IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINTON, Respondent, v. STUART ALAN BACHMAN, Appellant.	No. 38256-3-II UNPUBLISHED OPINION

Hunt, J. – Stuart Alan Bachman appeals his jury trial convictions for unlawful possession of a controlled substance (methamphetamine), unlawful use of drug paraphernalia, and second degree unlawful possession of a firearm. He argues that (1) the trial court erred in denying his motion to suppress his fingerprints obtained while he was in custody without a warrant or a court order under CrR 4.7(b)(2)(iii), (2) the trial court erred in permitting the State to call a last-minute fingerprint expert without granting a continuance for defense counsel time to prepare for this newly disclosed witness, and (3) the State engaged in prosecutorial misconduct in closing argument by commenting on Bachman's exercise of his right to remain silent. We affirm.

FACTS

I. Background

On March 27, 2007, Vader Police Officer Sean Uhlich was on routine patrol in Lewis County when he stopped Stuart Alan Bachman's Chevy Blazer because Bachman had a suspended license. Bachman was the only person in the car. Uhlich arrested Bachman for driving with a suspended license, removed Bachman from the Blazer, and placed him in the patrol car.

Uhlich then searched the Blazer incident to Bachman's arrest.[1] Inside the Blazer, Uhlich found (1) an orange plastic flare gun containing a live flare cartridge, (2) a tin box containing 12-gague shotgun shells, and (3) a small plastic vial containing a small amount of a white substance that was later found to be methamphetamine. While Uhlich searched the Blazer, Detective Tim English from the Lewis County Sheriff's Office arrived to assist.

English advised Bachman of his *Miranda*[2] rights. After English had field tested the white substance that Uhlich had found, English asked Bachman whether there had been more of this substance in the vial. Bachman told English that there had been more inside the vial but that he had used it earlier.

II. Procedure

The State charged Bachman with possession of a controlled substance (methamphetamine), unlawful use of drug paraphernalia, and second degree unlawful possession of a firearm. The probable cause affidavit asserted that Bachman had prior felony convictions precluding firearm possession and that his criminal history included three felony drug-possession convictions from Lewis County.

[1] Bachman did not challenge this search below, nor does he challenge it on appeal.

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

A. Discovery

On April 11, 2007, the State listed three witnesses it intended to call at trial: English, Uhlich, and an unnamed forensic scientist from the Washington State Patrol crime lab. An August 23 omnibus order stated that Bachman was not stipulating to any prior convictions and set the mutual discovery deadline at 10 days before trial, which appears to have been sometime before December 30, 2007.[3] After a series of continuances, the trial was set for July 15, 2008. On July 8, 2008, Bachman filed a notice of intent that he intended to rely on an unwitting possession defense.[4]

As Bachman's trial was to begin, defense counsel informed the trial court that the State had just (1) notified him it intended to present a certified copy of a judgment and sentence from Bachman's 2003 Lewis County felony drug conviction and a set of fingerprints it had recently obtained from Bachman without defense counsel's knowledge or a court order; and (2) disclosed a new witness, Detective Bruce Kimsey of the Lewis County Sheriff's Office, who would testify that Bachman's newly obtained fingerprints matched those on the certified copy of the 2003 judgment and sentence. Bachman objected to the introduction of the certified document, the newly obtained fingerprints, and Kimsey's proposed testimony.

Bachman argued that the State had failed to disclose any of this evidence before the discovery cutoff date and that the fingerprints were unlawfully obtained because the State had neither obtained a court order under CrR 4.7(b)(2)(iii) nor advised Bachman that he could refuse

[3] The record before us on appeal does not include this initial trial date.

[4] Bachman did not specify to which charge this defense applied. *See* CP 101.

to provide his fingerprints.[5] He asked the trial court to dismiss the firearm charge based on the State's unreasonable delay in disclosing this evidence.

The trial court criticized the State for its delay in obtaining and disclosing this evidence and witness, but it denied Bachman's motion to dismiss and offered Bachman a continuance to evaluate this new evidence and to interview Kimsey. Although defense counsel initially told the trial court that he would need a continuance, Bachman, against counsel's advice, refused to request a continuance and demanded to proceed to trial.[6] Accordingly, Bachman's defense counsel did not ask for a continuance, and the jury trial proceeded.

B. Trial

1. State's evidence

Uhlich and English testified as described above.[7] Over defense counsel's standing objection, the trial court admitted the certified copy of the 2003 judgment and sentence, which established a prior felony drug conviction. Kimsey then testified that the fingerprints on the certified copy of the 2003 judgment and sentence matched those taken from Bachman in his

[5] Bachman also asserted that (1) until the State presented the certified 2003 judgment and sentence and the new fingerprints shortly before trial, the State had not disclosed any evidence establishing a prior felony conviction; (2) without this evidence the State could not prove Bachman was prohibited from possessing a firearm; (3) defense counsel had relied on the absence of such evidence when in advising Bachman whether to go to trial; and (4) defense counsel would have approached the case differently had he known the State would present this last-minute evidence. On appeal, however, Bachman challenges only the trial court's admission of his fingerprints and what he mischaracterizes as the trial court's "denial" of a continuance.

[6] During trial, defense counsel renewed his objection to the newly obtained fingerprints, asserting that the State had failed to comply with CrR 4.7 and that the fingerprinting amounted to an unlawful search of Bachman's person. The trial court refused to reconsider its previous ruling.

[7] English also testified about how the flare gun worked. But Bachman does not challenge on appeal the sufficiency of the evidence supporting the firearm charge.

(Kimsey's) presence. Bachman asked to voir dire Kimsey about how he had obtained Bachman's fingerprints.

Outside the jury's presence, Kimsey testified that the prosecutor had called him on Friday, July 11, and asked him to obtain Bachman's fingerprints and to compare those prints to the prints on his 2003 judgment and sentence. Kimsey did not recall whether the prosecutor had told him that Bachman had defense counsel. Although Kimsey presumed that Bachman was represented, he did not know by whom and did not attempt to contact Bachman's counsel to explain that he (Kimsey) was going to contact Bachman to take his fingerprints. Kimsey called the jail, asked the staff bring Bachman to the booking area, and watched as the jail staff fingerprinted Bachman. Kimsey did not speak to Bachman and, as far as Kimsey knew, no one ever advised Bachman that he had the right to refuse to be fingerprinted.

2. Defense evidence

Bachman was the sole defense witness. He testified that (1) he did not know that a flare gun was a firearm or that he was not allowed to possess a flare gun; (2) he knew that he was not allowed to possess firearms because he had "an old felony in [his] past, and [he had not] petitioned the Court to get [his] rights back yet," RP at 100; (3) the vial Uhlich had found in the Blazer belonged to a friend who had borrowed the Blazer; (4) he (Bachman) had lied when he told English that the vial was his (Bachman's) because he was trying to protect his friend, who was involved in a child custody dispute; and (5) his friend had died of a drug overdose a few months before trial.

3. Closing argument and motion to dismiss

During the State's closing, the prosecutor argued:

> The State proved to you that Mr. Bachman was in his car, driving around by himself, and he had the vial of methamphetamine in his vehicle. He now wants you to believe he didn't know it was there. And the burden is on him. What did he show you? Well, one, he told Officer English, when asked—Officer English asked him if the vial was used to transport methamphetamine. Mr. Bachman said it was. And Mr. Bachman also said he used that vial with methamphetamine earlier that day.
>
> *Today for the first time—*

RP at 128 (emphasis added). Defense counsel interrupted with a general objection, which the trial court sustained. Bachman did not, however, state a specific ground for his objection or request a curative or limiting instruction. The prosecutor continued, stating:

> Today Mr. Bachman told you that he—he was not truthful in that statement because of—I believe he said he was protecting another person. Does that make sense to you?

RP at 128.

During Bachman's closing, defense counsel argued that although Bachman had initially told English that the vial was his, Bachman had explained that this statement was a lie to protect his friend. In rebuttal, the prosecutor argued:

> As to the unwitting possession, all you have is the testimony of the defendant who admitted to you that he was untruthful where (sic) the officer first confronted him. How can you believe a person that tells two different stories: Is that a preponderance? I don't think so. That's why I think—that's why the State believes you should find guilty times three, to use [defense counsel's] statement.

RP at 143. Bachman did not object to this argument.

After the jury retired to deliberate, Bachman moved to dismiss the drug charges or for a mistrial based on the italicized portion of the State's closing argument above, "Today for the first time . . . ." Bachman asserted that (1) when he objected during the State's closing argument, the

State was probably going to say something about Bachman's not having asserted that he had lied to England until he (Bachman) testified at trial, 15 months after his arrest; and (2) this statement, in conjunction with the prosecutor's rebuttal argument, violated Bachman's right to a fair trial.

The State characterized as "a slip" the prosecutor's reference to Bachman's trial testimony being the first time Bachman mentioned this version of the story. But the State argued that had Bachman made a more specific objection at that point, the trial court could have given the jury a curative instruction. Although the trial court agreed that the prosecutor's statement was "unartful," it agreed with the State and denied Bachman's motion to dismiss.

The jury convicted Bachman as charged. Bachman appeals.

ANALYSIS

I. Fingerprints

Bachman first argues that the trial court erred in allowing the State to use the fingerprint evidence it had obtained from Bachman in jail without a warrant or a court order under CrR 4.7(b)(2)(iii). He further argues that by taking his fingerprints without advising him of his rights, the State violated his right to privacy under both the Federal and State constitutions.[8] We disagree.

A. Standard of Review

We review a trial court's admission of evidence for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion when its decision is

[8] Because Bachman has not briefed the *Gunwall* factors, we do not separately address his state constitutional claim. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986); *see also State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993) (reviewing court will not address independent state constitutional claims unless appellant briefs the six factors established in *Gunwall*).

manifestly unreasonable or based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). We find no abuse of discretion here.

B. CrR 4.7(b)(2)(iii)

CrR 4.7(b)(2)(iii) provides:

> (b) Defendant's Obligations.
> . . . .
> (2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:
> . . . .
> (iii) be fingerprinted[.]

Although CrR 4.7(b)(2)(iii) *suggests* that a defendant is not required to provide fingerprints without a court order, it does not state that the State *must* obtain a court order before asking the jail to fingerprint a defendant who is being held in custody pending trial.

On the contrary, as the State suggests, RCW 43.43.735 provides authority under which the State can acquire any jailed defendant's fingerprints. RCW 43.43.735 provides:

> (1) It shall be the duty of the sheriff or director of public safety of every county, and the chief of police of every city or town, and of every chief officer of other law enforcement agencies duly operating within this state, to cause the photographing and fingerprinting of all adults and juveniles lawfully arrested for the commission of any criminal offense constituting a felony or gross misdemeanor. [. . .]
> (2) It shall be the right, but not the duty, of the sheriff or director of public safety of every county, and the chief of police of every city or town, and every chief officer of other law enforcement agencies operating within this state to photograph and record the fingerprints of all adults lawfully arrested.
> (3) Such sheriffs, directors of public safety, chiefs of police, and other chief law enforcement officers, may record, in addition to photographs and fingerprints, the palmprints, soleprints, toeprints, or any other identification data of all persons whose photograph and fingerprints are required or allowed to be taken under this section when in the discretion of such law enforcement officers it is necessary for proper identification of the arrested person or the investigation of the crime with which he or she is charged.

This statute clearly gives those holding defendants in custody the authority to fingerprint those individuals for identification and investigative purposes.

C. No Violation of Privacy Rights

Regardless of whether the State could have compelled Bachman to provide fingerprints without a warrant if he had not been in custody, the law is clear that the State could lawfully compel him to provide fingerprints while he was in custody. *Rise v. Oregon*, 59 F.3d 1556, 1559-60 (9th Cir. 1995), *overruled on other grounds by Ferguson v. City of Charleston*, 532 U.S. 67 (2001) and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), *cert. denied*, 517 U.S. 1160 (1996). As the Ninth Circuit has stated, fingerprinting a person held in lawful custody[9] does not violate that person's privacy rights:

> [E]veryday "booking" procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence. Thus, *in the fingerprinting context, there exists a constitutionally significant distinction between the gathering of fingerprints from free persons to determine their guilt of an unsolved criminal offense*[10] *and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state*.

Rise, 59 F.3d at 1559-60 (emphasis added) (citations omitted).

Bachman's reliance on *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007), does not

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[9] Bachman does not argue that his arrest and custody lacked probable cause or were otherwise unlawful.

[10] Contrast with the Ninth's Circuit description of an out-of-custody person's privacy rights:

> The gathering of fingerprint evidence from "free persons" constitutes a sufficiently significant interference with individual expectations of privacy that law enforcement officials are required to demonstrate that they have probable cause, or at least an articulable suspicion, to believe that the person committed a criminal offense and that the fingerprinting will establish or negate the person's connection to the offense.

Rise, 59 F.3d at 1559-60.

persuade us that a person has general expectation of privacy in "the integrity of his . . . fingerprints" while in custody. *Athan* addressed whether the State violated a defendant's right to privacy when it took a DNA[11] sample from saliva he had used to seal an envelope that police officers had obtained through a ruse. *Athan*, 354 Wn.2d at 362-63, 366-68. But *Athan* addressed the privacy interest in *bodily fluids* or *biological samples* taken from the individual's person, such as urine and saliva, not the privacy interests inherent in a person's *fingerprints*. *Athan*, 354 Wn.2d at 366-67, 373-74. Moreover, unlike Bachman, Athan was not in custody. Thus, Bachman's reliance on *Athan* fails.

Because Bachman has not established that he had a protected privacy interest in his fingerprints while he was in custody, he fails to show that the State violated his constitutional rights when jail staff took his fingerprints at the State's request. We hold, therefore, that the trial court did not err in denying Bachman's motion to suppress his fingerprints.

II. Newly Disclosed Evidence

Bachman next argues that the trial court erred in allowing the State to call Kimsey without first granting him a continuance to allow defense counsel to prepare for this last-minute witness's testimony. This argument fails because Bachman mischaracterizes the record: The trial court did not deny him a continuance.

Contrary to Bachman's assertion, the record clearly shows that the trial court expressly offered him the opportunity to continue the trial so his counsel would have time to examine the new evidence, to interview Kimsey, and to obtain additional information to challenge new

[11] Deoxyribonucleic acid.

evidence. But Bachman rejected both the trial court's offer and his defense counsel's advice to take a continuance. Instead, Bachman told his counsel he did not want to continue the trial, which defense counsel then reported to the trial court. Thus, it was not the trial court who denied Bachman a continuance and an opportunity to prepare for Kimsey's testimony; it was Bachman's own choice.

Furthermore, the invited error doctrine prohibits a party from creating a situation at trial and then claiming on appeal that it was reversible error. *See State v. Henderson*, 114 Wn.2d 867, 868, 870, 792 P.2d 514 (1990), (citing *State v. Boyer,* 91 Wn.2d 342, 588 P.2d 1151 (1979)). Accordingly, we hold that the trial court did not err in allowing the State to call Kimsey as a witness after Bachman rejected the trial court's offer of a continuance for time to prepare.

III. No Prosecutorial Misconduct

Finally, Bachman argues that the State committed reversible misconduct when the prosecutor commented during closing argument on what Bachman characterizes as the exercise of his right to remain silent, by (1) mentioning Bachman's statements to English, (2) saying, "Today for the first time—"; and (3) discussing Bachman's assertion at trial that he had lied to English to protect his friend. Bachman contends that these comments improperly communicated to the jury that Bachman had not mentioned that he had lied to protect his friend until trial and, in so doing, improperly implied Bachman's guilt.

A. Standard of Review

The State may not make closing arguments about the defendant's post-arrest silence in order to imply guilt. *State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988). But when the testimony or argument does not "highlight or call attention to defendant's post-arrest silence in such a fashion or to such a degree as to penalize defendant," it fails to violate due process and the right to a fair trial. *State v. Johnson*, 42 Wn. App. 425, 431-32, 712 P.2d 301 (1985), *review denied*, 105 Wn.2d 1016 (1986). To establish prosecutorial misconduct, Bachman must show that the prosecutor's action was both improper *and* prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004). Bachman fails to meet this burden.

B. No Prejudice

Bachman's timely objection interrupted the prosecutor's potentially improper comment, which, as a result, was somewhat obscure: "And Mr. Bachman also said he used that vial with methamphetamine earlier that day. *Today for the first time*—[objection]." RP at 128 (emphasis added). Therefore, even assuming, without agreeing, that the jury might have understood this partial statement to suggest that Bachman should have admitted to his alleged lie earlier, any such inference would not have been prejudicial in light of the entire record. At trial, Bachman (1) admitted that he had, in effect, told English that the vial containing the methamphetamine was his; and (2) claimed that he had done so to protect a friend who had died just a few months before trial. Thus, Bachman's own testimony had already made the jury aware that he claimed to have reasons, other than his own guilt, for waiting until trial to reveal these facts about the vial

belonging to a friend. Accordingly, we hold that any potential improper statement by the State in closing argument did not likely affect the jury's verdict and, therefore, was not prejudicial.

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:

Houghton, P.J.

Bridgewater, J.