

No. 65870-1-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICKLAS RIVAS,

Appellant,

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 COURT OF APPEALS
 STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

During the course of trial for a charge of DUI, the arresting officer testified Mr. Rivas refused to waive his Miranda¹ rights after arrest, and asked to speak with a lawyer before refusing a breath alcohol test. Mr. Rivas was found guilty. The State conceded this testimony was Constitutional error in response to Mr. Rivas' motion for discretionary review, but argued it was harmless error. This Court granted review. Mr. Rivas contends this error was not harmless, and the DUI conviction must be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial prosecutor violated Mr. Rivas' 5th and 14th Amendment rights by purposefully introducing testimony he refused to waive his Miranda rights after arrest, and requested to speak with a lawyer before deciding to refuse a breath test.
2. The error was not harmless.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the State improperly comment on a defendant's right to silence under the 5th and 14th Amendments where the arresting officer testifies the defendant refused to waive Miranda and asked to speak with a lawyer before refusing a breath test?
2. Is the introduction of such evidence at trial for DUI harmless beyond a reasonable doubt?

¹ 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

IV. STATEMENT OF THE CASE

King County Sheriff Deputy Paul Schene responded to the scene of a two car accident along International Boulevard in Seatac, Washington, at approximately 3 a.m., on June 4, 2005. (CP 270) One of the drivers involved, Nicklas Rivas, had the odor of intoxicants on his breath. (CP 273) He told the officer he had a couple of beers. (CP 274) The other driver - a taxi driver - and his passenger alleged Mr. Rivas caused the collision when he drove his vehicle into their lane. (CP 191; 212)

A second officer, Deputy David Jeffries, was called to the scene to investigate the potential DUI. (CP 355) While waiting for Jeffries, Deputy Laura Becker arrived to assist Schene. She had brief contact with Rivas, but concluded he was intoxicated. (CP 327-330) Jeffries contacted Rivas and noted signs of impairment; slurred speech, odor of intoxicants on breath, poor balance, blood shot watery eyes, and agitated aggressive behavior. (CP 356-361) The deputy elected not to perform sobriety tests out of officer safety concerns due to Rivas' alleged hostile behavior. (CP 360-361) Jeffries placed Rivas under arrest and placed him in his patrol car. (CP 361)

Inside the patrol car the deputy read Rivas a Miranda warning and an implied consent warning for a breath test. Jeffries drove Rivas to a local police department. (CP 362-363)

At the station Jeffries again read the Miranda warning and implied consent warning. The prosecutor elicited the following testimony, none of which was objected to by Rivas' attorney:

Q: And did he waive those rights?

A: No, he didn't. He actually asked for an attorney.

Q: Okay. And did you provide an attorney for him that day?

A: Yes, I did.

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Q: Okay. And following the conversation what happened?

A: Well, once that conversation is over with, I go back in and then make sure that he understands because once he's talked to the attorney, basically I don't ask any more questions except for information like his address and stuff like that, and ask him if he was -- you know, he was clear on what was going on, and he was. And then I asked him if he wanted to submit to the breath test.

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Q: Okay. And you finally -- and so, he talked on the phone. Did you -- at what point did you present the implied consent warnings that you spoke of earlier; was it before the conversation or after?

A: Actually it was both. I -- once we got to the police station, I presented a -- both to him because prior to him talking to the attorney, I want to make sure that he knows what to talk to the attorney about. So, I give him that information, and then I call the attorney, let him talk to the attorney, and then we go from there. (CP 374-376)

Following the conversation with the lawyer, Jeffries testified Rivas refused to submit to the breath test. (CP 395)

Rivas and three other witnesses testified. Rivas' brother testified he placed garbage bags that contained beer cans in Rivas' car prior to the accident. (CP 445-447) This explained why the officers found a partially full beer can in the car after arrest. The waitress who served Rivas dinner prior to the accident testified Rivas did not consume any alcohol during the several hours he was at the restaurant prior to the accident. (CP 450-454) Rivas' childhood friend, who was with Rivas for dinner, and followed Rivas in his own car, testified they did not consume any alcohol prior to the accident. (CP 470-474)

Rivas testified. (CP 497-530) He did not consume any alcohol prior to the accident. He believed the taxi driver was at fault for the accident. He denied being aggressive with Deputy Jeffries,

or calling him any derogatory names. No questions were asked regarding speaking with a lawyer or refusing a breath test.

The jury returned a guilty verdict. (CP 592-593) The jury returned a finding Rivas refused a breath test. (CP 594-595)

On RALJ appeal, appellate counsel raised issues related to corpus delicti, and ineffective assistance of counsel related to the corpus issue. The Superior Court affirmed the conviction. (CP 602)

Mr. Rivas filed a motion for discretionary review with this Court. He argued, under RAP 2.5(a)(3), that the prosecutor and officer violated his 5th and 14th Amendment rights by eliciting testimony he refused to waive Miranda rights and asked to speak with a lawyer before refusing a breath test.² The State responded, in part, by conceding the Constitutional error, but argued the error was harmless.³ This Court granted review.⁴

² Petitioner's Motion for Discretionary Review.

³ State's Response Opposing Motion for Discretionary Review; pg. 16.

⁴ Order Granting Discretionary Review.

V. ARGUMENT

1. Does the State improperly comment on a defendant's right to silence under the 5th and 14th Amendments where the arresting officer testifies the defendant refused to waive Miranda and asked to speak with a lawyer before refusing a breath test?

The issue in this case was aptly summarized by the Court in State v. Curtis, 110 Wn. App. 6, 10-11, 37 P.3d 1274 (2002):

Mr. Curtis contends his Fifth Amendment rights to remain silent and to receive counsel and his due process guarantee under the Fourteenth Amendment were infringed when the State called the jury's attention to his exercise of these rights. He contends this constituted an impermissible penalty on the exercise of his Miranda rights. And, as such, it violated the implied assurance that no negative consequences will attach to invoking these rights. Mr. Curtis contends the prosecutor deprived him of the presumption of innocence by deliberately soliciting evidence of his failure to waive his rights.

A claim of improper comment on a defendant's assertion of 5th Amendment rights is a claim of manifest constitutional error, which can be raised for the first time on appeal. RAP 2.5(a)(3); State v. Curtis, supra; State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Review is de novo. State v. Byers, 88 Wn.2d 1, 11, 558 P.2d 1334 (1977); *overruled on other grounds by* State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Once it is established that the alleged error is both constitutional and manifest, the Court considers the merits. State v. Jones, 71 Wn. App. 798, 809-810, 863 P.2d 85 (1993). The appellate court will review an error asserted for the first time on appeal if a cursory examination reveals a constitutional issue with practical and identifiable consequences in trial. State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001). The State has the burden of overcoming the presumption that a constitutional error is prejudicial. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

A. COMMENT ON ASSERTION OF RIGHTS AFTER ARREST PROHIBITED.

The right to be free from compelled self-incrimination is liberally construed. State v. Easter, 130 Wn.2d at 236. Our courts distinguish between comments on, as opposed to mere references to, a defendant's silence. State v. Porttorf, 138 Wn. App. 343, 346-347, 156 P.3d 955; State v. Slone, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006). A comment on silence occurs when a witness or prosecutor mentions a defendant's right to silence and the State uses the defendant's silence as evidence of guilt. See State v.

Lewis, 130 Wn.2d 700, 706-707, 927 P.2d 235 (1996); State v. Curtis, supra; (officer's testimony that after reading defendant his rights, defendant refused to talk and asked for attorney was comment on silence); State v. Romero, 113 Wn. App. 779, 785, 54 P.3d 1255 (2002); (testimony that "I read him his Miranda warnings, which he chose not to waive, would not talk to me" was a comment on silence). A mere reference to silence occurs when a witness or prosecutor references actions or statements that the jury could interpret as an attempt to invoke the right to silence. State v. Sweet, 138 Wn.2d 466, 480-481, 980 P.2d 1223 (1999); (officer's testimony that defendant said he would produce a written statement after discussing the matter with his attorney was an indirect reference to silence).

Once the suspect is arrested and Miranda rights are read, the State violates a defendant's Fifth and Fourteenth Amendment rights by introducing evidence of his exercise of Miranda rights as substantive evidence of guilt. State v. Easter, at 236. The reason for this is that the government, in reading these rights, implicitly assures the accused that he may assert his rights without penalty. Easter, at 238; citing Doyle v. Ohio, 426 U.S. 610, 618-619, 96

S.Ct. 2240, 49 L.Ed.2d 91 (1976). Either eliciting testimony or commenting in closing argument about the arrestee's exercise of his Miranda rights circumvents the Fifth Amendment right to silence as effectively as questioning the defendant himself. Easter, 130 Wn.2d at 236. The exercise of Miranda rights is not substantive evidence of guilt. State v. Lewis, 130 Wn.2d at 705.

B. CASE LAW SUPPORTS FINDING A VIOLATION IN THIS CASE.

The issue presented in this appeal is both procedurally and substantively identical to the issues raised in Curtis and Nemitz. Curtis was convicted of third degree assault. After his arrest he refused to waive Miranda rights. Trial testimony described his interaction with the officer:

Prosecutor: Go ahead. And you had him-once he got out, then you-

Officer: I read him his *Miranda*, his constitutional rights.

Prosecutor: Was anything said at that time?

Officer: He refused to speak to me at the time, and wanted an attorney present. Curtis, at 9.

Curtis successfully raised his challenge for the first time on appeal and received a new trial. The Court noted

several reasons why this exchange was a “comment” on the right to post-arrest silence. The reference in testimony was not accidental; rather the prosecutor purposefully asked for this testimony. Curtis, at 13. Curtis’ assertion of rights was not ambiguous; the trial testimony clearly showed he wanted to speak with counsel upon arrest. Curtis, at 13. The Court rejected attempts to minimize the violation. It was no less significant even though the prosecutor “did not harp” on the exercise of Miranda, or directly refer to it in closing argument. Curtis, at 13.

Nemitz also successfully raised his challenge for the first time on appeal and received a new trial. Nemitz was charged and convicted of DUI. During his arrest Nemitz gave the officer his lawyer’s business card. The events were described at trial:

The arresting officer told the jury that during the arrest Mr. Nemitz said something to his wife about a card. She went into their house and returned with Defense Counsel Phelps's business card, which Mr. Nemitz then handed to the officer. The defense did not object to this testimony. Mr. Nemitz then testified. The card was not mentioned on direct. But, during cross-examination, the

prosecutor asked Mr. Nemitz what was on the card. Mr. Nemitz replied: "On the back side of the card it has a paragraph that explains what your rights are, if you're stopped by an officer." CP at 117. Defense Counsel Phelps objected to further questions about the contents of the card. And the prosecutor stopped. Nemitz, at 213.

The Court concluded the introduction of this evidence was a comment on the assertion of rights. Nemitz, at 214.

The practical consequence of the evidence, however, was to put before the jury evidence which did not prove the elements of the offense, i.e., that Mr. Nemitz was (a) drinking and (b) driving. We therefore address the merits and consider whether the error was harmless. Nemitz, at 214.

The Court focused on the lack of probative value the testimony had to a DUI trial.

Here, there was no probative value to the information contained on the lawyer's card regarding appropriate constitutional rights. The only value of the card was *its inference that only a person disposed to drink and drive would take anticipatory steps to avoid self-incrimination and to assert the right to counsel in the context of a DUI stop*. To invite the inference of guilt from the exercise of constitutional rights is impermissible. Nemitz, at 215. [Emphasis added]

In Rivas' case, the prosecutor's questions led to testimony amounting to a direct comment on his assertion of rights. Her questions showed her intent to elicit testimony Rivas refused to waive his rights, asserted his rights and asked for a lawyer, and spoke with a lawyer, before deciding to refuse a breath test. Her questions cannot be construed as being accidental. Rivas' assertion of rights was not ambiguous. It is of no significance that the prosecutor did not "harp" on the testimony, or that she did not mention it in closing. She invited the jury to draw an inference Rivas refused to speak with the officer and sought counsel after his arrest because he was guilty and needed help in deciding whether to take the breath test. Nemitz, at 215.

The prosecutor's questioning amounted to a comment on the right to counsel, and not a mere reference to such a right. This type of comment, and the inferences that can be drawn from it, are improper, and it was clear error for this line of questioning to be made before a jury.

2. Is the introduction of such evidence at trial for DUI harmless beyond a reasonable doubt?

Where a Court finds there has been an impermissible comment on the defendant's exercise of Constitutional rights, it is presumed the error is prejudicial and the State must prove the error was harmless. Nemitz, at 215; Curtis, at 15. A constitutional error is harmless only if a reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008); citing Easter, supra. Otherwise, what may or may not have influenced the jury remains a mystery beyond the capacity of the appellate court. Curtis, at 15.

In Curtis, the Court found the State failed to overcome this presumption of prejudice. Curtis involved a case with disputed facts. Witness testimony differed regarding the fight, injuries, and whether weapons were used that may have caused injury. Curtis, at 9.

The Court also recognized that when prejudicial testimony is offered against a client, lawyers are placed in a difficult position; deciding whether to object or leave the impermissible comments alone. Curtis, at 15. The Court understood the reality that objecting can “[do] more harm than good.” Curtis, at 215. Without much further analysis the Court’s conclusion was that without any viable alternatives for defense counsel in this situation to address the prejudice, the State could not prove the prejudice was harmless. Curtis, at 215.

Nemitz provided even less analysis reaching the conclusion error was not harmless. And in the context of a DUI prosecution this is telling. The Court did not bother to provide any description of other evidence that might establish Nemitz’s guilt. The State did not contend the error was harmless.

In Nemitz, the Court noted that the only value to introducing evidence a DUI defendant would want to assert Constitutional rights was to create the inference that only a person disposed to drink and drive would take anticipatory steps to avoid self incrimination at the time of the DUI stop by asserting their rights. Nemitz, at 215. Apparently, the State could not disagree.

In the present case, Rivas not only asserted his Miranda rights; he asked to speak with a lawyer. By court rule a DUI suspect must be advised of his or her right to access to counsel "as soon as practicable" after arrest. CrRLJ 3.1(c)(1). Furthermore, a person in custody and asked to submit to a breath test has the right to the opportunity to speak with a lawyer prior to submitting to the test. State v. Templeton, 148 Wn.2d 193, 212, 59 P.3d 632 (2002). But since Rivas made no claim his right to counsel was violated, this evidence served no innocuous purpose before the jury. See Nemitz, at 215.

The officer explained he read the implied consent warning for the breath test to Rivas before he spoke with a lawyer:

I want to make sure that he knows what to talk to the attorney about. So, I give him that information, and then I call the attorney, let him talk to the attorney, and then we go from there.
(CP 376)

He also explained the consequences to his investigation once a person asks for a lawyer:

Well, once that conversation is over with, I go back in and then make sure that he understands because once he's talked to the attorney, basically I don't ask any more questions except for information like his

address and stuff like that, and ask him if he was -- you know, he was clear on what was going on, and he was. And then I asked him if he wanted to submit to the breath test. (CP 375-376)

Therefore, not only was this evidence proffered as substantive evidence contrary to Easter and Lewis, it had the further effect of terminating the deputy's investigation because he could no longer talk to Rivas.

To overcome the presumption of prejudice, the State must establish the error in presenting such testimony was harmless beyond a reasonable doubt. The State must prove the prejudice was de minimus in light of overwhelming untainted evidence in record. The jury in this case heard two competing version of events concerning the DUI investigation and arrest. Even if this Court considers the State's evidence as "strong," it was far from "overwhelming."

Like in Curtis, the jury heard contested evidence whether Rivas was driving under the influence. The State presented two civilian witnesses who were involved in an accident with Mr. Rivas. The driver never offered any testimony related to Rivas being impaired. (CP 191-198) The passenger testified Rivas looked and

sounded impaired. (CP 212-220) But on cross-examination admitted she never wrote these observations in her statement given to police two and half years earlier.⁵ (CP 230-231) The jury was free to question her credibility.

The State presented three King County Deputies as witnesses, but two did not have any meaningful contact with Rivas. Deputy Schene claimed to smell the odor of intoxicants coming from Rivas, and that Rivas admitted to drinking beer. (CP 272-275) But he engaged in no investigation and focused on the accident investigation. Deputy Becker had even less interaction with Rivas. She stood next to him for only a few minutes waiting for Deputy Jeffries to arrive. (CP 331-333) She alleged she smelled a slight odor of intoxicants and Rivas was unsteady on his feet. (CP 330) She never spoke with Rivas. (CP 337)

Deputy Jeffries performed a DUI investigation leading to an arrest. He claimed Rivas showed signs of alcohol use – blood shot watery eyes, slurred speech, and odor of intoxicants on breath. (CP 356-357) Furthermore, he claimed Rivas made racial slurs toward

⁵ Deputy Becker, who took the statement, testified if she had told her these things they would have been written in the statement. (CP 335-336)

the officer, and claimed it was a good thing Martin Luther King was shot and killed. (CP 362) He did not attempt sobriety testing for officer safety reasons, claiming Rivas was aggressive. (CP 365) After arrest he found a beer can, cold to the touch, in the car. (CP 368)

Rivas, however, presented testimony claiming he had not consumed any alcohol and was not impaired. His friend testified he had a late dinner with Rivas at a restaurant and neither consumed any alcohol. (CP 476-479) Rivas was not impaired that night. (Id.) The waitress at the restaurant testified Rivas did not consume alcohol. (CP 456-461) Rivas himself testified he did not consume any alcohol that evening and early morning. (CP 501-504) He was involved in an accident with a taxi cab on his way home, and thought the taxi was at fault. (CP 507) He had no contact with the people in the taxi, and called 911. (CP 511) He denied ever using any inappropriate language with Deputy Jeffries.⁶ (CP 522-525) He claimed Jeffries became upset with him when he would not cooperate with his investigation and asked to speak with a lawyer.

⁶ He admitted he told Jeffries he found it ironic his rights would be violated in a county named after Martin Luther King. (CP 538)

(CP 522) The beer can found in his car came from bags of garbage placed in the car which came from his parent's house a few days before the accident. (CP 527-528) Overall, he felt he was being railroaded by the deputy. (CP 525)

Within this context of opposing versions of evidence, the State's introduction of testimony commenting on Rivas' assertion of rights and speaking with a lawyer was prejudicial. This was a case where jurors had to choose between competing versions of events. The State argued Rivas was intoxicated; Rivas claimed he had not consumed any alcohol. By introducing substantive evidence Rivas refused to waive his rights and could not be questioned by the officer; and further that he asked to speak with a lawyer after arrest, the State created the strong impression Rivas hid behind his rights at a crucial part of the DUI investigation. This behavior was noticeably different from his behavior prior to arrest. It further created the impression he sought the advice of a lawyer to decide to refuse to take the breath test. A lawyer would be in the best position to counsel a DUI suspect to withhold evidence. This inference is strengthened by the fact Rivas did not offer the lawyer as a witness. Additionally, since the officer testified he could no

longer question Rivas after he spoke with a lawyer, the assertion of rights had the added effect of curtailing the officer's investigation when evidence of alcohol intoxication would be easiest to obtain. This evidence does nothing but prejudice Rivas in the eyes of the jury. Both impressions support the notion that only an intoxicated (i.e. guilty) person would be concerned with invoking rights and speaking to a lawyer.⁷ See Nemitz, at 215.

The burden is placed upon the State to prove the error was harmless. Evidence favoring guilt in this case was not overwhelming. Rivas submits the State's burden cannot be met in this case.

⁷ "The Defendant drank too much, got behind the wheel of a car, and then he chose to lie to the Officer about what and whether he had been drinking. He refused to take a test that would show the level of intoxication, the level of alcohol in his system." (State's closing argument – CP 551)

VI. CONCLUSION

For the reasons stated herein, Mr. Rivas argues this Court should find the State intentionally, and impermissibly, commented on his assertion of rights after arrest. Case law is clear the State is prohibited from offering this evidence as substantive evidence of guilt. See Lewis, 130 Wn.2d at 705; Easter, 130 Wn.2d at 236. Within the Miranda warnings, a defendant is implicitly assured he may assert said rights without penalty. The State's violation in this case mimics the violations found in Curtis and Nemitz. The State's case proving DUI was not overwhelming, and the State cannot meet its burden to prove the error was harmless beyond a reasonable doubt.

Mr. Rivas asks this Court to reverse his DUI conviction, and remand his case to the trial court for new trial.

RESPECTFULLY SUBMITTED this 4th day of October, 2011.

RYAN B. ROBERTSON
ATTORNEY AT LAW



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