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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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**ORIGINAL**

**No. 31779-0-III**

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

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**State of Washington,  
*Respondent***

v.

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

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Appeal from the Superior Court of Grant County  
on review from the District Court of Grant county

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*BRIEF OF APPELLANT*

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## I. INTRODUCTION

On August 5, 2010 Mr. Carl J. Price appeared in Grant County District Court before the Honorable Richard Fitterer in trial on a charge of Driving Under the Influence. The jury returned a guilty verdict at the trial. Mr. Price was sentenced on October 13, 2010 and a Notice of Appeal was filed on that date. Argument was held on May 10, 2013 before the Honorable Evan E. Spurline in Grant County Superior Court. The court entered an order affirming the Grant County District Court on June 03, 2013. A timely Motion for Discretionary Review was filed and the Commissioner granted review on August 12, 2013.

## II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

1. Whether the Superior Court committed reversible error by upholding the trial courts admission at trial and in argument in closing that a defendant's assertion of his right to remain silent during police questioning is indicative of guilt consistent with *State v. Easter*, 136 Wn.2d 228, 922 P.2d 1285 (1996), *Doyle 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. Whether the Superior Court committed reversible error by admitting the officers opinion testimony which was allowed over defense objection that: "In my opinion, he was to intoxicated to operate a vehicle" which invades

the province of the jury contrary to *State v. Kirkman*, 159 Wash.2d 918, 928, 155 P.3d 125 (2007) and *State v. Demery*, 144 Wash.2d 753, 759 (2001).

### III. STATEMENT OF THE CASE

A trial was held in Grant County District Court on August 05, 2010 based upon an arrest that occurred on April 30, 2009. On that day, Carl J. Price was allegedly observed in a truck driving slowly down an alley. (8/5/2010 RP 46-48) As the vehicle drove by Officer Huffman asked the driver of the vehicle, Mr. Price, how he was doing and a brief conversation ensued. (8/5/2010 RP 46-48) Id. Officer Huffman testified the exchange struck him as “strange” and “pretty odd” so the two officers decided to get into their respective patrol vehicles and follow the truck to make sure its “driving was okay.” (8/5/2010 RP 48-9) After following the truck for a short distance Officer Huffman observed the truck fail to stop at a marked stop sign. (8/5/2010 RP 50) The vehicle also ran over a curb as it made a right turn from the same intersection. (8/5/2010 RP 51) At that point Officer Huffman activated his emergency lights and the truck pulled to the side of the road. Id.

Upon contact Officer Huffman noted Mr. Price’s “eyes were watery, his pupils were dilated, and his speech was repetitive and slurred...” (8/5/2010 RP 52) Mr. Price was also viewed as “argumentative” and did not immediately cooperate with requests to provide his license and insurance. (8/5/2010 RP 53-4) Officer Huffman noted “an intermittent smell of a faint odor of alcohol” emanating

from the vehicle. (RP 54) When advised of the reason for the stop Mr. Price explained that locals in the town do not usually stop at stop signs. (8/5/2010 RP 55)

Officer Huffman returned to his patrol car, completed a records check on Mr. Price, and determined his license was suspended. (8/5/2010 RP 55) Officer Huffman came back to the truck and advised Mr. Price he was under arrest for driving with a suspended license. Id. Officer Huffman advised Mr. Price to turn the vehicle off and to step out onto the street. (8/5/2010 RP 56) For reasons unknown, the engine was running with the keys outside of the ignition; and Mr. Price had the keys in his right hand. (8/5/2010 RP 56-7) Officer Huffman grabbed Mr. Price's left arm and, when he was unable to remove Mr. Price from the truck, he directed Officer McLaughlin, who was standing nearby, to deploy his taser weapon. (8/5/2010 RP 57-8) After successful deployment of the taser Mr. Price was removed from the truck, wrestled to the ground, and placed in handcuffs. (8/5/2010 RP 59)

Shortly after being placed on the ground Mr. Price began to experience seizure-like symptoms. (8/5/2010 RP 60) By this time a third officer, Corporal Koch, arrived on scene. Id. The three officers carried Mr. Price from the street onto a grassy area and called for medical assistance. Id. Mr. Price was then transported to the hospital. (8/5/2010 RP 61) While at the hospital Officer Huffman advised Mr. Price of his constitutional rights, which he waived in order

to complete a DUI interview. (8/5/2010 RP 61-62) Mr. Price answered most of the interview questions but not all of them. (8/5/2010 RP 62-3)

At trial, the prosecutor asked Officer Huffman, based on his training and experience, whether “the defendant was too intoxicated to a level where he could not safely operate a motor vehicle.” (8/5/2010 RP 67) Over defense objection, Officer Huffman replied that, “In my opinion, he was too intoxicated to operate a vehicle.” *Id.* 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 RP 170) Mr. Carl J. Price did not testify at the trial in this case. (See generally RP 8/5/2010) Moreover, in closing argument, while reviewing for the jury the answers Mr. Price gave during the interview at the hospital, the prosecutor highlighted Mr. Price’s refusal to answer certain questions. (8/5/2010 RP 170) For example, the prosecutor stated: “That’s when [Mr. Price] knows not to answer...refused to answer the questions about the time of the last drink and do you believe the ability to drive was affected by your alcohol and drug use? Those questions he refused to...answer.” (8/5/2010 RP 183)

#### IV. ARGUMENT

**ISSUE 1: The Superior Court committed reversible error by upholding the trial courts admission at trial and in closing argument that a defendant’s assertion of his right to remain silent during police questioning is indicative of guilt consistent with *State v. Easter*, 136 Wn.2d 228, 922 P.2d 1285 (1996), *Doyle 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).**

The prosecutor here, as a quasi-judicial officer, was allowed to argue, contrary to the defendant's Fifth Amendment right to remain silent, that the jury should consider that silence to determine Mr. Prices' guilt. (8/5/2010 RP 183) The Superior Court's failure to reverse based upon prosecutorial misconduct in making an improper argument during the closing argument about the defendant's silence requires reversal by the Washington Supreme Court consistent with *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996).

The Fifth Amendment to the United States Constitution states, in part, no person "shall ... be compelled in any criminal case to be a witness against himself." This provision applies to states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964) The Washington Constitution, in article 1, section 9, states: "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts interpret these two provisions equivalently. *State v. Earls*, 116 Wash.2d 364, 375 (1991); *State v. Foster*, 91 Wash.2d 466, 473 (1979)

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wash.2d 466, 473, 589 P.2d 789 (1979); *Miranda v. Arizona*, 384 U.S. 436, 461 (1966) Moreover, "the State may not elicit comments from witnesses *or make closing arguments relating to a*

*defendant's silence to infer guilt from such silence.*” *State v. Easter*, 130 Wash.2d 228, 236 (1996) (emphasis added). As the United States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” *Miranda*, 384 U.S. at 468 n. 37. “The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State ‘just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.’” *Easter*, 130 Wash.2d at 236 (quoting *State v. Fricks*, 91 Wash.2d 391, 396 (1979)).

Here, the prosecutor’s closing argument directly asked the jury to infer guilt from Mr. Price’s refusal to answer certain questions during the DUI interview. Specifically, in rebutting the defense’s claims that Mr. Price suffered a medical impairment not related to alcohol, the prosecutor stated: “That’s when [Mr. Price] *knows not to answer...refused to answer* the questions about the time of the last drink and do you believe the ability to drive was affected by your alcohol and drug use? Those questions *he refused to...answer.*” (8/5/2010 RP 183) These comments are a textbook example of what the federal and state constitutions forbid: the use of “closing arguments relating to a defendant's silence to infer guilt from such silence.” *State v. Easter*, 130 Wash.2d at 236. Accordingly, Mr. Price’s privilege against self-incrimination was violated, and reversal is required.

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. *Clark* is distinguishable because those statements were admissible to impeach a defendant's testimony at trial. The use of Mr. Price's statements as substantive evidence was not impeachment. Once a defendant waives the right to remain silent and talks to police, the state may then use his statements or refusal to answer to impeach his inconsistent trial testimony. *Anderson v. Charles*, 447 U.S. 404, 100 S. Ct. 2180, 65 L.Ed.2d 222 (1980); *State v. Cosden*, 18 Wn.App. 213, 568 P.2d 802 (1977) It is because of this difference that the court should remand the case for a new trial.

**ISSUE 2: The Superior Court committed reversible error by admitting the officers opinion testimony which was allowed over defense objection that: "In my opinion, he was to intoxicated to operate a vehicle" which invades the province of the jury contrary to *State v. Kirkman*, 159 Wash.2d 918, 928, 155 P.3d 125 (2007) and *State v. Demery*, 144 Wash.2d 753, 759 (2001).**

The government in Mr. Carl J. Price's case was allowed to introduce the opinion of the police officer about Mr. Price's being too intoxicated to drive. The prosecutor asked Officer Huffman, based on his training and experience, whether "the defendant was too intoxicated to a level where he could not safely operate a vehicle." (8/5/2010 RP 67) Over defense objection, Officer Huffman 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 RP 170) Mr. Carl J. Price did not testify at the trial. (See generally 8/5/2010)

Allowing the law enforcement officer to render an opinion based upon his training and experience as to the ultimate issue for the jury to decide is contrary to Washington Supreme Court in *State v. Kirkman*, 159 Wn.2d 125, 155 P.3d 125 (2007) In *Kirkman*, supra at 928, the court held that testimony of law enforcement in the form of opinion on the issue to be determined by the jury is problematic and prohibited. *State v. Kirkman*, 159 Wash.3d 918, 928, 155 P.3d 125 (2007)

“No witness or expert may testify to his opinion as to the guilt of a defendant, whether by direct statements or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) 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 facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) The presentation of the question which allows the witness to decide the case for the jury is not permitted. *State v. Montgomery*, 163 Wn.2d 577, 591-592, 183 P.3d 267 (2008)

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other

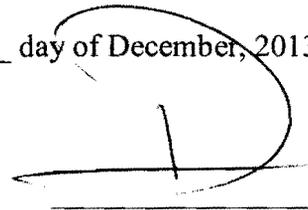
evidence before the trier of fact. *State v. Demery*, 144 Wash.2d 753, 759 (quoting *Heatley*, 70 Wash.App. at 759; *Kirkman*, 159 Wash.2d at 928)

Since this case did not involve a breath or blood test result, the only issue for the jury to decide was whether Mr. Price's ability to drive was lessened to any appreciable degree – and that is precisely what Officer Huffman testified to: “In my opinion, he was too intoxicated to operate a vehicle.” (8/5/2010 RP 170) Recently, Division III of the Court of Appeals held in *State v. Quale*, No. 30933-9-III (11/7/2013) that opinion testimony from a trooper “might well have improperly influenced the jury, depriving him a fair trial.” This court should therefore grant a consistent decision reversing the Superior Court and remanding the Price case for a new trial.

## V. CONCLUSION

The matter should be reversed based upon the introduction of the defendant's refusal to answer certain questions where Mr. Price never testified at trial. Any contrary ruling would be contrary to *State v. Easter*, 136 Wn.2d 228, 922 P.2d 1285 (1996). Similarly, remand and a new trial is required consistent with *State v. Kirkman*, 159 Wash.2d 918, 928, 155 P.3d 127 (2007) and *State v. Demery*, 144 Wash.2d 753, 759 (2001).

Respectfully submitted this 9 day of December, 2013



A handwritten signature in black ink, appearing to read 'D. Phelps', written over a horizontal line.

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