IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CAMERON SHANE EDDY, Appellant.	No. 39140-6-II UNPUBLISHED OPINION

Hunt, J. — Cameron Shane Eddy appeals his jury conviction for second degree burglary. He argues that we should reverse and remand for a new trial because (1) the State made impermissible comments about his pre-arrest silence implying that if he were innocent, he would not have remained silent; and (2) despite his failure to object below, the State cannot show that this allegedly unconstitutional prosecutorial misconduct was harmless. We affirm.

FACTS

I. School Burglary

On July 27, 2008, at approximately 11:37 p.m., Tacoma School District security patrol officer Mark Ugland responded to a "glass break alarm with audio"[1] in the weight room at Foss

[1] Based on the audio component, alarm company personnel reported that there are "definitely people, you can hear voices and they can hear glass breaking, something banging on something." I Verbatim Report of Proceeding (VRP) at 11-12.

High School and requested assistance from the Tacoma Police K-9 unit, which his partner, security patrol officer Mike McCarthy, called in. After unlocking the gate in the eight-foot, chain link fence surrounding the school premises, Ugeland, Tacoma K-9 Police Officer Wendy Haddow-Brunk, and her canine partner entered. Tacoma Police Officer John J. Moses arrived and noted that the scene looked like a burglary in progress: There was a broken window in the door to the weight room and a flipped over trash can below it, apparently used for access through the broken window.

Haddow-Brunk saw Cameron Eddy, Charles Smith, and Joshua Johnson walk out this door (with the broken window) directly towards her; she restrained her dog, advised them she was police, and in a "very loud" voice ordered them to stop or they would be bitten. I VRP at 93. The three men retreated back through the door and shut it behind them. Haddow-Brunk opened the door to follow Eddy, Smith, and Johnson into the weight room; she observed closely its broken window and released her dog. In pursuit of the men, her dog squeezed through a second door on the opposite wall leading to the gym. Over her police radio, Haddow-Brunk announced that the three individuals were running northbound through the weight room. In response, Ugland ran along the outside of the building to the possible exit points. Haddow-Brunk passed through the second door, following the sound of her barking dog as he pursued Eddy and Johnson through the school grounds. Meanwhile, Ugland and his partner apprehended Smith as he exited the building.

From the west side of the building Tacoma Police Sergeant Martin radioed Haddow-Brunk that Eddy was running toward Cheney Stadium, which borders the school on the other side

of an eight-foot high chain link fence. Haddow-Brunk climbed over the fence and used her dog to track Eddy through "very thick brush" and "down [an] embankment." I VRP at 99-100. Haddow-Brunk heard Eddy say, "Okay. I am here. Please don't let the dog bite me" I VRP at 124; she recalled her dog and talked Eddy out of the brush. Tacoma Police Officer Hoschauer took Eddy into custody. Johnson was also apprehended and placed under arrest.

II. Procedure

The State initially charged Eddy, Smith, and Johnson with second degree burglary, count I, and making or having burglar tools, count II. In its amended information, the State charged only second degree burglary, count I, in a joint trial involving only Eddy and Smith.[2]

At trial, Eddy testified on direct examination that he, Smith, and Johnson had been playing video games at his (Eddy's) house when they decided, at "11:[20]," to go to nearby Foss High School for a foot race. II VRP at 272. Arriving at Foss High School at "approximately 11:40 [PM]," he, Johnson and Smith climbed over the fence at the school and walked towards the track. II VRP at 272. They decided not to race when they found puddles on the track and no illumination. They noticed that someone had broken the glass window of the weight room door. Johnson stepped inside the weight room and found a crowbar, which they decided to put in Smith's "bag and go home and call the police." II VRP at 278. They "noticed that there was more stuff on the ground," II VRP at 278, including an overturned trash can, "piano wire," II VRP at 280, and a "glass cutter," II VRP at 281; so he (Eddy) and Smith put these items in

[2] Neither Smith nor Johnson are parties to this appeal.

Smith's backpack[3] and talked about "what [they] should say to the police." II VRP at 281. He (Eddy) then followed Johnson into the building to "provide a description of the character that was inside the building" because it seemed like there was a burglary "in progress," II VRP at 279; he (Eddy) intended to inform the police about the apparent burglary.

Eddy further testified on direct examination that he had run when the police arrived only because he was afraid of being attacked by the dog, not because he was trying to elude the police. On cross-examination, the State asked a series of questions that challenged Eddy's credibility on this point[4], several of which elicited no objection.

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[3] Police discovered piano wire, a black glass cutter, two Leatherman tools (multi-tool pliers), and a crow bar inside the backpack. I VRP at 55-58.

[4] For the first time on appeal, Eddy appeals the following italicized portions of his cross-examination testimony:

> Q [State]: And your response at that moment was *to say, [h]ey we are right here; we were just wondering what's going on, correct? That's what you told us*?
> A [Eddy]: That's not what I told them.
> Q: Right. What you did instead was run, correct? Yes or no?
> A: No.
> Q: You didn't run?
> A: Not at that time, no.
> Q: What did you do at that point?
> A: I stopped my retreat into the door.
> Q: Did you put your hands up in the air?
> A: No.
> Q: *Did you say anything to them to make it clear that you were stopping? Yes or no*?
> A: No.
> Q: Did you lie down on the ground?
> A: No.
> Q: Did you put your hands anywhere that might look like you were being handcuffed?
> A: No.
> Q: *Did you tell them anything to indicate that you were the good guys?*
> A: No.

[5]

In closing, the State highlighted what it characterized as many questions about Eddy's

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II VRP at 325-26.

> Q: Okay. So you are inside the weight room, the door is shut, the K-9 is outside of the weight room, outside. *You at that point, presumably say, Stop. We'll stop. Just don't let the K-9 in to bite us. Correct; did you say that*?
> A: No.
> Q: *No, you don't, correct*?
> A: I did not say that, correct.
> Q: Thank you. *You don't say, [w]e give up, correct*?
> A: No.
> Q: *You don't say anything that we are the good guys, correct*?
> A: No.
> Q: Okay.
> A: Wait.
> Q: *Do you say something that you are the good guys*?
> A: No. I'm sorry.
> Q. As you are running through Foss High School, do you at any point explain to the people chasing after you—
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> Because you are aware that a K-9 is chasing you, correct?
> A: I am aware of that.
> Q: Did you know at some point it was a police officer inside of Foss High School?
> A: Yes.
> Q: You are aware that a K-9 and a police officer were following you, correct?
> A: Yes.
> Q: *Do you at any point you are in Foss High School call to the police officer, Stop. I give up. Just don't let the dog bite me*?
> A: No I did not.
> . . .
> Q: While you are kindly waiting in the bushes, not trying to hide, but actually waiting for the police to come find you, *do you yell out to the police, [h]ey, I'm here, I'm just waiting for you guys, or some variation of that*?
> A: No.

II VRP at 329-32 (emphasis added to denote portions Eddy challenges for first time on appeal).

[5] Eddy did, however, object to one exchange during cross-examination (set forth in detail in the Analysis portion of this opinion).

version of events and argued to the jury:

> Cameron Eddy runs from the weight room through the gym, through the school, through the field, over a fence, and at no point does he say to anyone, [h]ey, I'll stop; I'm not trying to flee from you guys. Hey, I'm the good guy. Hey, I'm going to be cooperative. Please don't let the dog bite me. He could at any point say that to the police, but he is not interested in doing that.

II VRP at 398. After Eddy presented his closing argument, the State argued in rebuttal:

> Mr. Doherty [defense counsel] didn't address the fact that at no point did Mr. Eddy say anything that he would submit, and that's important. As he is running away, he has every opportunity to yell back, Please stop. I'll stop. Don't let[ ] the dog bite me.

II VRP at 449. Eddy neither objected to these remarks by the State nor asked the trial court to instruct the jury to disregard them.

The jury found both Eddy and Smith guilty of second degree burglary. Eddy appeals.

ANALYSIS

Eddy argues that the State's cross-examination and closing argument comments about his pre-arrest silence violated his constitutional protections and constituted prosecutorial misconduct that requires reversal. The State responds that its cross-examination properly impeached Eddy's direct testimony. We agree with the State.

At the outset, we note that Eddy objected to only one of the several portions of cross-examination that he now challenges on appeal. Even then, he objected only that the State's questions were argumentative; he did not object on constitutional grounds that these questions violated his right to remain silent under the Fifth Amendment.[6] We hold that Eddy fails to meet the high burden of showing that the comments he challenges for the first time on appeal were so

[6] U.S. Const, amend. V; Wash. Const, art. I, § 9.

flagrant and ill-intentioned that they could not have been cured with an instruction had he timely objected.

I. Standard of Review

A. Preservation of Error Below

To prevail on a preserved claim of prosecutorial misconduct, a defendant must show that the State's conduct was both improper and prejudicial, namely a "substantial likelihood the misconduct affected the jury's verdict." *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 551 U.S.1137 (2007) (quoting *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998), *recons. denied* 127 Wn.2d 628, 904 P.2d 245 (1995), *cert. denied* 518 U.S. 1026, 116 S. Ct. 2568 (1996)). This standard applies to the one instance of cross-examination to which Eddy objected below.

If, however, a defendant fails to object, he waives the error for appeal unless the alleged prosecutorial misconduct was so flagrant or ill-intentioned that the trial court could not have cured the error by instructing the jury. *Weber*, 159 Wn.2d at 270 (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) *cert denied* 523 U.S. 1008, 118 S. Ct. 1193 (1998)). This standard applies to the other instances of cross-examination and to the State's closing argument remarks, which Eddy challenges for the first time on appeal.[7]

[7] *See also* Section III of this Analysis, discussing the related "manifest constitutional error" exception to the preservation requirement.

B. Fifth Amendment Right To Remain Silent; Impeachment

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence.[8] U.S. Const., amend. V; Wash.Const., art. I, § 9. When a defendant testifies at trial, due process under the Fourteenth Amendment prohibits impeachment based on a defendant's silence after he receives *Miranda*[9] warnings; nevertheless, the State may constitutionally use his pre-arrest, pre-warning silence to impeach him. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

The Fifth Amendment privilege against self-incrimination prohibits the State from using a defendant's pre-arrest silence as substantive evidence of guilt. *State v. Easter*, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996). Nor may the State use a defendant's silence 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). But the State may use a defendant's prior inconsistent statements as impeachment evidence, offered solely to show that he is not being truthful. *Burke*, 163 Wn.2d at 219 (citing *State v. Thorne*, 43 Wn.2d 47, 53, 260 P.2d 331 (1953)).

II. Prosecutor's Cross-examination Preserved by Objection

Preserved for review and at issue in this appeal is the following single exchange during the State's cross-examination of Eddy, which he contends constituted reversible prosecutorial misconduct:

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[8] The Fifth Amendment prohibits impeachment based on a defendant's exercise of silence where the defendant neither waives the right nor testifies at trial. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) (citing *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)).

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

> Q: You get outside of Foss High School and run for some ways, and at some point you scale an eight-foot fence that surrounds the track and all the other things, correct?
> A: Yes.
> Q: Do you stop on top of the chain link fence, yell out to the police, [h]ey, I'm on top of the eight foot-fence and, say, [s]top, come get me?
> A: No.
> Q: It might have been a good idea, correct?
> A: No.
> Q: It wouldn't have been a good idea to stay eight feet above the ground, saying, Police, I'm right here; I'm not trying to elude you guys?
> MR. DOHERTY: *Objection, Your honor; argumentative.*
> THE COURT: Overruled. You may answer that.
> Q: (By Mr. Williams) Did that seem like a good idea?
> A: No.

II VRP at 331 (emphasis added).

Eddy argues that the above exchange alluded to his exercise of his right to remain silent, which may be constitutionally offensive, even when not emphasized. The State responds that before this exchange on cross-examination, Eddy had testified on direct that he ran and climbed the fence only to avoid the dog, not to elude police. Thus, the prosecutor properly sought to impeach Eddy by asking about what he had or had not done or said while eight feet in the air astride the fence, safe from the dog: The State's cross-examination tended to show that Eddy had been untruthful to the extent that his hiding from and failing to alert police to his whereabouts were at odds with his testimony on direct that he had run merely to avoid the dog, not to elude police.

Eddy analogizes the prosecutor's cross-examination here to several cases in which the State used a defendant's pre-arrest silence as evidence of guilt. *Burke*, 163 Wn.2d at 221-22; *State v. Knapp*, 148 Wn. App. 414, 421, 199 P.3d 505 (2009); *State v. Thomas*, 142 Wn. App.

589, 596, 174 P.3d 1264, *review denied*, 164 Wn.2d 1026 (2008), and *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997) Burke began a police interview about third degree rape charges but stopped the interview when his father intervened and advised his son to wait until counsel was consulted. *Burke*, 163 Wn.2d at 207. During its opening statement, the State described Burke's father as "sensing that it wasn't necessarily okay to have sex with [the underage girl]" and advising his son to end the interview, implying that the "guilty should keep quiet and talk to a lawyer." *Burke* 163 Wn.2d at 222. The *Burke* court held that the State had violated Burke's right to silence by implying that "suspects who invoke their right to silence do so because they know they have done something wrong." *Burke*, 163 Wn.2d at 222. Unlike in *Burke*, here, the State did not remark about any constitutionally protected silence, such as a defendant's request for a lawyer or choice to remain silent until after consulting with an attorney.

In *Thomas*, when police confronted the defendant on the telephone, he told Officer Peterson, "I don't want to talk to you." *Thomas*, 142 Wn. App. at 593. But Thomas testified at trial that he was never on the phone with Officer Peterson. *Thomas*, 142 Wn. App. at 596. In closing, the State argued, "He's [Thomas] just been accused of a crime. I mean he knows that that's what's going on. The cops showed up there for a reason." *Thomas*, 142 Wn. App. at 597. We held that some of the prosecutor's remarks properly served impeachment purposes but that others improperly commented on Thomas's silence as evidence of his guilt, such as when the State "emphasized that although [Thomas] had been accused of a crime, Thomas would not return to tell his story." *Thomas*, 142 Wn. App. at 596.

Eddy's case is unlike *Thomas* because the State's comments did not generally invite the

jury to link Eddy's silence with guilt. Instead, the State contrasted Eddy's specific testimony on direct examination, that he had climbed the fence simply to avoid the dog, with his failure to act in ways consistent with his own testimony, including his failure to call out to police for assistance, or even to identify his location, once he was safely beyond the dog's reach. Eddy had also testified on direct that he intended to investigate the apparent burglary and then go to the police with the information. The State's cross-examination of Eddy about why he did not call out to the police similarly highlighted for the jury this inconsistency in Eddy's testimony.

In *Knapp*, the defendant also testified at trial, denying that he had committed the burglary and asserting an alibi. *Knapp*, 148 Wn. App. 418. We noted that because Knapp had testified, the Fifth Amendment did not prohibit the State from commenting on his silence for impeachment purposes; nevertheless, we also held that the State could not use Knapp's pre-arrest silence as substantive evidence of his guilt. *Knapp*, 148 Wn. App. at 421. The prosecutor elicited a detective's testimony about two separate witnesses' positively identifying Knapp and Knapp's subsequent reactions: In the first occurrence, Knapp had immediately hung his head and said nothing; in the second, Knapp had displayed no reaction. *Knapp*, 148 Wn. App. at 419. During closing, the prosecutor argued that the jury should find Knapp guilty because, both times when witnesses identified him, "[W]hat did he do? He put his head down. Did he say, 'No. It wasn't me'? [sic] No." *Knapp*, 148 Wn. App. at 420 (emphasis omitted). We held that in this instance the prosecutor did not properly impeach Knapp's testimony but instead, impermissibly commented on Knapp's silence. *Knapp*, 148 Wn. App. at 421.

Here, in contrast with *Knapp* and the other cases on which Eddy relies, the State did not

impeach him merely because he had remained silent while fleeing the police and the K-9 dog. Instead, the State impeached Eddy on cross-examination by showing that his failure to call out his location to the police while astride the fence was inconsistent with his testimony on direct that he had wanted to talk with police but was merely trying to avoid being bitten by the police dog, not to elude the police. The State's cross-examination, thus, was directly relevant to the truthfulness of Eddy's own statements on direct. We hold that the trial court did not abuse its discretion in overruling Eddy's objection and allowing cross-examination for this limited impeachment purpose. We further hold that this specific instance of cross-examination did not constitute prosecutorial misconduct.

III. Unpreserved Prosecutor's Cross-examination and Closing

Eddy next challenges several sets of interactions with the prosecutor during cross-examination and portions of the State's closing arguments. He argues that the prosecutor acted repeatedly, deliberately, and flagrantly to elicit from him that he had failed to provide information to police when he had the opportunity after he was astride the fence, safe from the dog, thereby implying that if he were innocent, he would not have remained silent. The State responds that, to the extent the prosecutor asked Eddy about his silence on cross-examination, it was proper impeachment of Eddy's direct testimony. We agree with the State.

Eddy also contends that, despite his failure to object below, we should review this issue because it involves manifest constitutional error, which he may raise for the first time on appeal. This argument fails.

A. Standard of Review

Although we will not ordinarily review an error raised for the first time on appeal, there is an exception for a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). This "narrow" exception requires an "unmistakable, evident or indisputable" error. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); *Kirkman*, 159 Wn.2d at 934. Similarly, as we have previously noted, if a defendant fails to object at trial, he waives an alleged prosecutorial misconduct error on appeal unless he can show that the misconduct was so flagrant or ill-intentioned that the trial court could not have cured the error by instructing the jury. *Weber*, 159 Wn.2d at 270 (quoting *Stenson*, 132 Wn.2d at 719). Here, Eddy fails to meet this heightened burden.

B. No Manifest Error; No Incurable Flagrant and Ill-Intentioned Misconduct

On direct examination, Eddy testified that his activities at the scene of the burglary were essentially either an impromptu investigation by him to assist the police, by sharing information, or an attempt to avoid confronting an intimidating dog. For example, Eddy testified that he did not hide from police but rather he "waited" "in some bushes" for them to arrive. II VRP at 287. By asking Eddy on cross-examination why he never yelled out to the police, even after a "very long time," II VRP at 287, the prosecutor sought to impeach Eddy's direct examination assertions that he was not hiding in the bushes but waiting for the police so he could share information with them.

Although in isolation, some of the State's questioning might appear to have been a comment on Eddy's silence, when taken in context of his direct testimony and the other questions the State asked on cross-examination, the State's questions properly impeached Eddy. For

example, in isolation the following question might appear to have been an improper comment on Eddy's silence: "Did you say anything to them to make it clear that you were stopping?" II VRP at 326. But the State's impeachment purpose is clear when the questions is

considered against the backdrop of Eddy's direct testimony that he had entered the school building, hoping to get a glimpse of the burglar to "provide a description of the character that was inside the building" so that "it would seem as if we had the best intentions at the moment." II VRP at 279.

All of the State's comments to which Eddy failed to object below similarly challenged the truthfulness of Eddy's direct testimony. As such, the comments were proper impeachment under *Burke*; and they did not violate Eddy's constitutional right to remain silent. *Burke*, 163 Wn.2d at 218. Accordingly, we hold that Eddy fails to establish both manifest error affecting a constitutional right and flagrant and ill-intentioned prosecutorial misconduct.[10] Therefore, we

[10] We note that even if Eddy had been able to show flagrant and ill-intentioned prosecutorial misconduct, he has also failed to show that such misconduct could not have been cured by the trial court's instruction, especially in light of the trial court's general instruction to the jury in Instruction No. 1:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.
>
> . . .
>
> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence.

Clerk's Papers at 12.

need not further consider whether the State's cross-examination was reversible prejudicial error.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, A.C.J.

Van Deren, J.