

NO. 44585-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JOHN R.S. SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 12-1-03176-4

BRIEF OF RESPONDENT

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

1. Was appellant denied a fair trial as a result of ineffective assistance of counsel?
2. Did the prosecutor commit prosecutorial misconduct by cross-examining defendant regarding his inconsistent statements?
3. Was appellant denied a fair trial due to cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

The State does not object to appellant's statement of procedural facts.

2. Facts

On August 19, 2012 the victim, Jeff Morvel, received a phone call from an ex-girlfriend, "Dani," requesting a ride. II RP 160. She asked he pick her up at a mutual friend's home, a motor home located in Pierce County. III RP 161. Morvel had met the defendant, John Smith, approximately two-three times. II RP 158. The victim arrived at the home and recognized the defendant's car. The victim got of out his car and approached the motor home to pick up Dani. The defendant came down the stairs flailing his arms saying something implying he believed

the victim had made derogatory comments about him. II RP 163.

Immediately following the defendant's comments he punched the victim in the face. *Id.* The victim described falling back into his car and needing to "gather his wits" after the defendant punched him. *Id.* The defendant made further comments in a tone the victim described as "threatening." *Id.* The victim testified he got "one lick in" before being hit from behind, falling to the pavement and the defendant repeatedly pounding his face into the pavement. II RP 166. The victim sustained serious facial injuries. *Id.*

In addition to the victim describing the nature of his injuries, the radiologist that was assigned to assist with the victim's care, Dr. Mueller, also testified. II RP 209-18. He described the victim's injuries as "extensive fractures to the facial bones." II RP 212. He testified the cause of the victim's injuries was blunt force trauma. II RP 223. The victim elaborated further. He said the fractures were essentially "all over my face." II RP 165. He testified the fractures included around his eyes, between his eye sockets and nasal canal, cracks shooting down his cheek bones into his jaw, and that he could not bite down hard because it seemed like his jaw was "floating." II RP 166. He also testified that his speech was altered. In short, the victim sustained numerous, serious facial fractures as a result of the assault.

Responding Deputy Redding testified that he saw the victim and noted that the victim had a swollen face, particularly around the cheek bones and eyes, and was still bleeding from the nose when he contacted him. III RP 274.

There was another person at the motor home who witnessed at least part of the assault, Edmann Craig. Mr. Craig or "CC," was the owner of the motor home. He testified he knew all of the individuals. He testified he did not see the assault start, but did see the victim on the ground when the defendant went to hit him again. III RP 253. He later testified on cross-examination that he did not see the defendant hit the victim while the victim was on the ground and that he believed they were both throwing punches. III RP 257. He also testified that other than the defendant's hand being "busted up" he did not observe any injuries to the defendant. *Id.* He further noted the defendant had been upset that the victim was there to pick up the defendant's then-girlfriend, and the victim's ex-girlfriend, Dani, for a pregnancy appointment. III RP 260. He later recanted his statement to the deputy that the defendant knew in advance the victim was coming. III RP 264.

Despite a comment by the victim to treatment providers, there was no evidence that anyone else hit the victim. II RP 182, 253; III RP 287.

Defendant testified that the victim assaulted him as he stepped out of the motor home. III RP 287. He acknowledged that "CC" broke up the fight and that both he and victim were on the ground. III RP 288. He claimed he sustained a cut to the inside of his lip and that his eye was swollen the next day. III RP 189. The defendant testified on cross-examination that it was a "long fight" and acknowledged that he could have struck the victim as many as six times. III RP 292, 299.

The investigation was assigned to Detective Tate. III RP 323. He testified that he contacted the defendant, detained him by handcuffing him, and advised him of his Constitutional rights. III RP 329-30. He described the defendant as cooperative. III RP 330. Without going into the substance of what the defendant said, the detective explained that at no time did he prohibit the defendant or otherwise "cut him off" from making whatever statement he wished. *Id.*

At trial the defendant testified on direct examination to the assault as described earlier. On cross-examination the State pointed out the inconsistency of the appellant's testimony in that he denied being involved in any type of fight when he spoke with the responding detective. III RP 290-91. He explained he was scared at the time he spoke with the detective and that he was not under oath at the time. III RP 298-99. The

jury rejected the defendant's explanation and convicted the defendant as charged.

C. ARGUMENT.

1. APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

a. Trial counsel was not ineffective.

Appellant asserts he received ineffective assistance of counsel for two failures of his attorney. First, he claims that his attorney's failure to elicit his prior misdemeanor conviction during his direct examination constitutes ineffective assistance of counsel and he should receive a new trial as a result.

Second, appellant claims that his counsel's failure to object to the prosecutor's argument that appellant, though claiming to be the victim, did not contact police. He claims this conduct amounted to impermissible comment on his pre-arrest silence and therefore was objectionable.

Neither assertion, individually or collectively, amounts to ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, Smith must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-45, 899 P.2d 1251 (1995). If appellant fails to satisfy either part of the test, no further inquiry is needed. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917

P.2d 563 (1996). To show the necessary prejudice Smith must demonstrate that it is reasonably probable that, if not for his counsel's deficient performance, the outcome would have been different. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). "Reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Smith cannot claim ineffective assistance of counsel for conduct that can be fairly characterized as legitimate trial strategy or tactics. *McFarland*, 127 Wn.2d at 336. Smith cannot meet the burden of showing that but for the errors he claims, he would not have been convicted and therefore his claim must fail.

b. The appellant's statements were properly used for impeachment.

On direct examination appellant testified that the victim began yelling at him as he stepped from the motor home. He testified that the victim accused him of something and then hit him. III RP 287. He explained that his friend Edmann Craig broke up the fight and that he, appellant, suffered injuries. III RP 288. He said no one else was involved in the altercation. III RP 289. On cross examination, appellant was

compelled to admit he had given quite a different response to the responding detective. III RP 289-300, 300-311.

Only after appellant offered his explanation of the fight with the victim, did the State point out inconsistent statements he made to the detective. The State first confirmed that it was now the appellant's position that *he* was assaulted. III RP 290. The State pointed out that appellant told the responding detective that there had been no fight. III RP 290. He confirmed, appellant told the detective he was "not involved in a fight." III RP 291. At trial however, he admitted that he hit the victim numerous times, anywhere up to six times. III RP 299. When asked why he wasn't honest with the detective, appellant said he was "scared." III RP 298. He further explained he felt the detective was treating him as if he were "guilty from the gate." *Id.* He also commented at trial that he was "not under oath" when he was talking with the detective. *Id.* He explained the glaring inconsistency by stating that he was under oath at the time he testified at trial. III RP 299. He testified the fight with the victim was "a long fight" and they "matched hits." III RP 292, 300.

Appellant acknowledged making the statements to the detective and explained his reasoning for the difference, or inconsistency in the statements he made at trial. The State was clearly entitled to point out the contradictory nature of appellant's testimony once appellant elected to take

the stand and testify inconsistent with his prior out of court statements. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980); *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988).

- c. Defense counsel's failure to introduce his misdemeanor conviction may have been a legitimate trial tactic, alternatively, it did not prejudice him.

Appellant assigns error to defense counsel's failure to "pull the sting" of the admissibility of his 2003 misdemeanor conviction. (*App. Brf. p. 13*). While appellant may find fault in the timing of the admissibility of the conviction, i.e. on cross-examination by the State, appellant cannot object it was admissible.

The State enumerated numerous possible crimes of dishonesty in the Omnibus Order. CP 107. Though 13 are listed on the Order, the State references somewhere in the area of 22 convictions observed in appellant's criminal history. In fact, appellant's substantial unscored criminal history formed the basis for the State requesting an exceptional sentence. Defense counsel objected to the admissibility of all of the convictions, advocated the proper test for the court, and ultimately succeeded in only one conviction being admitted. I RP 7-16; II RP 146.

It appears that appellant's direct examination was narrow and focused to the fight with the victim. There is not a lot of extrinsic

inquiries. It is a reasonable tactic to limit a criminal defendant's exposure as much as possible, one possible method of doing so is by keeping the questioning precisely tailored to the events in question.

In the event of a criminal defendant with past convictions, there can be several possible tactics in addressing the situation. Appellant argues his counsel should have inquired first, or "pulled the sting." However, it is not ineffective assistance of counsel to limit the number of times the jury hears of the conviction. For example, if defense counsel would have made the first inquiry into the conviction, the State may have followed up with some form of minimal questioning. However, even a few questions by the State would mean the jury would hear of the conviction more than once. If the inquiry is left to the State, and particularly when there is but one conviction, it limits the number of times the jury is exposed to the conviction. Additionally, there is also the possibility that the State looks overly harsh or tedious in inquiring into an old conviction. Lastly, there is also the chance that in the tribulations of trial, the State may overlook or otherwise neglect to make the inquiry during cross-examination, in which case the jury never hears of the conviction. Regardless of which tactic counsel may have been following, counsel is in the best place to determine what may be the most

advantageous to the defendant. Counsel's approach may be considered a legitimate trial tactic or strategy.

Additionally, unlike other possible forms of evidence, the parties are not arguing over *whether* the evidence of the conviction was going to be admitted, but only by whom and how many times. There is no dispute that once the parties had the court's ruling, the jury was going to hear of the defendant's conviction. The fact that it was first elicited by the State does not result in any cognizable prejudice. The jury was going to hear the evidence.

Appellant overlooks his counsel's ability to have the remaining 20+ convictions suppressed. His attorney was familiar with both the applicable law and the individual facts of the appellant's situation. The prejudice of the conviction is its admission, not precisely *when* the jury hears it. The applicable court rules address whether a conviction should be admitted and in what fashion, they do not however address nor advocate by whom they should be elicited.

Furthermore, jurors are told they are the sole judges of credibility. CP 48 (J.I. 1). They are also explicitly told how they are to consider the fact that the defendant has previously been convicted of a crime, i.e. in deciding the weight or credibility to give his testimony. CP 52 (J.I. 4). We presume that juries follow the instructions and consider only evidence

that is properly before them. *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962) (quoting *State v. Priest*, 132 Wash. 580, 584, 232 P. 353 (1925)).

The appellant is unable to reasonably articulate and support the claim that but for counsel's election to have the conviction admitted in the State's case, the appellant would not have been convicted. His inability to carry this last element causes his claim to fail.

2. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

a. The State's comments on appellant's acts were not improper.

Appellant argues that the State's argument regarding the timing of the admission of his conviction was prosecutorial misconduct. However, appellant does not offer any meaningful authority for his proposition. The State is lawfully permitted to comment on defendant's actions prior to and during an investigation.

A conviction may be reversed for prosecutorial misconduct if he meets the appropriate burden. To do so, the appellant must establish that (1) the prosecutor acted improperly, and (2) the prosecutor's improper act prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The appellant cannot establish either element.

Appellant testified that the victim hit him as he exited the motor home. Appellant asserted that he responded to the victim's aggressive and

assaultive behavior. III RP 290. The State did nothing more than argue the reasonable inference that one who is unjustifiably assaulted as claimed by appellant would be the more likely individual to contact law enforcement. This argument refers to appellant's actions directly following the fight; they are not custodial, there is no protection to defendant's failure to act at this time.

Additionally, after direct examination the State is entitled to explore appellant's inconsistent statements including his statement to the detective that he was not involved in a fight. The jury may deduce what they may from appellant's explanation that he was not under oath at the time like he was in trial, but the State is certainly entitled to inquire. To hold that the State could not inquire would serve to endorse allowing defendant to go unchallenged and allow him to tell different versions of the same event without the jury having the benefit of knowing he has made contradictory statements. Where a suspect waives the right to silence, agrees to speak with law enforcement, later elects to testify in his defense, and gives an inconsistent statement, the State may introduce evidence of the inconsistent statement for impeachment purposes. *Hurd v. Terhune*, 619 F.3d 1080, 1086-87 (9th Cir. 2010).

Based upon the facts of this case, the appellant has failed to demonstrate the State acted improperly.

- b. Even if the Court were to conclude the State's remark was improper, appellant cannot demonstrate the conduct prejudiced him.

The State asserts the argument was not improper, however, if this Court were to find to the contrary, the cases cited by appellant to assist in this case do not support the finding of prejudice.

The court in *State v. Curtiss*, 110 Wn. App. 673, 692, 37 P.3d 1274 (2002) held that "because Curtiss did not invoke her right to remain silent during questioning, [the detective]'s testimony regarding her lack of response to certain interview questions was not improper." In this case, there was no mention--except by defendant himself--about electing to remain silent. He testified that he answered the detective's questions after his was advised of his Constitutional rights. The State did not comment on his ultimate decision to invoke his right to remain silent. His statements made prior to that were available for impeachment purposes and in fact were admitted by the State for that purpose.

Additionally, *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) has a notable exception. In *Anderson v. Charles*, 447 U.S. 404, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980) the Court stated once a defendant waives his right to remain silent and makes a statement to police, the prosecution may use such a statement to impeach the defendant's inconsistent trial testimony. Appellant's case, *State v.*

Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988) specifically included this very exception.

Appellant argues that admission of such statements serves to have a "chilling" affect on defendant's exercise of his right to remain silent and that such conduct constitutes "grave misconduct" on the part of the prosecutor. (*App.Brf.* p. 19). Appellant cites *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) in support of this argument. However, *Rupe* discussed a very different circumstance. In *Rupe*, during the penalty phase of his death penalty trial, the State argued that *Rupe's* collection of guns were for killing, and killing only. The State argued his gun collection was a factor to be considered against mitigation because it portrayed his intention and desire to kill others. In finding this argument impermissible for the penalty phase, the court concluded that using lawfully owing guns¹ could not properly be used as an argument for death. That is, use of constitutionally permissible conduct risked the creation of a chilling effect on the permissible conduct and was therefore improper argument. The circumstances are quite distinguishable than those presently before the court.

The appellant was entitled to either speak to the investigating detective, or not. He testified he did so after receiving his Constitutional warnings. The only evidence that he eventually elected to invoke his right

¹ *Rupe* lawfully owned the guns in question.

to remain silent came from the appellant, and only the appellant. III RP 294. His contradictory statements were used only in cross-examination and then only as permissible impeachment.

The jury ultimately learned that the appellant gave conflicting stories of the fight as well as not calling the police. The parties developed significant evidence of the facts surrounding the fight, included the testimony of a third party (Edmann Craig) III RP 246. The appellant testified to hitting the victim numerous times, up to and possibly including six times. III RP 299. The jury had the benefit of hearing that the appellant's injuries essentially consisted of an injured hand, a cut inside his mouth, and an eye that didn't swell until the next day. III RP 288-89.

The jury could have considered the disparity in the injuries as evidence as to who was the aggressor in the fight. The victim testified to having numerous facial fractures, including fractures that made eating difficult. II RP 164-66. The radiologist confirmed the extensive facial fractures. II RP 212-18. The deputy that responded to the victim that evening also described a severely injured person: swollen face, around check bones and eyes, still bleeding from his nose. III RP 274.

The jury had the opportunity to hear from the victim and the appellant, as well as other witnesses. They were able to observe their testimony and make the ultimate decisions regarding credibility.

Appellant has failed to demonstrate that any allegedly improper comment by the prosecutor resulted in improper prejudiced. The appellant

has failed to meet his burden that he was unduly or improperly prejudiced by the prosecutor's comment.

3. THE DOCTRINE OF CUMULATIVE ERROR IS NOT APPLICABLE.

Appellant argues that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, a defendant's conviction which is the combined effect of trial errors effectively denies the defendant's right to a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). But cumulative error does not apply where there are no errors or where the errors are few and have little or no effect on the trial's outcome. *Weber*, 159 Wn.2d at 279.

In the present case appellant asserts that he was deprived a fair trial because of ineffective assistance of counsel. However, as stated above, the timing of the admission of his conviction and the prosecutor's comment on the appellant's inconsistent statements were not error. Additionally, appellant failed to establish the necessary elements of ineffective assistance of counsel, namely that trial counsel's performance was deficient *and* that the conduct prejudiced him. Given appellant cannot support his claim of ineffective assistance of counsel, this argument cannot be grounds for cumulative error.

Appellant's second argument in support of cumulative error is the prosecutor's comment on appellant's inconsistent statements and his decision not to summon police after he was allegedly assaulted by the victim. Also as previously discussed, the prosecutor was entitled to introduce appellant's clearly contradictory statements. He did not commit misconduct in eliciting proper testimony. The prosecutor's comment that appellant did not summon police was not a comment on appellant's right to remain silent. The time in question involved appellant's actions, or lack thereof, following the fight. It did not address any custodial statements, nor any other constitutional protected activity. Because neither of these actions amount to error, they cannot serve as basis for cumulative error.

Alternatively, the appellant has not established that any error, if any, materially affected the outcome of the trial as required. *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

D. CONCLUSION.

The appellant was not denied a fair trial for ineffective assistance of counsel. The appellant has not established that his trial counsel performance was deficient and that any alleged deficiencies prejudiced him. Furthermore, his objection to the State's comment on appellant's choice not to summon police is not an impermissible use of any constitutionally protected activity and was properly admitted. His claim for a new trial based upon ineffective assistance of counsel must fail.

As noted above, because the prosecutor's comment on appellant's choice not to report the assault to police was not improper, the prosecutor did not commit misconduct and this claim must also fail.

Lastly, because the alleged errors delineated by appellant do not succeed, his argument for a new trial based on cumulative error must also fail.

DATED: December 2, 2013

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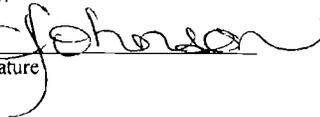


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