

No. 50262-0-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.

JODI ANN WARREN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
#01-1-00921-7

RESPONDENT'S BRIEF

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

1. Does the lack of specific testimony as to the precise wording of Appellant’s Miranda warnings require the suppression of subsequent statements given in custody?
2. Do routine procedures such as filling out DUI processing forms require Miranda warnings?
3. May a defendant invite error by objecting to the introduction of testimony for strategic reasons, and then on appeal allege error in failing to consider such testimony?
4. Does a question from the accused about whether she should speak with an attorney constitute an unequivocal request for an attorney, requiring the termination of all questioning?
5. Is a brief statement by the prosecutor alluding to a possible sentence of community service substantially likely to change the jury’s verdict creating unfair prejudice to the defendant?
6. Would the absence of all post-arrest statements by the defendant and the prosecutor’s comment alluding to a possible sentence of community service have resulted in a verdict of acquittal instead of conviction?

FACTS

On May 29, 2001, Jodi Ann Warren (“Appellant”) was driving erratically on I-5, and was stopped by Washington State Trooper Jason Armstrong near the junction of I-5 and Lakeway Ave. in Bellingham. RP

4-5, 152.¹ Following a field sobriety test, Trooper Armstrong arrested the Appellant for Driving Under the Influence (“DUI”). RP 4-5, 145. Incident to the arrest, Trooper Armstrong searched the Appellant, some areas in her automobile, and her purse. RP 6. Inside the purse, Trooper Armstrong discovered a pipe made of aluminum foil that had been used to smoke marijuana and a bindle with traces of what appeared to be (and was) cocaine, and a cocaine-snorting device. RP 9, 47, 54. Trooper Armstrong seized the purse and its contents, and took it with him in his patrol car. RP 6. Prior to taking the Appellant to jail, Trooper Armstrong read the Appellant her constitutional rights from a DUI checklist or, as the officer stated, “we had gone through the constitutional rights which she stated she understood.” RP 24, 6, 19, 33, 45. The Appellant admitted at trial, without complaint, that Trooper Armstrong advised her of her constitutional rights. RP 146-47. Trooper Armstrong also asked the Appellant a series of specific questions to determine whether she understood her rights, and recorded the Appellant’s answers in his report. RP 7, 24-25. Appellant stated to the officer that she understood those rights and the waiver of them. RP 7, 24.

Prior to being read her rights, the Appellant denied knowing what

¹ As in the Appellant’s brief, the Verbatim Report of Proceedings is referenced as follows: “RP” refers to the hearing and trial held on December 18 & 19, 2001, and “SRP” refers to the ruling on Appellant’s new trial motion and sentencing of February 6, 2002.

the Trooper found in her purse, and afterward she denied using marijuana or cocaine recently. RP 8. After being read and confirming her Miranda warnings and denying that she had used drugs recently, Appellant asked if she should talk further without first talking to her lawyer. RP 8-9. Trooper Armstrong indicated that it was up to the Appellant and stopped questioning her. RP 9-10, 19. When Trooper Armstrong arrived at the Whatcom County Jail with the Appellant, Trooper Armstrong asked her if she wanted to call her attorney and suggested that she might try calling his answering service. RP 10, 19-20. However, the Appellant indicated that she would call her attorney later when he was in the office, implying that the DUI processing could proceed without a lawyer. RP 11.

C. ARGUMENT

1. The Appellant Was Fully Advised of Her Rights and Received Adequate Miranda Warnings

a. The Trial Court Correctly Found that the Specific Wording of Miranda Warnings Need be Proven as Long as the Rights Are Adequately Conveyed

The Appellant claims that the trial court erred by admitting post-arrest statements by the Appellant, notwithstanding an alleged failure to fully advise the Appellant of her rights before questioning her. The right to receive Miranda warnings was derived by the Supreme Court from the

Fifth Amendment² privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 439-40, 442 (1966). The central holding of Miranda is as follows:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

² According to the Washington Supreme Court, “the protection of article 1, section 9 [of Washington’s Constitution] is coextensive with, not broader than, the protection of the Fifth Amendment.” State v. Moore, 79 Wn. 2d 51, 483 P.2d 630 (1971); State v. Earls, 116 Wn. 2d 364, 374-75, 805 P.2d 211 (1991).

Id. at 444-445. Miranda was motivated, in no small part, by “the famous Wickersham Report to Congress by a Presidential Commission” in the 1930s, which found that “police violence and the ‘third degree’ flourished at that time.” Id. at 445. The Miranda Court explained that its decision was driven by a desire to end practices where, “the police resorted to physical brutality - beating, hanging, whipping - and to sustained and protracted questioning incommunicado in order to extort confessions.” Id. at 446. “Miranda warnings are intended to protect a suspect thrust into an ‘unfamiliar atmosphere’ or an ‘interrogation environment’ who may think the interrogation will continue until he confesses.” State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988). The State must prove by a preponderance of evidence that a custodial statement of a defendant is voluntary. State v. Grisby, 97 Wn.2d 493, 505, 647 P.2d 6 (1982) (citing Lego v. Twomey, 404 U.S. 477 (1972); State v. Braun, 82 Wn.2d 157, 509 P.2d 742 (1973)). There is no evidence of underhanded, coercive or abusive questioning in the present case.

A police officer need not follow "word for word" the precise language in Miranda, if s/he informs the defendant of his rights "in a way which conveys their full import." State v. Rupe, 101 Wn.2d 664, 677, 683 P.2d 571 (1984) (citing California v. Prysock, 453 U.S. 355 (1981); State v. Hutton, 57 Wn. App. 537, 789 P.2d 778 (1990)). For instance, “no

Washington court has held that . . . Miranda warnings specifically [must] include the advice that counsel will be appointed ‘without charge’” particularly where “nothing in the record even suggests that [the defendant] was confused about his right to counsel.” State v. Hutton, 57 Wn. App. 537, 789 P.2d 778 (1990) (holding that Miranda warnings were adequate even though they could have been “even clearer[.]”) In the present case, nothing in the record suggests either that the Appellant was not advised of her right to remain silent or to have an attorney present during questioning, or that she was confused about these rights. On the contrary, the Appellant’s trial counsel acknowledged at trial that the officer “read the constitutional rights” to the Appellant, RP 45, and the Appellant confirmed that she understood them. RP 6, 19, 24, 33, 45. The Appellant personally acknowledged at trial, without complaint, that Trooper Armstrong had reviewed her constitutional rights with her. RP 146-47.

The Appellant now argues that there is an absence of evidence as to how Trooper Armstrong specifically administered the Miranda warnings. Appellant’s Br. at 8-10. However, “the warnings need not be an incantation of the precise language contained in Miranda.” California v. Prysock, 453 U.S. 355 (1981). Similarly, the Washington Supreme Court has held that no “talismanic incantation” is necessary to make Miranda warnings effective. “The essence of the Miranda warnings is that the defen-

dant be advised of his rights in a way which conveys their full import” including a warning that “sufficiently alerts a defendant that his statements may be used in court.” State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984). This standard is satisfied if “defendant was generally aware of his legal rights but waived them.” Id. There is nothing in the record providing a reason to doubt whether the warnings provided by Trooper Armstrong were sufficient.

In the present case, the Appellant complains that Trooper Armstrong did not ask the Appellant to sign a written waiver of her rights, and erroneously asserts that Trooper Armstrong did not present the Appellant with a waiver form to be read nor read such a form to the Appellant. The United States Supreme Court and the Supreme Court of Washington have explicitly rejected the argument that a waiver of Miranda rights is invalid because it is not in writing. North Carolina v. Butler, 441 U.S. 369, 373 (1979); Rupe, 101 Wn.2d at 678. Furthermore, the record amply demonstrates that Trooper Armstrong was working from his “DUI packet” when he gave the Appellant her Miranda warnings and explained the waiver to her, RP 7; and Appellant’s trial counsel acknowledged to the Court the police report’s statement that Trooper Armstrong, “read the constitutional rights” to the Appellant, RP 45, and the Appellant confirmed that she understood them. RP 6, 19, 24, 33, 45. The record further reflects that

Trooper Armstrong asked the Appellant a series of specific questions to determine whether she understood her rights, and recorded the Appellant's answers in his report. RP 7, 24-25. The Appellant stated to the officer that she understood those rights and the waiver of them. RP 7, 24. Contrary to the Appellant's assertions, Trooper Armstrong did read the Appellant's Miranda warnings to her. See Appellant's Br. at 8.

The Appellant further complains that Trooper Armstrong did not testify specifically as to what constitutional rights he advised the Appellant of before questioning her. Appellant's Br. at 8-10. Similarly, in State v. Brown, 940 P.2d 546, 132 Wash.2d 529 (1997)(a portion of the record had been lost by a court reporter), the appellant argued that the record as to Miranda warnings was "conclusory at best" and "because this portion of the record (which addresses his Miranda warnings) is missing, appellate counsel is unable to effectively assign and argue error on appeal[.]" However, in that case, the court held that the appellant's "claim is without merit" because there was sufficient non-testimonial evidence in the record to satisfy the court that appropriate Miranda warnings had been provided. Id. While the evidence in this case is not as clear as it could be, it is clear that Trooper Armstrong employed a standardized Miranda procedure as discussed above. Furthermore, Trooper Armstrong testified that Appellant "asked if she should say anything without talking to a lawyer and I told

her it was up to her.” RP 9. This statement unmistakably indicates that the Appellant knew and understood that she did not have to talk to the officer without an attorney, and that Trooper Armstrong had further clarified to her that it was her decision whether to do so.

b. Routine Booking Procedures Such as Filling Out a DUI Processing Form Do Not Require a Miranda Waiver

Additionally, “it is well established that routine booking procedures do not call for Miranda warnings[.]” State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). In the present case, as soon as the Appellant raised the possibility of speaking to an attorney, Trooper Armstrong stated that it was up to the Appellant whether to consult her attorney before answering further and terminated the interview. RP 9-10, 19. The only questions that Trooper Armstrong asked following the termination of the interview were necessary to execute “the standard procedure of processing a DUI.” RP 11. Trooper Armstrong testified that the DUI processing in this case involved “[n]othing other than what normally takes place.” RP 11.

2. The Appellant Impermissibly Invited Error by Objecting to Testimony About the Specific Miranda Warnings Provided to the Appellant and Later Appealing on the Ground that Such Testimony Was Not Presented

“Invited error prohibits a party from ‘setting up error in the trial court and then complaining of it on appeal.’” State v. Armstrong, 69 Wn. App. 430, 434, 848 P.2d 1322 (1993) (quoting State v. Young, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991)). In Washington, “a self-invited error precludes appellate review” even against complaints that the Appellant has been denied constitutional due process. State v. Lewis, 15 Wn. App. 172, 176, 548 P.2d 587 (1976). This rule is particularly applicable, where “defense counsel employed a tactical maneuver in what then appeared to be the best interest of his client.” Id. When a defendant employs a strategy at trial that forecloses certain constitutional rights, an appellate tribunal should not later retract that implied waiver to save the defendant from himself.

We hold, therefore, that when a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right. A criminal defendant is entitled to a fair trial from the state, including due process. He is not denied due process by the state when such denial results from his own act, nor may the state be required to protect him from himself.

Id. at 177. This analysis applies exactly to the present case. The Prosecutor requested to reopen the Rule 3.5 hearing in order to answer a “technical matter” raised by the trial court that the state had not provided specific testimony as to what specific Miranda rights the Appellant was advised of. RP 33. When the Prosecutor made this request, defense counsel said: “I object, Your Honor. We have rested and decided our strategy in this case. We haven’t called our client to testify.” RP 33. The record clearly indicates that, for strategic reasons, defense counsel objected to the introduction of testimony about the specific Miranda rights of which the Appellant was advised. The Appellant cannot now claim that the state’s failure to introduce such testimony is reversible error, simply because the strategy was unsuccessful.

Following defense counsel’s objection to introducing more specific testimony about the Appellant’s Miranda warnings, the Prosecutor stated that the testimony was sufficiently clear that the Appellant had received adequate Miranda warnings. RP 33. The court agreed and stated that “without the issue being raised” by the Appellant, he didn’t think that the lack of specificity was a problem. RP 33. During that colloquy, defense counsel never retracted his objection nor indicated that he believed in any way that the Miranda warnings or the testimony regarding them were deficient. He did not ask questions in cross-examining Trooper Armstrong to

clarify the specific rights of which the Appellant was advised, though he had ample opportunity to do so. In fact, in arguing a motion in limine, seeking to suppress some of Appellant's post-arrest statements, defense counsel acknowledged that Trooper Armstrong had written in the police report that he "read the constitutional rights[.]" RP 45. If the Appellant believed that more testimony as to her Miranda warnings was needed, she should not have objected to its introduction before the trial court. Accordingly, this court should not countenance any appeal flowing from the failure to provide more specific evidence about Appellant's Miranda warnings.

3. The Defendant Failed to Make an Unequivocal Request for an Attorney Sufficient to Require the Cessation of Questioning

"[T]he Fifth Amendment privilege against self-incrimination must be asserted; it is not self-executing." State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988) (citing Garner v. United States, 424 U.S. 648, 654 n.9 (1976)). If the accused requests an attorney, questioning must cease until an attorney is present. Miranda, 384 U.S. at 474; Edwards v. Arizona, 451 U.S. 477, 482 (1981). However, the right to counsel must be "clearly asserted" to bar re-interrogation of the defendant and require the suppression of subsequent statements. Edwards, 451 U.S. at 485. Appellant is correct that a waiver of the right to counsel during interrogation

may not be induced by a misstatement of the rights of the accused. State v. Tetzlaff, 75 Wn.2d 649, 652, 453 P.2d 649 (1969) (warnings were given to the effect that the accused had a right to an attorney only if charged with a crime). However, there is no indication in the record that there was such a misstatement in the present case.

The accused must invoke the right to counsel through unequivocal language to make it effective. The United States Supreme Court held:

The applicability of the "'rigid' prophylactic rule" of Edwards requires courts to "determine whether the accused actually invoked his right to counsel." Smith v. Illinois, supra, at 95 (emphasis added), quoting Fare v. Michael C., 404 U.S. 707, 719 (1979). . . . [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer, in light of the circumstances, would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. See ibid. ("the likelihood that a suspect would wish counsel to be present is not the test for applicability of Edwards"); Edwards v. Arizona, supra, at 485 (impermissible for authorities "to reinterrogate an accused in custody if he has clearly asserted his right to counsel") (emphasis added).

Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Smith v. Illinois, 469 U.S., at 97 -98 (brackets and internal quotation marks omitted). Although a suspect need not "speak with the discrimination of an Oxford don," post, at 12 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer, in the circumstances, would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the

suspect. See *Moran v. Burbine*, 475 U.S. 412, 433 , n. 4 (1986) ("the interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).

We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. See *Arizona v. Roberson*, supra, at 688 (KENNEDY, J., dissenting) ("the rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion"). The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation. . . . We also noted that, if a suspect is "indecisive in his request for counsel," the officers need not always cease questioning. See *id.*, at 485.

Davis v. United States, 512 U.S. 452 (1994) (emphasis supplied). This language makes clear that an indecisive or equivocal statement about an attorney does not require the cessation of questioning. As the Supreme Court of Washington stated in *State v. Grieb*, 52 Wn. App. 573, 576, 761 P.2d 970 (1988), "equivocally stated desires are of no moment." The *Davis* Court applied this rule to facts strikingly similar to the present case and concluded that the Appellant's alleged request for counsel was insufficient to require the cessation of questioning:

The courts below found that petitioner's remark to the NIS agents - "Maybe I should talk to a lawyer" - was not a request for counsel, and we see no reason to disturb that conclusion. The NIS agents therefore were not required to stop questioning petitioner, though it was entirely proper for them to clarify whether petitioner in fact wanted a lawyer.

Davis v. United States, 512 U.S. 452 (1994) (emphasis supplied). Similarly, in State v. Smith, 34 Wn. App. 405, 409, 661 P.2d 1001 (1983), the Court of Appeals specifically found that the question "[d]o you think I need an attorney?" was an equivocal request, requiring further clarification.

In the present case, the officer testified that the Appellant "asked if she should say anything without talking to a lawyer and I told her it was up to her." RP 9. The Appellant's equivocal statement does not materially differ from the equivocal statements evaluated in the Davis and Smith cases, and clearly was not an effective assertion of the right to counsel sufficient to terminate questioning. The Appellant's statement can easily be distinguished from the situation in State v. Chapman, 84 Wn.2d 373, 375, 526 P.2d 64 (1974), where the accused had asked for an attorney "now" or State v. Grieb, 52 Wn. App. 573, 574 761 P.2d 970 (1988), where the accused had stated repeatedly "I don't wanna waive my rights" but the police continued to question him anyway.

When Trooper Armstrong arrived at the County Jail with the Appellant, he attempted to clarify her equivocal statement, asking directly "if she wanted to call her attorney." RP 10, 19. The Appellant "stated that she did not have his home number and didn't know how she was going to get a hold of him." RP 10, 19. Trooper Armstrong suggested that the Ap-

pellant could call his answering service. RP 10, 19-20.³ In reply, the Appellant inquired what would be taking place. RP 10, 20. When told that she would be processed for a DUI and other criminal offenses, “[s]he stated that she would call the attorney later that day when he got in the office” implying that Trooper Armstrong could “move forward with the paperwork” and that Appellant would get her attorney involved at a later time. RP 11. This was the factual finding of the trial court. Supp. CP, Sub. No. 59 ¶¶ 7-8.

The Supreme Court has held that a police officer need not go out of the way to put an accused person in touch with his/her attorney if s/he has knowingly consented to answer questions without an attorney. The court held that the police need not even inform the accused that his/her attorney was immediately available and waiting within the same building to talk to the accused because, “[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.” State v. Bradford, 95 Wn.App. 935, 978 P.2d 534 (1999) (quoting Moran v. Burbine, 475 U.S. 412, 422 (1986)). While the lateness of the

³ Although the Appellant made no unequivocal expression of desire for a lawyer, Trooper Armstrong’s offer to allow her to call his answering service would have met the requirement of Criminal Rule 3.1(c)(2) that the “person in custody who desires a lawyer shall be provided access to a

hour and the Appellant's assumption of her attorney's unavailability may have affected her willingness to go ahead with the DUI processing without the attorney's assistance, her consent was nonetheless voluntary. This contention is strengthened by the fact that Trooper Armstrong clearly indicated to the Appellant that it was her decision whether to speak to her attorney before answering further questions, RP 9-10, 19, and specifically asked her if she wanted to call him on the telephone. RP 10, 19.

4. The Prosecutor's Brief Statement that the Jury Was Not to Consider Sentencing in its Determination of Guilt did not Create Reversible Error

The Appellant argues that the following language in the Prosecutor's closing argument is improper:

One of your [jury] instructions states, I think it is Instruction No. 1, it talks about how you have nothing whatever to do with any punishment that may be imposed in case of a violation of law; the fact that punishment is irrelevant to you.

So the fact that if the defendant is convicted and if she is ordered to perform community service or something like that, that's not to enter into it.

RP 177; see Appellant's Br. at 27. The Appellant's trial counsel objected to the above-quoted argument. The court sustained the objection and instructed to Prosecutor to move on. RP 177. The Appellant correctly noted

telephone.”

that the Court of Appeals has held that raising the possibility that the accused may receive probation may be improper.

Prosecutorial argument that an accused may receive probation is generally considered to be improper, and the issue then arises whether the impropriety has been prejudicial. See *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948); *Fryson v. State*, 17 Md. App. 320, 301 A.2d 211 (1973); Annot., 16 A.L.R.3d 1137, 1140 (1967).

State v. Torres, 16 Wn. App. 254, 262, 554 P.2d 1069 (1976). The Appellant relies heavily on that ruling for its contention that the Prosecutor's comments warrant reversal in the present case. However, in Torres, the impropriety was found to create reversible error because the prosecutor was, "continuing to underscore the irrelevant argument in the face of the consistent sustaining of objections to the argument by the trial judge" and "[t]here comes a time, however, when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error." Id. at 263. In the present case, after the trial court sustained defense counsel's objection, the Prosecutor did not persist in underscoring the fact that the Defendant might receive a light sentence and, in fact, stated that the jury was "not to consider any potential punishment of the defendant in this case." RP 177.

In order to constitute reversible error, an improper argument must create "a 'substantial likelihood' the prosecutor's comments affected the

verdict.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing State v. Reed, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984) aff’d, 199 Wn.2d 711, 837 P.2d 599 (1992)); State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984); State v. Music, 79 Wn.2d 699, 715, 489 P.2d 159, 169 (1971); State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991), review denied, 118 Wn.2d 1007 (1991). “If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” State v. Case, 49 Wn.2d 66, 74 298 P.2d 500 (1956).

“The burden of proving such prejudice rests with the defense.” Barrow, 60 Wn. App. at 876. The defense has demonstrated no prejudicial impropriety in the present case. Any implication by the Prosecutor that the defendant might receive a light sentence was very vague, and was in the context of advising the jury not to consider possible sentencing in the determination of guilt or innocence. RP 177.

The Appellant relies on Davenport, 100 Wn.2d at 763, for the proposition that “[t]he prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” In Davenport, however, when the prosecutor misstated the law, the court overruled the defendant’s objection. Id. at 759. In the present case, the Prosecutor did not misstate the law and, in fact, merely reiterated

the instruction that the jury was not to consider possible sentencing during its deliberations. RP 177. Unlike Davenport, the trial court in the present matter sustained defense counsel’s objection. RP 177. The trial court explicitly found that the potential impact of the Prosecutor’s statement about sentencing “cuts both ways” and that any potential prejudice resulting from it was “de minimous [sic].” SRP 6. Based on his interaction with the jury, Judge Nichols found that the jury members had “kept their eye on the ball and followed the court’s instructions[.]” SRP 6. A legal presumption favors the court’s finding:

[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). “The jury is presumed to follow the instructions of the court.” Id. at 499. As the Supreme Court stated in State v. Mak, 105 Wn.2d 692, 699, 718 P.2d 407 (1986), “the trial court has broad discretion in determining whether the challenged portion of the argument affected the jury’s verdict, and the burden of showing prejudicial error is on the defendant.” The only evidence of prejudice presented by the Appellant is a vague reference to the hearsay of one or more jurors that may have remarked that the charges in the underlying

ing case were not terribly serious. Appellant's Br. at 28. That is hardly the type of solid evidence needed to overcome the powerful presumptions articulated above. Accordingly, the trial court's finding that no prejudice resulted from the prosecutor's statement about sentencing should be sustained.

5. Any Alleged Error by the Trial Court in this Matter was Harmless and Does Not Require Reversal

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.

State v. Gutierrez, 50 Wn. App. 583, 589-90, 749 P.2d 213 (1988). Even if all of the Appellant's post-Arrest statements and the Prosecutor's request that the jury not consider the Defendant's potential sentence had been kept from the jury, the Appellant would have been convicted anyway. The record contains conclusive scientific evidence that the substance found in the Appellant's purse was cocaine. RP 83-123. It has never been alleged by the Appellant that she was not in possession of the cocaine as testified to by Trooper Armstrong. RP 50-83. Defense counsel speculated that Trooper Armstrong may have lied about finding the cocaine. His proffered evidence for that argument was that Trooper Armstrong may have seemed angry on the night of the arrest, the fact he did not find drugs elsewhere within the Appellant's immediate control, and the fact that he

did not have a female officer do the pat-down search of the Appellant or produce fingerprints for the vial containing the cocaine. 178-84. In virtually every case, the police have an opportunity for mischief if they are so inclined. However, the Appellant provided no affirmative evidence leading to a reasonable belief that Trooper Armstrong might have done something wrong. Appellant's speculative statements do not create reasonable doubt in the absence of affirmative evidence of police misconduct, which was entirely absent in the case.

The court noted, and appellant agreed, that the privilege against self-incrimination embodied in the Fifth Amendment extends only to testimonial or communicative evidence and does not protect an accused from being the source of real or physical evidence against himself. Moore, at 55 (citing *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); *United States v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967)). *Schmerber* held that blood tests to determine alcoholic content are not testimonial or communicative in nature and, thus, compelling such tests does not violate the Fifth Amendment. *Schmerber*, at 765. However, appellant urged the court to hold that compelling a Breathalyzer test violated his privilege against self-incrimination under article 1, section 9.

State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991). The testimonial evidence in the present case that Trooper Armstrong found a vial in the Appellant's purse was unrefuted by anything but wild speculation. The physical evidence that the vial contained cocaine is simply overwhelming. Even if true, none of the Appellant's allegations of tainted evidence would

affect Trooper Armstrong's testimony that he found the vial in the Appellant's purse, or the physical evidence that the vial contained cocaine. The jury concluded, as it should have, that the Appellant was in possession of cocaine prior to her arrest.

The only argument that the Defendant's possession of cocaine may have been unwitting arose from the unsubstantiated assertion of the defendant that other people at her place of employment had access to her purse and, therefore, opportunity to put the cocaine there. RP 137-144, 147-149. However, none of the people who supposedly had access to the Appellant's purse were called to testify at trial to confirm the Appellant's assertion. RP 173-75. In the absence of corroborating evidence, the jury concluded, as it should have, that the Appellant did not meet her burden to prove that her possession of the cocaine was unwitting. Again, the Appellant's failure to provide evidence to corroborate her explanation of her cocaine possession would be completely unaffected by any of the errors asserted in this appeal. Therefore, even if the Appellant's allegations of error were valid, the errors would be harmless and would not require reversal.

CONCLUSION

Based on the analysis set forth above, the State respectfully requests that this court uphold the trial court's holdings and affirm Warren's conviction.

Respectfully submitted this 30th day of December, 2002.

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CERTIFICATE

I certify that I mailed a copy of the attached document to this COURT and NANCY P. COLLINS, Appellant's attorney, at :

**WASHINGTON APPELLATE PROJECT
1305 Fourth Ave., Suite 802
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postage prepaid, on _____, 2003.

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