

63778-9

63778-9

NO. 63778-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
JACKSON MURIUKI,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MICHAEL J. FOX

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**BRIEF OF RESPONDENT**

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**A. STATEMENT OF THE ISSUE**

Did the prosecutor's argument about admissible consciousness of guilt evidence regarding Muriuki's refusal to take the breath test during closing argument deprive Muriuki of a fair trial when Muriuki fails to establish either a substantial likelihood that the argument was improper or that any possible misconduct affected the jury's verdict?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

The defendant, Jackson Muriuki, was charged with felony driving under the influence and driving while license suspended in the first degree on June 25, 2008. CP 1-6. Muriuki pled guilty to driving while license suspended in the first degree on June 17, 2009. CP 23-29. After trial, a jury found Muriuki guilty of felony driving under the influence on June 23, 2009. CP 48. He was sentenced on July 2, 2009. CP 56-64.

**2. STATEMENT OF FACTS**

Trooper George Englebright has been a trooper with the Washington State Patrol since 2002. 4 RP 14. As part of his law enforcement training, he has had substantial training to detect

drivers who are under the influence of alcohol and/or drugs. 4 RP 17-18. The training includes recognition of numerous alcohol impairment indicators such as physical observations, poor decision making, and inability to perform divided attention tasks. 4 RP 17-26. In addition, he takes refresher courses every two years and renews his certification. 4 RP 17. Trooper Englebright testified that he has made approximately 1000 stops where he has conducted field sobriety tests and that based on his investigation only about 300 of those drivers were arrested for DUI. 4 RP 21.

Trooper Englebright was on duty on the night of June 17, 2008. 4 RP 29. Around 10pm, Trooper Englebright watched as Muriuki made an unsafe turn from Highway 99 onto 192<sup>nd</sup>, and drove the wrong way into oncoming traffic lanes. 4 RP 30, 41, 47. The area where the defendant drove was just below the crest of a steep hill where oncoming traffic would not have been able to see Muriuki's vehicle coming. 4 RP 30-31. Trooper Englebright pulled in behind Muriuki and activated the patrol car's lights and sirens. 4 RP 44. Instead of moving into the correct lane of travel and pulling over to the right side of the road, Muriuki continued driving on the wrong side of the road and turned left into a parking lot. 4 RP 44.

Muriuki never made any attempt to correct his lane of travel. 4 RP 45. Muriuki's speed was approximately 10 mph. 4 RP 45.

As Trooper Englebright approached Muriuki's car, he noticed that the driver's window was down and he could smell an odor of intoxicants coming out of the car. 4 RP 53. There were two people in the car; Muriuki was in the driver's seat. 4 RP 53. Although the timing is unclear, Trooper Englebright instructed Muriuki to move his car forward into a parking stall. 5 RP 96-97.

Upon further contact, Trooper Englebright noticed that Muriuki's eyes were red and watery, and an obvious odor of intoxicants was coming from his breath. 4 RP 53-54. Based on these physical observations and the dangerous driving, Trooper Englebright asked Muriuki if he was willing to submit to voluntary field sobriety tests. 4 RP 56.

Muriuki exited his car slowly and used the car to help himself out. 4 RP 57. Once out of the car, Muriuki had trouble balancing and "wobbled" on his feet. 4 RP 57. He grabbed onto the car door and the side of the car to steady himself. 4 RP 57. Trooper Englebright testified that Muriuki was not only grabbing the car for support, but also placing his weight on the car to steady himself. 4 RP 57.

The field sobriety tests were conducted in the motel parking lot. 4 RP 70. The parking lot had a slight grade, but Trooper Englebright did not have any problems keeping his balance when walking or standing in the parking lot. 5 RP 110-11. Trooper Englebright testified that a parking lot is an ideal location to conduct field sobriety tests. 5 RP 111. There was nothing in the motel parking lot that was problematic to conducting field sobriety tests at this location. 5 RP 111-12. Trooper Englebright did not have any visibility problems with the illumination in the parking lot and the weather was clear. 5 RP 113.

Trooper Englebright asked whether Muriuki had any injuries. 5 RP 38. Muriuki did not indicate he had any physical problems at that time. 5 RP 38. However, once back at the police department after the arrest, Muriuki stated he had back and knee problems that caused him to limp. 5 RP 130-31. There was no evidence that Trooper Englebright ever observed Muriuki limping.

The first field sobriety test conducted was the horizontal gaze nystagmus (HGN). 4 RP 57-58. Horizontal gaze nystagmus is an involuntary jerking of the eye caused by consumption of alcohol. 4 RP 58, 60-61. In each eye, Trooper Englebright observed lack of smooth pursuit, nystagmus at maximum deviation,

and the angle of onset was prior to 45 degrees. 4 RP 68-69. Out of six possible clues, the defendant exhibited all six clues of intoxication. 4 RP 70. Although there are other rare causes of nystagmus, there was nothing to indicate that Muriuki's nystagmus was caused by anything other than alcohol. 5 RP 44. The obvious odor of intoxicants continued to come from Muriuki's breath during this test. 4 RP 68. In addition, Muriuki swayed throughout this test. 4 RP 68.

The second field sobriety test conducted was the walk-and-turn. 4 RP 70. Just prior to performing the walk-and-turn, Trooper Englebright directed Muriuki to stand in the instructional position while giving instructions on how to perform the simple test. 4 RP 74. The instructional position requires a suspect to stand with one foot in front of the other and his arms down at his side. 4 RP 75. The instructional phase is important because, like the walk-and-turn test itself, it reveals whether a suspect's ability to multitask (stand in one spot while listening to simple directions) and ability balance are impacted by alcohol. 4 RP 74. Here, Muriuki was off balance from the beginning of the instructional phase. 4 RP 74. He could not stay in the instructed position and continually lost balance. 4 RP 74. In addition, he could not follow simple instructions as

evidenced by starting the test twice before instructed to begin. 4 RP 74.

In the walk-and-turn test, a suspect is instructed to walk nine steps forward, turn, then walk nine steps back in a line, touching heel-to-toe on every step and keeping the arms down at his/her side. 4 RP 75. A parking space line separator was used as the "line" in this case. 4 RP 70. Muriuki missed the heel-to-toe touch on every step. 4 RP 76. He also lost balance a total of five times during the 18 steps of the test causing him to step off the parking line. 4 RP 76. Muriuki failed this test. 4 RP 76.

The third field sobriety test was the one-leg stand. 4 RP 80. During the test, suspects are instructed to lift one foot off the ground using whichever foot is most comfortable for them and keep it raised 6 inches off the ground with their toe pointed until the trooper tells them to stop. 4 RP 80. Here, Muriuki was still off balance. 4 RP 80. He lost balance four times requiring him to put his foot down to regain balance. 4 RP 80-81. Rather than keeping his arms at his side as instructed, Muriuki raised his arms up over his head to help himself regain balance. 4 RP 81.

Trooper Englebright testified that based on his observations of Muriuki's driving, physical condition and performance on the field

sobriety tests, it was not safe to let Muriuki get back in his car to drive because he was impaired by alcohol. 4 RP 82.

Muriuki was arrested and read his Miranda<sup>1</sup> rights. 4 RP 83. He was transported to a local police department. 4 RP 84. Muriuki was again advised of his constitutional rights and advised of the implied consent warnings. 4 RP 84. The implied consent warnings inform suspects that their driver's license will be suspended for a year if they refuse the breath test. 4 RP 86. Muriuki refused to take the breath test. 4 RP 87. Although it was suppressed at Muriuki's request at trial, Muriuki told Trooper Englebright that he wasn't going to take the breath test because he didn't have a license anyway. 1 RP 26; 4 RP 3-5.

During his entire contact with Muriuki, Trooper Englebright testified that Muriuki's coordination was poor, he had slow speech, and he could not follow simple directions. 4 RP 81, 91. Trooper Englebright testified that Muriuki failed every field sobriety test. 4 RP 90. Muriuki did not simply have a slight odor of intoxicants on his breath, but rather had a strong and obvious odor of intoxicants on his breath. 4 RP 91. Based on his training and experience,

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<sup>1</sup> See Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966).

Trooper Englebright testified that Muriuki had obvious impairment due to the use of alcohol. 4 RP 92.

Muriuki testified at trial. 5 RP. He testified that he drank one Heineken beer before dinner and another with dinner. 5 RP 119. He said he stopped drinking 45 minutes before he was pulled over. 5 RP 142. He testified that he had smoked cigarettes in the car. 5 RP 126. He testified that he made the bad turn because his passenger gave him last second directions. 5 RP 128. Muriuki testified that he has knee problems and back problems and that he was limping on the night of the arrest. 5 RP 130-31. He also testified that he answered the standard DUI questionnaire where he informed Trooper Englebright of his physical issues. 5 RP 135.

On cross, Muriuki conceded that he does not normally wobble when he walks or when he stands still. 5 RP 143. He further conceded that he does not normally have problems with balance, does not normally sway, and does not normally need to grab onto objects to help himself balance. 5 RP 143-44.

Muriuki stipulated that he had been previously convicted of vehicular assault under the driving under the influence prong of the statute, although the language was sanitized for the jury. 5 RP 117.

**C. ARGUMENT**

**1. THE PROSECUTOR'S ARGUMENT WAS NOT MISCONDUCT SINCE MURIUKI FAILS TO SHOW IT WAS IMPROPER AND PREJUDICIAL.**

To prove prosecutorial misconduct, a defendant must show that the prosecuting attorney's conduct was both improper and prejudicial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (emphasis added). The prosecutor's comments are reviewed in context of the entire argument, the issues in the case, the evidence addressed in the argument and the jury instructions. State v. Carver, 112 Wn. App. 300, 306, 93 P.3d 947 (2004). To prove the conduct was prejudicial, the defendant must establish a substantial likelihood the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). If defense counsel fails to object to an improper remark, reversal is appropriate only if the remark is so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (2009).

- a. There Was No Prosecutorial Misconduct Since Muriuki's Refusal To Take The Breath Test

Was Admissible Consciousness Of Guilt Evidence.

In closing, the prosecutor argued at length about the numerous facts in evidence that proved that Muriuki was affected by alcohol. 5 RP 175-86. One of those many factors was Muriuki's refusal to take the breath test. 5 RP 186. The prosecutor pointed out that he refused to take the breath test even though he would lose his license for a year. 5 RP 186. The prosecutor argued that he didn't take the test because he knew he was under the influence of alcohol. 5 RP 186. Both of these statements were correct. Even if the defendant had already lost his license, he would have lost it for another year because of this refusal. If he was not under the influence of alcohol, he would have taken the test because he would have had nothing to hide. Here, the refusal was admissible consciousness of guilt evidence.

A refusal to take the breath test can be used against a defendant at trial. State v. Long, 113 Wn.2d 266, 267, 778 P.2d 1027 (1989); RCW 46.61.517. Refusal evidence is probative of guilt or innocence. Id. at 268. Courts may not exclude evidence of a refusal unless, under the facts of a particular case, the probative

value of the evidence is outweighed by the danger of unfair prejudice. Id. at 272.

Muriuki argues that the prosecutor's argument was improper because he did not take the breath test solely because he did not have a driver's license. Muriuki did not ask the court to suppress the refusal itself. Trooper Englebright testified that Muriuki refused to take the breath test. 4 RP 86. Trooper Englebright further testified that he advised Muriuki that he would lose his license for a year if he refused to take the breath test. 4 RP 84, 86. In addition, Muriuki himself testified he refused to take the breath test. 5 RP 134. Muriuki never offered any other evidence about his refusal to take the breath test, specifically that he didn't have a license anyway. 1 RP 26. In fact, the State sought to offer this statement since it shows that his judgment was impaired, but Muriuki objected and his statement was suppressed. 4 RP 3-5.

In sum, since the refusal was admissible consciousness of guilt evidence, there was no prosecutorial misconduct.

- b. Even if the Court Finds the Argument was Improper, Muriuki Fails To Establish A Substantial Likelihood That The Misconduct Affected The Jury's Verdict.

Even if this court finds that the comment was improper, Muriuki fails to establish a substantial likelihood that the misconduct affected the jury's verdict. Throughout the closing argument, the prosecutor spoke at length about numerous facts proving that Muriuki was affected by alcohol, emphasizing his decision to drive into oncoming lanes of traffic, the obvious odor of intoxicants on his breath, poor coordination, bloodshot and watery eyes, slow speech, continual inability to balance while standing up or walking, and failure of all three field sobriety tests. In other words, the defendant's refusal to take the breath test was only one of the numerous factors discussed by the prosecutor.

At trial and in his brief, Muriuki attempts to explain away signs of his intoxication. In his brief, he claims that the cigarette smoke caused the nystagmus (the involuntary jerking of the eye) rather than his consumption of alcohol. Brf. App. at 13. However, there is absolutely no evidence in the record that cigarette smoke causes nystagmus.

Muriuki claims that he failed the walk-and-turn because there was a downward slope in the parking lot. Brf. App. at 13. However, that argument is contrary to the evidence. Trooper Englebright testified that the ends of the parking lot were graded a

bit for what appeared to be proper rain water drainage. 5 RP 28. Although the parking lot had a slight grade, Trooper Englebright did not have any problems keeping his balance when walking or standing in the parking lot. 5 RP 110-11. In addition, even in light of the slight grade, there was nothing in the parking lot that was problematic to conducting field sobriety tests in this location. 5 RP 111-12.

Muriuki also argues that he could have failed the one-leg stand because of back and knee problems. Brf. App. at 13-14. During the test, it was Muriuki's choice to lift whichever foot was most comfortable for him. 4 RP 80. There is no evidence on the record that Trooper Englebright ever saw Muriuki limp. Rather, Muriuki had trouble balancing while standing on his own two feet throughout the contact. During the one-leg stand in particular, he lost balance four times requiring him to put his foot down to regain balance. 4 RP 80-81. In addition, rather than keeping his arms at his side as instructed, Muriuki raised his arms up over his head to help himself regain balance. 4 RP 81. Clearly Muriuki's failure of the one-leg stand was due to his intoxication.

Finally, Muriuki argues that he was not under the influence of alcohol because Trooper Englebright instructed him to pull forward

into a parking stall. Brf. App. at 14. Arguably, however, this occurred at the very beginning of their contact, not during or after the DUI investigation. Trooper Englebright testified that based on his investigation including his observations of Muriuki's driving, physical condition and performance on the field sobriety tests, it was not safe to let Muriuki get back in his car to drive because he was impaired by alcohol. 4 RP 82.

Based on the totality of the evidence presented at trial and discussed in closing argument, there is overwhelming evidence that Muriuki had been driving while affected by alcohol. Even if the Court finds that the comment was improper, Muriuki fails to establish a substantial likelihood that the misconduct affected the jury's verdict.

c. Even if the Court Finds the Argument was Improper, the Prosecutor's Argument Does Not Rise To The Level Requiring Reversal.

In the case at hand, Muriuki did not object to the prosecutor's comment during the closing argument and must accordingly show that the comment, if improper, was so prejudicial that a curative jury instruction could not have alleviated the error. He has not made such showing.

Had Muriuki objected at the time the comment was made, the court could have instructed the jury to disregard the comment. In addition, the error would have been brought to the prosecutor's attention and allowed her the opportunity to clear up the misstatement with the jury.

Muriuki has not shown that the prosecutor's comment could not have been cured by an instruction. Thus, the comment does not rise to the level of "flagrant and ill-intentioned" required for reversal. Muriuki's claim that the prosecutor engaged in flagrant misconduct fails.

**D. CONCLUSION**

For the reasons set out above, the State respectfully requests that the Court affirm the jury's verdict.

DATED this 3 day of June, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JACKSON MURIUKI, Cause No. 63778-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty H. Huddleston  
Name

6/3/10  
Date

Done in Seattle, Washington

6/3/10  
Dana Lind