

FILED

FEB 28 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29397-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LEIVAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The State engaged in misconduct during closing argument and denied appellant a fair trial. 3RP¹ 290.

2. The State commented on Leivan's right to silence. 3RP 190.

Issues Pertaining to Assignments of Error

1. During closing argument, the prosecutor encouraged the jury to convict appellant because metal theft "happens frequently here in Grant County and nobody's ever caught." Did this argument, which encouraged the jury to send a message to the community that metal theft would not be tolerated, constitute prejudicial misconduct and violate appellant's right to a fair trial?

2. The investigating officer testified he left his card and asked that appellant call him back, but he never did. Was this testimony an improper comment in violation of Leivan's constitutional right to remain silent? Or alternatively, was the failure to object ineffective assistance of counsel?

¹ There are six volumes of Verbatim Report of Proceedings referenced as follows: 1RP – July 28, 2010, 9:01 a.m.; 2RP – July 28, 2010, 10:32 a.m.; 3RP – July 29, 2010; 4RP – July 30, 2010; 5RP – Aug. 30, 2010; 6RP Aug. 31, 2010.

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grant County prosecutor charged appellant Charles Leivan with one count of trafficking in stolen property, as an accomplice. CP 17. The jury found him guilty and the court imposed a standard range sentence. CP 40, 49-51. A motion for new trial was denied. CP 42; 6RP 7. Notice of appeal was timely filed. CP 64.

2. Substantive Facts

Leivan grew up with his friend Carlos Bazan, who often sells scrap metal to recyclers. 3RP 243, 246. Indeed, Leivan lets Bazan keep his trailer at Bazan's home because he borrows it so often. 3RP 243. As a friend, Leivan agreed to drive Bazan on a recycling errand because Bazan did not have a valid driver's license. 3RP 244.

On July 19, 2009, Bazan drove to Leivan's home with the truck and trailer and the two continued, with Leivan driving, to the home of Wayne Hannah. 3RP 244. According to Leivan, Hannah added some additional radiators and air conditioners to the irrigation pipes that were already in the truck and trailer. 3RP 245, 254-55. Hannah then drove the trio to Bargain Town in Moses Lake. 3RP 245. Once there, Hannah conducted the transaction while Leivan helped unload the pipes. 3RP 256. Leivan accompanied Bazan and Hannah to the bank, but did not receive any of the

money because he was merely helping out as a favor to his friend. 3RP 251-53, 255-56. Leivan denied any knowledge that the pipes, radiators and other metal objects were stolen. 3RP 247.

Bazan testified he asked Hannah to sell the metal for him because he has a business license and can get a better price. 3RP 144. He testified the metal Hannah sold on his behalf belonged to him and to Hannah, and that Leivan's only involvement was to help unload. 3RP 145. He testified he had collected the metal over the course of a couple of weeks, including some from a recent job he did on Babcock ridge. 3RP 145-46. He agreed most of the metal was his, which was why he got the bulk of the money. 3RP 149-50. Bazan pled guilty to trafficking in stolen property but the plea did not involve any agreement to testify. 3RP 152.

Hannah testified Leivan and Bazan arrived at his home and Bazan asked him to sell a load of scrap metal for him. 3RP 106, 111. He testified the pair arrived with the trailer full of pipes and radiators. 3RP 110. Hannah and his wife testified Hannah added nothing to the load of metal Bazan and Leivan brought to their home. 3RP 220. She testified the metal was "garbage" and did not appear to be stolen. 3RP 221-22.

Hannah agreed to sell it for them because Bazan has a prior drug conviction and is not able to sell. 3RP 111-12. He testified he had no knowledge the pipes and radiators were stolen. 3RP 112. He drove Bazan's

truck to Bargain Town, where Leivan helped unload. 3RP 117. Hannah received \$686 for the load and gave \$600 to Bazan. 3RP 118-20. He did not know whether Bazan shared the money with Leivan. 3RP 119-20.

Jonathan Edwards worked at Bargain Town and conducted the transaction with Hannah at around noon on July 19, 2009. 2RP 77, 79-80. He testified there is a “do not buy” list of persons who have sold stolen property in the past. 2RP 78. Hannah was not on this list, and Edwards did not believe there had ever been a problem with property he brought them. 2RP 80. However, he testified he was suspicious because the pipe appeared too usable to be recycled as scrap. 2RP 94. Edwards testified Hannah came accompanied by two men, one white and one Hispanic, and said he was selling the metal items for them. 2RP 81-82. Edwards recognized Leivan as the person who helped unload the metal. 2RP 93. Edwards also explained he pays a higher rate to sellers with a business license. 2RP 79.

Also the morning of July, 19, 2009, local property owner John Hoersch noticed a theft. 2RP 50. On one corner of his property were several older trucks and tractors that were missing radiators and other parts. 2RP 51. He concluded they had been removed recently because the fluid was still dripping when he noticed the theft. 2RP 50-51. He saw two sets of footprints and two sets of tire tracks in the field, indicating his property had

been accessed from across the adjoining alfalfa field rather than from the road. 2RP 55-56.

Hoersch immediately proceeded to Bargain Town in Moses Lake, where he found the precise combination of radiator models, other engine parts, and irrigation pipe that were missing from his property. 2RP 59-60. Bargain Town returned Hoersch's property and showed him the receipt with Wayne Hannah's name on it. 2RP 67, 74. Two days previously, Hoersch recalled seeing Leivan ride by his property, right by the area where his old trucks are stored, on a motorcycle in the company of another man, Lamar Loomis. 2RP 71.

Corporal Mike Crowder of the Grant County Sheriff's Office investigated. 3RP 159-60. He saw tracks from two vehicles on Hoersch's property, one larger from a full-sized, four-wheel drive pickup truck, and the second set smaller, possibly from a trailer. 3RP 162-63. He received a license plate number from Edwards at Bargain Town that matched a truck he found at Bazan's home, although it was registered to a Jose Garcia. 3RP 169. In the truck were tools for cutting metal as well as joints and fittings consistent with the stolen irrigation pipes. 3RP 170. The tires had mud and dirt on them and the tread was consistent with the tracks he saw at Hoersch's property. 3RP 170.

When he went to Leivan's home, he found a trailer matching Hannah's description. 3RP 172-73. The tread on the trailer tires also appeared consistent with the second set of tracks on the Hoersch property, and the trailer tires also had dirt on them. 3RP 175. He testified he left his card with Leivan's sister, told her he was investigating a theft, and asked that Leivan give him a call as soon as possible, but Leivan never called. 3RP 190.

C. ARGUMENT

1. THE PROSECUTOR IMPROPERLY URGED THE JURY TO SEND A MESSAGE WHEN HE FOCUSED ON THE FREQUENCY OF METAL THEFT IN GRANT COUNTY DURING CLOSING ARGUMENT.

The prosecutor began closing argument by referencing a discussion during jury selection regarding the frequency of metal theft in Grant County. 3RP 290. "During jury selection in this case, there was a lot of talk about metal thefts in general. And that it happens frequently here in Grant County, and nobody's ever caught." 3RP 290. The prosecutor next segued into discussing the charged offense: "The defendant here, Charles Leivan, is accused in this case of trafficking in stolen metal." 3RP 290. This argument focused the jury on the general problem of metal theft, rather than on the facts of this case. It encouraged the jury to punish someone, anyone, for this

general problem because it happens so often and “nobody’s ever caught.”

3RP 290. This improper argument violated Leivan’s right to a fair trial.

- a. The Argument that Metal Thefts Occur Frequently and Nobody Is Ever Caught Was Improper Because It Encouraged the Jury to Punish Leivan for the Crimes of Others.

Exhortations of this kind -- to decide a case based on passion or to send a message to other engaged in similar crime - are prohibited. See, e.g., United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); United States v. Kopituk, 690 F.2d 1289, 1342-43 (11th Cir. 1982); State v. Finch, 137 Wn.2d 792, 839-42; 975 P.2d 967 (1999); State v. Coleman, 74 Wn. App. 835, 876 P.2d 458 (1994); State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 118 (1989); State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984). Such argument jeopardizes the defendant’s right to be tried solely on the basis of the evidence presented to the jury. Young, 470 U.S. at 18.

Courts have only permitted prosecutors to call upon juries to act as “the conscience of the community” so long as their remarks are not designed to inflame the jurors’ passions. Kopituk, 690 F.2d at 1342-43; Finch, 137 Wn.2d at 841. While such appeals are not impermissible per se, they become so when the prosecutor attempts to emotionalize the process. Id.²

² Courts have taken a similar approach in a related context, where the prosecutor improperly urges the jury to “do its job,” or implies that a not guilty verdict would be a

The prosecutor's argument in this case crosses the line. By arguing that such cases are frequent and "nobody's ever caught," the prosecutor encouraged the jury to punish Leivan in place of those unapprehended others. This case is therefore distinguishable from Finch, where the prosecutor's appeal to the jury to act as the "conscience of the community" contained no inflammatory imagery and was tempered by his simultaneously urging that the case be decided based on the evidence. Finch, 137 Wn.2d at 840. This case is likewise distinguishable from Bautista-Caldera, where the prosecutor, in a child-sex case, urged the jury:

ladies and gentlemen, do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf. Thank you.

Bautista-Caldera, 56 Wn. App. at 195. While the Court condemned this line of argument as an attempt to "exhort[] the jury to send a message to society," it declined to reverse the conviction, because the prosecutor's immediately

violation of the jurors' oath. See Young, 470 U.S. at 18; Coleman, 74 Wn. App. at 838. Such violations are considered one of the most egregious forms of misconduct. Coleman, 74 Wn. App. at 840. In Young, the prosecutor, in addition to vouching for the credibility of his witnesses, called upon the jury to "do its job." 470 U.S. at 17-19. The Court condemned this action as having "no place in the justice system" and expressed its concern that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." Id. at 18. However, because the prosecutor's comments came in response to improper conduct by defense counsel, and because the evidence against Young was very strong, the Court concluded the comments were unlikely to have affected the verdict. Id. at 18-20. Similarly, in Coleman, the Court found the prosecutor's improper argument (a not guilty verdict would violate the jurors' oaths) was tempered by a number of other remarks suggesting the jurors were free to render whatever decision they saw fit. Coleman, 74 Wn. App. at 838.

preceding remarks had urged the jury to decide the case based on the evidence. Id. at 195.

Here, by contrast, the prosecutor began the closing argument by reminding the jury of all the other thefts and all the uncaught thieves. These remarks bear more similarity to the impassioned and un-tempered remarks made in State v. Acker, where, in another child-sex case the prosecutor argued that laws prohibiting sexual assault against children “are only as good as the juries that are willing to enforce them” and that the child witnesses “had the courage to come in here and tell you about it. Give them some justice folks.” State v. Acker, 265 N.J. Super. 351, 355, 627 A.2d 170, 172 (1993). The court in Acker held these remarks clearly improper and reversed the conviction, a decision cited with approval in Coleman. Id. at 172; Coleman, 74 Wn. App. at 838. Although the prosecutor in Acker committed additional misconduct, the Court expressly held that “that argument alone had the clear capacity to deprive defendant of his constitutional right to a fair trial.” Acker, 627 A.2d at 173.

By using this “send-a-message” type argument encouraging the jury to punish Leivan for the misdeeds of others, the prosecutor distracted the jury from its proper role of evaluating the evidence to determine if the State had proven its case beyond a reasonable doubt. Therefore, the comments were misconduct.

b. Incurable Prejudice from this Flagrant Misconduct Requires Reversal.

The substance of the misconduct requires reversal. This was a close case that turned largely on credibility. The physical evidence was inconclusive, particularly on the only disputed issue, whether Leivan knew he was assisting in criminal conduct. Where there is little corroboration of the State's theory and/or the credibility of witnesses is key, the likelihood of prejudice resulting from prosecutorial misconduct is heightened. State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993). The prosecutorial misconduct here diverted the jury's focus from a dispassionate evaluation of credibility and focused it instead on concern for the general problem of metal theft in Grant County. Under these circumstances, because there exists a substantial likelihood that the misconduct affected the verdict, the conviction should be reversed.

No instruction could have cured the prejudice here. Because they reflected back to the jury's own discussion during voir dire, the prosecutor's comments were likely to shape the jury's deliberations regardless of instruction. "This is one of those cases of prosecutorial misconduct in which '[t]he bell once rung cannot be unring.'" State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (quoting State v. Trickel, 16 Wn. App. 18, 30, 533 P.2d 139 (1976)).

In Powell, the prosecutor concluded her closing argument by telling the jury that a not guilty verdict would send the message that children who reported sexual abuse would not be believed, thereby “declaring open season on children.” 62 Wn. App. at 918. Although the State conceded, in that case, that the comments could have been construed as improper, it argued that there was no basis for appeal since Powell’s objection was sustained and no curative instruction was sought. Id. at 919. The court in that case held, “It may be that a carefully worded curative instruction could have remedied the prejudice those flagrant remarks would have engendered, but that is speculation.” Id. The Court held Powell had been denied a fair trial. Id.

As in Powell, it is entirely unlikely the jury could have erased from its mind the idea that everyone’s property was in danger if it did not convict Leivan. Like Powell, he was denied a fair trial.

2. THE STATE VIOLATED LEIVAN’S CONSTITUTIONAL RIGHT TO SILENCE BY IMPLYING HIS PRE-ARREST DECISION NOT TO CALL THE SHERIFF WAS SUBSTANTIVE EVIDENCE OF GUILT.

The officer’s testimony that Leivan failed to call him back was an improper comment on his right to silence. 3RP 190. In Washington, even when the defendant testifies at trial, use of pre-arrest silence is limited to impeachment; pre-arrest silence may not be used as substantive evidence of guilt. State v. Burke, 163 Wn.2d 204, 222, 181 P. 3d 1 (2008) (citing State

v. Lewis, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996)); see State v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006 (2001). When the State invites the jury to infer guilt by implying silence shows a guilty mind, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated. Burke, 163 Wn.2d at 222 (citing Lewis, 130 Wn. 2d at 706-07 and State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

“A direct comment on silence-such as a statement that a defendant refused to speak to an officer when contacted-is always a constitutional error.” State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004). Objection and instruction may do more harm than good by further emphasizing the negative implication in the jury’s minds; “the bell is hard to unring.” Id. at 446. This issue is, therefore, properly raised for the first time on appeal. Id. at 445-46; RAP 2.5(a)(3). Appellate courts review claims of constitutional error de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The State bears the burden of showing, beyond a reasonable doubt, that the error was harmless. Burke, 163 Wn.2d at 222-23. An error is harmless only if the reviewing court is convinced beyond a reasonable doubt that the jury would have reached the same result had the error not occurred. Id.

The Burke court noted that the proper analysis of comments on pre-arrest silence requires careful attention to “proper impeachment, and the use

of silence itself to imply guilt.” 163 Wn.2d at 219. The court has been cautious in evaluating such evidence:

This court has been very careful to limit the use of silence to impeachment only. Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true. [. . .].

Id. The Burke court found that prosecutor intentionally invited the jury to infer guilt from Burke’s termination of his police interview: “The inference the jury is invited to make is that Burke ended the interview because he adopted his father’s advice, based on the idea that the guilty should keep quiet and talk to a lawyer.” Id. at 222. Because the State advanced the link between guilt and termination of the interview, implying that suspects who invoke their right to silence do so because they know they have done something wrong, the court held the State violated Burke’s right to silence. 163 Wn.2d at 222.

The State may attempt to analogize this case to State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996), but that case is inapposite because it did not involve a direct comment on silence. The officer in Lewis testified he told Lewis, “if he was innocent he should just come in and talk to me about it.” Id. at 703. However, the officer did not testify about appointments made and broken by Lewis, and the prosecutor did not argue in closing that the

defendant refused to speak with police or of his failure to keep appointments with the officer. Lewis, 130 Wn.2d at 703-04. The Lewis court concluded that the officer did not even refer to Lewis' silence, let alone imply that such silence was the result of his guilt. 130 Wn.2d at 705-06. The court affirmed Lewis' conviction. Lewis, 130 Wn.2d at 707. In stark contrast to Lewis, the officer in this case testified he asked Leivan to call him as soon as possible and then specifically testified he did not do so. 3RP 190-91. This directly implicates Leivan's constitutional right not to speak to law enforcement and implies he was guilty because he did not respond to the officer's message. As in Burke, the state used the evidence of Leivan's decision not to call the Sheriff as substantive proof of guilt, violating his right to silence.

This case is further distinguishable from Lewis, in that the evidence of Leivan's decision not to call the Sheriff was not valid as impeachment evidence. The prosecutor's questions to the Sheriff were not framed as impeachment of Leivan, as they did not purport to present prior inconsistent statements or assertions that contravened his trial testimony. Instead, the questions were designed to suggest Leivan would have called the police to tell his version of events if he were innocent and to suggest he did not call because he had a guilty conscience.

As the Burke court stated, silence is ambiguous at best, and "it is impossible to conclude that a failure to speak is more consistent with guilt

than with innocence.” Burke, 163 Wn. 2d at 218-19. The evidence of Leivan’s silence is, thus, even less relevant than the evidence adduced through Burke’s cross- examination. Whereas the prosecutor in Burke asked him to explain why he “failed to say that he thought J.S. was 16 at the time of the police interview,” here, Leivan did not say anything at all -- there could be no inconsistency. Burke, 163 Wn.2d at 209.

Yet, as in Burke, the prosecutor’s remarks drew the jury’s attention to the defendant’s silence as evidence of guilt. Since the evidence was not relevant to impeach Leivan’s credibility, the evidence was only relevant to indicate his allegedly guilty conscience, and was thus substantive evidence of his guilt. As such, the State’s emphasis on Leivan’s decision not to call the Sheriff violated his constitutional right to silence. Burke, 163 Wn.2d at 222.

The State cannot prove this comment to be harmless beyond a reasonable doubt. Because the central component of Burke’s defense to third-degree rape of a child was his testimony that he believed the girl was of legal age, the court found that the references to his silence were not harmless:

The trial boiled down to whether the jury believed or disbelieved Burke’s story that the victim told him she was 16. Repeated references to Burke’s silence had the effect of undermining his credibility as a witness, as well as

improperly presenting substantive evidence of guilt for the jury's consideration.

Burke, 163 Wn.2d at 222-23. Accordingly, the court reversed Burke's conviction. Burke, 163 Wn.2d at 223.

This case similarly rested on credibility, on whether the jury believed Leivan knew Bazan was involved in criminal conduct. See 3RP 292 (prosecutor's closing argument that if Bazan knew the metal was stolen, as his friend, Leivan must have also known); 3RP 302-03 (defense closing argument that mere friendship is not evidence of knowledge). Bazan engaged in the transaction and pled guilty to trafficking. The evidence was clear that Leivan assisted. The only disputed issue was his knowledge. Since mental states are rarely subject to direct evidence, the jury had to decide whether to believe the State's argument based on tangential circumstantial evidence or Leivan and Bazan's testimony that he knew nothing. As in Burke, the jury's decision boiled down to who to believe. Undermining Leivan's credibility by presenting evidence he remained silent when the Sheriff sought to speak with him about the case was not harmless error.

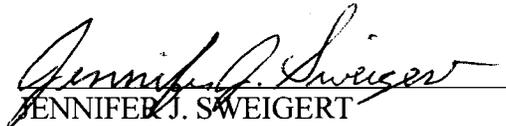
D. CONCLUSION

For the foregoing reasons, Leivan requests this Court reverse his conviction.

DATED this 24th day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", is written over a horizontal line.

JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 29397-1-III
)	
CHARLES LEIVAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] D. ANGUS LEE
GRANT COUNTY PROSECUTOR'S OFFICE
P.O. BOX 37
EPHRATA, WA 98823-0037

[X] CHARLES LEIVAN
NO. 10GSJ2939
GRANT COUNTY JAIL
P.O. BOX 37
EPHRATA, WA 98823

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF FEBRUARY, 2011.

x *Patrick Mayovsky*