IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES MATTHEW EWING, Appellant.	No. 39258-5-II UNPUBLISHED OPINION

Sweeney, J. – This appeal follows convictions for theft of a firearm, second degree unlawful possession of a firearm, and second degree theft with a firearm enhancement. The defendant raises a number of assignments of error both directly and obliquely, by a claim of ineffective assistance of counsel. Our Supreme Court has recently concluded that the unanimity instruction given here is flawed because it required jury unanimity to vote "no" on the firearm enhancement. We therefore reverse the firearm enhancement. We also cannot discern any tactical reason why counsel would not urge the sentencing court to consider the theft of a firearm and second degree theft as the "same criminal conduct" for sentencing purposes. And we question the

calculation of the offender score. But we cannot conclude that the police officer's comment amounted to a prejudicial comment on the defendant's right to remain silent. We therefore affirm the convictions, reverse the firearm enhancement and remand for recalculation of the offender score and resentencing.

FACTS

A jury convicted Charles Matthew Ewing of theft of a firearm, second degree unlawful possession of a firearm, and second degree theft. The jury also found that Mr. Ewing was armed with a firearm when he committed the second degree theft.

Stephen Quesenberry is Mr. Ewing's roommate and was the victim of the thefts. Mr. Quesenberry was sleeping on a couch. He woke up when Mr. Ewing entered the apartment. Mr. Quesenberry went upstairs to his room and fell back asleep. Later, he noticed that several items, including his handgun, were missing. Mr. Quesenberry called Mr. Ewing to ask about the missing items. Mr. Ewing never answered his calls or returned his messages. Mr. Ewing had gone to California. Mr. Quesenberry did not see Mr. Ewing again until this case came to trial.

Mr. Ewing admitted in e-mails that he took some of Mr. Quesenberry's possessions, including his handgun, before he left for California. Amanda Rice, an acquaintance of Mr. Ewing, testified that Mr. Ewing admitted he took some of Mr. Quesenberry's possessions and that he suggested he also took Mr. Quesenberry's handgun. Ms. Rice and Tanya Wurl, Mr. Ewing's girlfriend at the time of the theft, each testified that Mr. Ewing asked them to testify falsely on his behalf. And Tanya Wurl testified that Mr. Ewing fled to California without telling her. Officer Dave Miller testified that Mr. Ewing agreed to visit the police department to answer questions but

never came.

The court instructed the jury and included an instruction on the firearms enhancement with this language: "If you unanimously have a reasonable doubt as to this question, you must answer 'no.'" Clerk's Papers (CP) at 62. The jury found Mr. Ewing guilty on all counts and answered the special verdict that he was armed with a firearm when he committed the theft.

The trial court sentenced Mr. Ewing to 140 months of total confinement. Mr. Ewing's judgment and sentence indicates that he had an offender score of 6 because of prior offenses. The judgment and sentence also originally included a point for committing the current crimes while on community custody but that point was crossed out because he was not on community custody when he committed these crimes. Mr. Ewing's current convictions for theft of a firearm and second degree unlawful possession of a firearm should have increased his offender score by one point. But the sentence reflects an offender score of 8, not 7, for each of those crimes. His current conviction for second degree theft increased his offender score by another point and so the offender score was shown as 9. The State determined the standard range to be 128 to 164 months, and the court then sentenced him to 140 months. He appeals the convictions and the sentence.

DISCUSSION

COMMENT ON RIGHT TO REMAIN SILENT

Officer Miller testified that Mr. Ewing agreed to come in and talk but then did not come in. Mr. Ewing did not object to this testimony at trial. Nonetheless, he contends here on appeal that the testimony was an improper comment on his right to remain silent. And he asks us to

review the assignment of error, in the first instance.

> The required analysis is a four-step process:
>
> > First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The error must be truly "manifest" and truly of constitutional proportions. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). "'[M]anifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. 'Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." *Lynn*, 67 Wn. App. at 345 (footnote omitted). This is a narrow exception to the usual rule that counsel must object in the trial court to preserve an error for appeal. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). "[T]he appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (quoting *Kirkman*, 159 Wn.2d at 926-27). And, ultimately, the claimed error is still subject to a harmless error analysis. *O'Hara*, 167 Wn.2d at 98.

"Manifest" requires a showing of actual prejudice. *O'Hara*, 167 Wn.2d at 99. And, again, that requires a plausible showing that the asserted error had "'practical and identifiable consequences in the trial of the case.'" *O'Hara*, 167 Wn.2d at 99 (quoting *Kirkman*, 159 Wn.2d

at 935). The actual prejudice analysis is different than the harmless error analysis in this context. "[T]he focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99-100.

The United States and Washington Constitutions guarantee the right to remain silent. U.S Const. amend. V; Wash. Const. art. 1 § 9; *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). And this includes pre-arrest; so the State may not use pre-arrest silence in argument or its case-in-chief as substantive evidence of a defendant's guilt. *State v. Easter*, 130 Wn.2d 228, 241, 243, 922 P.2d 1285 (1996). Accordingly, "A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

We must first decide "'whether the prosecutor manifestly intended the remarks to be a comment on that right.'" *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991)). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *Lewis*, 130 Wn.2d at 707. But we do not consider a prosecutor's statement a comment on a constitutional right to remain silent if "standing alone, [it] was 'so subtle and so brief that [it] did not "naturally and necessarily" emphasize defendant's testimonial silence.'" *Crane*, 116 Wn.2d at 331 (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978) (second alteration in original)). "A remark that does not amount to a comment is considered a 'mere reference' to silence and is not reversible error absent a showing of prejudice." *Burke*, 163 Wn.2d at 216 (quoting *Lewis*,

130 Wn.2d at 706-07).

Here, Officer Miller testified that Mr. Ewing agreed to visit the police department for questioning but then never came:

> Q: Okay. And can you tell us how that conversation went?
> A: I just told Mr. Ewing he was a suspect and I needed to come in and talk to him face to face.
> Q: Okay. And did he agree to do that?
> A: Yes, he did.
> Q: Okay. So what arrangements did you make, if any, at that point in time?
> A: I set a date and time for him, and he said he would come to Lacey Police Department and come and talk to me.
> Q: Okay. And so at the date and time that you set, did he come to the department?
> A: He did not.
> Q: Did he come at any point after that?
> A: No.
> Q: So then I take it after a certain amount of time, you inferred that he wasn't coming; is that true?
> A: Yes, yes.

I Verbatim Report of Proceedings at 41.

Mr. Ewing had no obligation to talk to the police, and the officer's comments can be fairly read as a comment on Mr. Ewing's decision not to talk to Officer Miller. The more difficult question is whether Mr. Ewing has made a plausible showing that the error "'had practical and identifiable consequences in the trial of the case.'" *O'Hara*, 167 Wn.2d at 99 (quoting *Kirkman*, 159 Wn.2d at 935).

Mr. Ewing argues that Officer Miller's testimony prejudiced him because its "only value was the inference that only a person who had something to hide would fail to attend a scheduled appointment for the purpose of providing a statement to the police." Br. of Appellant at 11. But

whether Ewing showed up for an appointment was only one small part of Officer Miller's testimony about his investigation. After Officer Miller made the comment, the State continued with general questions about the nature of his investigation. And aside from the brief comment, no one at trial made any further reference to Mr. Ewing's failure to keep his appointment. We are unable to conclude then that this reference had the practical and identifiable consequences in the trial of this case necessary to invoke the exception to the general rule that counsel object at trial. *O'Hara*, 167 Wn.2d at 99; *e.g.*, *State v. Sweet*, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999) (comment that defendant had to talk to his attorney before giving a statement was a mere reference to silence not a comment on right to remain silent); *State v. Rogers*, 70 Wn. App. 626, 630-31, 855 P.2d 294 (1993) (defendant's refusal to say how much he had to drink in vehicular homicide case not of constitutional proportions because the comment was not highlighted), *review denied*, 123 Wn.2d 1004 (1994).

Moreover, when the comments are placed in the overall context of this trial, we would conclude that the remaining evidence was both untainted and overwhelming. And so any error would be harmless. *E.g.*, *State v. Watt*, 160 Wn.2d 626, 636, 160 P.3d 640 (2007).

UNANIMITY INSTRUCTION

The court instructed the jury that it must return a unanimous verdict on the firearm enhancement:

> Because this is a criminal case, *all twelve of you must agree in order to answer the special verdict form.* In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".
>
> Because this is a criminal case, each of you must agree for you to return a verdict.

CP at 62-63 (emphasis ours). Mr. Ewing contends this was error because the answer "no" does not require unanimity. The state Supreme Court agrees with him. *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010).

We then reverse the firearm enhancement.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Ewing next argues that his lawyer did not effectively represent him because he (1) did not object to Officer Miller's testimony that he now asserts was a comment on his silence, (2) did not argue that his theft of a firearm and second degree theft convictions amounted to the same criminal conduct, and (3) did not object to the unanimity instruction. We have reversed the firearm enhancement based on the flawed unanimity instruction, and so we need only address the first two claims here.

To show ineffective assistance of counsel, Mr. Ewing must show (1) deficient performance and (2) resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). He must first show that his lawyer's representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). He must then show that but for those lapses, the outcome of this trial would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We are very deferential to counsel's performance and so begin our analysis with a strong presumption that counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

On Officer Miller's testimony, we have already concluded that the comments did not rise

to the level of prejudice that would require us to review the claim in the first instance here on appeal. The same analysis applies to the prejudice prong. On the second claim, the theft of a firearm and second degree theft convictions do appear to encompass the same criminal conduct. RCW 9.94A.589(1)(a) ("two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim"). The crimes involved the same criminal intent—the "intent to deprive" the owner of property or services. RCW 9A.56.020(a), .040, .300(4) ("The definition of 'theft' and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm"). Mr. Ewing committed the crimes at the same time and place, in the apartment he shared with Mr. Quesenberry. And Mr. Quesenberry was the sole victim of each crime. Thus, Mr Ewing's theft of a firearm and second degree theft convictions may well encompass the same criminal conduct, as a matter of law.

And we cannot see any reason why the argument should not have been made at sentencing. Of course, the offender score here would change if both crimes amount to the same criminal conduct. RCW 9.94A.589(1)(a). So the required prejudice prong is also satisfied. We conclude then that Mr. Ewing was not effectively represented at sentencing.

CALCULATION OF OFFENDER SCORE

We will remand for resentencing and so raise another concern for the sentencing court to address on remand.

Mr. Ewing had six prior felonies, three from Washington and three from Florida. He then had an offender score of 6 from his prior offenses. But his sentence reflects an extra point. Mr. Ewing had only 6 points, so his "sentencing data" should have started at 7, which is 6 points plus

one point for count I. Instead, it appears that Mr. Ewing's "sentencing data" started at 8. CP at 75-76. This may have been because of the initial belief that these crimes were committed while Mr. Ewing was on community custody status.

HOLDING

We then reverse the sentencing firearm enhancement. We affirm the convictions for theft of a firearm, second degree unlawful possession of a firearm, and second degree theft. And we remand for a same criminal conduct analysis and recalculation of the offender score and sentence.

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.

Sweeney, J.

We concur:

Penoyar, C.J.

Worswick, J.