IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT J. ALLMAN, aka JEFFREY RYAN ALLMAN, Appellant.	No. 38064-1-II UNPUBLISHED OPINION

Penoyar, A.C.J. — Robert Allman appeals his possession of a stolen motor vehicle conviction, arguing that the State committed prosecutorial misconduct during closing arguments by repeatedly commenting on his right to silence. Allman also argues that the State shifted the burden of proof to him by asserting that he should have called an exculpatory witness at trial and provided exculpatory information to the arresting police officers. Finally, in a statement of additional grounds for review (SAG),[1] Allman argues that (1) the trial court erred by admitting statements he made to officers at the time of his arrest; (2) the State violated his right to a fair trial by using evidence of a damaged ignition and screwdriver to infer guilt; (3) the trial court improperly denied him a drug offender sentencing alternative (DOSA) sentence; and (4) the cumulative error doctrine warrants reversal in this case. We affirm.

FACTS

On November 3, 2007, Tacoma police officers Sean Ovens and Eric Scripps were working the graveyard shift. Just before midnight, the officers were on patrol when they observed a vehicle and ran its license plate number through their computer. The officers learned that the

[1] RAP 10.10.

vehicle had been reported stolen. They subsequently followed the vehicle into a Safeway parking lot.

When the officers caught up with the vehicle, Allman had already exited the driver's side of the car, and Dedra Caldwell had exited the passenger side. Ovens handcuffed Allman, advised him of his *Miranda*[2] rights, and placed him into the patrol vehicle. The officers discovered a flat head screwdriver in Allman's coat pocket and shaved keys in the vehicle's center console and driver's side floorboard. The officers did not investigate whether any of these keys started the vehicle or fit its ignition. Scripps asked Allman how he came into possession of the vehicle. Allman responded that "Crystal," from Tillicum, had loaned him the car because she wanted him to install a stereo in it for her. 2 Report of Proceedings (RP) at 152. Allman then announced, "I have nothing else to say." 1 RP at 51.

Caldwell initially told the officers that Allman had picked her up that night and that she did not know the car was stolen. At trial, however, she testified that she stole the vehicle the night the police recovered the car, using shaved keys a friend had given her.[3] She also testified that, on her way to pick up Allman from Crystal's house in Tillicum, she removed and sold the car's stereo. Caldwell maintained that after picking up Allman around 7:45 p.m., she told him she had borrowed the car from Crystal. Caldwell also testified that they subsequently drove to Saint Joseph's Hospital, where they met with Crystal's boyfriend in order to retrieve some things they

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

[3] The owner of the vehicle, Anthony Fischer, did not know Allman or Caldwell and he did not give either of them permission to drive his car. Fischer, who inspected the car after it was recovered in the Safeway parking lot, indicated that his stereo and T-tops (removable automobile roof panels) were missing.

had left in his car. On their way to the hospital, Allman took over driving duties because Caldwell was driving erratically. They stayed at the hospital for ten to fifteen minutes before leaving, and roughly ten to fifteen minutes after leaving the hospital, the police stopped them.

On November 5, 2007, Allman signed his initial release documents using his brother's name, Jeffery Ryan Allman. Prior to trial, the State moved to amend the information to reflect Allman's true identity, to which the defense objected. The trial court overruled the defense's objection, saying, "There are a lot of folks that use nicknames and other combinations of names as part of their daily life. I don't think that language is prejudicial. . . ." 1 RP at 4.

At the CrR 3.5 hearing,[4] the trial court addressed how the State should present the statements Allman made to the officers prior to invoking his right to silence. The court stated:

> I don't think the officers can say, because at one point Mr. Allman did say, "I am not going to answer any more questions," I don't think the officers can comment upon his exerting his right to remain silent on more questioning as to Crystal. They can say that they asked, you know, where she lived, if he could give an address or something, and he did not respond to that. But I think beyond that, to say he refused to answer any more questions, that's entirely his right and is consistent with *Miranda*.

1 RP at 81 (emphasis added).

At trial, during closing, the prosecutor repeatedly drew attention to Allman's refusal to provide further information about Crystal:[5]

> He tells the officers he got the car from Crystal. But the officers can't get any information out of him about who Crystal is. What does an innocent man do in the same situation? "Well, I was just driving the car, and I borrowed it from a friend. I was going to put a stereo in it for her. As you can see there is a stereo missing."

[4] A CrR 3.5 hearing was held to determine how the statements Allman made to police prior to invoking his right to silence could be addressed during trial without infringing on Allman's right to silence.

[5] Allman did not testify on his own behalf at trial.

> "Who's your friend." 'Crystal Smith. You know, she lives over in Tillicum on XY Street."

3 RP at 260-61. A short time later, the prosecutor stated:

> So an innocent person would tell the officer who the car is from, why he had it, and actually know who the person is that he supposedly borrowed the car from.
>
> . . . .
>
> It is reasonable to believe that the defendant didn't know the car was stolen under these circumstances, when he tells one story to the officers, refuses to give full information to the officers.

3 RP at 261, 265-66. After defense counsel made his closing argument, the prosecutor stated during rebuttal:

> The defendant tried to talk his way out of a crime, and he got it wrong, because he didn't give the officers information that somebody telling the truth would give them.
>
> . . .
>
> "And Crystal is my friend who lives in Tillicum, I have known her for so long, her last name is such and such, you can reach her this way. Call her, ask her, because I just got the car from her, or my friend did." That's what somebody telling the truth does.

3 RP at 287-88. In addition to commenting on Allman's withholding information, the prosecutor also referenced the fact that Allman provided police officers with a false name when he was arrested:

> Why would somebody innocent tell the officers somebody else's name? And then use a story that his girlfriend supposedly gave him and then not be willing to fill in the details that an innocent person would naturally provide to the officers.

3 RP at 288-89. The prosecutor then stated:

> [H]e doesn't tell the officers any more information about Crystal aside from her first name. I don't know if Crystal exists. Who knows? It's awfully convenient. If she does exist, why isn't she here?

3 RP at 296. Then, the prosecutor commented that innocent people provide police with more

thorough information, so that the police may verify their story:

> Innocent people provide that information who Crystal is, where she is, what her last name is, how to [reach] her.

3 RP at 297.

Finally, just before the prosecutor concluded his closing remarks, he commented:

> [T]he refusal to provide information about the story regarding Crystal . . . . It just doesn't make sense.

3 RP at 302. The defense did not object to any of the State's comments.[6]

The jury convicted Allman of unlawful possession a stolen motor vehicle. He now appeals.

ANALYSIS

I. Comments on Silence

Allman asserts that the prosecutor, during closing arguments, committed prosecutorial misconduct by repeatedly stating that an innocent person would have provided more information than Allman did. Allman argues that he was exercising his constitutional right to remain silent, and that the prosecutor improperly commented on his decision to do so. The State contends that Allman made a statement to police, and it was not error for the State to discuss the extent of that statement. We agree with Allman that the prosecutor improperly commented on his right to silence. Any error, however, was harmless.

To establish prosecutorial misconduct, an appellant must prove that the prosecutor's

[6] While Allman did not object at the time the comments were made at closing, the defense attempted to continue sentencing in order to review the trial transcripts to determine whether to file a motion for a new trial. The trial court denied Allman's request to continue sentencing and told Allman that his actions would not be construed as a waiver for purposes of appeal.

conduct was improper and that this improper conduct prejudiced his right to a fair trial. *State v. Dixon*, 150 Wn. App. 46, 53, 207 P.3d 459 (2009). To establish prejudice, the appellant must show a substantial likelihood that the misconduct affected the jury's verdict. *In re Pers. Restraint of Pirtle,* 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). We review a prosecutor's comments during closing argument in the context of the total argument, "the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

A defendant may assert his right to remain silent at any time, and if he stops answering questions, there is a reasonable possibility he is relying upon that right. *State v. Heller*, 58 Wn. App. 414, 419-20, 793 P.2d 461 (1990) (quoting *State v. Apostle*, 512 A.2d 947, 953 (1986). Moreover, "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," and the State may not use a defendant's silence as substantive evidence of guilt. *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002).

Where a defendant waives the right to remain silent and makes a partial statement to police prior to invoking his right to remain silent, the State may use the statement to impeach a subsequent defense. *State v. Cosden*, 18 Wn. App. 213, 220-21, 568 P.2d 802 (1977). Our Supreme Court has held: "If a defendant voluntarily offers information to police, his toying with the authorities by allegedly telling only part of his story is certainly not protected by [*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] or [*Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)] . . ." *State v. Young,* 89 Wn.2d 613, 621, 574 P.2d

1171 (1978) (quoting *State v. Osborne*, 364 N.E.2d 216 (1977)). Furthermore, a defendant waives the right to remain silent concerning the subject matter of the statements he made. *State v. Belgarde*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988).

An impermissible comment on silence requires more than merely referencing the silence. *State v. Slone*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006), *review denied***,** 159 Wn.2d 1010 (2007). We must consider "whether the [State] 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 (1991)).

The State's argument, that Allman's partial silence allowed the State to comment on his comments regarding Crystal, is unpersuasive. Here, the prosecutor clearly crossed the line when he repeatedly advised the jury of what an "innocent person" would have done or shared with the officers. 3 RP at 261. Any error, however, was harmless. Allman has not demonstrated that there is a substantial likelihood this misconduct affected the jury's verdict in this case. The evidence against Allman was overwhelming. Allman was charged with possessing a stolen vehicle. The evidence conclusively established that the car was stolen and that Allman possessed it. The sole disputed issue for trial was whether Allman knew the car was stolen. Because the car could only be started with a screwdriver and shaved keys, the evidence that Allman knew it had to be stolen was overwhelming. He was not charged with stealing the car. Whether Crystal, or someone else, gave him the stolen car would not affect the result. Thus, the likelihood that the prosecutor's comments affected the jury's verdict is small.

II. Shifting the Burden of Proof

Allman next argues that the prosecutor improperly shifted the burden of proof to him by

questioning his failure to provide information to the arresting officers and failing to call an exculpatory witness to testify at trial. The State claims that its comments did not shift the burden of proof to Allman, but instead merely pointed out evidentiary deficiencies in his arguments. Again, we agree with Allman that the State's comments were improper. Any error, however, was harmless.

A prosecutor commits misconduct by making an argument during closing arguments that shifts the burden of proof to the defendant. *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). To establish prosecutorial misconduct, Allman must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *Dhaliwal*, 150 Wn.2d at 578. We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578. A prosecutor may commit misconduct if he mentions in closing argument that the defense did not present witnesses or explain the factual basis of the charges, or if he states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory. *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009). The mere mention that the defense's evidence is lacking, however, is not necessarily improper. *Jackson*, 150 Wn. App. at 885-86.

The State is also entitled to comment upon the quality and quantity of the defense's evidence, and an argument about the amount or quality of evidence the defense presented does not necessarily shift the burden of proof to the defense. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). Finally, a prosecutor's remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are made in reply to

his or her acts and statements. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In this case, the State alluded to the fact that Allman failed to present an exculpatory witness, Crystal. It did so, though, only after the defense counsel argued in his closing that Crystal was a real person, rather than a fictional character, from whose home Caldwell picked up Allman. The defense stated:

> We know Crystal does exist. We know that because her mother was in the hospital. Both -- Dedra has testified to that. We don't have any reason to believe that Crystal is a fictional person at all. And that at least there's some corroboration in the fact, according to Dedra, Mr. Allman was at Crystal's house. So Crystal's real. Nothing unreasonable about Crystal being real, nothing in the testimony or the evidence you have heard would suggest she's not a real person.

3 RP at 279-80. The prosecutor responded to the defense's statement: "I don't know if Crystal exists. Who knows? It's awfully convenient. If she does exist, why isn't she here?" 3 RP at 296.

Because the State failed to request a missing witness instruction, it was arguably precluded from arguing that Allman should have presented Crystal as an exculpatory witness. Any error, however, was harmless as the evidence against Allman was overwhelming in this case.

III. SAG

A. *Miranda* Rights

Allman argues that the officers did not properly advise him of his *Miranda* rights prior to questioning. Specifically, he argues that the record fails to demonstrate that he acknowledged that the officers read him or that he understood his rights. At trial, Ovens, testified that he recited Allman's *Miranda* rights to him. After Ovens advised Allman of his *Miranda* rights, Ovens claims Allman responded: "I understand." 1 RP at 11. Additionally, Scripps testified that Ovens

advised Allman of his *Miranda* rights. Substantial evidence supports the trial court's finding that the officers properly advised Allman of all his rights.

B. False Name

Allman next argues that the State committed prosecutorial misconduct, depriving him of a fair trial, because it mentioned that he offered a false name at the time of his arrest. Defense counsel objected to the State's amended information, which included the alias—Jeffery Ryan Allman—Allman used when he signed his release papers. The trial judge overruled the objection: "There are a lot of folks that use nicknames and other combinations of names as part of their daily life. I don't think that language is prejudicial . . . ." 1 RP at 4.

Allman failed to preserve the issue for appeal because he failed to object to the State's comments during closing. Therefore, now he must show the comments were prejudicial, flagrant, and ill intentioned. *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987). He merely provides three references to the record in which the State alludes to Allman's use of an alias. He therefore fails to meet his burden.

Even had he preserved his right to appeal the issue, Allman could not have shown that the prosecutor's comments were improper and prejudiced his right to a fair trial. *See Dixon*, 150 Wn. App. at 53. *See also State v. Chase*, 59 Wn. App. 501, 507, 799 P.2d 272 (1990) (providing a false name shows consciousness of guilt, and thus furthers inferences of criminal intent); *State v. Allen*, 57 Wn. App. 134, 143, 788 P.2d 1084 (1990) (giving a false name to a police officer suggests guilty knowledge and, hence, is relevant evidence).

Therefore, the State's references to Allman's use of an alias—which was clearly indicated in the amended information—was not improper and did not deprive him of a fair trial.

C. Improper Evidence

Allman next contends that the State denied him a fair trial by referencing a damaged ignition and the screwdriver found in his pocket to infer guilt. He argues that the State's comments regarding the screwdriver and ignition were prejudicial and designed to "inflame the passion of the jury." SAG at 11. He appears to argue that the danger of unfair prejudice substantially outweighed the probative value of this evidence, depriving him of due process. ER 403. He also appears to argue that the prosecutor engaged in prosecutorial misconduct.

The decision to admit evidence is generally within the trial court's sound discretion, and we will reverse a trial court's evidentiary ruling only for abuse of discretion. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). We may affirm on any ground adequately supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Importantly, "[t]he threshold to admit relevant evidence is very low [and] [e]ven minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

Allman appears to argue that the trial court should have excluded the evidence of the screwdriver because its probative value was substantially outweighed by the danger of unfair prejudice against him. At trial, the State entered the flat head screwdriver confiscated from Allman into evidence. The defense did not object. Scripps testified how screwdrivers are sometimes used to defeat ignitions to start or steal automobiles, and police discovered a

screwdriver on Allman. Both Ovens and Scripps also indicated that the ignition in the automobile was damaged. Fischer testified that he noticed no damage to his ignition. Allman fails to demonstrate that the trial court abused its discretion by admitting the screwdriver into evidence.

Allman also appears to argue that the State committed prosecutorial misconduct when it referred to the screwdriver during closing:

> And then there's the screwdriver. The officer testified that [screwdrivers] are commonly used to defeat ignitions, break into cars, obviously a flat head screwdriver can be used to pry things open, whether it's a door, you can pry stereos out of a dashboard, you can stuff this in the ignition to destroy the ignition and then use it for leverage to turn the ignition over, if you don't have the key that fits it. And as you can see, this is a flat head screwdriver . . . to pry things open, stuff it into anything to be able to get the torque necessary to turn that ignition.

3 RP at 257-58. Once again, the defense failed to object to these comments; therefore, Allman must prove that the comments were flagrant and ill-intentioned. He fails to do so.

D. DOSA Sentence

Allman argues that the trial court improperly denied him the opportunity to serve a DOSA sentence, even though he is statutorily eligible to do so.

A trial court must meaningfully consider a qualified defendant's DOSA request. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Absent a constitutional or procedural challenge, however, we will not review a sentencing court's discretionary decision to deny a defendant's request for DOSA. *Grayson*, 154 Wn.2d at 338. Allman has shown neither constitutional nor procedural error; therefore, we decline to review this issue.

E. Cumulative Error

Finally, Allman argues that the cumulative effect of the aforementioned errors denied him the constitutional right to a fair trial. The cumulative error doctrine applies when several errors

occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Instead, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn. App. at 673-74. The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Because the errors in this case were harmless, reversal is not warranted.

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.

Penoyar, A.C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.