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SUPERIOR COURT DISTRICT OF JEFFERSON COUNTY
APP

SUPREME COURT NO. _____
COURT OF APPEALS NO. 55679-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN B. BURKE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Richard J. Thorpe, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Justin Burke, appellant below, asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION OF COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals, Division I, filed in his case on March 6, 2005

A copy of the decision is in the Appendix at A-1 through A-6.

C. ISSUES PRESENTED FOR REVIEW

1. Does the state improperly comment on a defendant's exercise of his state and federal constitutional rights to remain silent and to counsel by asking the jury to find him guilty because the defendant ended a voluntary investigatory interview by asking if he could consult with an attorney?

2. Is there a significant, constitutional difference between asking the jury to find a defendant guilty because of an inconsistency between his trial testimony and his statement to the police and asking the jury to find him guilty because he

chose to terminate the interview and not tell his side of the story?

3. Does a person have the right to consult with his attorney prior to being charged or taken into custody and irrespective of his right to the appointment of counsel?

4. If an accused person exercises his right to terminate an investigatory interview so that he can consult with an attorney, does he waive that invocation of his right to remain silent by making a parting comment to the police?

D. STATEMENT OF THE CASE

1. Overview and trial evidence

Justin Burke was charged with having sexual intercourse with J.S. when she was fifteen years old and he was more than four years older than she was. CP 73-74. Justin's defense at trial was that J.S. told him she was almost seventeen years old and that she looked mature enough to be believed.¹ RP 115

¹ Defense counsel argued to the jury in closing that "[s]he is an attractive, beautiful, young woman, well developed for her age. . . . [I]f we read the whole [instruction], in fact, the height, she is probably nearly six feet tall, the fact that she is well developed, how she looks, how she carries herself, her maturity [I]t really does say in instruction 8 that it's true that if
(continued...)

The incident occurred on August 18, 2003, at a party at the apartment of J.S.'s older sister Jaime Schuman. 2RP 25-31, 33, 94-98, 163, 180.² T2RP 30-31. There was drinking and some smoking of marijuana at the party. 2RP 32-33, 37. Guests moved from the upstairs to downstairs and out to the back yard where there was a fire in the firepit. 2RP 179, 183-184; 3RP 7-11, 23-24. J.S. got fairly inebriated. 2RP 33-34. Late in the evening, she sat on a couch downstairs wrapped in a blanket watching television. 2RP 35 Justin sat next to her. 2RP 40.

Accounts from others who attended the party that evening varied as to the degree to which J.S. was actively engaged with Justin. 2RP 170, 184, 186. She testified at trial that she kept moving away from Justin and did not talk to him at all and that she did not wish to have the sexual intercourse that ensued. RP 40-44-54, 73. Others reported that the

¹(...continued)
Justin reasonably believed that she was at least 16 years of age, based upon her declarations, you can find him not guilty." RP 115.

² The verbatim report of proceedings is in three volumes designated 1RP, 2RP and 3RP. The hearing on the motion for new trial and sentencing is designated RP(sent).

next day a young woman told J.S.'s older sister Jaime that J.S. and Justin had been "all over each other." 2RP 173. Justin described mutual flirtation, willing sex, and J.S. telling him she was a high school senior and almost seventeen years old. 3RP 11-12, 13-14, 17-19, 21-24.

Jaime had left the party to spend the night at her boyfriend's house. RP 41-42. When she heard the report the next day that J.S. and Justin had been "all over each other," Jaime called her sister, who had gone home, and Justin several times until she got them to agree that they had engaged in sexual intercourse. 2RP 56-57, 109-114, 141-143.

The state's recurring theme throughout the trial was set out in opening statement, in which the prosecutor described Detectives Richardson and Honnen going to Justin's home "to find out his side of the story." 2RP 11. The prosecutor continued:

And for a time the defendant talked to them, freely telling them, yeah, I don't remember what her name was, but it was Jamie's [sic] sister, and Yes, we had sex. And then interestingly the defendant's father cut in, perhaps sensing that things, that the police there and perhaps sensing that it wasn't necessarily okay to have sex with J.S., the defendant's father in effect ended the interview by telling the defendant, his own son, that he shouldn't be talking to

police. And that pretty much did end the interview, except the defendant had a few parting shots.

The defendant seated here in the jacket and tie next to counsel informed Detective Richardson and Detective Honnen, who was standing by, that this was a bunch of shit and that Edmonds Woodway girls are always getting people into trouble.

And with those remarks, he concluded the interview and the police simply left. They weren't there to arrest anybody, they were there to gather the defendant's side of the story. That is all he chose to give them and they left.

2RP 11-12.

In examining Detective Richardson, the state elicited that the police went to Justin's house just to get his side of the story. 2RP 209-210. The state elicited that Justin's father asked if a charge would be filed; and, when Detective Richardson said very possibly one would be, he advised Justin not to make any further statements until he had talked to an attorney. 2RP 213-214. Detective Richardson then testified that Justin asked if he could talk to an attorney, and for that reason, except for some parting words, the interview ended. 2RP 214-215.

A. Okay. Father advised Justin not to make any other statements until he spoke to an attorney. And then he [Justin] asked me if that was

possible. And I told him yes, he could speak to an attorney.

Q. After you advised him of that, did he have any more words for you?

A. Then he made a statement that he thought that this was a bunch of shit, that girls at Edmonds Woodway were always trying to get guys into trouble.

Q. Did he ever explain that to you?

A. *At that time he had already asked pretty much to talk to an attorney, or so what I interpreted as, so I did not ask anymore questions. That was kind of his --*

Q. That was his parting shot?

2RP 215 (emphasis added). The prosecutor continued to make sure that the jury understood that Justin chose to end the interview by asking, "Was it your impression at that time that the defendant was choosing to end the interview?" 2RP 215. This question elicited from Richardson that he probably would have continued talking to Justin if he had not asked for an attorney and that Justin never said that J.S. told him she was sixteen or seventeen. 2RP 215-216.

Detective Honnen testified and the state elicited from him that Justin's father advised him not to make any more comments. 2RP 221.

On cross examination, the prosecutor questioned Justin repeatedly and intensely about his never telling the police that J.S. said she was sixteen or seventeen. 3RP 54-55, 58-65, 78. During this questioning, the prosecutor asked Justin if this was not the "whole crux of the matter." RP 62.

In closing, the prosecutor argued that Justin should have and would have told the police that J.S. said she was sixteen or seventeen if that were true, and that Justin "never got around to what turned out to be the most significant thing here and what he told you on the stand, he never said, J.S. told me, J.S. told me that girl, Jaime's sister, she told me she was 16 . . . Well, what about she told me she was 16, or she told me she was 17, nothing, nothing. And then his father shut down the interview." 3RP 110-111.

In rebuttal closing argument, the prosecutor argued again to the jury that Justin never told the police that J.S. said she was sixteen. 3RP 130, 132.

2. Motion for new trial or arrest of judgment

At the hearing on the motion for new trial or arrest of judgment, new counsel argued that the

state committed constitutional error by commenting on Justin Burke's exercise of his constitutional rights to remain silent and to access to counsel. RP(sent) 3-4. Counsel noted that, in its briefing, the state relied on cases where the defendant did not exercise his rights, gave a full and thorough statement to the police and then was impeached with what he or she did not say at trial. RP(sent) 4.

The prosecutor argued at the hearing that Justin's father could not invoke Justin's rights and that Justin himself did not do so; he did not invoke his right to counsel and he chose to keep talking by making a parting statement after the interview was concluded. RP(sent) 6-10.

Defense counsel responded that the defense motion was based, not on the introduction of what Justin actually said to the police, but on the questioning and argument about why he ended the interview without saying more. RP(sent) 13.

The trial court denied the motion on the grounds that Justin's asking if he could speak to an attorney didn't "rise to the dignity of a request for counsel such as to make the comment on it constitutionally -- I mean a violation of the

constitution." RP(sent) 15. The court further stated that "the questions on cross examination and the questions -- and the closing argument was clearly intended to explore credibility and to examine credibility of the defendant and not to unconstitutionally imply guilt by reason of silence." RP(sent) 15.

3. The decision of the Court of Appeals

The Court of Appeals held that the prosecutor did not comment on Justin's invocation of his right to remain silent because Justin did not invoke his right to remain silent, that Justin did not have a right to request to consult with an attorney prior to charging, and that the police do not have to honor a request to speak to an attorney unless an interview is custodial or charges have been filed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(B)(1), (2, (3) AND (4). THE HOLDING IN THIS CASE IS IN CONFLICT WITH OTHER ECISIONS, IMPLICATES CONSTITUTIONAL RIGHTS AND IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

Review should be granted because the case meets the criteria set out in RAP 13.4(b). The issues are constitutional; the decision is in conflict with other decisions of this Court and the Court of

Appeals; and the issues are of substantial public importance which should be decided by this Court.

1. **THE HOLDING THAT JUSTIN DID NOT INVOKE HIS RIGHT TO REMAIN SILENT SO THAT HE COULD SPEAK TO AN ATTORNEY INVOLVES THE DEPRIVATION OF A CONSTITUTIONAL RIGHT AND IS IN CONFLICT WITH REPORTED DECISIONS.**

The issue of whether Justin could and did invoke his right to remain silent is an issue of constitutional magnitude and an issue of substantial public importance. The decision of the Court of Appeals is in conflict with well-established authority on this issue. An accused person has a constitutional right to remain silent, even before his arrest, that derives from the Fifth Amendment, and the state may not elicit testimony or comment on the defendant's exercise of his right to remain silent to imply guilt from such silence. State v. Easter, 130 Wn.2d 228, 238, 243, 922 P.2d 1285 (1996); State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997).

Here, it was undisputed that Justin communicated his wish to terminate the interview with the police so that he could consult with an attorney. Two experienced detectives heard him and

decided that they should end the interview for that reason. The fact that Justin made a parting shot as the detectives left did not constitute a waiver of his request to conclude the interview so that he could talk with an attorney. He had a right to remain silent even though he was not in custody and he elected to exercise it until such time as he had spoken with his attorney.

The decision's holding that the police can ignore the invocation of the right to terminate an interview and to counsel and continue questioning without a waiver is contrary to reported decisions. In Washington, when the suspect makes even an equivocal request for an attorney, police questioning may continue only for the purpose of clarifying the request. State v. Robtoy, 98 Wn.2d 30, 38-39, 653 P.2d 284 (1982). Detective Richardson could only have asked Justin questions to clarify whether he was really asking for an attorney or not, even after Justin asserted his innocence as a parting statement.³ 2RP 11-12. Since Detective

³ Justin's saying that the girls at Edmonds Woodway always were getting people in trouble and that the allegation against him was a "bunch of shit" is not inconsistent with a claim that he was misled by J.S. 2RP 11-12.

Richardson chose not to ask clarifying questions or to seek a waiver, the interview was effectively terminated by Justin's asking if he could talk to an attorney before being questioned further.

Clearly, the prosecutor's argument and questioning at trial assumed that Justin had terminated the interview by exercising his rights to do so rather than tell his story to the police: the prosecutor asked Detective Richardson, "Was it your impression at that time that the defendant was choosing to end the interview?" 2RP 215. It was that exercise of rights which the prosecutor used to argue guilt, not Justin's inconsistent statements to the police; and the Court of Appeals decision permitting such flagrant constitutional error is inconsistent with well-established authority. The prosecutor blatantly asked the jury to find Justin guilty because he decided to end the interview to speak with an attorney, without telling fully "his side of the story." This was an impermissible comment on the exercise of the right to remain silent just as was the prosecutor's reference to the defendant as being a "smart drunk" in Easter, supra. Review should be granted to clarify that prosecutors

can never ask the jury to find a defendant guilty based on the defendant's exercise of a constitutional right. A person must be free to exercise his right to remain silent at any point during an interview and the holding in this case would allow the state to comment on that exercise for any person who did not exercise his right at the beginning of the interview.

2. THE COURT OF APPEALS MISAPPREHENDED THE DIFFERENCE BETWEEN THE RIGHT TO APPOINTED COUNSEL AND THE RIGHT TO TERMINATE AN INTERVIEW IN ORDER TO CONSULT WITH ONE'S ATTORNEY.

The Court of Appeals failed to appreciate the difference between having the right to consult with an attorney and having the right to the appointment of counsel; citing CrR 3.1(b)(1) and State v. Copeland, 89 Wn. App. 492, 499, 949 P.2d 458 (1998), the court held that "Burke never invoked his right to counsel because he had no right to counsel at the time of the voluntary interview."

Burke was not, however, asking that an attorney be appointed for him; he was asking if the interview could be terminated to allow him to consult with counsel. He had every right to do so and the decision of the Court of Appeals denying him his

Fifth Amendment right to the assistance of retained counsel during an interview with the police is unsupported by any relevant authority. This is an important issue which should be decided by this Court. If the Court of Appeals is correct, suspects who have not been charged will be unable to terminate interviews to consult with attorneys. This would be a violation of the Fifth Amendment right to remain silent and to protect that right by exercising the right to counsel.

3. THE COURT OF APPEALS' DECISION ALLOWING THE PROSECUTOR TO COMMENT ON THE EXERCISE OF CONSTITUTIONAL RIGHTS IS CONTRARY TO REPORTED DECISIONS AND IS A SIGNIFICANT LEGAL ISSUE WHICH SHOULD BE DECIDED BY THIS COURT.

What the prosecutor did in this case was comment on Justin's decision to terminate the interview, which he had a constitutional right to do -- even though he had not been charged or taken into custody -- and ask the jury to find him guilty for this reason. Easter, supra. The decision of the Court of Appeals upholding this conduct is contrary to reported decisions and is a constitutional issue of substantial public importance which should be decided by this Court.

There are numerous decisions holding that it is error to permit the state to ask the jury to draw negative inferences from the exercise of any constitutional right. See State v. Johnson, 80 Wn. App. 337, 339-340, 908 P.2d 900 (1996); State v. Jones, 71 Wn. App. 798, 810, 963 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994); Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1980); Dyson v. United States, 418 A.2d 127, 131 (D.C. 1980).

A direct comment on the exercise of the right to remain silent occurs when the state uses a comment as substantive evidence of guilt or to suggest that silence was an admission of guilt. For example, in State v. Romero, 113 Wn.App. 779, 787, 54 P.3d 1255 (2002), the testimony, "I read him his Miranda warnings, which he chose not to waive and would not talk to me," was held to be a direct comment on the exercise of the right to remain silent. For another example, in State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002), the comment that the defendant refused to talk saying he wanted an attorney was held to be a direct comment on the right to remain silent. The comment in Curtis was

essentially the prosecutor's recurring theme in this case -- from opening statement to closing rebuttal argument. Review should be granted on this significant issue to clarify that a direct comment on the exercise of the right to remain silent can never be used to imply guilt, even though one can be impeached with any inconsistent statements that are made prior to the invocation of rights.

F. CONCLUSION

Petitioner respectfully submits that review should be granted and his judgment and sentence reversed and the case remanded for retrial.

DATED this 14 day of March, 2006

Respectfully submitted,



John Henry Browne
WSBA #4677.
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 55679-7-1
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
JUSTIN BRYCE BURKE,)	
)	
Appellant.)	FILED: March 6, 2006

GROSSE, J. – When a defendant does not remain silent and talks to law enforcement officers, the State may comment on what the defendant does not say. Because Burke did not invoke his right to remain silent when he voluntarily participated in a prearrest interview with detectives, the State’s comments at trial could not have been improper commentary upon Burke’s invocation of his right to remain silent. We affirm.

FACTS

On August 18, 2003, 23-year-old Justin Burke had intercourse with 15-year-old J.S. The two were attending a party and J.S. was intoxicated. Burke was later charged with Third Degree Rape of Child, in violation of RCW 94.44.079.

On September 10, 2003, after a report had been filed, but before charges were brought against Burke, two detectives went to Burke’s house and interviewed him about the incident. Burke was living at home with his parents at the time. Detective Michael Richardson testified that it was a voluntary interview

and that the detectives, "wanted to establish that Mr. Burke was indeed the suspect" and "that what was alleged in the report actually took place." Upon arriving at the Burke family home, the detectives identified themselves as police and told Burke that they would like to talk to him. Burke then invited the police into the house. Detective Richardson conducted the interview. Burke's father was listening-in from nearby.

Detective Richardson testified at trial that he first asked Burke about the party. Burke related to Richardson that people at the party were drinking alcohol and smoking "weed" and that "most of the people were high school age and one of the girls started to flirt with him." Burke told him that he did not recall the girl's name, but that he knew it was "Jamie's sister" and that "he and the girl were flirting and the next thing he knew was they ended up in bed together." Detective Richardson testified that Burke, "then said he later found out that she was younger than he thought she was." Richardson then testified, "I asked [Burke] basically how old she was and he said he did not know, but that he knew she was in high school." Burke then admitted to Detective Richardson to having sexual intercourse with the girl and in response to questions about whether the girl was intoxicated, "[Burke] said that she had been drinking but she was not stumbling drunk" and that "she was aware of what was going on."

At that point in the interview Detective Richardson testified that "[Burke's] father basically came into the room and asked if any charges were going to be filed in the case." Detective Richardson "told him it's very possible that charges would be filed." Burke's father then "advised [Burke] not to make any other

statements until he spoke to an attorney.” Burke then asked Detective Richardson “if that was possible.” Detective Richardson told him, “yes, he could speak to an attorney.” Burke then “made a statement that he thought that this was a bunch of [expletive], that girls at Edmonds Woodway were always trying to get guys into trouble.” Detective Richardson got up and told Burke that he would be in contact with him in the future and that he would call him and let him know about the disposition of the case.

At trial Burke asserted as an affirmative defense that J.S. had told him that she was “turning 17.” In an effort to combat this defense, the State argued before the jury that Burke could not be believed because he had not mentioned this important piece of information to the police during the interview. After being repeatedly cross-examined on the subject, Burke stated that he did not tell the police about J.S. telling him that she was almost 17 because it did not seem particularly important and he was nervous. The State then argued before the jury that Burke’s explanation was inconsistent with his testimony that when he found out the day after the incident that J.S. was 15, he cried. The State argued in closing, “It sounds like he did know the age of consent. Sounds like he did know the significance of her being 15, because when he says he found out for the first time he cried.”

Burke was convicted as charged. After obtaining new counsel, Burke filed a motion for a new trial and arrest of judgment, claiming that the State committed constitutional error by commenting on Burke’s exercise of his constitutional rights to remain silent and access to counsel. In addition to claiming that the State’s

questioning of Burke as to why he did not tell the police that J.S. had told him she was turning 17 was improper, Burke pointed to statements made by the prosecutor during opening and closing arguments.

Specifically, during opening statements the prosecutor said of Burke's interview with the police:

And for a time the defendant talked to [the police], freely telling them, yeah, I don't remember what her name was, but it was Jamie's sister, and yes, we had sex. And then interestingly the defendant's father cut in, perhaps sensing that things, that the police there and perhaps sensing that it wasn't necessarily okay to have sex with [J.S.], the defendant's father in effect ended the interview by telling the defendant, his own son, that he shouldn't be talking to police. And that pretty much did end the interview, except the defendant had a few parting shots.

The defendant seated here in the jacket and the tie next to counsel informed Detective Richardson and Detective Honnen, who was standing by, that this was a bunch of [expletive] and the Edmonds Woodway girls are always getting people into trouble.

And with those remarks, he concluded the interview and the police simply left. They weren't there to arrest anybody, they were there to gather the defendant's side of the story. That is all he chose to give them and they left.

And in closing the prosecutor commented:

And did you notice, when [Burke] was complaining to the police, about how the girls at Edmonds Woodway High are always trying to get people into trouble, he never got around to what turned out to be the most significant thing here and what he told you on the stand, he never said, [J.S.] told me, [J.S.] told me that girl, Jamie's sister, she told me she was 16. Well, he asked him, how old was she, how old was she Justin. I don't know.

Well, what about she told me she was 16, or she told me she was 17, nothing, nothing. And then his father shut down the interview.

The trial court denied Burke's motion, stating:

My recollection of the testimony, after reviewing the record, the father interjected and said maybe you shouldn't talk to him until you talk to a lawyer. He said, can I talk to a lawyer, and the cop said,

yes, you can, whereupon he made this whole statement about it all being [expletive] and the police just withdrew. They took the question about a lawyer – well, having heard the question about the lawyer, they decided that the overwhelmingly safe thing to do would be to not continue to question. They stopped questioning and left.

I don't think that rises to the dignity of a request for counsel such as to make the comment on it constitutionally – I mean a violation of the constitution.

The questions on cross examination and the questions – and the closing argument was clearly intended to explore the credibility and to examine credibility of the defendant and not to unconstitutionally imply guilt by reason of silence.

It's when the silence is intended to imply guilt that it's – I mean, commenting on it is wrong, it seems to me, from my reading of the cases.

And it wasn't like the situation of the drunk sitting there not saying a single word and having that conduct being commented on as evidence of guilt.

I am not persuaded that the defendant's question about an attorney was a request for counsel. So the motion will be denied.

Burke appeals.

ANALYSIS

The State is prohibited at trial from arguing unfavorable inferences from the exercise of a constitutional right.¹ Defendants have a constitutional right to counsel that derives from the Sixth Amendment. Defendants also have a constitutional right to remain silent that derives from the Fifth Amendment.² In a criminal proceeding, the State may not elicit comments from witnesses or make arguments relating to a defendant's prearrest or postarrest silence to infer guilt from such silence.³ A direct comment on a defendant's silence occurs when the

¹ State v. Johnson, 80 Wn. App. 337, 339-40, 908 P.2d (1996).

² State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996).

³ Easter, 130 Wn.2d at 243.

State uses the comment as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.⁴

When the defendant elects to testify, the State may use the defendant's prearrest silence to impeach the defendant's credibility without improperly commenting on the exercise of the defendant's right to remain silent.⁵ Moreover, it is not improper for a witness to comment on a defendant's failure to give an exculpatory explanation if the defendant waived the right to remain silent by voluntarily talking to police.⁶ Consequently, when a defendant does not remain silent and talks to law enforcement officers, the State may comment on what the defendant does not say.⁷ Likewise, "the State may question a defendant's failure to incorporate the events related at trial into the statement given [to] police or it may challenge inconsistent assertions."⁸

Here, Burke never invoked his right to counsel because he had no right to counsel at the time of the voluntary interview. A suspect has no right to counsel unless adversarial criminal proceedings have been initiated, or he is subject to custodial interrogation.⁹ The prosecution therefore could not have impermissibly

⁴ State v. Romero, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002).

⁵ Easter, 130 Wn.2d at 237.

⁶ State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001); State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988).

⁷ Clark, 143 Wn.2d at 765 (citing State v. Young, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)).

⁸ Belgarde, 110 Wn.2d at 511.

⁹ CrR 3.1(b)(1) ("The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.") See also State v. Copeland, 89 Wn. App. 492, 499, 949 P.2d 458 (1998).

commented on Burke's invocation of his right to counsel because no such right had accrued at the time of the voluntary police interview.

Furthermore, Burke never asserted his right to remain silent, but instead voluntarily answered Detective Richardson's questions until his father interjected with the suggestion that he not speak to them further until he spoke with a lawyer. After asking the detective if that was possible, Burke continued to speak voluntarily, claiming the situation was a bunch of [expletive] and making a derisive comment about girls who attended J.S.'s high school. The detectives decided to cease asking questions and left. As explained by Detective Richardson at trial:

You know, I probably could have continued talking with him, but since his father was there and they had mentioned an attorney, it was a voluntary type interview anyway, I didn't – I felt that we needed to just leave at that point.¹⁰

¹⁰ Detective Richardson also testified in response to a question as to whether he thought Burke had said enough about an attorney to make him think he should not ask Burke any more questions:

Yeah, at that point basically it was a voluntary interview and I felt that with his father interjecting into the conversation and saying that Justin, don't make anymore statements until you talk to an attorney, I believed that at that point when Justin asked me if that was possible, that that was kind of his way of stopping the interview. And you know, when he made the statements at the end of the interview, that was – that wasn't any questioning or anything, that was just a statement he made.

Detective Richardson was correct, he could have continued to speak with Burke at that point because Burke had continued to speak to him, but instead he chose to exercise caution and end the interview.¹¹

At trial the prosecutor stated that it was the father who shut down the interview. This statement is correct insofar that it was the father's interjection that led the detectives to decide to cease questioning. However, Burke's right to remain silent was his to invoke; he chose not to do so, but instead kept talking to the police about the incident.

Burke asks us to distinguish his case from State v. Clark.¹² Clark involved the kidnapping, murder and rape of a 7-year-old Roxanne Doll. The day after Roxanne was found missing the defendant Clark, who had been drinking and taking drugs with Roxanne's mother at her house the night before, went to the Everett police station accompanied by his aunt to give the police copies of the missing-person flier they were distributing. There he spoke with Lieutenant Peter Hegge who asked them to go to Roxanne's house to talk to police who were there interviewing people who might have information relevant to the search for Roxanne. Clark said he would drive over, but after seeing the number of police at the house, he continued on. Clark told his aunt who was riding with him that he did not stop because he did not have a driver's license.

¹¹ See State v. Grieb, 52 Wn. App. 573, 575, 761 P.2d 970 (1988) (quoting Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) ("Once an accused asserts his right to remain silent and his right to counsel, all interrogation must cease until an attorney is present 'unless the accused himself initiates further communication, exchanges, or conversations with the police.'").

¹² Clark, 143 Wn.2d at 765.

The next day, Detective Lloyd Herndon interviewed Clark who asked him why he had not stopped at the house the previous day. Clark claimed that he did not stop at the house because he was low on gas and could not make it out to the house. Detective Herndon, who had apparently asked Clark to page him previously, then asked Clark why he had not paged him. Clark said he did not want to hassle with the police.

Clark challenged the prosecution's introduction of his failure to stop at the house and page Detective Herndon as evidence of prearrest silence which was introduced to persuade the jury of his guilt. The Washington Supreme Court found this was not a matter of prearrest silence. The Clark court stated:

It would appear Clark's characterization of these events as prearrest silence is not entirely correct. He volunteered to speak with Lieutenant Hegge and Detective Herndon. He told Lieutenant Hegge he would go to the Doll-Iffrig house on April 1, 1995; he told his aunt, traveling with him, he did not stop because he had no license. The next day he changed his story and told Detective Herndon he did not come out because he was low on gas.

When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say. False information given to the police is considered admissible as evidence relevant to defendant's consciousness of guilt.

Here Clark spoke with police on two occasions prior to arrest, and developed a conflicting account of why he did not follow Lieutenant Hegge's instructions to meet with detectives at the Doll-Iffrig house. This is not apparently a matter of prearrest silence. There was no error.¹³

In short, because Clark had volunteered to speak with Lieutenant Hegge and Detective Herndon the door was open for the prosecution to comment on what he did not say to the police and the conflicting information he gave to the detectives.

¹³ Clark, 143 Wn.2d at 765 (citations omitted) (emphasis in original).

We do not see any relevant distinction between Clark and the case at bar. Burke volunteered to speak with the police and answered several questions, including a question about the victim's age. When Detective Richardson asked Burke if he knew the victim's age, Burke said that he did not know how old she was, but he knew she was in high school. He did not mention she had told him she was turning 17, the defense he later raised at trial. However, he did tell the police he later found out that she was younger than he thought she was. Burke then initiated further communication with the police after asking if it was possible for him not to make any more statements before speaking with an attorney. At no time did Burke invoke his right to remain silent, because he continued speaking voluntarily about the incident even after his inquiry about an attorney. Since Burke did not invoke his right to remain silent, the State's comments could not have been improper commentary upon his invocation of his right to remain silent. There was no error.

For the above reasons, the judgment and sentence is affirmed.

Grosse, J

WE CONCUR:

Appelwick, ACJ

Colman, J