

No. 45446-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CLIFFORD STONE, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUE 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT9

 A. SERGEANT HOVINGHOFF’S TESTIMONY
 REGARDING STONE’S STATEMENT THAT IT
 WOULD TAKE 15 PEOPLE TO DRAW HIS BLOOD
 WAS NOT A COMMENT ON STONE’S RIGHT TO
 REMAIN SILENT9

 1. Standard Of Review..... 9

 2. The Testimony Of Sergeant Hovinghoff Was Not
 An Impermissible Comment On Stone’s Right To
 Silence9

 3. If Sergeant Hovinghoff’s Testimony Was In Error,
 Any Error Was Harmless 17

IV. CONCLUSION.....22

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Anderson</i> , 171 Wn.2d 764, 254 P.3d 815 (2011).....	18
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 204 (2008)	11
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	21
<i>State v. Castro</i> , 141 Wn. App. 485, 170 P.3d 78 (2007)	9
<i>State v. Easter</i> , 130 Wn.2d 228, 992 P.2d 1285 (1996)	10, 16
<i>State v. Fricks</i> , 91 Wn.2d 395, 588 P.2d 1328 (1979)	11
<i>State v. Fuller</i> , 169 Wn. App. 797, 282 P.3d 126 (2012)	11, 12, 13, 16
<i>State v. Gauthier</i> , 174 Wn. App. 257, P.3d 126 (2013)	10, 13, 14, 15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	21
<i>State v. Hager</i> , 171 Wn.2d 151, 248 P.3d 512 (2011)	11
<i>State v. Keene</i> , 86 Wn. App. 589, 938 P.2d 839 (1997)	12, 19
<i>State v. Lewis</i> , 130 Wn.2d 700, 927, P.2d 235 (1996).....	18
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997)	21
<i>State v. Olinger</i> , 130 Wn. App. 22, 121 P.3d 724 (2005).....	21
<i>State v. Pottorff</i> , 138 Wn. App. 343, 156 P.3d 955 (2007) .	17, 18, 20
<i>State v. Romero</i> , 114 Wn. App. 779, 54 P.3d 1255 (2002).....	10
<i>State v. Sloan</i> , 133 Wn. App. 120, 134 P.3d 1217 (2006)	10, 11

Federal Cases

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91
(1976)11

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694
(1966)18

Washington Statutes

RCW 46.20.308(2)(b).....19

Constitutional Provisions

Washington State Constitution, Article 1, § 9.....10

U.S. Constitution, Amendment V10

I. ISSUE

- A. Was Trooper Hovinghoff's testimony that Stone told him it would take 15 people to draw his blood a comment on Stone's right to silence, and if so, did the trial court err when it ruled the testimony was admissible?

II. STATEMENT OF THE CASE

On June 29, 2013 Sergeant Hovinghoff was still working as a trooper for the Washington State Patrol, where he has worked since August 2005. RP 46. Sgt. Hovinghoff observed a vehicle traveling 71 miles per hour in a 55 miles per hour zone on State Route (SR) 508, east of Justice Road. RP 46. Stone was the driver of the car, a Pontiac Sunbird. RP 47. It was a warm summer day, becoming dusk, but light enough that Sgt. Hovinghoff could see the car and driver as it passed him. RP 47.

Sgt. Hovinghoff performed a traffic stop on the car and the sole occupant was the driver, Stone. RP 47-48. Sgt. Hovinghoff contacted Stone, asked for Stone's license, the vehicle registration, and proof of insurance. RP 48. Sgt. Hovinghoff immediately smelled "the obvious strong odor of intoxicants coming out of the vehicle." RP 48. Sgt. Hovinghoff has extensive training in detecting intoxicants and impaired driving. RP 49-51. Sgt. Hovinghoff is also a Drug Recognition Expert (DRE), which makes him an expert at

detecting drug impairment through a 12 step process. RP 52-53. Sgt. Hovinghoff has arrested a couple hundred DUIs and investigated around 400 hundred suspected DUIs. RP 54.

Sgt. Hovinghoff had also observed Stone, while still in the car had avoided looking at the trooper, he had what Sgt. Hovinghoff referred to as a 1,000 yard stare. RP 59. Stone had difficulty when he removed his wallet and retrieved his driver's license. RP 55. Stone "removed his wallet and then struggled and fumbled to get the driver's license out of the pocket of his wallet." RP 55. Sgt. Hovinghoff observed Stone's eyes were bloodshot, watery, and he appeared glassy-eyed. RP 55, 59. Stone also had droopy eyelids and a flushed face. RP 55.

As Stone spoke, Sgt. Hovinghoff could smell the odor of intoxicants come from Stone. RP 55. Stone's speech was slurred. RP 89. Stone told Sgt. Hovinghoff that he was coming home from Yakima. RP 93. Sgt. Hovinghoff later asked Stone if he had been drinking and Stone replied, not much. RP 56. Sgt. Hovinghoff asked Stone to exit his car and walk to the front of the vehicle. RP 56. Sgt. Hovinghoff described Stone's exit of the vehicle, "[i]n one motion he opened the door and he swung his foot out around the door and then he stood up and as he went to close the door he used the door

for balance - - the window was open - - while holding onto the B portion of the door. He swung it closed and he used it for balance as he closed the door.” RP 56. After exiting the car Sgt. Hovinghoff could still smell the odor of intoxicants coming from Stone. RP 56. Sgt. Hovinghoff could even smell the odor of intoxicants over the odor of the chew Stone had in his mouth. RP 57.

Sgt. Hovinghoff observed Stone to be a strong individual, who walked fairly normal, and appeared to be in good health. RP 82. Stone declined to do the voluntary standardized field sobriety tests. RP 57. Stone’s movements appeared slow and his thought process delayed throughout Sgt. Hovinghoff’s contact with him. RP 59. Sgt. Hovinghoff arrested Stone for Driving While Under the Influence of Intoxicating Liquor and/or Drugs (DUI).

Stone was argumentative and uncooperative throughout the contact and this conduct got worse as the evening went on. RP 61. Stone initially demanded an inventory of the trunk of the vehicle, and then went back and forth about whether he wanted the trunk inventoried, which Sgt. Hovinghoff explained was not something troopers would do in the normal course of business. RP 61-63. During Sgt. Hovinghoff’s contact with Stone he seemed fixated on the trunk of his car and had a difficult time staying with his thought

process. RP 64. Sgt. Hovinghoff inventoried the car for impound. RP 62. While inventorying, Sgt. Hovinghoff discovered a partially empty bottle of vodka in the back seat. RP 62

Sgt. Hovinghoff suggested to Stone that he may want to spit out his chew (they don't allow it at the jail). RP 61. Stone replied, "I'd like to see you make me." RP 61. On the ride to jail Stone became more combative, appeared to be attempting to remove his handcuffs, and at one point state, "what do you bet in three hits I can make it through this Plexiglas?" RP 66-67. Sgt. Hovinghoff informed the jail that he may need extra help because the person he was bringing in was combative and escalating contact. RP 67.

While in the BAC room at the jail Sgt. Hovinghoff left Stone handcuffed because Stone had been so combative. RP 70. Sgt. Hovinghoff read Stone his implied consent warning for breath. RP 71-73. Stone refused to take the breath test. RP 74. Sgt. Hovinghoff advised Stone that he would apply for a search warrant for Stone's blood. RP 75. Stone told Sgt. Hovinghoff it would take 15 people to take his blood. RP 75. That statement concerned Sgt. Hovinghoff because of the combative and argumentative nature of his interaction with Stone continued to escalate. RP 76. Sgt. Hovinghoff told Stone that it could be arranged to have that many

people on hand and Stone stared at Sgt. Hovinghoff, became more aggressive and attempted to stand up out of the chair and charge Sgt. Hovinghoff. RP 76. It took three jail staff to pin Stone back into the chair. RP 76. As the jail staff took Stone out of the BAC room for processing he attempted to kick Trooper Hovinghoff. RP 77.

After consulting his command chain Sgt. Hovinghoff decided not to get a search warrant for blood because of the concern that someone would ultimately get hurt attempting to take a sample of Stone's blood. RP 77. Sgt. Hovinghoff did get a search warrant for Stone's car. RP 77-78. Sgt. Hovinghoff retrieved the bottle of vodka when he executed the search warrant. RP 78.

The State charged Stone with one count of Felony Driving Under the Influence. CP 1-3. Stone elected to try his case to a jury. See RP. Stone stipulated that he had a prior conviction for Vehicular Assault while under the influence of intoxicating liquor or any drug. CP 33-34. There was a motion in limine by Stone's trial counsel seeking to prohibit the State from eliciting testimony regarding Stone's refusal of the blood draw and his statement that it would take 15 people to take his blood. RP 13-18. The trial court denied the motion in regards to Stone's reaction to being told by

Sgt. Hovinghoff that he would get a warrant. RP 17. Stone testified in his own defense. See RP 129.

Stone testified that on June 29, 2013 he got up early, after only having about four hours of sleep and drove over to Yakima, from Lewis County for a family reunion. RP 129-30, 142. Stone testified he played a number of games while at the family reunion and denied consuming any alcohol while at the reunion. RP 130-33. Stone stated he left the Yakima area around 7:15 p.m. RP 133.

On the way home Stone stopped in Packwood for a pit stop and a woman asked him if she could get a ride to Morton and he agreed. RP 134. Stone claimed the woman asked him if he had anything to drink and he said, yes, and she asked if she could have some. RP 134-35. Stone let her mix vodka with the orange juice he had purchased in Packwood and Stone had a sip of the woman's drink. RP 134-35. The woman got out in Morton. RP 134.

Stone was pulled over by Trooper Hovinghoff for speeding. RP 137. Stone testified the reason he had difficulty getting his license out of his wallet was because there was another card with something sticky on it and his license stuck to it when he tried to pull it out. RP 137-38. Stone testified Sgt. Hovinghoff came back to Stone's car and asked Stone to step out of the car. RP 139.

Stone told Sgt. Hovinghoff he was not going to answer any questions or do anything. RP 139. Stone explained he has difficulty getting out of his car because the car sits low and Stone has long legs. RP 139. Stone denied using the car for balance. RP 139. Stone stated he had a big chew in his mouth but did not believe he was slurring his words. RP 140. Stone explained he was not sure if he could pass field sobriety tests because he has had a couple of herniated disks in his lower back which caused nerve damage. RP 141. He also has hearing loss in both ears which throws off his balance. RP 141. Stone testified he has a balance problem due to his lower back. RP 141.

Stone acknowledges he probably did have bloodshot and water eyes, but explained that he had been up since 6:00 a.m., had only had four hours of sleep, there was a ton of pollen blowing around in Yakima, he had been in the sun, and he sprayed himself with bug spray. RP 142. Stone stated he was agitated because Sgt. Hovinghoff told him to get out of the car instead of asking (although Stone initially testified Sgt. Hovinghoff asked) and he believes Sgt. Hovinghoff was standoffish and egging Stone on. RP 144. Stone also claimed Sgt. Hovinghoff was curt and disrespectful. RP 144.

Stone admitted the bottle of vodka found in his car was his and stated it had been there for over a week. RP 145. Stone admitted to consuming less than a shot from the bottle of vodka that day. RP 145.

Stone claimed the handcuffs were down on a scar on his hand and uncomfortable. RP 147. Stone explained he made the comment about hitting the center guard because he was agitated. RP 147. Stone admitted to stating it would take 15 people to take his blood. RP 148. Stone claims he is deathly scared of needles due to an incident with a head injury and that is why he made the statement. RP 149. Stone explained he got up to leave after Sgt. Hovinghoff stated they could arrange to have 15 people hold him down, he slipped as he was getting up and he was not trying to be aggressive or attack Sgt. Hovinghoff. RP 150. Stone also testified he did not intentionally try to kick Sgt. Hovinghoff, but his leg slipped out. RP 151.

Stone was convicted of Felony DUI. CP 70. Stone timely appeals his conviction. CP 86. The State will supplement the facts as needed throughout its argument.

III. ARGUMENT

A. SERGEANT HOVINGHOFF'S TESTIMONY REGARDING STONE'S STATEMENT THAT IT WOULD TAKE 15 PEOPLE TO DRAW HIS BLOOD WAS NOT A COMMENT ON STONE'S RIGHT TO REMAIN SILENT.

Stone claims the testimony by Sgt. Hovinghoff that Stone stated it would take 15 people to draw his blood was a comment on Stone's right to silence and his right against self-incrimination. Brief of Appellant 6-10. Stone is incorrect in his analysis, as this comment was introduced for the purpose of showing Stone's aggressive behavior, Stone did not exercise his right to silence, and Stone's statement was not in response to a request for consent for a blood draw, but rather a reaction to being told Sgt. Hovinghoff was going to secure a search warrant for Stone's blood. Further, any error is harmless.

1. Standard Of Review

Constitutional issues are reviewed de novo. *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

2. The Testimony Of Sergeant Hovinghoff Was Not An Impermissible Comment On Stone's Right To Silence.

Stone argues his statement that it would take 15 people to draw his blood, which was in response to Sgt. Hovinghoff telling

Stone he was going to get a warrant to draw Stone's blood after Stone refused the breath test, was a comment on Stone's right to silence in violation of the 5th Amendment of the United States Constitution and Article 1, § 9 of the Washington State Constitution. Brief of Appellant 6-10. Stone encourages this Court to find the error here similar to that found in *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013). Brief of Appellant 10. Sgt. Hovinghoff's testimony was offered to show Stone's state of mind, was not a comment on Stone's silence, and provided the explanation for why Sgt. Hovinghoff ultimately did not pursue a search warrant for Stone's blood. There was no error.

A person cannot be compelled in a criminal case to provide evidence against him or herself. U.S. Const. amend. V; Const. art. I, § 9. A person who invokes his or her right to silence may not have that silence used as substantive evidence of guilt in a criminal trial. *State v. Sloan*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006), citing *State v. Easter*, 130 Wn.2d 228, 238, 992 P.2d 1285 (1996) (additional citations omitted). It is a violation of a defendant's due process rights for the State to exploit or comment on the defendant's choice to exercise his or her right to remain silent. *State v. Romero*, 114 Wn. App. 779, 786-87, 54 P.3d 1255 (2002),

citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), *State v. Fricks*, 91 Wn.2d 391, 395–96, 588 P.2d 1328 (1979). The State, therefore, “cannot elicit comments from a witness that are related to a defendant’s silence or make such comments during closing arguments in order to infer guilt. *Sloan*, 133 Wn. App. at 127 (citations omitted).

When the defendant’s exercise of his or her right to remain silent is raised, the reviewing Court “must consider whether the prosecutor manifestly intended the remarks to be a comment on [the right to remain silent].” *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 204 (2008) (internal quotations and citations omitted). A mere reference to a defendant’s silence does not amount to a comment on his or her right to silence. *Burke*, 163 Wn.2d at 216. “When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say,” as it is not a matter of an exercise of the right to silence. *State v. Hager*, 171 Wn.2d 151, 158, 248 P.3d 512 (2011) (internal citations omitted). On the other hand courts liberally construe a person’s constitutional right to remain silent. *State v. Fuller*, 169 Wn. App. 797, 814, 282 P.3d 126 (2012). A person may elect what information to share with police and does not give up the right to

silence by answering some questions but not others. *Fuller*, 169 Wn. App. at 814-15.

In *State v. Keene*, this Court held that the deputy prosecutor and the detective who testified impermissibly commented on Keene's right to silence. *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997). The detective "testified that she never heard from Keene after she warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again." *Keene*, 86 Wn. App. at 594. The deputy prosecutor used Keene's failure to contact the detective as substantive evidence to infer guilt by telling the jury "it could decide if Keene's failure to contact the detective was the act of an innocent man." *Id.*

In *Fuller* the defendant invoked his right to partial silence by not answering, post-arrest, some of the detective's questions. *Fuller*, 169 Wn. App. at 816. The partial invocation prevented the State from using Fuller's silence to infer his guilt, and therefore the State could not elicit testimony regarding the silence or comment on the silence as to infer Fuller's guilt. *Id.* The State repeatedly used Fuller's failure to deny murdering the victim as an inference that Fuller was guilty of the crime of murder. *Id.* The Court of Appeals held this conduct violated Fuller's right to silence, and the

violation was not harmless beyond a reasonable doubt. *Id.* at 818-20.

In a cold case rape investigation there was DNA collected at the time of the rape that seven years later came back as a match to Gauthier. *Gauthier*, 174 Wn. App. at 259-61. The detective working the case asked Gauthier for a cheek (buccal) swab for a sample of Gauthier's DNA. *Id.* at 261. According to the detective Gauthier initially agreed to provide a DNA sample, a fact which Gauthier disputed. *Id.* Gauthier contacted a lawyer regarding the DNA sample and was advised against consenting to provide the sample. *Id.* Gauthier called and left a message for the detective informing the detective on the advice of counsel, he would not give a DNA sample. *Id.* There was a motion in limine brought by Gauthier's trial counsel to exclude evidence of Gauthier's refusal to provide a DNA sample. *Id.* Counsel argued that the evidence would be an impermissible comment on Gauthier's Fifth Amendment right to counsel and silence. *Id.* The court ruled that if Gauthier testified the prosecutor had the right to cross-examine Gauthier about his refusal to provide a DNA sample, but could not reference Gauthier's right to counsel. *Id.* at 262. The Court of Appeals concluded that the prosecutor's questions regarding Gauthier's

refusal to voluntarily provide DNA violated Gauthier's Fourth Amendment right to refuse a warrantless search. *Id.* at 263-67. The Court of Appeals also held there was no tendency in Washington to distinguish between an exercise of a person's Fourth or Fifth Amendment rights because the "court's are appropriately reluctant to penalize anyone for the exercise of *any* constitutional right." *Id.* at 267 (internal quotations and citations omitted, emphasis original).

The distinction between the cases above and Stone's case is this is not a case where Stone exercised his right to remain silent regarding the search warrant for blood. The exchange between Sgt. Hovinghoff and Stone was as follows:

Q Now, you said that when you're reading the portion after the pause he said "I don't understand." Did that appear to be genuine to you?

A It seemed more like it was just being more confrontational at that point, I don't understand it, I'm not going to listen anymore.

Q Now, I want to ask you about... So he refused to provide a breath sample?

A Yes.

Q What did you do after he refused to provide a breath sample?

A I advised him I would apply for a search warrant for blood.

Q And what was his reaction to you telling him that you were going to get a warrant for blood?

A He said it would take 15 people to get blood from him.

RP 75. Sgt. Hovinghoff was then asked if Stone's response concerned him and he stated it did, explaining the combative and argumentative nature of Stone continued to escalate as the night went on. RP 75-76. Sgt. Hovinghoff next explained that because of Stone's aggressive and combative nature he called his superior and it was determined the best course of action would be to not apply for a search warrant for Stone's blood. RP 76. This decision was made in part because of Stone's behavior and also because they feared someone would ultimately end up getting hurt by Stone. RP 76-77.

The testimony regarding Stone's statement that it would take 15 people was not a comment on Stone's right to silence under the Fifth Amendment or a comment on Stone's right to be free of warrantless searches under the Fourth Amendment. Sgt. Hovinghoff was not asking Stone to consent to a warrantless search, therefore there is no implication of a violation of the Fourth Amendment. *Gauthier*, 174 Wn. App. at 267; RP 75-76. Stone was not exercising his right to silence, or even partial silence, as he

voluntarily made the post-arrest statement to Sgt. Hovinghoff in response of being told Sgt. Hovinghoff would just apply for a warrant for Stone's blood. *Easter*, 130 Wn.2d at 238; *Fuller*, 169 Wn. App. at 816; RP 75-76.

The deputy prosecutor did not even argue that Stone's statement inferred guilt. See 195, 212, 217. The deputy prosecutor did state that Stone's refusals to do the field sobriety tests, PBT, and BAC test suggested a guilty conscious, because in Sgt. Hovinghoff's experience, people who refuse everything are often intoxicated. RP 195, 212-13. The deputy prosecutor did mention that Stone started freaking out when Sgt. Hovinghoff informed Stone that a search warrant for blood would be obtained due to Stone's refusals. RP 195, 212, 217. Freaking out about a blood test and refusing to take the other tests are different. There was no opportunity to refuse the blood test because Stone was not asked for consent to take his blood. RP 75-76. This testimony was used to show Stone's aggressive and combative behavior. RP 217. Further, the testimony helped explain why Sgt. Hovinghoff ultimately did not apply for the search warrant for Stone's blood. RP 212, 216-17. Sgt. Hovinghoff's testimony regarding the blood draw was not a comment on Stone's constitutional right to be silent, against self-

incrimination, or against warrantless searches. The testimony shows an uncooperative and aggressive person who decided to threaten Sgt. Hovinghoff and caused the trooper to determine it would be unsafe to attempt to draw Stone's blood. This Court should hold there was no violation of Stone's constitutional rights and affirm the conviction.

3. If Sergeant Hovinghoff's Testimony Was In Error, Any Error Was Harmless.

A comment on a defendant's right to silence can be harmless error. *State v. Pottorff*, 138 Wn. App. 343, 346-48, 156 P.3d 955 (2007). In *Pottorff* the court differentiated the review standards of the harmless error analysis based upon what type of comment was made by the State. *Pottorff*, 138 Wn. App. at 347. The court explained that the prejudice incurred as the result of a direct comment about a person's right to remain silent would require the State to show the error was harmless beyond a reasonable doubt. *Id.* "A direct comment occurs when a witness or state agent makes a reference to the defendant's invocation of his or her right to remain silent." *Id.* at 346.¹ A constitutional error is

¹The court gave the following as examples of direct comment on the evidence: An officer testifying that he read a defendant his *Miranda* warnings and the defendant chose not to waive his right to remain silent and would not speak to the officer. An officer testifies that a defendant would not speak to the officer and requested an

deemed harmless if the reviewing court is certain beyond a reasonable doubt that the verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). The Supreme Court has held, “[t]his court employs the overwhelming untainted evidence test and looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt.” *Anderson*, 171 Wn. 2d at 770.

Whereas, the prejudice incurred when the State makes an indirect comment on a person’s right to silence is reviewed under the lower standard, which determines whether no reasonable probability exists that error affected the outcome. *Pottorff*, 138 Wn. App. at 347. The State makes an indirect comment on a person’s right to silence when it, through a witness or the deputy prosecutor, references an action or comment made by the defendant which could be inferred as an attempt by the defendant to exercise his or her right to silence. *Id.*, citing *State v. Lewis*, 130 Wn.2d 700, 706, 927, P.2d 235 (1996).²

attorney. See *Pottorff*, 138 Wn. App. at 347. (referring to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

² “[O]fficer did not testify the defendant refused to talk, but rather that the defendant claimed he was innocent ...[O]fficer’s testimony that the defendant would take polygraph test after discussing the matter with his attorney was an indirect reference to silence.”

Sgt. Hovinghoff's testimony regarding Stone's statement that it would take 15 people to draw his blood is at best an indirect comment on Stone's right to silence and/or warrantless search.³ See RP 75-76. There is no testimony that Stone invoked his right to silence. See RP 75-76.

In *State v. Keene*, this Court held that the deputy prosecutor and the detective who testified impermissibly commented on Keene's right to silence. *Keene*, 86 Wn. App. at 594. The detective "testified that she never heard from Keene after she warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again." *Keene*, 86 Wn. App. at 594. The deputy prosecutor used Keene's failure to contact the detective as substantive evidence to infer guilt by telling the jury "it could decide if Keene's failure to contact the detective was the act of an innocent man." *Id.*

While there was testimony regarding Stone's refusal of the BAC as indicative of guilt, this is permissible. The State is permitted by statute to elicit testimony regarding a person's, who has been arrested for DUI, refusal of the BAC test. RCW 46.20.308(2)(b). Stone's argumentative, difficult, escalating, and combative

³ The State is not agreeing that the testimony is in error, but for the sake of argument is making this harmless error argument to the Court.

behavior, which Stone admitted to in his own testimony, was important for the State to be able to shine a light on because it explained why Sgt. Hovinghoff did not get a warrant for Stone's blood. RP 75-77, 144, 147-48. If the State failed to explain why the warrant was not sought Stone could have argued that he was obviously not impaired because Sgt. Hovinghoff did not bother to even attempt to get a search warrant for his blood.

There was no reasonable probability that the error alleged by Stone affected the outcome of his trial. *Pottorff*, 138 Wn. App. at 347. The indirect comment on Stone's right to silence was dwarfed by the overwhelming evidence that Stone committed the crime of Felony DUI. Sgt. Hovinghoff gave an excellent summation of the State's evidence and the reasons for Stone's arrest:

It was the speeding originally which can be a sign of impairment. Again, all of these are taken as a totality, not necessarily the individual item, the individual item that causes it or that I look at. So there's the speeding. There's the upon contact he had the odor of alcohol, intoxicants coming from the vehicle. He had bloodshot watery eyes, flushed face. His motor skills were slow. Thought process was delayed. His speech was slurred. He had difficulty getting out of the vehicle. He used the vehicle for balance as he exited the vehicle. Trying to think if there was anything else I missed there. His demeanor and nature, you know, the standoffish goes towards it. There was the 1,000-yard stare, extremely watery eyes, the odor of intoxicants coming from him as he spoke that was stronger than the chew, his admission to drinking. All

those things went into weight of why I believed that he was impaired and should not operate a motor vehicle, couldn't operate it safely.

RP 96-97.

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted). Therefore, while Stone's own testimony attempted to explain away each of the intoxication indicators observed by Sgt. Hovinghoff, the finder of fact did not find Stone credible, and it is not for this Court to revisit credibility. Therefore, there is no reasonable probability that the alleged error affected the outcome of this trial, and therefore the error is harmless. Stone's conviction should be affirmed.

IV. CONCLUSION

Sgt. Hovinghoff's testimony was not a comment on Stone's exercise of his constitutional right to silence. If this Court were to find error, it was harmless. Stone's conviction should be affirmed.

RESPECTFULLY submitted this 2nd day of May, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

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

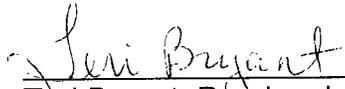
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. CLIFFORD STONE, JR., Appellant.	No. 45446-7-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 2, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Peter B. Tiller, attorney for appellant, at the following email address: Slong@tillerlaw.com.

DATED this 2nd day of May, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

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