IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29397-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
CHARLES ROLAND LEIVAN, aka Charles Roland Lei Van,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Brown, J. — Charles Leivan appeals his first degree trafficking in stolen property conviction, arguing the prosecutor improperly elicited testimony infringing on Mr. Leivan's right to remain silent and improperly appealed to the passion of the jury by commenting on the frequency of scrap metal thefts in the area during closing argument. We affirm.

FACTS

On July 19, 2009, around 9:00 or 10:00 a.m. John Hoersch, a Quincy, Washington, businessman found truck radiators, aluminum engine parts, and irrigation pipe were missing from the northwest corner of his property. Mr. Hoersch assumed the

items had been removed recently because antifreeze was still dripping off the truck frames when he became aware of the theft. Mr. Hoersch saw two sets of footprints and two sets of tire tracks on his property in the area where the stolen items had been. Mr. Hoersch recalled seeing Mr. Leivan ride his motorcycle on Mr. Hoersch's property two days prior, near the area where the stolen property had been located.

Mr. Hoersch contacted Bargain Town, a local scrap yard. He found the stolen radiators, engine parts, and irrigation pipe there. Jonathan Edwards worked at Bargain Town and reported Wayne Hannah brought in the stolen property on July 19, 2009. Mr. Hannah was accompanied by two men—one was Mr. Leivan. Mr. Leivan helped Mr. Hannah unload the metal, which Mr. Hannah then sold for $685.55. Mr. Edwards noted that the metal "looked suspicious . . . . It was too usable to be just given as—as a scrap or as a trash." Report of Proceedings (RP) (July 28, 2010) at 94. Mr. Hannah claimed Mr. Leivan and Carlos Bazan came to his home on July 19, 2009. Mr. Leivan and Mr. Bazan had a trailer with pipes and radiators. Mr. Hannah agreed to sell the metal for them because Mr. Bazan was not able to sell scrap metal because of a prior conviction.

Grant County Sheriff's Corporal Mike Crowder investigated the theft. He observed two sets of tire tracks and two sets of footprints in the area where the items were stolen. Mr. Edwards gave Corporal Crowder the license plate number of the truck Mr. Hannah, Mr. Bazan, and Mr. Leivan used to bring items to Bargain Town. Corporal

Crowder later found that truck at Mr. Bazan's address. Corporal Crowder went to Mr. Leivan's home where he found a trailer that matched the description of the one used to deliver the property to Bargain Town. Corporal Crowder saw dirt on the trailer tires and the tread appeared to him consistent with the second set of tracks found on Mr. Hoersch's property.

The State charged Mr. Leivan with first degree trafficking in stolen property as an accomplice. During trial, Corporal Crowder testified that while investigating, he left his card with Mr. Leivan's sister in an attempt to contact Mr. Leivan and asked that she have Mr. Leivan call him. The State asked, without objection, whether Mr. Leivan contacted him and the corporal testified, "No." RP (July 29, 2010) at 191.

Mr. Leivan denied having any knowledge that the radiators, irrigation pipe, and other metal pieces were stolen. At the beginning of closing argument, the prosecutor thanked the jury for its service and then stated without objection, "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. The defendant here, Charles LeiVan, is accused in this case of trafficking in stolen metal." RP (July 29, 2010) at 290. Jury voir dire is not part of our record.

The jury found Mr. Leivan guilty as charged. He appealed.

ANALYSIS

The issue is whether Mr. Leivan was denied a fair trial based on prosecutorial

misconduct. He contends the prosecutor improperly elicited testimony infringing on Mr. Leivan's right to remain silent and improperly appealed to the passion of the jury by commenting on the frequency of scrap metal thefts in the area during closing argument.

Mr. Leivan bears the burden of showing the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)). "Prejudice occurs where there is 'a substantial likelihood that the misconduct affected the jury's verdict.'" *In re Detention of Sease,* 149 Wn. App. 66, 81, 201 P.3d 1078 (quoting *State v. Thomas,* 142 Wn. App. 589, 593, 174 P.3d 1264 (2008)), *review denied,* 166 Wn.2d 1029 (2009).

Because Mr. Leivan did not object to the alleged misconduct, he has waived the issue for appeal unless the prosecutor's misconduct was "'so flagrant and ill-intentioned that it evince[d] an enduring and resulting prejudice'" incurable by a jury instruction. *Gregory,* 158 Wn.2d at 841 (quoting *State v. Stenson,* 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

First, the State may not comment on a defendant's exercise of his Fifth Amendment right to remain silent. *State v. Sweet*, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999). Not all remarks, however, amount to a "comment" on the exercise of a constitutional right. *Id.* at 481. Improper references to silence are not reversible error

absent prejudice. *State v. Romero*, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002). A "comment" occurs when the State uses a defendant's silence as substantive evidence of guilt or suggests the silence was an admission of guilt. *Gregory*, 158 Wn.2d at 838. "By contrast, indirect or fleeting references to a defendant's apparent exercise of the right to silence do not rise to the level of constitutional error." *State v. Burke*, 163 Wn.2d 204, 225-26, 181 P.3d 1 (2008).

In *Sweet*, a detective testified that when he asked the defendant to provide a written statement, the defendant "'said that he would do that after he had discussed the matter with his attorney.'" *Sweet*, 138 Wn.2d at 480. The testimony was found to be "at best 'a mere reference to silence which is not a "comment" on the silence [and] is not reversible error absent a showing of prejudice.'" *Id.* at 481 (alteration in original) (quoting *State v. Lewis,* 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996)).

Here, the challenged statements were indirect references to Mr. Leivan's silence and were not being used as substantive evidence of guilt. The information was offered to describe the course of the officer's investigation. In closing argument, the State argued Corporal Crowder was unsuccessful in contacting Mr. Leivan and did not directly comment on his right to remain silent. Since Mr. Leivan cannot show the prosecutor's question was so flagrant and ill-intentioned that it resulted in enduring and resulting prejudice, this issue is waived. *Gregory*, 158 Wn.2d at 841 (quoting *Stenson*, 132 Wn.2d at 719).

Second, allegedly improper comments are to be reviewed on appeal in the context of the prosecutor's entire argument, the issues in the case, and the evidence addressed in the argument. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Mr. Leivan argues the prosecutor's remark in closing argument regarding the frequency of scrap metal thefts was a statement encouraging the jury to punish someone, anyone, for the general problem. But the prosecutor began closing argument by thanking the jury for its service. He then made the comments challenged here referring back to events during jury voir dire that are not part of our record, and transitioned into a summary of the evidence presented throughout the trial without returning to the subject. Viewing the prosecutor's statements in the context of the entire argument, the disputed comment was innocuous. The prosecutor's words were not so flagrant and ill-intentioned that they resulted in prejudice. Accordingly, this issue is also not appealable.[1]

Affirmed**.**

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.

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Brown, J.

[1] Mr. Leivan also alleges ineffective assistance of counsel in his assignments of error, but fails to provide argument. Appellants waive assignments of error that they fail to argue in their opening appellate briefs. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Therefore, this issue is waived.

WE CONCUR:

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Korsmo, A.C.J.	Siddoway, J.