IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27288-5-III**
Respondent,	)	
v.	)	**Division Three**
SCOTT MICHAEL TAYLOR,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Brown, J. ─ Scott Michael Taylor appeals his convictions for attempted residential burglary and three counts possessing a controlled substance. Mr. Taylor contends (1) his multiple controlled substance possession convictions violate double jeopardy, (2) the judgment and sentence erroneously identifies the maximum term of confinement for the attempted residential burglary charge, (3) the trial court erred by failing to hold a CrR 3.5 hearing, and (4) the State improperly commented on his right to remain silent in the burglary prosecution. The State concedes the double jeopardy violation and the maximum sentencing error, but argues the State's comments were harmless. We agree with the State's concessions, but disagree the comments were

harmless. Accordingly, we affirm one count of possessing a controlled substance, vacate two controlled substance convictions, and reverse Mr. Taylor's attempted residential burglary conviction.

FACTS

On December 6, 2007, Mr. May awoke to a loud thumping sound on the door of his apartment. He got up, looked through the peephole on the door, and saw an individual standing outside the door. He did not know the individual, and he was not sure of the gender. At trial he testified a female was at the door. Mr. May saw the individual come toward his door, and again heard a thumping noise. Minutes later, he heard another sound coming from the apartment door, like someone was trying to dismantle his lock with something metal. Mr. May called his apartment rental office, and then the police. When Mr. May inspected his apartment door, he noticed marks near the deadbolt that were not there the night before.

The apartment manager, Daniel Gire, and the maintenance supervisor, Jose Benavidez, responded to Mr. May's telephone call to the apartment rental office. Mr. Gire and Mr. Benavidez saw a female standing outside of Mr. May's apartment. When the female saw them, she started walking away down the staircase. Mr. Gire and Mr. Benavidez saw a male, they identified as Mr. Taylor, standing on a patio near the staircase. They saw Mr. Taylor and the female walk away together.

Kennewick Police Officer Shirrell Veitenheimer responded to Mr. May's

telephone call to the police. The Officer saw a male, later identified as Mr. Taylor, and a female, later identified as Ms. Hines, walking toward a vehicle. Officer Veitenheimer stopped the vehicle. Mr. Taylor was in the driver's seat, and Ms. Hines was in the passenger seat. The vehicle was registered to Mr. Taylor. Mr. Taylor told Officer Veitenheimer he was at the apartment building because Ms. Hines was looking for a friend. Officer Veitenheimer placed Mr. Taylor under arrest for attempted residential burglary. Later, Kennewick Police Officer Ryan Hull searched Mr. Taylor's vehicle. Officer Hull found a pry bar on the floor of the vehicle on the driver's side. In the glove box, Officer Hull found a sunglass case containing a pair of safety glasses, and a piece of broken glass with white crystal residue. In addition, directly behind the driver's seat, Officer Hull found a black backpack containing a small black purse containing numerous baggies, one containing a yellowish substance, and a spoon. The piece of broken glass, the substance in the baggie, and the spoon tested positive for methamphetamine.

The State charged Mr. Taylor with count I, attempted residential burglary, as an accomplice, in violation of RCW 9A.52.025 and RCW 9A.28.020(1); and counts II, III, and IV, possession of a controlled substance in violation of RCW 69.50.4013(1). For count II, the controlled substance was listed as "methamphetamine on broken glass found in vehicle." Clerk's Papers (CP) at 61. For count III, the controlled substance was listed as "methamphetamine in plastic baggie found in black pouch in vehicle." CP

at 61. For count IV, the controlled substance was listed as "methamphetamine on a soiled spoon in the vehicle." CP at 61.

At a pretrial hearing, Mr. Taylor's attorney stated:

> Your Honor, we are on for pretrial also a 3.5 hearing [sic]. In reviewing the police reports and speaking with [the State] it doesn't appear we need a 3.5, so we will waive our right to a 3.5 hearing and we would agree that the statements were made voluntary [sic].

Report of Proceedings (RP) (Jan. 23, 2008) at 2.

At trial, Mr. May, Mr. Gire, Mr. Benavidez, Officer Veitenheimer, and Officer Hull testified to the above. Additionally, Officer Hull testified he transported Mr. Taylor to jail. Officer Hull testified regarding their conversation, without objection:

> [The State:] At some point when you were transporting him to jail, did he ask you what he was being charged with?
> [Officer Hull:] Yes ma'am, he did. I told him at that time that he was being arrested for attempted burglary as well as possession of a controlled substance.
> [The State:] And what did he ask you after that?
> [Officer Hull:] . . . He asked what kind of a controlled substance he was being arrested for. And I told him that I wasn't going to give him any further information about my investigation.

1 RP (Feb. 29, 2008) at 170-71.

Without objection, Officer Hull testified about a conversation with Mr. Taylor during transport back from the hospital, after medical clearance:

> [The State:] When you transported him back to the jail, did he initiate some conversations with you?
> [Officer Hull:] Yes, ma'am, he did.
> [The State:] And what did he talk to you about?
> [Officer Hull:] As we were in transport to the jail, he began to ask drug

> related questions. He asked if I had ever seen MDA in the area.
> . . . .
> [The State:] Do you know MDA is a common name for a street drug?
> [Officer Hull:] I do know that, yes. After that he asked if I see more heroin than methamphetamines in the area. And I told him I see a substantial amount more of methamphetamines than heroin.
> [The State:] Then what did he say?
> [Officer Hull:] He - - this was as we were pulling into the sallyport of the jail. He said that that was my first lie.

1 RP (Feb. 29, 2008) at 174-75.

The State played part of a phone call made by Mr. Taylor from jail for the jury:

> [Unknown:] That they found the tool used to pry on the door in the driver's area of your truck.
> [Mr. Taylor:] That doesn't mean nothing. Cause I'll just get right up on the stand I'll say yeah she threw it there. She got in my truck and threw it down. That easy.
> [Unknown:] Well then, well you better prove it to the jury you weren't involved.
> [Mr. Taylor:] Well you know what, I only have 12 people, I gotta [sic] have one person undecisive [sic], it's really simple.
> [Unknown:] Oh I know.

Pl.'s Ex. 34; 2 RP (Mar. 5, 2008) 242-44.

Mr. Taylor testified he agreed to give Ms. Hines a ride to Mr. May's apartment building and that she had a black backpack with her. He related when they arrived at the apartment building, Ms. Hines got out of his vehicle and "went to see who she was going to see." 2 RP (Mar. 5, 2008) at 250. He testified he waited awhile, and he got out of his vehicle. He further testified he walked toward the apartment building when he heard Ms. Hines arguing and yelling. Mr. Taylor testified he saw Ms. Hines walking toward him, and then he followed her back to his vehicle. He testified Ms. Hines left the

vehicle once again, and after waiting for her for awhile, he again walked toward the apartment building. He testified he saw Ms. Hines at the top of the stairway, and that she came down the stairs, grabbed his sleeve, and lead him back to his vehicle.

On cross-examination, the State questioned Mr. Taylor about what he then said:

> [The State:] And at no point did you tell [Officer Hull] what you told the ladies and gentlemen of the jury today; isn't that true?
> [Mr. Taylor:] I didn't tell him anything at all.
> [The State:] You didn't. Today is the first time that you're actually telling anybody about that; isn't that true?
> [Mr. Taylor:] Pretty much, yeah.
> . . . .
> [The State:] Isn't it true that night, Mr. Taylor, that you never told the police that that backpack was not yours; correct?
> [Mr. Taylor:] I never told the police anything.
> [The State:] Actually that's not true, you did tell the police stuff; isn't that true?
> [Mr. Taylor:] I guess I would ask you to rephrase it.
> [The State:] Okay, well, isn't it true that you did not tell the police that that backpack was not yours?
> [Mr. Taylor:] Yeah, I didn't tell them anything about it.

2 RP (Mar. 5, 2008) at 262, 268. Mr. Taylor did not object to these questions.

The State questioned Mr. Taylor about whether he had used drugs with Ms. Hines asking, "[i]sn't it true that the two of you have used methamphetamine together?" 2 RP (Mar. 5, 2008) at 265. Mr. Taylor did not object to this question, and affirmatively responded. The State asked Mr. Taylor, "[i]sn't it true that at one point you were going to try and get your meth dealer to bail you out of jail?" 2 RP (Mar. 5, 2008) at 266. Mr. Taylor objected to this question, and the trial court sustained the objection, and instructed the jury to disregard the question.

The State cross-examined Mr. Taylor about whether Ms. Hines threw the pry bar at his feet when she got in the vehicle, and Mr. Taylor affirmatively answered.

Johnny Poteet, a private investigator employed by Integrity Assurance, also testified for the defense. On cross-examination, Mr. Poteet testified he was hired by the defense. The State then asked, "[w]ell, Mr. Poteet, you and I both know how you get paid; . . . correct?" 2 RP (Mar. 5, 2008) at 294. Mr. Taylor unsuccessfully objected to the question as "beyond the scope of my questioning and relevance." 2 RP (Mar. 5, 2008) at 294, 295. The State asked Mr. Poteet about who hired him and who paid his bills.

In its closing argument, when the State argued "when [Mr. Taylor] . . . asked the police officer, what am I being charged for? And Officer Hull said - -", Mr. Taylor objected to the argument, as commenting on his right to remain silent, and moved for a mistrial. 2 RP (Mar. 5, 2008) at 332. The trial court overruled the objection and denied the motion for a mistrial. The State then argued:

> [Y]ou remember the testimony of Officer Hull when he was taking [Mr. Taylor] to jail. He said, Officer Hull, what am I being charged with? And Officer Hull said, well, you're being charged with attempted residential burglary and possession of a controlled substance. And [Mr. Taylor], he wanted to talk about drugs. He wanted to talk about what substances. But [Mr. Taylor] never said anything to him about the attempted residential burglary.

2 RP (Mar. 5, 2008) at 334.

The State continued:

> And then [Mr. Taylor] got on the stand today and he told you it's

> not my drugs. That wasn't my bag. Ms. Hines brought that bag inside the car. But when - - he never told the police that that day. Don't you think that might have been something important that you would want to tell the police? I would submit to you that it would be?

2 RP (Mar. 5, 2008) at 341.

Mr. Taylor objected, stating, "I'm going to submit a continuing objection." 2 RP (Mar. 5, 2008) at 341.

The jury found Mr. Taylor guilty as charged. The trial court sentenced Mr. Taylor to 60 months' confinement on count I, and 24 months' confinement each for counts II, III, and IV. The judgment and sentence identifies the maximum term of confinement for count I as 10 years. Mr. Taylor appealed.

ANALYSIS

A. Double Jeopardy

The issue is whether Mr. Taylor's convictions on counts III and IV, for possession of methamphetamine, violate double jeopardy. Mr. Taylor contends these convictions violate the constitutional prohibition on double jeopardy, because the possession of methamphetamine convictions, counts II, III, and IV, all pertain to methamphetamine found in Mr. Taylor's truck, within his actual or constructive possession. The State concedes, and we accept the concession.

We review de novo a double jeopardy claim. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). The double jeopardy clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice

put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." Const. art. I, § 9. "Both double jeopardy clauses prohibit multiple convictions under the same statute if the defendant commits only one unit of the crime." *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009). "Vacating convictions which violate double jeopardy is the appropriate remedy for double jeopardy violations." *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). The State appropriately concedes error.

Here, because the statute at issue prohibits possession of a controlled substance, regardless of the source, and does not suggest separate units of prosecution, double jeopardy requires dismissal of two of the three controlled substance counts. *See* RCW 69.50.4013(1) (stating in relevant part, "[i]t is unlawful for any person to possess a controlled substance"); *see also State v. Chenoweth*, 127 Wn. App. 444, 463, 111 P.3d 1217 (2005) (dismissing one of two counts of possession of methamphetamine based upon double jeopardy concerns) (citing *State v. Adel*, 136 Wn.2d 629, 637, 965 P.2d 1072 (1998). Accordingly, we reverse Mr. Taylor's convictions on counts III and IV. This obviates the need to discuss Mr. Taylor's error claims surrounding counts III and IV.

B. Maximum Term

The issue is whether the judgment and sentence erroneously identifies the maximum term of confinement for Mr. Taylor's conviction on count I, attempted

residential burglary, as 10 years. Mr. Taylor contends the maximum term of confinement for this crime is five years. The State correctly concedes this error, and we pass to the next issue without further discussion because below we reverse Mr. Taylor's conviction on count I.

C. CrR 3.5 Hearing Requirements

The issue is whether the trial court erred by failing to hold a CrR 3.5 hearing. Mr. Taylor contends, for the first time on appeal, a CrR 3.5 hearing was required to determine whether his statements to Officer Hull were admissible.

CrR 3.5(a) provides in relevant part, "[w]hen a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible."

However, "[t]he fact that the rights which the rule was promulgated to protect are of constitutional magnitude does not prevent a waiver." *State v. Rice*, 24 Wn. App. 562, 565, 603 P.2d 835 (1979). A CrR 3.5 hearing "may be waived if done so knowingly and intentionally." *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). Further, a defendant's attorney may waive a CrR 3.5 hearing. *See id*. Here, Mr. Taylor's attorney waived the CrR 3.5 hearing at a pretrial hearing, by stating:

> Your Honor, we are on for pretrial also a 3.5 hearing [sic]. In

> reviewing the police reports and speaking with [the State] it doesn't appear we need a 3.5, so we will waive our right to a 3.5 hearing and we would agree that the statements were made voluntary [sic].

RP (Jan. 23, 2008) at 2.

In addition to this express waiver, Mr. Taylor impliedly waived his rights under CrR 3.5 by failing to raise the issue of waiver and failing to object to Officer Hull's testimony at trial. *See Fanger*, 34 Wn. App. at 638 (stating that the defendant "impliedly waived his rights under CrR 3.5 as well by failing at trial to raise the issue of invalid express waiver and to object to the officers' testimony").

Moreover, Mr. Taylor argues a CrR 3.5 hearing was required to determine whether he was properly advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and whether he voluntarily waived these rights. However, "[t]he *Miranda* protection is premised on custodial interrogation." *State v. Warness*, 77 Wn. App. 636, 639, 893 P.2d 665 (1995). "A suspect who is in custody but not being interrogated does not have *Miranda* rights." *Id*. at 639. A custodial "interrogation" is defined as "express questioning" or its "functional equivalent" initiated by law enforcement officers after a person is in custody or otherwise significantly deprived of his freedom. *State v. Hawkins*, 27 Wn. App. 78, 82, 615 P.2d 1327 (1980). Here, Officer Hull did not interrogate Mr. Taylor. Mr. Taylor asked questions of Officer Hull, and Officer Hull responded. Nothing about Officer Hull's responses were "reasonably likely to elicit an incriminating response." *State v.*

Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992). Thus, *Miranda* warnings were not required. *Warness*, 77 Wn. App. at 639-40.

In sum, the trial court did not err by failing to hold a CrR 3.5 hearing.

D. Comment on Silence

The issue is whether the State erred in commenting on Mr. Taylor's right to be silent. Although miscast as prosecutorial misconduct, Mr. Taylor correctly identifies the comments as violating state and federal guarantees granting an accused the right to remain silent. U.S. Const. amend. V; Const. art. I, § 9. Washington cases follow these constitutional principles. *State v. Burke*, 163 Wn.2d 204, 211-17, 181 P.3d 1 (2008); *State v. Easter*, 130 Wn.2d 228, 234-41, 922 P.2d 1285 (1996). Due process prohibits impeachment based on silence, after warnings are given. *Burke*, 163 Wn.2d at 217.

"In the post-arrest context, it is well-settled that it is a violation of due process for the State to comment upon or otherwise exploit a defendant's exercise of his right to remain silent." *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002); *see also Doyle v. Ohio*, 426 U.S. 610, 617-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). "The State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt." *Id*. at 787. However, "if the defendant waives the right to remain silent and makes a post-arrest statement, the prosecutor may draw the attention of the jury to the fact that a story told at trial was omitted from the statement." *State v. Silva*, 119 Wn. App. 422, 429, 81 P.3d 889 (2003) (citing *State v. Belgarde*, 110 Wn.2d 504,

511, 755 P.2d 174 (1988)). Under this exception, "[w]hen a defendant waives the right to remain silent, makes a self-serving partial statement at the time of his arrest, then presents additional exculpatory testimony at trial . . . the State [may] impeach the defendant with both the statement and the pertinent omissions." *Id*. at 430 (citing *Belgarde*, 110 Wn.2d at 511-12).

The State incorrectly argues because Mr. Taylor did not remain silent and spoke with Officer Hull, it could comment on what he did not say, citing to *State v. Young*, 89 Wn.2d 613, 574 P.2d 1171 (1978). However, *Young* is factually distinguishable. There, the defendant chose not to remain silent after he was arrested, making several damaging comments and asking several inculpatory questions. *Young*, 89 Wn.2d at 619-21. The court found that "[t]he prosecutor was entitled to argue the failure of the defendant to disclaim responsibility after he voluntarily waived his right to remain silent and when his questions and comments showed knowledge of the crime." *Id*. at 621. Here, however, Mr. Taylor did not make damaging comments or ask inculpatory questions. His questions were limited to what he was being charged with and general drug-related questions.

Further, Mr. Taylor did not give a self-serving partial statement after his arrest, followed by inconsistent trial testimony. *See Silva*, 119 Wn. App. at 430 (citing *Belgarde*, 110 Wn.2d at 511). Thus, the State should not have been permitted to impeach Mr. Taylor with his silence.

Accordingly, we hold the State used Mr. Taylor's silence as substantive evidence of guilt, violating Mr. Taylor's due process rights.[1] *See Romero*, 113 Wn. App. at 786-87. Given the improper cross-examination and closing argument shown here, and the close evidence showing Mr. Taylor's accomplice participation in the burglary, we cannot agree with the State that the comments were harmless beyond a reasonable doubt. See *Burke*, 163 Wn.2d at 222-23 (discussing harmless error in the context of a comment on the right to silence). Drawing out evidence that Mr. Taylor failed to relate

[1] Based on the record, we assume that Mr. Taylor was given his *Miranda* rights upon his arrest. The only reference to *Miranda* rights being given was by the State, in response to Mr. Taylor's objection during its closing argument.

exculpatory facts about the burglary and arguing that silence to the jury under these facts require reversal of the attempted residential burglary conviction. Therefore, we reverse Mr. Taylor's conviction for count I, attempted residential burglary, and remand for a new trial. It follows that the trial court erred in denying his motion for a mistrial made during the State's closing argument.

D. Other Arguments

We acknowledge Mr. Taylor's arguments regarding the State's references to his indigent status, and who paid his defense team as being irrelevant and unfairly prejudicial, but we do not address them because we cannot say they will reoccur on retrial. We note in passing, however, that it was improper for the State to question Mr. Taylor regarding his past drug use. "[E]vidence of other crimes, wrongs, or acts is inadmissible to show action in conformity with the prior crimes, wrongs, or acts." *State v. Avendano-Lopez*, 79 Wn. App. 706, 713, 904 P.2d 324 (1995) (citing ER 404(b)). Even so, Mr. Taylor did not object to the State's questioning, and a curative instruction could have been utilized to obviate the prejudice.

And we acknowledge Mr. Taylor's argument that the State committed misconduct by asking him, "[i]sn't it true that at one point you were going to try and get your meth dealer to bail you out of jail?" 2 RP (Mar. 5, 2008) at 266. Mr. Taylor objected to this question, and the trial court sustained the objection, and instructed the jury to disregard the question. We presume a jury follows the court's instructions. *State v. Swan*, 114

Wn.2d 613, 661-62, 790 P.2d 610 (1990).

Affirmed in part. Reversed in part.

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

Brown, J.

WE CONCUR:

Kulik, C.J.

Sweeney, J.