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Court of Appeals
Division III
State of Washington

No. 31779-0-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

CARL J. PRICE,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the State err by commenting on petitioner's silence after Petitioner waived *Miranda* and spoke to the police?

2. Did Officer Huffman invade the province of the jury by testifying that he believed the Petitioner was intoxicated to the point where he could not safely drive?

II. STATEMENT OF THE CASE

On April 30, 2009, Ephrata Police Officers Todd Huffman and Jack McLauchlan observed Carl Price driving his pickup truck in an alley behind the Ephrata Police Department. RP 46–47. After a brief conversation, the officers decided to follow the Defendant. RP 48. Officer Huffman saw Price fail to stop at a stop sign and then hit a curb while turning. RP 50–51. Huffman activated his lights and initiated a traffic stop of Price's truck. RP 51.

Huffman contacted Price and noticed classic signs of intoxication including watery eyes, slurred speech, and the odor of alcohol. RP 52–54. Huffman checked Price's license status and determined him to be suspended. Huffman told Price he was under arrest. RP 55. Price refused to exit the vehicle or even turn it off. RP 56. Price removed the keys from

the ignition with the vehicle still running. RP 56–57. Price played “keep away” with the keys and refused to provide them to Huffman or to shut off the vehicle. RP 57. A struggle between Huffman and Price ensued. RP 57. McLauchlan used his taser on Price, and Huffman wrestled Price out of the vehicle. RP 58. When officers placed Price in handcuffs he began to display “seizure like symptoms.” RP 59–60. The officers summoned an ambulance and Price was transported to Columbia Basin Hospital. RP 60–61.

While at the hospital, Huffman read the “Constitutional Rights” from the Washington State Patrol DUI packet to Price. RP 61. Price waived his rights and opted to speak with Huffman during the “DUI Interview” phase of the investigation. RP 62–63. Although Price answered most of the DUI interview questions, he refused to answer questions about the time of his last drink and whether he felt his ability to drive was impaired. RP 105–11.

At the first trial, the jury found Price guilty of Resisting Arrest and Driving while License Suspended, but the jury was unable to reach a decision on the DUI charge. RP 8. At the second trial, the results of the BAC blood draw were excluded. RP 20. Because the jury had already heard the BAC number, the court declared a mistrial at Price’s request. RP 20.

Price's third trial commenced on August 5, 2010. Before the trial began, the State conducted a brief CrRLJ 3.5 hearing to determine the admissibility of Price's statements. RP 23–27. The court ruled that the entirety of the DUI interview packet was admissible. RP 30.

During trial, Huffman testified, over Price's objection, that in his opinion, Price had been too intoxicated to safely operate a motor vehicle. RP 65–67. Huffman also testified about Price's failure to answer certain questions in the DUI packet while volunteering answers to most of the remaining questions. RP 111. Defense counsel did not object to that testimony. RP 111. During closing argument, the prosecutor referenced this testimony. RP 170, 183. Price was convicted of Driving Under the Influence. RP 190.

Price appealed his conviction to the Grant County Superior Court. The Superior Court upheld the conviction, ruling that Huffman's testimony was permissible and that Price's non-response to some of the questions in the DUI packet was admissible against him. Price now brings this appeal.

III. ARGUMENT

A. It was not Improper for the State to Comment on the Appellant's Post-Miranda silence.

The general rule is that evidence commenting on an accused's silence is inappropriate. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d

1285 (1996). However, case law is clear that when a defendant fails to invoke his right to remain silent during an interrogation and selectively chooses questions to answer, it is permissible for the State to comment on what the defendant does not say. *See, e.g., State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001); *State v. Embry*, 171 Wn. App. 714, 750, 287 P.3d 648 (2012); *State v. Curtiss*, 161 Wn. App. 673, 691–92, 250 P.3d 496 (2011), *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978).

In *Curtiss*, the defendant challenged the testimony of a detective who testified that Curtiss had selectively answered some questions during a post-*Miranda*¹ interview while providing no response to others. *See Curtiss*, 161 Wn. App. at 691–92. The reviewing court determined the testimony about Curtiss’ non-responses was admissible because the trial court had conducted a CrR 3.5 hearing and concluded Curtiss never invoked her right to remain silent. *Id.* Specifically, the court expressly held that “Curtiss never invoked her right to remain silent, so no party could have improperly commented on it at trial.” *Id.* at 692.

Here, just as in *Curtiss*, defendant chose to speak to the police. After a CrRLJ 3.5 hearing the trial court held the statements during the

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

DUI interview were admissible. *See* RP 111. At no time during the DUI interview did defendant invoke his right to remain silent.

Defendant argues that, under *Clark*, the State may comment on the defendant's silence only for impeachment purposes. However, defendant fails to identify anywhere in *Clark* where the court so narrowly circumscribed its ruling. To the contrary, in *Clark*, the court expressly held: "When a defendant does not remain silent and instead talks to police, the state may comment on what he does *not* say." 765 (citing *Young*, 89 Wn.2d at 621) (emphasis in original). This is precisely the situation here: defendant never invoked his right to remain silent but instead selectively answered the investigating officer's questions. Defendant's decision to pick and choose between which questions he answered permitted the State to comment on what defendant did *not* say during that interview.

This is consistent with the Washington State Supreme Court's ruling in *Young*, where it held: "If a defendant voluntarily offers information to police, *his toying with the authorities by allegedly telling only part of his story is certainly not protected by Miranda or Doyle.*" *Young*, 89 Wn.2d at 621 (emphasis added). Both the trial court and Superior Court ruled correctly on this issue, and this Court should affirm their findings.

B. The Trial Court Properly Admitted Officer Huffman's Opinion Testimony Regarding Appellant's Intoxication and Ability to Drive a Vehicle.

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.2d 1098 (2008). It is well established under Washington case law that a witness may give an opinion as to another person's appearance or demeanor. *Id.* at 190. This includes an opinion that a defendant was "obviously intoxicated" and "could not drive a motor vehicle in a safe manner." *City of Seattle v. Heatley*, 70 Wn. App. 573, 577-82, 854 P.2d 658 (1993).

Here, as in *Heatley*, the officer testified that Price was "too intoxicated to operate a vehicle." RP 67. As in *Heatley*, Officer Huffman's testimony was based on the officer's experience and his observations of Price. RP 65-67. Huffman was available for cross examination and the jury was given a full opportunity to decide for themselves what weight to give the opinion testimony. The same was true in *Heatley*. See *Heatley* 70 Wn. App. at 581-82.

The *Heatley* court held that "where the testimony is supported by proper foundation, the trial court has discretion to admit opinion testimony on the degree of intoxication in a prosecution for driving while under the influence." *Id.* at 582. "The fact that an opinion encompassing

ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” *Id.* at 579.

Here, nothing indicates that the trial court abused the discretion given to it by the *Heatley* decision. Huffman’s opinion testimony was admissible because Huffman laid the proper foundation.

The petitioner’s reliance on *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), is misplaced. *Kirkman* dealt with the issue of a witness offering opinion testimony about the veracity of a victim. That type of testimony is clearly the province of the finder of fact. In contrast, Officer Huffman gave an opinion—based on personal observation—about the level of petitioner’s intoxication. This was likely helpful to the jury, but did not interfere with their role. *Heatley* at 581-82.

Heatley was decided by Division I of the Court of Appeals 20 years ago and has since been cited with approval in numerous Washington cases. Division III cited *Heatley* with approval (and came to the same conclusion) in *State v. Lewellyn*, 78 Wn. App. 788, 795, 895 P.2d 418 (1995). Here, Appellant brings nothing new to the table. This was a straightforward application of *Heatley* and both the trial court and Superior Court reached the correct legal conclusion.

IV. CONCLUSION

The admission of, and the State's comments on, the Appellant's post-*Miranda* silence were consistent with prior Court of Appeals and Supreme Court cases, including *Clark*, *Young*, and *Curtiss*. Nothing in those cases limits the use of such evidence only to impeachment scenarios. The trial court's decision admitting the officer's opinion testimony was consistent with prior Court of Appeals and Supreme Court cases, including *Heatley* and *Lewellyn*.

For these reasons, the State asks that this Court affirm the conviction.

DATED this 6th day of February, 2013

Respectfully submitted:

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