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NO. 64468-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TEODORO VALLEJO,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES

1. A trial court has discretion to admit relevant evidence.

In this DUI trial, the court admitted evidence of the defendant's refusal to participate in DUI sobriety and breath tests. Was this evidence relevant?

1. A defendant has a right to confidential communication with his attorney. Here, the trial court admitted the defendant's refusal to participate in DUI tests. Does the attorney-client privilege have any bearing here regarding the test refusal evidence?

2. A trial court has discretion to tailor appropriate jury instructions to the case before the court. Here, the trial court included the name of the offense and the elements of the crime in its jury instructions. Was this proper?

3. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court during the appeal and are consistent with the trial court's oral ruling. Has the trial court properly submitted written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.¹

Defendant Teodoro Vallejo was charged by information with Felony Driving Under the Influence. CP 1. The trial court held CrR 3.5 and 3.6 hearings, where the court admitted Vallejo's statements to police and found Vallejo's stop and arrest lawful. 1RP 44-45; 2RP 41-43. After declaring a mistrial, the court held a new trial but retained its earlier pretrial and evidentiary rulings. 4RP 3. In this second trial, a jury found Vallejo guilty of Felony Driving Under the Influence as charged. CP 50.

The court issued its written findings of fact for the CrR 3.5 and CrR 3.6 hearing on August 25, 2010. Supp. CP __ (Sub 84 and 85, Findings of Fact / Conclusions of Law). The trial court imposed a standard range sentence. 6RP 10; CP 51-59. Vallejo now appeals his conviction. CP 60-69.

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (09/02/09); 2RP (09/03/09); 3RP (09/08/09); 4RP (09/09/09); 5RP (09/10/09); 6RP (Sentencing 10/16/09).

2. SUBSTANTIVE FACTS.

Seattle Police Officer Mike Lewis was driving on Interstate-5 around 4 a.m., when Teodoro Vallejo passed Lewis at 90 m.p.h. 4RP 13-14. Lewis activated his overhead emergency lights and followed Vallejo. 4RP 16-17. Vallejo slowed to 60 m.p.h., the speed limit, but did not pull over. 4RP 15-16. Lewis turned his siren on and directed his spotlight to Vallejo, who exited Interstate-5 but continued driving. 4RP 16. Upon reaching an intersection, Vallejo stopped and turned left through a red light without signaling. 4RP 16. The pursuit ended after a couple of minutes when Vallejo drove into his apartment complex and parked his car. 4RP 17-18.

Vallejo immediately exited his car. 4RP 19. His eyes were droopy and his movements were slowed. 4RP 19. Lewis approached Vallejo, who emitted a strong odor of alcohol. 4RP 20. Lewis patted Vallejo for weapons, and noticed by touch and smell that Vallejo had urinated in his pants. 4RP 20. Lewis, who is trained in DUI investigations, concluded that Vallejo was obviously intoxicated. 4RP 9, 20.

Lewis saw in the front passenger seat area of Vallejo's car a recently emptied beer bottle. 4RP 21, 45-46. Because Lewis had a K-9 vehicle, which was not equipped for prisoner transport, he

called Officer Peplowski to take custody of Vallejo. 4RP 22. After 30 minutes, Peplowski arrived and observed Vallejo's strong odor of alcohol, slurred speech, and red and watery eyes. 4RP 22, 63. Vallejo's clothes were unkept and smelled of urine. 4RP 63, 78.

Peplowski read Vallejo his Miranda rights and drove Vallejo to the police precinct, where Vallejo became more emotionally volatile; at times joking and then becoming angry. 4RP 79-80; 5RP 51. As they arrived at the precinct, Peplowski asked Vallejo if he was willing to do a field sobriety test. 4RP 67. Vallejo said, "probably not." 4RP 67. Inside the precinct, Vallejo asserted that he had only drunk a six-pack of Coca-Cola with water. 4RP 76-77; 5RP 17. Peplowski read Vallejo the implied consent warnings, which indicated that he had a right to refuse to take a blood alcohol concentration (BAC) breath test, but that his license would be suspended if he did not and that this "refusal to take this test may be used in a criminal trial." 4RP 68-72. Vallejo told Peplowski that he would not take the test. 4RP 70-71.

The parties stipulated that at the time of Vallejo's arrest, he had been convicted of the crime defined in RCW 46.61.5055 (the DUI penalty statute) at least four times within the past ten years. 5RP 58; CP 48-49.

3. RELEVANT PRETRIAL FACTS.

The court addressed a pretrial defense motion to exclude trial evidence that Vallejo refused to participate in the DUI sobriety and breath tests. 1RP 46. The court recognized this motion was an evidentiary issue, but allowed Vallejo to testify regarding his motion. 1RP 47-48.

Vallejo testified that in 1993 he was cited for drinking and driving in Buckley, Washington. 1 RP 50. His public defender at that time told Vallejo never to participate in a breath test. 1RP 50. Vallejo said that he believed that this advice also related to a field sobriety test. 1RP 50. At the time of his arrest for the current offense, Vallejo attempted to contact his current trial attorney, but did not speak to his current attorney or any other attorney before refusing the tests in this case. 1RP 17-21.

While recognizing that statutorily the test refusals were admissible, defense argued that because of Vallejo's prior advice from counsel, there was no consciousness of guilt and the evidence was not relevant. Defense also argued that the admission of this evidence would "compel" him to testify to the jury about this 1993 conversation with his prior public defender. 1RP 56.

The trial court disagreed, found the evidence relevant, and that pursuant to ER 403 the prejudicial effect of admitting the evidence does not outweigh its probative value. 1RP 58. The court found that the evidence "is probative of his knowledge that he was under the influence." 1RP 58. The court also indicated that if Vallejo wished to testify in the trial, the court would allow any reference to his prior conversations with his attorney to be "sanitized" so that it did not include the fact that he had prior counsel. 1RP 58. Vallejo chose not to testify at trial. 5RP 73.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED VALLEJO'S DUI TEST REFUSALS.

Vallejo argues that the trial court abused its discretion and violated Vallejo's attorney-client privilege when the court admitted evidence that Vallejo refused to take DUI sobriety and breath tests. Vallejo's claims are without merit.

a. The Trial Court Did Not Abuse Its Discretion In Admitting Vallejo's Test Refusals.

Vallejo claims that the trial court abused its discretion when it admitted evidence of his DUI test refusals. Because the evidence was relevant and highly probative, this claim fails.

RCW 46.20.308 states that a person who drives a vehicle on a road in the State of Washington consents to take a breath test when police have reasonable grounds to request the test pursuant to a DUI investigation. RCW 46.20.308. "The refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath under RCW 46.20.308 is admissible into evidence at a subsequent criminal trial." RCW 46.61.517.

In State v. Long, 113 Wn.2d 266, 272-73, 778 P.2d 1027 (1989), our Supreme Court considered the legislative history of RCW 46.61.517 in detail, and concluded, "the legislative determination that refusal evidence is relevant and fully admissible to infer guilt or innocence now seems clear." State v. Cohen, 125 Wn. App. 220, 223-24, 104 P.3d 70 (2005) (quoting State v. Long, 113 Wn.2d 266, 272-73, 778 P.2d 1027 (1989)). A DUI alcohol test provides strong evidence of guilt or innocence, and "a driver's refusal to take the test is evidence of guilty knowledge." Cohen, 125 Wn. App. 200, 222-25, 104 P.3d 70 (2005) (citing South Dakota v. Neville, 459 U.S. 553, 564, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983)).

Indeed, refusal to take a field sobriety test (FST) or a Blood Alcohol Concentration (BAC) breath test is admissible in court, so

long as a trial court finds the refusal relevant to the case. City of Seattle v. Stalsbroten, 138 Wn.2d 227, 239, 978 P.2d 1059 (1999) (citing Long, 113 Wn.2d at 272); City of Fircrest v. Jensen, 158 Wn.2d 384, 398-99, 143 P.3d 776 (2006). DUI test evidence is relevant and admissible if it survives an ER 403 analysis.² Cohen, 125 Wn. App. at 226-27. Thus, evidence of refusal to take DUI tests is properly admitted if the trial court finds that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Id.

The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Griswold, 98 Wn. App. 817, 823, 991 P.2d 657 (2000). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or its discretion is exercised for untenable reasons. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

Here, the trial court engaged in an extensive ER 403 analysis before admitting this relevant evidence. 1RP 58, 61-62. Vallejo smelled of alcohol, had a recently emptied bottle in his car,

² ER 403 states that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

slurred his speech, and urinated on himself, but yet asserted that he had nothing to drink but water and Coca-Cola. When offered the opportunity to submit to a test to show whether he was intoxicated, he declined. The court found that the test refusal was "probative of his knowledge that he was under the influence." 1RP 58. It concluded that any other reason that Vallejo wanted to claim for why he did not take the tests would go to the weight of the evidence, not admissibility. 1RP 58, 61-62. Accordingly, the court found that these DUI test refusals would not create prejudice that substantially outweighs the probative value of the evidence. 1RP 58-59, 61-62.

Vallejo argues that because his DUI test refusals were "long after he was arrested and transported to a police station and at a time when he wanted to speak with his lawyer, his refusal to take part in providing the police with further potentially incriminating evidence was far more prejudicial than probative of his consciousness of guilt." Appellant's Brief at 12-14. But the trial court correctly concluded that these claims challenged the weight of the evidence before the jury, not its admissibility. 1RP 58, 61-62.

To argue that the refusals were improperly incriminating, Vallejo cites People v. DeGeorge, 541 N.E.2d 11, 13 (N.Y. 1989),

which holds that a defendant's silence during police interrogation is often more prejudicial than probative. But our Supreme Court held that refusals to perform FST and BAC breath tests are non-testimonial and are not a form of communication. Stalsbroten, 138 Wn.2d at 222-23; City of Fircrest v. Jensen, 158 Wn.2d 384, 398-99, 143 P.3d 776 (2006). A refusal to take a DUI test is not self-incrimination; it is an affirmative act, not silence from speaking. Id. The refusal to take a DUI test is not the type of post-arrest interrogation silence referenced in DeGeorge. Accordingly, DeGeorge is inapposite.

Vallejo has not shown that the trial court's admission of this evidence was manifestly unreasonable based on the facts of this case. As such, the evidence was properly admitted.

b. Admission Of The DUI Test Refusal Evidence Did Not Violate the Attorney-Client Privilege.

Vallejo next claims that by admitting his BAC test refusal, the trial court violated his attorney-client privilege, and thus his right to counsel. Vallejo argues that because an attorney told him in 1993 to never participate in a BAC Test, "the State should not be free to comment on his refusal to submit to further blood alcohol testing

when it was predicated on the express advice of counsel."

Appellant's Brief at 9. Because Vallejo confuses the privilege of confidential attorney-client communication with the non-communicative act of his refusal, his claim fails.

A defendant is entitled to attorney-client confidentiality. RCW 5.60.060.³ The privilege applies to communication and advice between an attorney and client. State v. Perrow, 156 Wn. App. 322, 328, 231 P.3d. 853 (2010). However, a defendant's refusal to participate in a BAC test is not a form of communication. Stalsbrotten, 138 Wn.2d at 233-34. The refusal is itself a non-testimonial act that neither explicitly nor implicitly makes "a factual assertion or disclose information." Stalsbrotten, 138 Wn.2d at 233-34 (citing Pennsylvania v. Muniz, 496 U.S. 582, 594, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990)).

Here, Vallejo refused the BAC test. He was not asked to explain the reason why he made this decision either by police or at trial. Whether Vallejo relied on fifteen-year old legal advice or his own consciousness of guilt in refusing the test does not make the

³ This privilege exists statutorily in RCW 5.60.060(2)(a) and states:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

test refusal a confidential disclosure. Because the evidence of the refusal is not a form of communication, it is not protected by the attorney-client privilege. Accordingly, the admission of the evidence cannot violate the attorney-client privilege or Vallejo's right to counsel.

Vallejo essentially argues that when the trial court admitted evidence in this case it was necessary for him to disclose to the jury the advice he received from his lawyer 15 years ago. But this argument is unpersuasive. Vallejo's decision to discuss or not discuss this attorney communication was voluntary and strategic. In fact, Vallejo opted not to testify to the jury in the trial and the court indicated it would sanitize any reference to prior counsel.

Vallejo provides no authority to support his claim that a defendant can exclude evidence that he created as a result of following his counsel's advice. According to this rationale, any time an attorney recommends a certain action, the evidence that follows from that advice would need to be excluded. This novel interpretation of the attorney-client privilege would lead to absurd results and is without legal authority.

The only authority Vallejo cites are cases that hold the general proposition that when the government seizes or obtains

privileged communication, that communication is protected and otherwise inadmissible. See Dietz v. Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997); Soter v. Cowles Publ'g Co., 131 Wn. App. 882, 130 P.3d 840 (2006); Perrow, 156 Wn. App. at 328; RCW 5.60.060(2)(a). These cases do not extend the attorney-client privilege to exclude evidence just because a defendant's actions were on the advice of counsel. Because the evidence admitted in this case was neither a form of communication nor a disclosure, it cannot be privileged communication, and Vallejo's claim fails.

c. Any Evidentiary Error Would Be Harmless.

Even if the trial court had erred in admitting the test refusal evidence, the error would be harmless. Evidentiary error is grounds for reversal only if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). An error is harmless if the evidence is of minor significance in reference to the evidence as a whole. Neal, 144 Wn.2d at 611.

Here, had the evidence of Vallejo's test refusals not been admitted into evidence the outcome of the trial would not be materially affected. The evidence of Vallejo's intoxication was overwhelming. Based on their training and experience, police testified to Vallejo's obvious intoxication. 4RP 9, 20. Vallejo smelled of alcohol, had droopy red eyes, had his clothes in disarray, and reeked of urine. 4RP 22, 63, 67. He had a recently drunk bottle of beer in his car. 4RP 21, 45-46. While driving, Vallejo sped, failed to pull over despite lights, sirens, and a spotlight, and committed multiple driving infractions. 4RP 16-18. Vallejo was clearly under the influence and the parties stipulated that Vallejo had at least four prior requisite offenses that elevated this crime to a felony. CP 48-49. The evidence as a whole is sufficient for the jury to conclude that Vallejo had committed the crime of Felony Driving Under the Influence. As such, any error would be harmless.

2. THE JURY INSTRUCTIONS WERE PROPER.

Vallejo argues that the trial court "unnecessarily attached the 'felony' label to the offense through the jury instructions and included the prior convictions as an element of the offense in the

to-convict instructions." Appellant's Brief at 15. Because the trial court correctly named the charged offense as Felony Driving Under the Influence, which has as an element that the defendant had prior offenses, Vallejo's claim is without merit.

A trial court has discretion whether and how to instruct the jury related to an offense. State v. Hagler, 150 Wn. App. 196, 202, 208 P.3d 32 (2009). A court has a duty to inform the jury of all of the elements of the charged offense, because the State has the duty to prove each element beyond a reasonable doubt. Id. at 201-02; State v. Chambers, ___ P.3d ___, WL 3213614 at *4 (Wn. App., August 10, 2010). While the trial court may bifurcate an element into a special jury instruction, it is not required to do so. State v. Oster, 147 Wn.2d 141, 146-47, 52 P.3d 26 (2002); State v. Roswell, 165 Wn.2d 186, 197-98, 196 P.3d 705 (2008).

The crime of Felony Driving Under the Influence has as an element of the offense that the person has four or more prior offenses within ten years as defined in RCW 46.61.5055. Chambers, WL 3213614 at *5. This element distinguishes the crime of Felony Driving Under the Influence from the separate offense of Driving Under the Influence, a misdemeanor crime. State v. Castle, 156 Wn. App. 539, 542-43, 234 P.3d 260 (2010).

Here, the trial court instructed the jury that the defendant was charged with Felony Driving Under the Influence. 5RP 62-69. This was the charged offense. CP 1-4. Clarifying the charged offense in the jury instruction was within the discretion of the trial court and is consistent with the Washington Pattern Jury Instructions. See WPIC 4.21.⁴

The trial court also properly listed all of the elements of the offense, including the element requiring proof that Vallejo had at least four prior offenses. Even with the stipulation to that element, the Court had a duty to list all of the elements of the offense of Felony Driving Under the Influence. See Hagler, 150 Wn. App. at

⁴ The sample for a to-convict instruction as described in WPIC 4.21 is as follows:

WPIC 4.21
ELEMENTS OF THE CRIME -- FORM

To Convict the defendant of the crime of _____ each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1)
- (2)
- (3)
- (4)
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

202. Since this proof of prior offenses was an element of the crime, the court properly listed it in the to-convict instruction.

Vallejo argues that the "only task for the jury was to determine whether Vallejo committed the predicate offense of driving while intoxicated." Appellant's Brief at 16. But this claim ignores a crucial element of the offense. Since Vallejo has filed his opening brief, this Court has clarified that proof of the defendant's prior offenses is an element of the crime of Felony Driving Under the Influence that must be proved. Chambers, 2010 WL 3213614 at *5; Castle, 156 Wn. App. at 542-43.

Vallejo relies on State v. Hagler as an example of how prejudicial designations for an offense should be omitted from jury instructions. However, proving four or more prior offenses within ten years is an element of Felony Driving Under the Influence, and thus must be included in the jury instructions for that crime. Hagler, 150 Wn. App. 196, 202; Chambers, 2010 WL 3213614 at *5; Castle, 156 Wn. App. at 542-43. This case is therefore distinguished from Hagler, where this Court held that it was improper to include a mere designation of "domestic violence," which was not an element of the offense. Hagler, 150 Wn. App. 196, 201-02. Moreover, the trial court here accepted a defense

proposed instruction to minimize any prejudice by stating that: "The jury is not to speculate as to the nature of the prior convictions." Supp. CP ___ (Sub 56, Court's Instruction to the Jury / Instruction No. 9). Because the court properly instructed the jury as to the elements of the offense, the jury instructions are proper.

3. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED FINDINGS.

Vallejo asserts that the trial court failed to enter Findings of Fact and Conclusions of Law as required by CrR 3.5 and 3.6(b). On August 25, 2010, the trial court entered the required written findings. Supp. CP ___ (Sub 84 and 85).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369, rev. denied, 120 Wn.2d 1011 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125, rev. denied, 102 Wn.2d 1024 (1984).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter

the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992).

However, unlike Smith, here the court entered findings that have not delayed resolution of Vallejo's appeal. There is no resulting prejudice. Hillman, 66 Wn. App. at 774; McGary, 37 Wn. App. at 861.

Vallejo cannot establish unfairness or prejudice resulting from the delayed entry of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp. CP ___ (Sub 84 and 85). The language of the findings follows the trial court's oral ruling. 1RP 44-45; 2RP 41-43. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Supp. CP ___ (Sub 86, Trial Prosecutor Declaration).

In light of the above, Vallejo cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.5 and 3.6(b) findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Vallejo's conviction for Felony Driving Under the Influence.

DATED this 26th day of August, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for Teodoro Vallejo, Washington Appellate Project, 1511 3rd Ave, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. TEODORO VALLEJO, Cause No. 64468-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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