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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
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No. 44794-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CITY OF TACOMA, Respondent,

v.

DAVID ERICKSON, Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle

**BRIEF OF APPELLANT
DAVID ERICKSON**

JENNIFER VICKERS FREEMAN
Attorney for David Erickson
WSBA # 35612

1115 Tacoma Avenue South
Tacoma, WA 98402
(253) 507-4706

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I. ASSIGNMENTS OF ERROR

1. The Superior Court erred by affirming Mr. Erickson's conviction for being in physical control of a motor vehicle while under the influence of intoxicants, finding that Mr. Erickson failed to prove he was safely off the roadway by a preponderance of the evidence.
2. The Superior Court erred by finding that the City did not improperly comment on Mr. Erickson's post-*Miranda* request for counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient evidence to convict David Erickson of being in physical control of a motor vehicle while under the influence of intoxicants where his vehicle was lawfully and safely parked prior to being pursued by law enforcement, and where the officer testified that the vehicle was safely parked?
2. Did the City improperly comment on Mr. Erickson's invocation of his right to counsel in violation of the Fifth Amendment by repeatedly eliciting testimony about Mr. Erickson's request for counsel and commenting on his request for counsel in closing argument?

III. STATEMENT OF THE CASE

1. Procedural History.

On June 7, 2012, Mr. Erickson was found guilty of one count of physical control with an enhancement for refusing the breath test. (RP 248). Following his conviction, Mr. Erickson timely filed a Notice of Appeal with Pierce County Superior Court. (CP 276-80).

On appeal, Mr. Erickson argued, among other things, that (1) there was insufficient evidence to find that Mr. Erickson had not proven he was safely off the roadway by a preponderance of the evidence, and (2) the City improperly commented on his exercise of his constitutional rights after *Miranda*. (CP 281-302). On March 22, 2013, Pierce County Superior Court affirmed Mr. Erickson's conviction, finding that a rational trier of fact could have found that Mr. Erickson was not safely off the roadway and that, based on the facts of the case, the City did not improperly comment on Mr. Erickson's exercise of his right to counsel. (CP 265-66).

On April 18, 2013, Mr. Erickson filed a Notice of Intent to Seek Discretionary Review. (CP 267-70). On September 6, 2013, this court granted the motion in part, allowing Mr. Erickson to appeal the Superior Court's findings on the affirmative defense of being safely off the roadway and the City's comments on Mr. Erickson's invocation of his

right to counsel.

2. Facts.

On September 29, 2011, Mr. Erickson drove to the Opal bar. (RP¹ 178). Mr. Erickson parallel parked his motorcycle along the curb, at an angle, resting on the kickstand. (RP 43-44). Mr. Durham parallel parked his SUV in front of Mr. Erickson's motorcycle. (RP 40).

Mr. Erickson had not been drinking before he went to the Opal. (RP 178). During the evening, he went back and forth between Golden West and the Opal. (RP 42).

At some point that night, Mr. Erickson got on his motorcycle. (RP 43). When Mr. Erickson was on his motorcycle, he pulled the motorcycle upright and scraped the bumper of Mr. Durham's SUV and the motorcycle fell over. (RP 42-44). Mr. Durham testified that Mr. Erickson put the key in the motorcycle. (RP 43). But, Mr. Durham never saw Mr. Erickson try to turn anything or try to start the motorcycle. (RP 66).

After the motorcycle fell, a couple guys helped Mr. Erickson get the bike back up and then it fell again into Mr. Durham's car. (RP 43). The motorcycle fell three times. (RP 45). Mr. Durham yelled at Mr. Erickson about hitting his car, followed him, and called 911. (RP 45).

Officer Mills contacted Mr. Erickson at the bar and handcuffed

¹ Verbatim Report of Proceedings, found in the Clerk's Papers, pages 1-264, are referred to as "RP," followed by the page number.

him. (RP 177). The officer advised Mr. Erickson of his *Miranda* rights. (RP 73-74, 122). Mr. Erickson appeared intoxicated and had a hard time walking. (RP 118-19).

Officer Graham also responded to the scene. (RP 128). He testified that the motorcycle was legally parked and safely off the roadway when he arrived. (RP 156).

DA: When you saw the bike according to the picture that you drew there it was legally parked?

W: It was.

DA: And it was safely out of the roadway?

W: It was.

(RP 156).

Officer Graham contacted Mr. Erickson and noticed that his eyes were watery and droopy, that his face was flushed, he smelled like alcohol, his speech was slurred, and he was drooling. (RP 133). The officer testified that Mr. Erickson didn't say much other than he wanted an attorney. (RP 133). The City then asked:

CA: Okay. And when you contacted him there what did you do?

W: I opened up the patrol vehicle. I contacted Mr. Erickson. . . . Um I you know I tried asking him some questions. Ah wasn't getting much out of it other than he wanted an attorney. Um.

CA: Okay, did you did you ask him if he had anything to drink?

W: I attempted to ask him but all he would respond is that he wanted an attorney.

CA: Okay, so did you try to pursue any questioning when he asked for an attorney?

W: I just asked if he would perform voluntary field sobriety tests. Which all he kept saying was that he wanted an attorney. And at that point we stopped.

...

CA: Okay, so you just asked him if he was willing to do those test?

W: I did.

CA: And how did he respond to that?

W: He just wanted an attorney.

(RP 133-34).

Officer Graham believed that Mr. Erickson was impaired and arrested him. (RP 134). The officer testified that Mr. Erickson didn't have much of a reaction, "all he wanted was an attorney." (RP 135).

The City again raised the issue of Mr. Erickson not answering questions.

CA: Okay. And ah now you indicated that you really didn't ask the defendant his version of the events. And why was that?

W: Like I said when I first started making contact Mr.

Erickson in the back seat of my patrol vehicle um just about anything I said to him was responded to with I want an attorney.

(RP 166-67).

At the police station, Officer Graham attempted to read Mr. Erickson his *Miranda* rights. (RP 136).

CA: Okay. And did the defendant indicate he understood that?

W: All he would say is I need an attorney.

CA: Okay. So you um it's fair to say you were not trying to investigate any and ask him questions about what happened?

W: No.

CA: And why was that?

W: He had requested an attorney.

CA: Okay. And them um did you get any information about an attorney that the defendant wanted?

W: He advised that he had a business card in his wallet that had ah his attorney's number on it.

(RP 137).

The City continued to ask questions about the officer's attempts to contact Mr. Erickson's attorney, that they were able to get an attorney from the Department of Assigned Counsel on the phone, and that Mr. Erickson was left alone for fifteen minutes. (RP 137-40).

When asked if he would submit to a breath test, Mr. Erickson refused. (RP 147).

In closing, the City argued that Mr. Erickson was not safely off the roadway because the motorcycle fell and the leak from the motorcycle could have been dangerous. (RP 218, 245).

The City also discussed Mr. Erickson's invocation of his right to counsel, saying that the defendant wanted to speak to an attorney, that Officer Graham got an attorney on the phone, and that Mr. Erickson spoke to an attorney for twenty minutes. (RP 219-20). The City said, "That's a long time." (RP 220).

I. ARGUMENT

1. There Was Insufficient Evidence for a Jury to Find David Erickson Guilty of Physical Control Because He Proved By a Preponderance of the Evidence That He was Safely Off the Roadway.

"The standard for determining whether a conviction rests on insufficient evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). "The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the

crime charged.” *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).

In this case, the City had the burden to prove beyond a reasonable doubt that Mr. Erickson was in physical control of a motor vehicle while under the influence of or affected by intoxicating liquor. RCW 46.61.504(1). A person cannot be convicted of physical control if they moved their vehicle safely off the roadway *prior to being pursued by law enforcement*. Former RCW 46.61.504(2).

When reviewing a challenge to the sufficiency of evidence based on an affirmative defense with that standard of proof, the inquiry is whether, considering the evidence in the light most favorable to the city, a rational trier of fact could have found that the accused failed to prove the defense by a preponderance of the evidence.

City of Spoke v. Beck, 130 Wn. App. 481, 486, 123 P.3d 854 (2005), *review denied*, 157 Wn.2d 1022 (2006).

“The actual physical control statute was enacted to protect the public by (1) deterring anyone who is intoxicated from getting into a car except as a passenger, and (2) enabling law enforcement to arrest an intoxicated person before that person strikes.” *State v. Votava*, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003).

A person can be safely off the roadway when their vehicle is parked on the side of the street. *City of Tacoma v. Belasco*, 114 Wn. App. 211, 212-3, 56 P.3d 618 (2002).

In *Beck*, an officer responded to a possible DUI, found Beck asleep in her car with the engine running, parked in two spaces in a parking lot. *Beck*, 130 Wn. App. at 484. At trial, the officer testified that she was off the roadway and was not a danger to others. *Id.* Beck was convicted at trial, but the conviction was reversed because the Court of Appeals found that no jury could find that Beck was not safely off the roadway when the officer had testified that she was safely off the road and not a danger to others. *Id.* at 488.

The most compelling aspect of this case is [the officer's] acknowledgment at trial that Ms. Beck's car was off the roadway and there was no danger. . . . [N]o reasonable trier of fact would disregard this plain admission that provided the factual basis for the elements of the defense from a trained police officer on the scene.

Id. at 488.

In this case, Mr. Erickson parked his motorcycle safely off the roadway prior to drinking. Like in *Beck*, the officer in this case testified that the motorcycle was parked legally and safely off the roadway. (RP 156). This case is indistinguishable from *Beck*. As in *Beck*, no jury could have found that the defendant did not establish that the motorcycle was

safely off the roadway by a preponderance of the evidence. Therefore, the Superior Court erred by affirming Mr. Erickson's conviction.

Furthermore, the City argued that the motorcycle was not safely off the roadway because it was leaking fluid, which created a danger. There is no case law to support this argument. The intent of the statute, as discussed above, is to allow police to stop an intoxicated person before they drive while under the influence. The public policy concerns addressed by the physical control statute are not meant to prevent a motorcycle from leaking fluid in a parking lot.

2. The City Improperly Commented on Mr. Erickson's Post-Miranda Request for Counsel in Violation of the Fifth Amendment.

Defendants are guaranteed a right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution and article 1, section 9 of the Washington State Constitution. *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992); U.S. CONST. amend. V, XIV; WASH. CONST. art. I, sec. 9. In order to protect this privilege, police officers must inform a criminal suspect, prior to custodial interrogation, of the right to remain silent, the right to counsel, and the right to cease questioning if he or she requests the assistance of counsel. *Miranda v. Arizona*, 384 U.S. 436, 474, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). Although counsel did not object to the City's comments on his right to

counsel at trial, Mr. Erickson raised the violation of his right to counsel in his original appeal. *See State v. Nemitz*, 105 Wn. App. 205, 208, 215, 19 P.3d 480 (2001) (comments on right to counsel can be raised for the first time on appeal).

"[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 City violates a defendant's constitutional rights by introducing evidence that after being advised of his *Miranda* rights, the defendant invoked those rights. *State v. Lewis*, 130 Wn.2d 700, 706, 927 P.2d 235 (1996); *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). It is error for the City to intentionally elicit testimony that after being read his *Miranda* rights, the defendant requested an attorney. *State v. Curtis*, 110 Wn. App. 6, 9, 37 P.3d 1274 (2002). There is no reason to elicit such testimony other than to allow the jury to infer that requesting an attorney implies guilt. *See id.*

Constitutional error is presumed to be prejudicial, and the State bears the burden of proving the error harmless. . . . To overcome the presumption of prejudice, the State must persuade this court that the untainted evidence overwhelmingly supports a guilty verdict. Otherwise, what may or may not have influenced the jury remains a mystery beyond the capacity of three appellate judges.

Id., at 14.

In *Lewis*, the officer testified that he spoke to the defendant on the phone, the defendant said he was innocent, and the officer told him that if he was innocent, he should come in and talk to the officer. *Lewis*, 130 Wn.2d at 703. There was no other testimony about the defendant not speaking to the officer and it was not mentioned in closing argument. *Id.* at 706. The Supreme Court held that the testimony was not a comment on the defendant's silence and affirmed the conviction. *Id.* at 706-7.

In *Easter*, the defendant was charged with vehicular assault based on driving while under the influence. *Easter*, 130 Wn.2d at 230-1. At trial, the officer testified that the defendant was a "smart drunk," meaning he was "evasive, wouldn't talk to me, wouldn't look at me, wouldn't get close enough for me to get good observations of his breath and eyes, I felt that he was trying to hide or cloak." *Id.* at 233. The prosecutor repeatedly referred to the defendant as a "smart drunk" in closing arguments. *Id.* The Supreme Court found that the defendant's rights were violated by the comment on his silence and that it was prejudicial; the conviction was reversed. *Id.* at 241-3.

In *Nemitz*, the defendant was charged with DUI. *Nemitz*, 105 Wn. App. at 208. The State elicited testimony that the defendant handed the officer a card from his attorney, which had his constitutional rights listed on the back. *Id.* at 213. The Court of Appeals found that the State

improperly elicited evidence that the defendant invoked his rights, which was not relevant to prove whether or not he was drinking and driving and reversed the conviction. *Id.* at 214-5.

In *Curtis*, the prosecutor asked the officer if the defendant said anything in response to being advised of his *Miranda* warnings. *Curtis*, 110 Wn. App. at 13. The officer responded that the defendant said he did not want to answer questions and he wanted an attorney. *Id.* The Court of Appeals noted that the prosecutor did not “harp” on the defendant’s invocation of his rights, but the prosecutor did elicit the testimony and, in combination with the prosecutor’s closing arguments that that the defendant knew he did something wrong because he took the backgrounds while fleeing the scene, the testimony could have prejudiced the defendant. *Id.* The Court of Appeals found the error was not harmless and reversed the conviction. *Id.* at 16.

Most recently, Division I of the Court of Appeals held that introducing evidence that a defendant invoked his Fourth Amendment rights by refusing to give a DNA sample was an improper comment on the defendant’s invocation of his constitutional rights. *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013).

In this case, the City repeatedly elicited testimony that Mr. Erickson invoked his rights after being read *Miranda*. (RP 133-35, 166-

67). The City elicited testimony that Mr. Erickson had an attorney's card in his wallet and that he spoke to an attorney. (RP 137-40). In closing arguments, the City talked about Mr. Erickson speaking to an attorney for twenty minutes and said, "That's a long time." (RP 220). In total, the City commented on Mr. Erickson's request for counsel at least nine times.

This testimony was elicited by the City and clearly violated Mr. Erickson's constitutional rights. It is well settled that a person's invocation of their constitutional rights after being advised of *Miranda* may not be used against them at trial. This case involved a DUI, which requires the City to prove similar facts to those in *Easter* and *Nimetz*. Neither *Easter* nor *Nimetz* stand for the proposition that in a DUI case the prosecutor's burden somehow allows a comment on a defendant's invocation of their rights. Furthermore, Mr. Erickson did not deny that he had been drinking, deny that he refused the breath test, or in any way open the door to the City introducing evidence that he requested or spoke to an attorney. The trial court's finding that "based on the facts of this case" the City properly commented on Mr. Erickson's invocation of his right to counsel was clearly error. If this court does not reverse and remand for dismissal due to insufficient evidence, this court should reverse and remand for a new trial based on the improper comments on Mr. Erickson's request for counsel.

V. CONCLUSION

In conclusion, there was insufficient evidence to convict Mr. Erickson of being in physical control of a motor vehicle while under the influence of intoxicants because he established, by a preponderance of the evidence, that he was safely off the roadway. In addition, the City improperly commented on Mr. Erickson's post-*Miranda* request for counsel. For these reasons, this court should reverse the conviction in this case and remand for dismissal, or in the alternative, a new trial.

Dated this 10th day of December, 2013.

Respectfully Submitted,

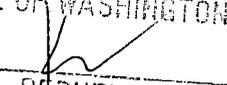


JENNIFER VICKERS FREEMAN
WSBA# 35612
Attorney for Appellant, David Erickson

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The undersigned certifies that on this day correct copies of this corrected appellant's brief were delivered, by hand, to the following:

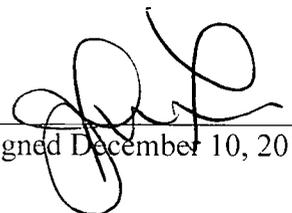
David C. Ponzoha, Clerk, Division II, Court of Appeals, 950 Broadway Street,
Suite 300, Tacoma, WA 98402

City of Tacoma Prosecuting Attorney's Office, 930 Tacoma Avenue S, Room
440, Tacoma, WA 98402.

The undersigned certifies that on this day correct copies of this corrected appellant's brief were delivered, by placing in U.S. Mail, to the following:

David Erickson, 6041 California AVE SW, #205, Seattle, WA 98136.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.


Signed December 10, 2013 at Tacoma, Washington.

CERTIFICATE OF SERVICE

Jennifer Vickers Freeman
Attorney at Law
1115 Tacoma AVE S
Tacoma, WA 98402
(253) 507-4706