v. Hoffman</i> , 116 Wn.2d 51, 94, 804 P. 2d 747 (1994).....	20
<i>State v. Ish</i> , 170 Wn. 2d 189, 196, 241 P. 3d 389 (2010).....	12
<i>State v. Jackson</i> , 150 Wn. App. 877, 885, 209 P. 3d 535 (2009)	9, 12

<i>State v. Johnson</i> , 100 Wn.2d 607, 621, 674 P.2d 145 (1983), <i>overruled on other grounds by State v. Bergeron</i> , 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).....	17
<i>State v. Lewis</i> , 130 Wn.2d 700, 707, 927 P.2d 235 (1996)	13, 14, 15
<i>State v. Litzenberger</i> , 140 Wash. 308, 311, 248 P. 799 (1926).....	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	19, 20
<i>State v. Monday</i> , 171 Wn. 2d 667, 676, 257 P. 3d 551 (2011)	7
<i>State v. Morgensen</i> , 148 Wn. App. 81, 90–91, 197 P.3d 715 (2008)	21
<i>State v. Morris</i> , 150 Wn. App. 927, 931, 210 P. 3d 1025 (2009).....	9
<i>State v. Newbern</i> , 95 Wn. App. 277, 296, 975 P. 2d 1041 (1999)	22
<i>State v. Romero</i> , 113 Wn. App. 779, 54 P. 3d 1255 (2002).....	16
<i>State v. Stenson</i> , 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).....	8, 12
<i>State v. Sweet</i> , 138 Wn. 2d 466, 480-81, 980 P.2d 1223 (1999).....	14, 17
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	19
<i>State v. Tolias</i> , 135 Wn. 2d 133, 140, 954 P. 2d 907 (1998).....	21
<i>State v. Warren</i> , 165 Wn. 2d 17, 28, 195 P.3d 940 (2008)	12

Federal and Other Jurisdictions

<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).....	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	19, 20
<i>United States v. Necochea</i> , 986 F.2d 1273, 1281 (9th Cir.1993).....	20

Statutes

RCW 9.94A.535(3)(t) and (u)..... 2

Rules and Regulations

RAP 2.5(a)(3)..... 21

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

1. Whether the defendant has demonstrated prosecutorial misconduct which prejudiced the outcome of his trial?
2. Where the defendant did not object below, whether the defendant has demonstrated prosecutorial misconduct that was flagrant, ill-intentioned, and incurable by instruction?
3. Whether the prosecutor committed misconduct where his argument was confined to the evidence, testimony and issues?
4. Whether the prosecutor personally opined on the defendant's guilt?
5. Whether the prosecutor vouched for a witness' credibility with extrinsic evidence?
6. Whether the prosecutor elicited a comment of the defendant's silence where he asked a police officer witness about the defendant's post-*Miranda* statement?
7. Whether the prosecutor elicited a comment on the defendant's silence where he asked a follow-up question resulting in the unsolicited answer that the defendant chose not to answer further questions?

8. Whether the prosecutor committed misconduct where he did not repeat, remark on, or argue the defendant ceasing police questioning?
9. Whether there is overwhelming evidence in this case?
10. Whether the defendant has demonstrated deficiency of counsel and prejudice thereby?
11. Where the defendant failed to object, request the court to recuse itself, or request a new hearing below, whether the defendant may raise appearance of fairness of the trial court for the first time on appeal?
12. Whether the defendant demonstrates that the trial court's actual or potential bias?

B. STATEMENT OF THE CASE.

1. Procedure

On May 26, 2011, the Pierce County Prosecuting Attorney (State) charged the defendant, Zane Cavender, with one count of residential burglary. CP 1-2. The State also alleged statutory aggravating factors of rapid recidivism and presence of the victim. *Id.*; RCW 9.94A.535(3)(t) and (u). On November 17, 2011, the State amended the Information to add, in the alternative, a count of burglary in the second degree. CP 10-11. The

State included the rapid recidivism aggravator regarding the alternative.

Id.

Trial began on January 10, 2012, before the Hon. Beverly Grant. 1 RP 5. During pretrial motions, the defendant stipulated to the admissibility of his statements to police. 1 RP 15. After hearing all the evidence, the jury found the defendant guilty of residential burglary. CP 102. The jury also found the aggravating factor that the victim was present. CP 103. The defendant elected to waive jury determination of rapid recidivism. CP 100, 3 RP 658. The defendant also stipulated to facts regarding his release date from prison. 3 RP 658. The court found that the state had proven rapid recidivism. 3 RP 662, CP 113-115.

On February 24, 2012, the court imposed an exceptional sentence of 116 months in prison. CP 119, 130. On March 14, 2012, the defendant filed a timely notice of appeal. CP 139.

2. Facts

In the early morning hours of May 23, 2011, Antonio Davila was awakened by his dogs barking. 1 RP 154. He looked out the back window from the second floor of his home. *Id.* There had been some break-ins and thefts in or near the garage earlier that month. His car had been broken into and a global positioning system (GPS) had been taken. 1 RP 152. Soon after that, his garage had been broken into and his lawn mower and other items had been stolen. 1 RP 155. Then, on a third occasion, some

pedestrians in the alley behind his house had attempted to enter his garage just as Davila was closing the garage door. 1 RP 155.

When he looked out the back window, he could see that the “person door” to the garage was ajar 6-7 inches. 1 RP 156. Davila got his .45 pistol and told his wife to call the police. *Id.* Davila went down to investigate.

When he got to the garage door, he heard movement inside the dark garage. 1 RP 159. He reached in, flipped on the light switch, and closed the door. *Id.* He moved to the window and looked inside. *Id.* He saw two men inside his garage. *Id.*

Davila ordered the two men to come out of the garage with their hands up. 1 RP 159. He saw the two men scurrying about in the garage. 1 RP 160. One of the men reached into his pockets. *Id.* This concerned Davila, who thought that the man may have been reaching for a weapon. *Id.*

Davila, a United States Army Special Forces weapons expert, moved around and took a position on the sidewalk, approximately 10-15 feet from the door. 1 RP 161. At that point, one of the men opened the door and ran out. 1 RP 162. The first man ran toward Davila. 1 RP162. Davila fired one shot at the first man. *Id.* The first man ran out the gate and down the alley. 1 RP 163.

Moments later, the second man ran out. 1 RP 164. It was the defendant. 1 RP 170. Davila shot him. *Id.* The defendant ran out the gate

and dropped in a grassy area next to the garage. *Id.* Davila checked the defendant to make sure that he was not armed. 1 RP 165. After quickly checking the area for other suspects, Davila got his Army field medical bag. 1 RP 166. Davila then rendered aid to the defendant's gunshot wound until police arrived. 1 RP 167.

Police arrived minutes later. They found Davila by the defendant, rendering aid to a gunshot wound. 1 RP 120. Police found that the defendant was wearing a black hooded sweatshirt, black t-shirt, and dark pants. 3 RP 472, 506. The defendant was also wearing black gloves and carrying a flashlight, which was "on". 1 RP 122, 3 RP 472. He also had a flat-head screwdriver in his pocket. 1 RP 125, 3 RP 472. The defendant had a folding knife and a syringe in his pocket. 1 RP 125, 3 RP 473.

The fire department arrived to render medical aid. 3 RP 473. When the fire department entered the alley, they discovered another person face-down, next to a garage a few doors away from Davila's house. 3 RP 479, 1 RP 127. The person was later identified as Anthony McDougald. 2 RP 268. He had a gunshot wound in the back. 1 RP 127. He was dead. 1 RP 127, 2 RP 266. McDougald was wearing a brown denim jacket and black jeans. 1 RP 127. He was also wearing blue rubber gloves. *Id.* McDougald had a folding knife clipped to the pocket of his jeans. 3 RP 516.

McDougald had two separate keys on fobs on him. 2 RP 271, 287. One of the key sets included the house and garage keys to Davila's house.

2 RP 287. The keys were connected to a carabiner. 2 RP 287. All these items belonged to Davila and his wife, Jennifer Vittetoe. 1 RP 173. McDougald also had a number of credit cards, which belonged to Vittetoe. 1 RP 228, 2 RP 287. Next to McDougald's body, police found a U.S. Army Special Forces sweatshirt. 1 RP 128, 3 RP 517. The sweatshirt belonged to Davila. 1 RP 171. Davila had left it in his car, in his garage. 1 RP 172.

One of their dogs awakened Ms. Vittetoe. 1 RP 216. She looked around for her husband and saw that he was outside near the garage. 1 RP 220. He told her to call 911. *Id.* When the police arrived, she discovered that her purse, normally left on a hook in the back room, was missing. 1 RP 225, 3 RP 406. Ms. Vittetoe also discovered that a DVD player had been thrown on the floor of their home office on the first floor of the house. 1 RP 226.

The defendant had a Barnes and Noble giftcard in his possession. 3 RP 476. This item had come from Ms. Vittetoe's purse. 1 RP 228.

Det. Nasworthy examined the garage. He found a hammer and hatchet near the "person" door. 3 RP 525, 526. There was a car in the garage. 3 RP 526. Det. Nasworthy found the glove box open. *Id.* He also found house keys on the front seat. 1 RP 232, 3 RP 528. Those keys had come from Ms. Vittetoe's purse. 1 RP 173, 232.

C. ARGUMENT.

1. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN EXAMINING WITNESSES OR IN CLOSING ARGUMENT.

a. Standard of review and the defendant's burden.

All prosecutorial misconduct cases involve a constitutional issue: violation of the defendant's right to a fair trial. *See, e.g., State v. Monday*, 171 Wn. 2d 667, 676, 257 P. 3d 551 (2011). Generally, in a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn. 2d 741, 756, 278 P. 3d 653 (2012). In extreme cases, such as an appeal to racial bias as in *Monday, supra*, the Court has employed a constitutional harmless error standard. Also, where the prosecutor comments on the defendant's pre-arrest silence (*see, e.g., State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996)), or post-arrest silence (*State v. Fricks*, 91 Wn.2d 391, 396–97, 588 P.2d 1328 (1979)), the Court has employed a constitutional harmless error standard. Recently, in *Emery*, the Supreme Court rejected the defendant's invitation to abandon the existing general standard in favor of the constitutional harmless error standard. 174 Wn. 2d at 757.

In the present case, the defendant has alleged multiple instances of prosecutorial misconduct. Among others, he alleges that the prosecutor elicited a comment regarding the defendant's post-arrest silence. App. Br., at 17. If proven, the constitutional harmless error standard would apply to this allegation. *See, Easter*. For his other allegations, the general standard applies. *See, Emery*. First, however, under both standards, he has the burden to show the misconduct occurred. *Emery*, at 760-761. The defendant's allegations will be addressed in turn.

Generally, at trial, the defendant has the duty to act upon perceived misconduct and to request a remedy. If the defendant did not object to the prosecutor's conduct at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *See, State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Recently, in *Emery*, the Supreme Court discussed this duty to object and the reasons why this duty, and the waiver rule, exists. 174 Wn. 2d at 761-762.

- b. The prosecutor's closing remarks did not comment on the defendant's 5th Amendment right or the burden of proof.

In closing argument, a prosecuting attorney has wide latitude to argue the evidence and express reasonable inferences from it. *See, e.g., State v. Gentry*, 125 Wn.2d 570, 641, 888 P. 2d 1105 (1995). Any

allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn. 2d 559, 578, 79 P. 3d 432 (2003).

A prosecutor may commit misconduct in closing argument if he comments that the defense did not present witnesses or if he states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory. *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

However, mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *See, State v. Jackson*, 150 Wn. App. 877, 885, 209 P. 3d 535 (2009), citing *Fleming*, 83 Wn. App. at 215. A prosecuting attorney may properly argue that certain testimony is not denied, and may comment that evidence is undisputed:

Surely the 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.

State v. Morris, 150 Wn. App. 927, 931, 210 P. 3d 1025 (2009), quoting *State v. Litzenberger*, 140 Wash. 308, 311, 248 P. 799 (1926).

The facts of this case included that the defendant was shot and seriously wounded by the homeowner. The defendant's companion, McDougald, was shot fatally. The defense strategy, or theme, was to portray the property owner, Davila, as over-reacting at minimum, and perhaps even as a murderer. Defense cross-examination posed the question why Davila did not just call 911. *See, e.g.* 1 RP 182. The defense went so far as to call Dr. Clark, the Pierce County Medical Examiner, to testify about McDougald's cause of death; and to emphasize that McDougald was shot in the back. 3 RP 452. Defense counsel questioned Det. Vold about how one could intentionally hit a target that one is shooting at and Davila's special Army training. 2 RP 319. Defense counsel argued in closing that, after Davila shot the defendant without provocation, McDougald ran and Davila chased him and shot him down in the alley. 3 RP 616. Defense counsel also argued that "Whatever happened sounds fishy"; apparently implying that the scene and evidence was tampered with. 3 RP 627.

In closing argument, the prosecutor specifically addressed the very real potential of sympathy for the defendant, and condemnation of Davila's actions, as affecting the verdict, because the defense had implicitly or explicitly made it an issue. He posed the rhetorical question: "Gee, he was shot. Hasn't justice been served?" 3 RP 592. He went on to address the defense implication that the evidence had been planted on the defendant and McDougald. 3 RP 600. Again responding to the defendant's

strategy to focus on the fact that the defendant and McDougald had been shot; and McDougald killed, the prosecutor sought to focus the jury on the evidence of the actual issue at hand: whether the defendant (and McDougald) had burglarized the victims' home and garage:

This is a case about a burglary, members of the jury. Zane Cavender is charged with residential burglary and burglary in the second degree. This is not a homicide trial. The detectives went on to investigate this as a homicide because there was the killing of a human being. Tony McDougald was shot and died there at the scene, and so they investigated this as if there is a potential that somebody could be criminally charged. It is clear who fired the shots that killed Tony McDougald. That is not in issue and was not in dispute ever. They investigated his story. They investigated the crime scene. They treated this like a homicide investigation, and Tony Davila wasn't charged. The person that is charged with a crime you are here to decide is Zane Cavender. He is charged with the burglary. It's not State v. Tony Davila. The evidence in this case, there is no evidence to contradict what Tony Davila told you had occurred that day. Nothing. Every bit of evidence that was introduced by Tony Davila was corroborated by the other witnesses who were involved in this investigation, and the other witnesses concluding this is a burglary.

3 RP 605.

Here, the prosecutor never commented or even pointed out that the defendant did not testify. He argued evidence that was before the jury. He argued that the jury needed to focus on that evidence; and not sympathy, or concern regarding, or speculation about, the propriety of Davila's actions; or the decision whether or not to arrest or charge Davila with a crime.

Even if this argument was improper, the defense did not object to it. Therefore, the defendant is deemed to have waived the error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *See, Stenson*, 132 Wn.2d at, 727. Here, the alleged improper argument could have been cured by instruction. *See, e.g. State v. Warren*, 165 Wn. 2d 17, 28, 195 P.3d 940 (2008). For example, the court could have reminded the jury of, or repeated, Instruction 4 (CP 19): that the defendant is not required to testify and that the jury may not infer guilt or hold it against the defendant if he does not testify.

- c. The prosecutor did not “bolster” or vouch for any witness’ testimony.

Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. *State v. Ish*, 170 Wn. 2d 189, 196, 241 P. 3d 389 (2010). It is improper for a prosecutor to personally vouch for a witness's credibility. *See, State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Jackson*, 150 Wn. App. 877, 883, 209 P. 3d 553 (2009). Prosecutors may, however, argue an inference from the evidence and the reviewing court will not find prejudicial error “unless it is ‘clear and unmistakable’ that counsel is expressing a personal opinion.” *Brett*, 126 Wn.2d at 175.

In the closing argument quoted in section 1 b. above, the prosecutor did not vouch for the witness' credibility. The reviewing court looks at the entire argument instead of highlighted snippets of argument out of context. *See, Dhaliwal*, 150 Wn.2d at 578. In context, the prosecutor argued the credibility of witnesses and the strength of the State's case. He outlined which evidence (and reasonable inferences from the evidence) could support the jury's conclusion that Davila and Vittetoe were credible. Nowhere did he express his personal opinion regarding a witness' credibility. This is not vouching.

- d. There was no comment regarding post-arrest silence.

During its case in chief, the State may not use evidence of a defendant's pre-arrest silence 'either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.' *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); *see also Easter*, 130 Wn.2d at 241. Likewise, yet based upon the defendant's due process rights, the State may not elicit or comment upon post-arrest silence. *See, State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *Fricks, supra*.

When the defendant's silence is raised, the appellate court considers "whether the prosecutor manifestly intended the remarks to be a comment on that right." *Burke*, 163 Wn. 2d at 216, quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). "Comment" means that the State uses the accused's silence to suggest to the jury that the refusal to

talk is an admission of guilt. *Lewis*, at 707. “[A] mere reference to silence which is not a ‘comment’ on the silence is not reversible error absent a showing of prejudice.” *Lewis*, at 706–707. *See also, State v. Sweet*, 138 Wn .2d 466, 480-81, 980 P.2d 1223 (1999) (no prejudice where State did not emphasize the comment or make any further argument).

In this case, the witness merely mentioned in passing that the defendant ceased the interview. Officer Cockcroft had gone to St. Joseph’s hospital to check on the defendant’s condition. 2 RP 257. Cockcroft re-advised the defendant of the *Miranda*¹ rights. 2 RP 260. The prosecutor asked Cockcroft what the defendant had said:

[PROSECUTOR] Q.: Okay. Did he agree to speak with you?
[OFFICER COCKCROFT] A.: He didn’t say he didn’t want to initially, no.
Q.: Did you ask him questions about the investigation?
A.: I asked him what happened.
Q.: And what did he tell you?
A.: He said, “Some dude shot me in the back.”
Q.: Did he offer any further explanation about how some “dude” had shot him in the back?
A.: At that point he elected to no longer answer my questions.
Q.: Was he ever taken in for surgery?
A.: Yes.

2 RP 261.

The record does not show that prosecutor intentionally or specifically elicited information about the defendant exercising his right to remain silent or terminate the questioning. Nor does the record reflect that

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

he attempted to capitalize on it. He simply ignored it and moved on to a question regarding whether the defendant was then removed to surgery and the defendant's medical condition after surgery. The prosecutor did not mention Cockcroft's testimony in closing, nor mention the defendant's statement, let alone argue that the silence was evidence of guilt.

There are significant differences between this case and *Easter*. Officer Cockcroft's testimony was not a "comment". At best, it was "a mere reference to silence which is not a 'comment' on the silence [and] is not reversible error absent a showing of prejudice." *Lewis*, 130 Wn.2d at 706. The defendant has not established he was prejudiced by this testimony.

In *Easter*, the State and the officer deliberately commented on the defendant's silence when the officer referred to him as a "smart drunk." *Easter*, 130 Wn.2d at 234. The officer explained that he meant that Easter was "evasive, 'wouldn't talk' and was hiding something." *Id.*, at 234. These comments constituted prejudicial error. *Id.*, at 242-43.

In *Easter*, despite a pretrial order to the contrary, the prosecuting attorney elicited testimony and an opinion from the arresting officer regarding the defendant's exercise of his right to remain silent; that the defendant was a "smart drunk". *Id.*, at 233. The prosecutor went on to make "smart drunk" her theme and argue the post-arrest silence several times in closing. *Id.*, at 234. Notably, the defense counsel preserved these issues for appeal. She objected to the officer's testimony (130 Wn. 2d at

233) and moved for a mistrial, based upon the State's closing argument. *Id.*, at 234.

Easter is an example of where the prosecutor violated the defendant's right against self-incrimination. *State v. Romero*, 113 Wn. App. 779, 54 P. 3d 1255 (2002), and *State v. Curtis*, 110 Wn. App. 6, 67 P. 3d 1274 (2002), both cited by the defendant, raised a similar issue, but less egregious than, *Easter*. In all three of these cases, the defendant had exercised his right to remain silent. In *Romero*, the prosecutor asked a general question: "What happened there?" The police officer described the defendant as uncooperative, and after the advisement of rights, refused to answer questions. 113 Wn. App. at 793. There never was a statement from the defendant.

In *Curtis*, the prosecutor asked the officer if the defendant had made a statement. 110 Wn. App. at 9. As in *Romero*, the officer responded that the defendant refused to speak and requested an attorney. *Curtis*, at 9. The prosecutor and officer added to this through later testimony that the defendant refused to speak to the officer when later contacted in the jail. *Id.*

As pointed out above, none of this happened in the present case. The defendant did waive his right to silence and answered a question. He then stopped. No comment was elicited or made regarding his exercise of

rights. The fact that the defendant terminated the interview was not used as evidence of his guilt.

This case is more like what happened in *Sweet*. The officer's statements in *Sweet* were a mere reference to the defendant's silence, which did not warrant reversal absent a showing of prejudice. 138 Wn.2d at 481. In *Sweet*, the officer testified that Sweet said he would take a polygraph test and that he would give the officer a written statement after he had consulted with his attorney. The polygraph and the written statement were not introduced at trial. *Id.*, at 480. The court upheld the conviction because Sweet did not show that he was prejudiced by the testimony. *Id.*, at 481.

- e. There is overwhelming evidence of the defendant's guilt in this case.

The reviewing court uses two overlapping tests to determine whether constitutional error is harmless: the contribution test and the overwhelming evidence test. *State v. Johnson*, 100 Wn.2d 607, 621, 674 P.2d 145 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). Under the contribution test, an error is harmless if, beyond a reasonable doubt, it did not contribute to the verdict. *Johnson*, 100 Wn.2d at 621. Under the overwhelming evidence test, an error is harmless if, beyond a reasonable doubt, the untainted evidence necessarily leads to a finding of guilt. *Johnson*, 100 Wn.2d at 621.

Even if the prosecutor had elicited a comment on the defendant's right to remain silent from Officer Cockcoft, as in *Easter*, the State can meet the "overwhelming evidence" requirement. The defendant was charged with residential burglary and burglary in the second degree. The defendant and his accomplice, McDougald, were caught in the victims' dark garage at 4:00 a.m.. They had no permission to be there. They were both wearing dark clothing and wearing gloves. The defendant was wearing a black shirt, black trousers, and a black hooded sweatshirt. The defendant was carrying a flashlight. He had a flat-blade screwdriver in his pocket. Both men carried knives.

In addition, on their persons, the defendant and his accomplice had the victims' property, including Ms. Vittetoe's gift and credit cards, which had been taken from her purse, in the house. McDougald had Davila's Army sweatshirt, which had been taken from the car in the garage. McDougald had the victims' keys, which had been taken from Vittetoe's purse, in the house. The house keys, which had been taken from Vittetoe's purse in the house, were found on the front seat of the victims' car in the victims' garage, where Davila saw the defendant and McDougald.

There is no question that the defendant and McDougald burglarized the victims' house and garage.

f. Ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S.

668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

There is a strong presumption that a defendant received effective representation. *McFarland*, 127 Wn.2d at 335; *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case,

viewed as of the time of counsel's conduct." *Strickland*, at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. Because a prosecuting attorney has wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence (*see, e.g., State v. Hoffman*, 116 Wn.2d 51, 94, 804 P. 2d 747 (1994)), "[l]awyers do not commonly object during closing argument "absent egregious misstatements." *In re Personal Restraint of Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004)(quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993)). A decision not to object during closing argument is within the wide range of permissible professional legal conduct. *Davis*, at 717.

There is no reason to object where, as here, there was no misconduct. Even if the testimony and argument were improper, it was very minor. Given the circumstances, counsel was not deficient in failing to object. He may have made a tactical judgment that an objection would do more harm than good by calling attention to what Officer Cockcroft had merely mentioned in passing. The defendant fails to show deficiency of counsel or prejudice.

2. THE DEFENDANT MAY NOT RAISE AN APPEARANCE OF FAIRNESS ISSUE FOR THE FIRST TIME ON APPEAL.

Issues not raised in the trial court may not be raised for the first time on appeal, unless it is a “manifest error affecting a constitutional right”. RAP 2.5(a)(3). An appearance of fairness claim is not “constitutional” in nature; therefore, it may not be raised for the first time on appeal. *See, State v. Morgensen*, 148 Wn. App. 81, 90–91, 197 P.3d 715 (2008); *see also, State v. Tolias*, 135 Wn. 2d 133, 140, 954 P. 2d 907 (1998); *City of Bellevue v. King County Boundary Review Board.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978).

Here, the defendant did not object to the court’s remarks. Also, after the court made the remarks, the defendant did not request that the judge recuse herself from sentencing the defendant. The defendant had ample opportunity to make such a motion, as the remarks were made on January 24, 2012, and the sentencing hearing was set over to February 24; a month later. The defendant has not preserved this issue for appeal.

3. THE DEFENDANT DOES NOT DEMONSTRATE THAT THE TRIAL VIOLATED THE APPEARANCE OF FAIRNESS RULE.

To succeed in a claim of violation of appearance of fairness, the challenging party must show evidence of the decision maker’s actual or

potential bias. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010); *State v. Newbern*, 95 Wn. App. 277, 296, 975 P. 2d 1041 (1999).

Here, one of the victims, Davila, had expressed how the crime had profoundly affected him and his wife. 3 RP 666. In relating her personal experience, the court expressed empathy. 3 RP 667.

In addressing the defendant a month later at sentencing, the court did not upbraid the defendant or condemn him; the court said that she thought his expression of remorse was “heartfelt”. 3 RP 684. The court spoke words of encouragement and wished the defendant well in his goal to become a counselor to troubled youth. 3 RP 685.

The defendant does not demonstrate that the court’s remarks to the victim resulted in prejudice to him in the imposition of sentence. When it alleged the two aggravators, the State gave notice that it was seeking an exceptional sentence. Both aggravators were established. The State recommended 116 months, which the court imposed. 31 days before invading the victims’ home and property, the defendant had been released from prison after sentence for 5 felonies; one in King County and four in Pierce. In Pierce County, he had been sentenced for two violent crimes: two counts of assault in the second degree; and two non-violent crimes: felony eluding and theft of motor vehicle. CP 116. The defendant cannot show that the trial court based its decision on inappropriate reasons rather

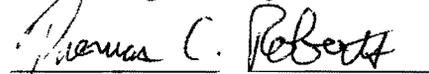
than his dismal criminal record and a legitimate desire to protect the public. Under the defendant's reasoning, every judge who has ever been a crime victim would be barred from hearing criminal cases.

D. CONCLUSION.

The defendant received a fair trial where overwhelming evidence was presented against him. There may be doubt, disagreement, and perhaps even controversy regarding the use of deadly force by the homeowner. It is very unfortunate that McDougald was killed. However, there is no doubt that the defendant and McDougald were caught in the act of burglarizing the victims' home and garage. The prosecuting attorney did not commit misconduct in the trial or in arguing the case. The State respectfully requests that the defendant's conviction and sentence be affirmed.

DATED: November 16, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

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.

11-16-12 [Signature]
Date Signature

PIERCE COUNTY PROSECUTOR

November 16, 2012 - 3:59 PM

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