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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31779-0-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

**State of Washington,
*Respondent***

v.

**Carl J. Price,
*Appellant***

Appeal from the Superior Court of Grant County on Review from the
District Court of Grant County

REPLY BRIEF OF APPELLANT

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I. ISSUES ON REPLY

1. The Superior Court committed reversible error by upholding the admission at trial and during closing argument that the defendant's assertion of his right to remain silent during police questioning is indicative of guilt in consideration of *State v. Easter*, 136 Wn.2d 228, 922 P.2d 1285 (1996), *Dayle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 2244-45, 49 L.Ed. 91 (1976) and *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716-17, 123 L.Ed.2d 353 (1993).
2. The Superior Court committed reversible error by admitting the officers opinion testimony allowed over defense objection that: "In my opinion, he was to intoxicated to operate a vehicle" which invades the providence of the jury contrary to *State v. Kirkham*, 159 Wash.2d 918, 928, 155 P.3d 125 (2007) and *State v. Demery*, 144 Wash.2d 753, 759 (2001).

II. ARGUMENT ON REPLY

1. **The admission of the defendants assertion of his right to remain silent during questioning as indicative of guilt is improper consistent with *State v. Burke*, 163 Wn.2d 204, 221-22, 181 P.3d 1 (2008) and *Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965)**

The government response ignores that Mr. Price never testified at his trial yet the prosecution used his decision to not respond to officers questions against him at trial. One reason a defendant's silence may not be introduced at trial as evidence of guilt is because silence is ambiguous.

United States v. Prescott, 581 F.2d 1343, 1352 (9th Cir. 1978) citing

United States v. Hule, 422 U.S. 171, 176-77, 95 S. Ct. 2133, 45 L.Ed.2d 99 (1975) The Washington Supreme Court in *State v. Burke*, 163 Wn.2d

204, 217, 181 P.3d 1 (2008) held: “We have concluded that even when the defendant testifies at trial, use of pre arrest silence is limited to impeachment and may not be used as substantive evidence of guilt.....In circumstances where silence is protected, a mere reference to the defendant’s silence by the government is not necessarily a violation of this principle; however, when the State invites the jury to infer guilt from the invocation of the right to silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated.”

The Washington Supreme Court in *State v. Easter*, 130 Wash.2d 228, 236 (1996) held, “the State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence to infer guilt from such silence. The State using a defendant’s silence against him defeats the protection of the Fifth Amendment and Article I § 9 of the Washington State Constitution. *State v. Earls*, 116 Wash.2d 364, 375 (1991); *State v. Foster*, 91 Wash.2d 466, 473 (1979)

The government’s reliance on *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001) is misplaced because the statements refusing to answer were used for impeachment when the defendant testified at trial. The refusal to answer was not used here to impeach Mr. Price who did not testify at trial. (See Trial transcript generally 8/5/2010)

2. **The Superior Court committed reversible error in admitting the officers opinion testimony, allowed over defense objecting, that: “In my opinion, he was too intoxicated to operate a vehicle” which is contrary to *State v. Kirkham*, 159 Wash.2d 918, 928, 155 P.3d 125 (2007) and *State v. Demery*, 144 Wash.2d 753, 759 (2001)**

The testimony of the officer in this case was based on his training and experience, whether “the defendant was too intoxicated to a level where he couldn’t safely operate a vehicle.” (8/5/2010 RP 67) Over defense objection, Officer Hoffman replied that, “In my opinion he was too intoxicated to operate a vehicle.” (8/5/2010 RP 67) During the prosecutor’s closing argument, he reminded the jury that Officer Huffman testified that “the defendant was so intoxicated that he was not.....unable [sic] to safely operate a motor vehicle.” (8/5/2010 PR 170)

“No witness, lay or expert, may testify to his opinion as to guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1982) Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Kirkham*, 159 Wn.2d 918, 927 P.3d 1125 (2007) The question based upon the training and experience gives the answer the “aura of reliability” when the testimony comes from a law enforcement officer. “Opinion testimony

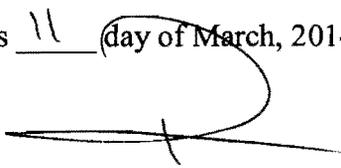
should be avoided if the information can be presented in such a way that the jury can draw its own conclusions.” *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008)

The facts of this case, with the arguments used by the prosecution in closing are such that the improper testimony along with the closing argument require the reversal of the conviction.

III. CONCLUSION

The admission of the defendant’s silence and the prosecutions argument in closing that this silence demonstrates the defendant’s guilt requires reversal and remand for a new trial. Additionally, the officers testimony that “the defendant was to intoxicated to a level where he could not safely operate a vehicle” (8/5/2010 PR 67) along with the prosecution’s use of these statements in closing (8/5/2010 RP 170) warrants a reversal of the case for a new trial.

Respectfully submitted this 11 (day of March, 2014



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