NO. 44502-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD E. FREBS,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUE

Did the testifying deputy make a comment on the appellant's right to silence and violate his due process rights when the testimony was in regards to non-testimonial evidence of driving while under the influence and argument and comment upon the appellant's refusal to provide that evidence as required by statute is permissible?

II. ANSWER

No. The comment was regarding non-testimonial evidence, not protected by the Fifth Amendment.

III. STATEMENT OF THE CASE

On January 13, 2011, Richard Krebs was charged with felony hit and run and driving while under the influence. CP 1-2. The State amended those charges to add two counts of felony harassment and one count of reckless driving. CP 4-6.

On March 16, 2012, Richard Krebs was found guilty of two counts of Felony Harassment, threats to kill, one count of reckless driving, and one count of driving while under the influence. CP 69. And though evidence had been admitted at trial that showed he failed to remain at the

scene of a collision, after being informed that he had injured an individual, he was found not guilty of felony hit and run. CP 4. 69.

At trial, the State presented evidence from Robert McEldoon, Scott Keately, Tom Ryan, James Barton, Ken Sellers, and Cowlitz County Sheriff deputies, Lorenzo Gladson and Brady Spaulding.

On January 10, 2011, Richard Krebs was involved in a one car rollover-collision on a logging road. RP 205-06. This collision was the result of an extended incident of road rage that took Mr. Krebs from Highway 503, Lewis River Road, traveling east from Woodland, Washington towards Cougar, Washington and into the back roads of logging country. RP 66-131.

Ken Sellers was a trucker involved in several incidents with Mr. Krebs, which included being hit by Krebs's vehicle. Sellers described that his initial contact with Krebs happened when he stopped his logging truck on Highway 503 because he thought he may have kicked up some rocks onto Krebs's vehicle, a black Honda Element, after he passed it. RP 66, 70-76. He said the Honda pulled up and tailgated him to where he could not see the vehicle in his rearview mirrors. RP 72-73. He said that the vehicle was so close to him that had he slammed on his brakes the vehicle would have hit him. RP 73. Sellers pulled his logging truck over, stepped out to see what was wrong, and asked if he had done something wrong. RP

77. Krebs then drove at and hit Sellers with his vehicle's side mirror, before he stopped his vehicle. RP 78-82. Krebs tried to step out of his vehicle, but Seller prevented him from doing so. Krebs then said told Sellers that they had issues, fixed his mirror, and drove away after Sellers told him that they need to involve law enforcement. RP 85-89.

Sellers then described that on two occasions Krebs drove towards him in the westbound lane of Highway 503 and played a game of high-speed chicken. RP 94-97. He later identified the overturned vehicle as the same that chased him, hit him, and then played chicken with him. RP 98, 101.

James Barton spoke with Sellers following the incidents. RP 124-25. He described the emotional state Sellers was in. Barton described Krebs's erratic driving. He testified that Krebs crossed double yellow lines and forced oncoming cars onto the shoulder of the road. RP 129. Barton was able to identify Krebs when Krebs followed him into the logging roads, stopped and glared at him. RP 132-35.

Not surprisingly, Krebs was involved in a collision. Before Cowlitz County Sheriff deputies arrived at the scene, two loggers, Robert McEldoon and Scott Keatley, attempted to assist Mr. Krebs, who was trapped in his vehicle, unable to escape. RP 143-48.

As they assisted Krebs, both McEldoon and Keatley detected the scent of consumed alcohol coming from his person. RP 145-46, 166, 172. They also noted that his responses were delayed, his speech was slurred, and he had difficulty understanding their questions. RP 147, 172. They also described how Krebs had difficulty finding the ignition of the vehicle that was on the steering wheel. RP 149.

McEldoon described Krebs as erratic, suicidal, and belligerent. RP 151, 167-68.Krebs told the McEldoon and Keatley that they had better get away from the vehicle, because he was going to kill them. RP 153. McEldoon stepped away from the vehicle because he was concerned for his safety, and, as he said, he needed to make sure that he went home that night. RP 154. He then told Keatley to get down from the vehicle and they waited for law enforcement to arrive. RP 154-55.

Keatley recalled Krebs saying "I'm going to fucking kill you" to the responding paramedic. RP 168-69. He then recalled Krebs turning to McEldoon and tell him to get away from the vehicle because he was going to kill him. RP 169. Krebs then turned to Keatley and said "and I'm going to fucking kill you, too." RP 170. This concerned Keatley, but when Krebs started to put his hands in his pockets he left the vehicle because he did not want to get killed. RP 170. When asked if he thought it possible, Keatley said that Krebs informed him he had a grenade. RP 171.

Tom Ryan was a paramedic who attended to Krebs as he was driven to the hospital. He described Krebs as less than cooperative, that he declined medical help, and that his demeanor vacillated between cooperative to unpleasant. RP 186-88. He also testified that Krebs admitted to the consumption of alcohol. RP 188-89.

Deputy Lorenzo Gladson responded to the scene of the collision. RP 192-99. He described the safety concerns associated with arriving at scenes where a suspect had threatened suicide. RP 193-96. Because of the threats of suicide and the threats against the lives of other witnesses, he and Deputy Spaulding formulated a plan to extract Krebs from his vehicle. They took certain precautions. RP 196. When he reached into the vehicle to grab Krebs, Gladson noticed the strong odor of intoxicants. RP 197-98. As he escorted Krebs to the ambulance that was on scene, Gladson continued to notice the odor of intoxicants coming from Krebs. RP 198. Because of Krebs's unwillingness or inability to walk, both Gladson and Spaulding had to carry him up the hill. RP 199. He described Krebs's coordination as poor and that Krebs would not stand up and that he was argumentative. RP 199.

On direct examination, Deputy Spaulding also testified that Krebs exhibited several signs of intoxication. RP 212-22. He described that when he opened the door of Krebs vehicle he noticed the scent of consumed

alcohol, RP 210, when he broke open the window of the vehicle to extract Krebs he noticed the scent of alcohol, RP 212, and when Krebs it was obvious the scent of consumed alcohol was coming from his person. RP 212, 214. He described Krebs as unhappy and uncooperative, which was uncharacteristic of people who had been in a collision. RP 214-16. Krebs was so uncooperative, that Deputy Spaulding removed himself from the ambulance so that Krebs could receive medical attention. RP 216.

Spaulding once again smelled the odor of intoxicants coming from Krebs, when he returned to the ambulance after 10 minutes and opened the back door. RP 216-17.

Spaulding attended to Krebs at the hospital. RP 218. At that point, Krebs staggered around the observation area, as he did so, he shuffled and stumbled over his feet. RP 218-19. In fact, Krebs had to hold onto the walls of the observation room for support. RP 219. Krebs's face was flushed, he had watery, bloodshot eyes, and his breath still emitted the scent of alcohol as he spoke with slurred speech. RP 219-20. Spaulding testified that these observations were indicators of intoxication. RP 219.

Spaulding advised Krebs of his Miranda rights and Krebs waived them and he agreed to speak with the deputy. RP 221. Krebs then described the incident with Sellers. RP 221, 225. Krebs also stated that he had consumed fourteen beers, but then changed his story and stated he did

not have a drink. Krebs was then confronted by Spaulding with the observations of intoxication, and again stated that he did have a drink. RP 226.

Spaulding then read Krebs his implied consent warnings for blood. RP 226. At that time, Krebs refused to give blood and requested an attorney. During testimony, Deputy Spaulding stated that based on his observations he felt Krebs was under the influence. RP 226. Deputy Spaulding was then asked if he did not get blood from Krebs, to which he responded "I did not. He refused; he lawyered up at that point. "RP 226.

At that point Defense counsel objected. RP 226. The comments were determined to be an indirect comment on Krebs's right to silence and mistrail was denied. RP 241-42. After the trial court's ruling, the State made no further inquiries or any mention of Krebs's refusal to submit to a blood draw.

IV. ARGUMENT

In Washington, a defendant's constitutional right to silence applies in both pre and post-arrest situations. *State v. Easter*, 130 Wash.2d 228, 243. 922 P.2d 1285 (1996). An impermissible comment on a defendant's right to silence occurs when the State uses a defendant's constitutionally guaranteed right to its advantage and to suggest that silence was an

admission of guilt. *State v. Lewis*, 130 Wash.2d 700, 707, 927 P.2d 235 (1996).

1. A refusal to submit to field sobriety tests is not protected under the Fifth Amendment.

Here, when asked if the he was able to obtain blood from the defendant, Officer Spaulding stated he did not get blood and that Krebs "refused. He lawyered up." The answer was in response to a line of questioning devoted Krebs's refusal to provide a blood sample, as required under RCW 46.20.308. The fact of that refusal is admissible into evidence at trial and can be argued to a jury. RCW 46.61.517. Furthermore, field sobriety tests are non-testimonial, *State v. Smith*, 130 Wash.2d 215, 223, 922 P.2d 811 (1996), and produce only real or physical evidence rather than communicating testimonial evidence. *City of Mercer Island v. Walker*, 76 Wash.2d 607, 612-13, 458 P.2d 274 (1996). Krebs's refusal to provide a blood sample, as required by statute, was no more testimonial than had he actually performed the test.

A refusal to submit to sobriety tests is not a statement communicating testimonial evidence. Indeed, a refusal is conduct that indicates a consciousness of guilt. *City of Seattle v. Stalsbroten*, 138 Wash.2d 227, 978 P.2d 1059 (1999)(*quoting Newhouse v. Misterly*, 415 F.2d 514, 518 (9th Cir.1969))(discussing refusal evidence in the context of

blood alcohol tests). Refusing to take a particular sobriety test "merely exposes a defendant to the drawing of inferences, just as does any other act." *Stalsbroten*, 138 Wash.2d at 235;(*quoting State v. Wright*, 116 N.M. 832, 835, 867 P.2d 1214, 1216 (Ct.App.1993)).

In *Stalsbroten*, the Supreme court held that a defendant's refusal to take a field sobriety test does not communicate a perception of intoxication, and is no more testimonial than the actual performance of a field sobriety test. 138 Wash.2d at 234, 978 P.2d 1059. The Court reasoned that the argument that a refusal to take an FST communicates the suspect's belief that the test will produce evidence of his or her guilt confuses reasonable inferences with communications. 138 Wash.2d at 234 (*citing to Welch v. District Court of Vt.*, 461 F.Supp.592, 595 (D.Vt.1978)). Indeed, the court stated clearly that evidence of the refusal and of the words of refusal, standing alone, do not constitute testimonial evidence of any thought, reason or excuse for the refusal. Moreover, the Court held that because a defendant's refusal to perform an FST is not testimonial evidence, Fifth Amendment protections do not apply. Id at 235.

Here, the refusal included a request for an attorney. Rather than submitting to the blood draw, as required by law, Krebs requested counsel. Through his testimony, the Deputy did not suggest Krebs would not speak

with him, nor imply Krebs's guilt through the refusal. Rather, the officer gave the reason he did not obtain blood from the defendant. Following that explanation. no other reference was made to Krebs's request for an attorney, nor was any reference direct or indirect to Krebs's right to silence made.

2. Even if the Court does not find the comment as a reference to non-testimonial evidence of refusal, it was an indirect comment on the defendant's right to silence.

An officer's indirect reference to the defendant's silence is not error absent further comment inferring guilt. *Lewis*, 130 Wash.2d at 705-07, 927 P.2d 235. A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. *Lewis*, 130 Wash.2d at 707 (most jurors know that an accused has a right to silence and would not derive guilt from a defendant's silence, absent prosecutorial comment).

In *State v. Portoff*, 138 Wash.App. 343, 156 P.3d 955 (2007), the Court of Appeals held that the officer's comment on the defendant's right of silence was harmless error where the officer provided a non-responsive answer to the prosecutor's question. Portoff was charged with Assault in

the third degree for hitting a person on the head with his cane and claimed self-defense. The investigating officer testified that he had advised the defendant of his rights and spoke freely with him regarding the incident. 138 Wash.App. at 345-46. At one point, the prosecutor asked the officer what had happened after the conversation with the defendant concluded. The officer testified that he asked the defendant whether he had struck the victim with his can and that the defendant said that he wanted to invoke his right to silence. The State did not pursue the line of questioning and did not argue the invocation in closing. Id. at 346.

Following the *Romero* guidelines, the Court first determined that the comment the comment was a direct comment on the defendant's right to silence. *See State v. Romero*, 113 Wash. App. 779, 54 P.3d 1255 (2002). It then applied the harmless error standard, and found the comment did not undermine the defendant's claim of self-defense. *Portoff*, 138 Wash.App. at 348.

Here, the comment was made during testimony regarding the investigation of a DUI, not the other crimes the defendant was charged with. The prosecution of DUI permits the use of a refusal of tests as evidence, whether those tests are roadside field sobriety tests or tests designed to measure a suspect's blood alcohol content. When Deputy Spaulding made the reference to Krebs's request for an attorney, he had

just described to the court how he had informed Krebs of his implied consent warnings for blood. Krebs had exhibited several indicators of intoxication and consumption of alcohol, and he admitted to consuming 14 beers, including a half a beer while driving as he wrecked his vehicle. RP 218-26. The questioning of Deputy Spaulding went as such:

Prosecutor: You then placed him under arrest?

Spaulding: At that point, I read him his implied consent for blood.

Prosecutor: Okay. and…

Spaulding: Given my observations and belief that he was under the influence.

Prosecutor: Alright. So, you did not get blood from him?

Spaulding: I did not. He refused. He lawyered up at that point.

While non-responsive to the State's question, the deputy's answer was a description of how the Krebs refused to comply with the requirements of the implied consent warnings and refused to provide a blood sample.

Applying the Romero guidelines to determine whether a comment rises to constitutional proportions, the Court should first consider whether the comment could reasonably be considered purposeful and responsive to the State's questioning, with even a slight inferable prejudice to the

defendant's claim of silence. *Romero*, 113 Wash.App. at 791, 54 P.3d 1255(*citing State v. Curtis*, 110 Wash.App. 6, 13-14, 37 P.3d 1274 (2002)).

Next, the Court should determine whether the comment could reasonably be considered unresponsive to a question posed by the examiner. When reviewing the comment in this context, the Court should also inquire whether the comment was (a) given for the purpose of attempting to prejudice the defense, or (b) resulting in the unintended effect of likely prejudice to the defense. *Romero*, 113 Wash.App. at 791, 54 P.3d 1255 (*citing Douglas v. Cupp*, 578 F.2d 266, 267(9th Cir.1978)). Finally, the Court should enquire whether the indirect comment was exploited by the State during the course of the trial, including argument, in an apparent attempt to prejudice the defense offered by the defendant. *Romero*, 113 Wash.App. at 791(citing State v. Easter, 130 Wash.2d 228, 236, 992 P.2d 1285 (1996)).

If the court answers yes to any one of the three guidelines, the indirect comment is an error of constitutional proportion and should be reviewed using the constitutional harmless error standard. Easter, 130 Wash.2d at 241-42, 922 P.2d 1285. If no is answered to all three questions, a non-constitutional error standard of review applies. *Romero*,

113 Wash.App. at 791 (*citing State v. Sweet*, 138 Wash.2d 466, 481, 980 P.2d 1223 (1999).

First, as Krebs concedes, Deputy Spaulding's comment was not responsive to the State's questioning. Spaulding was asked if he did not get blood from Krebs. The question required a simple yes or no answer, but Deputy Spaulding stated Krebs refused by lawyering up. Still, the answer was not a comment on the right to silence, but a refusal to provide blood as required by statute. Any comment on Krebs's refusal is not prejudicial because the fact of a refusal can be argued as substantive evidence at trial. RCW 46.61.517. Certainly, the response was clumsy but not intentional nor prejudicial, because the fact of the refusal would have been admitted into evidence regardless.

The comment was not used by the State during the course of the trial. Moreover, the State and the trial court agreed to not make further use of the comment in the trial or closing argument. RP 242. Indeed, the trial court did not instruct the jury refusal nor did the State argue refusal in closing to prove DUI; instead, the State argued the facts of intoxication.

Having established that the comment was unresponsive and that State did not exploit the comment during trial or closing arguments, the only enquiry the Court should make is whether the comment was given for

the purpose to prejudice Krebs or whether it resulted in unintended prejudice.

The answer to the first part is no. However, the answer to second part is more complicated. Compared to Romero, where the officer testified that he had read the Miranda warnings to the defendant "which [the defendant] chose not to waive, would not talk" to the officer, the Court ruled that the comment was a direct comment on the defendant's right to silence. 113 Wash.App. at 793. The court further reasoned that even if indirect, the comment did not pass the second guideline because, though unresponsive and volunteered, it indicated an attempt by the officer to prejudice the defendant. Id.

Unlike *Romero*, Deputy Spaulding's comment was in relation to the implied consent warnings, not Krebs's rights as provided to him under Miranda. Though Spaulding had informed Krebs of those rights, RP 220, and Krebs had waived them and chose to speak with Spaulding, those rights are considerably different than the warnings for blood or breath. Furthermore, the questioning during trial had moved from testimony of any conversation between Krebs and Deputy Spaulding and on to the requested search for evidence of the crime of Driving while under the influence. Consequently, the statement was not in reference to remaining

silent but to a refusal to provide actual, physical evidence: evidence that is non-testimonial in nature.

3. **The comment was harmless error.**

Prejudice that results from an indirect comment should be reviewed using the non-constitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome. *Romero*, 113 Wash.App. at 791-92, 54 P.3d 1255. However, if the Court finds the comment to be a direct reference to Krebs's constitutional right to silence, then it should review if the error was harmless. Such an error should be reviewed beyond a reasonable doubt. *Romero*, 113 Wash.App. at 790, 54 P.3d 1255.

Even if the court finds Deputy Spaulding's non-responsive answer to be a direct comment on Krebs's right of silence, there is nothing in the record to suggest the State exploited the answer for substantive evidence of guilt. In *Portoff*, the court held that because the State moved directly away from the officer's comment and did not use the officer's direct comment on the defendant's right to silence that the error was harmless. The court further reasoned that the comment did not directly follow testimony of *Miranda* warnings, which distinguished it from *Romero*. 138 Wash.app. at 348.

Similar to the defendant in *Portoff*, Krebs agreed to waive his rights, spoke at length with Deputy Spaulding regarding his driving, the consumption of alcohol, and the incidents being investigated. It was not until Deputy Spaulding informed the defendant of his implied consent warnings for blood that he requested an attorney and refused to provide that evidence.

While the current case is not an issue of assault, the reasoning in *Portoff* is instructive when determining that the comment was in any case harmless error beyond a reasonable doubt.

The State has shown beyond a reasonable doubt that the defendant was driving a vehicle and that he did so in a reckless manner that endangered the safety of a human being, while exhibiting the signs of intoxication and impairment. Moreover, the State showed that Krebs threatened the lives of two responders who, not knowing Krebs or what he was capable of and only knew him for his threats and statement that he had a grenade, reasonably believed that he could carry out his threats to kill.

Deputy Spaulding's comment had nothing to do with the threats made to the two responders, and there was no argument from defense counsel that it did. Indeed, the comment was only germane to the charge of Driving While under Influence, because it was regarding his refusal to

provide blood. Excluding that evidence, the testimony from several witnesses that described the Krebs`s behavior, his blood shot eyes, the scent of intoxicants on his breath and within his vehicle was enough to suggest he was impaired by intoxicating liquor and or drugs. In addition, there was testimony regarding his overall driving which began with his aggressive, road-rage against Ken Sellers. There was testimony that he hit Sellers, caused an injury, and then failed to remain at the scene and provide assistance. Krebs was found not guilty for that count, Felony hit and run. Consequently, if the comment was error, it was harmless.

V. CONCLUSION

For the above reasons, the appellant's argument fails and his request for a new trial should be denied.

Respectfully submitted this 9 day of September, 2013.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 17th, 2013.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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