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COURT OF APPEALS
DIVISION ONE

JAN 09 2012

NO. 65870-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NICKLAS RIVAS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JAN -9 PM 12:46

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A. ISSUES PRESENTED

1. On direct appeal to the superior court, Rivas raised errors relating to corpus delicti and ineffective assistance of counsel. Now, on discretionary review to this Court, he claims for the first time a separate and distinct error regarding an improper comment on his exercise of constitutional rights. Where there is no authority for pursuing one direct appeal in the superior court and a second direct appeal in the Court of Appeals, has Rivas failed to preserve his claim for review?

2. A party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence. In this case, Rivas' attorney told the jury in opening statement that Rivas invoked his right to counsel after arrest and spoke with an attorney before deciding to refuse the breath test. As a result, the prosecutor elicited testimony from the arresting officer that Rivas invoked his right to an attorney and spoke to an attorney before deciding to refuse the breath test. Did Rivas invite the testimony that he now challenges on appeal?

3. At trial, the defense was the first party to inform the jury that Rivas invoked his right to an attorney after arrest. When the State never argued or suggested that the jury could infer guilt

from Rivas' exercise of constitutional rights, and presented overwhelming untainted evidence of Rivas' guilt, was any error regarding Rivas' exercise of rights harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Nicklas Rivas in King County District Court with Driving While Under the Influence ("DUI"). CP 4. The case proceeded to jury trial on October 24, 2007. CP 13. Five witnesses testified for the State and four witnesses testified for the defense. CP 13-17. After a three-day trial, the jury returned a guilty verdict. CP 18.

Rivas timely appealed to the King County Superior Court. CP 25. On appeal, Rivas argued that the trial court improperly denied a motion to dismiss under the corpus delicti rule and that he received ineffective assistance of counsel during a pretrial suppression hearing. CP 602. Rivas later conceded that the trial court properly ruled on his corpus delicti motion, and the superior court held that defense counsel had not rendered ineffective assistance. Id.

Rivas petitioned this court for discretionary review.

Pet'r Mot. for Discretionary Review. He did not seek review of the superior court decision, but rather raised a wholly new claim of error based on proceedings in district court. Id. at 1. This Court granted review. Order Granting Discretionary Review.

2. SUBSTANTIVE FACTS

At the beginning of trial, each party gave an opening statement describing the evidence the jury would hear at trial. Supplemental RP 1-11.¹ The prosecutor's opening statement focused on Rivas' pre-arrest conduct and did not refer to Rivas' exercise of his constitutional rights after arrest. Supplemental RP 1-8. The defense attorney also gave an opening statement. Supplemental RP 8. He told the jury there was "a rest of a story that has not been told to you, and it's come through several witnesses that we intend to bring to trial." Id. In particular, the defense attorney discussed Rivas' conversation with an attorney after his arrest:

They took him to the police station. Mister Rivas was not going to give them any sample until he was able

¹ "Supplemental RP" refers to the transcript of the parties' opening statements, filed as Appendix A to the State's Motion to Supplement the Record.

to speak to an attorney. He learned that he was given access to a public defender and based upon his conversation, he declined to give a sample of his [breath].

Supplemental RP 11. He also highlighted the fact that the officers did not ask Rivas any of the standard questions associated with DUI investigations. Id.

After opening statements, the jury heard the following testimony. On June 4, 2005, around 3:00 a.m., taxi cab driver Merid Boger picked up a customer, Ms. Renee Gonzalez. CP 192. As Mr. Boger drove down International Boulevard, another car collided with his taxi. CP 192, 213. Both vehicles pulled to the side of the road. CP 192, 213. The other vehicle was driven by the appellant, Nicklas Rivas. CP 193-94, 216.

Rivas jumped out of his vehicle and charged at the taxi cab, blaming Mr. Boger for the collision. CP 193-94, 213, 217. Ms. Gonzalez, who was seated in the back of the taxi cab, saw Rivas stagger as he approached the cab. CP 217. Ms. Gonzalez locked her door because she was frightened by Rivas. CP 221. Rivas pushed his face "right up on the window" as he screamed at Mr. Boger. CP 219. While yelling, Rivas

called Mr. Boger a "sand nigger" and a "towel head."

CP 217-18.

From the backseat of the taxi cab, Ms. Gonzalez saw that Rivas' eyes were red, glossy, and bloodshot. CP 219. She also noticed that Rivas' speech was slurred and he had difficulty standing still. CP 219-20. Ms. Gonzalez had experience identifying intoxicated people through her work as a cocktail waitress, and, in her opinion, Rivas appeared intoxicated and "didn't look like a sober man at all." CP 219. When the police arrived, Ms. Gonzalez observed the officers' investigation from the safety of the taxi cab. CP 223-24. She watched as Rivas argued with the police, flailing his arms, pulling away from the officers and appearing "quite heated." CP 224-25.

King County Sheriff's Deputy Paul Schene was the first law enforcement officer to arrive at the scene of the accident. CP 152-57. Separately, he asked Rivas, Mr. Boger, and Ms. Gonzalez to explain how the collision occurred. CP 274-75. Rivas' explanation conflicted with that of Mr. Boger and Ms. Gonzalez. CP 276. Mr. Boger's and Ms. Gonzalez's explanations were consistent with one another and consistent with the damage to the vehicles. CP 280-81. Rivas'

explanation was inconsistent with the damage Deputy Schene observed. CP 276, 280-81.

While investigating the accident, Deputy Schene noticed an odor of intoxicants coming from Rivas. CP 273. Deputy Schene asked Rivas if he had consumed any alcohol, and Rivas initially said no. CP 274. When Deputy Schene asked Rivas the same question a second time, however, Rivas admitted that he'd had "a few beers." Id. Rivas told Deputy Schene that he had denied drinking alcohol because he thought Deputy Schene "was talking about hard alcohol." Id. Deputy Schene explained to Rivas that "alcohol" meant "anything with alcohol in it." Id. Based on his observations, Deputy Schene believed Rivas was impaired by alcohol. CP 281. Deputy Schene returned to his patrol car and asked King County Sheriff's Deputy David Jeffries and King County Sheriff's Deputy Laura Becker to assist with the investigation. Id.

When Deputy Becker responded to the scene, Deputy Schene asked her to stand by Rivas to "watch him." CP 281. Deputy Becker noticed that Rivas was uneasy on his feet, swayed while standing, and had an odor of intoxicants on his

breath. CP 330. Based on her observations, Deputy Becker believed Rivas was under the influence of alcohol. Id.

Deputy Jeffries arrived at the scene around 3:13 a.m. CP 354. When Deputy Jeffries approached Rivas, Rivas spontaneously told Deputy Jeffries that he would not take a portable breath test or "PBT." CP 356. Deputy Jeffries was not carrying a PBT at the time and did not use one in the course of investigating DUI cases. CP 356, 432-33. Deputy Jeffries noticed that Rivas was unsteady on his feet, and he swayed back and forth. CP 356. Additionally, Rivas' eyes were red, watery, and bloodshot, his speech was slurred, and he had an odor of intoxicants on his breath. CP 357.

Rivas immediately took an aggressive stance with Deputy Jeffries. CP 357. Due to Rivas' aggressive demeanor, Deputy Jeffries did not administer any field sobriety tests. CP 358-60, 367. By this time in his career, Deputy Jeffries had conducted over 10,000 investigations for DUI, resulting in approximately 2,000 arrests. CP 352. Based on his observations of Rivas, viewed in the context of his training and experience, Deputy Jeffries determined that Rivas was affected

by alcohol and that it would be unsafe for Rivas to drive.

CP 365.

When Deputy Jeffries advised Rivas that he was under arrest for DUI, Rivas struggled and resisted being handcuffed. CP 364. After Deputy Jeffries placed Rivas in handcuffs, Rivas began swearing at Deputy Jeffries and repeatedly called him a "nigger." CP 362. Rivas also told Deputy Jeffries that he was "glad Martin Luther King got shot and he deserved it." Id. After Deputy Jeffries read Rivas his constitutional rights, Rivas called him an "idiot." CP 363.

After the arrest, Deputy Jeffries searched Rivas' car and found an open can of Budweiser beer in the passenger compartment, within reach of the driver. CP 369. There was a little bit of beer left in the can, and it was "cold and wet to the touch." CP 369-70. The condition of the beer can suggested that the beer had been "freshly consumed." CP 371.

Following his arrest for DUI, Rivas was transported to a police station for processing. CP 375. During processing, Rivas refused to submit to the breath test. CP 397. At trial, the prosecutor asked Deputy Jeffries if he had read Rivas his Miranda rights prior to asking Rivas to provide a breath sample.

CP 375. The prosecutor then asked if Rivas had waived his rights. Id. Deputy Jeffries responded that Rivas had not waived his rights; instead, Rivas had asked for an attorney. CP 376. Deputy Jeffries put Rivas in contact with an attorney before Rivas decided to refuse the breath test. Id.

After the State rested, the defense elected to put on a case. CP 445. Rivas' brother, Robert Baca, was the first witness to testify on Rivas' behalf. Id. Mr. Baca claimed he had put several trash bags full of garbage in Rivas' vehicle that contained, among other things, beer cans and pizza boxes. CP 447-48. Mr. Baca was not with Rivas on the night of the incident, however. CP 449.

Rivas' friend, Tricia Tribble, testified that Rivas arrived at Denny's restaurant about 11 p.m., and he drank only "Coke" with his meal. CP 452-53. Steven Erickson, Rivas' life-long friend, also testified in Rivas' defense. CP 476. Although Mr. Erickson claimed to have been with Rivas on the night of the arrest, Mr. Erickson admitted that he watched the arrest from afar and never attempted to provide a statement to the officers on Rivas' behalf. CP 476, 492-93. During direct examination, Mr. Erickson testified he heard Rivas say, "I know my rights, and

I know I can have a lawyer present." CP 483-84. According to Mr. Erickson, Deputy Jeffries "got mad" when Rivas asked for a lawyer and began "manhandling" Rivas. CP 484.

Rivas also testified in his own defense. CP 497. During direct examination, defense counsel elicited testimony that Rivas told Deputy Jeffries that he wanted to have an attorney present. CP 522, 526. Rivas denied causing the collision, denied drinking alcohol, and denied making derogatory remarks to Mr. Boger and Deputy Jeffries. CP 507-10, 526-27, 532-33, 535-36, 539.

C. ARGUMENT

1. RIVAS FAILED TO PRESERVE ANY ISSUE AS TO AN IMPROPER COMMENT ON THE EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

When Rivas exercised his right of direct appeal to superior court under RALJ 2.2, he raised two issues: corpus delicti and ineffective assistance of counsel. Now, on discretionary review to this Court, he has abandoned the issues raised in superior court and claimed an entirely different claim of error regarding a comment on his Fifth Amendment rights. In the trial court, Rivas never objected to the testimony he now challenges on discretionary

review. Most importantly, this claim of error was never submitted to, or considered by, the superior court on direct appeal. There is no authority that allows Rivas to pursue two separate and distinct direct appeals, as he now seeks to do.

a. Upon Granting Discretionary Review, This Court Reviews The Decision Of The Superior Court, Not The Proceedings In The District Court.

The jurisdiction of the appellate courts is confined to the jurisdiction granted by the constitution, statute, and court rule. See RCW 2.06.030. The Rules of Appellate Procedure provide the authority for the Court of Appeals to review a decision of the superior court on RALJ appeal. But neither the Rules of Appellate Procedure nor the Rules for Appeal of Decisions of Limited Jurisdiction provide a mechanism for the Court of Appeals to *directly review* a decision of the district court. Rather, upon accepting discretionary review, the Court of Appeals reviews *the decision of the superior court*. See RALJ 9.1(h) ("The decision of the superior court on appeal is subject to discretionary review pursuant to RAP 2.3(d)."); see also RAP 2.3(d) ("Discretionary review of a superior court decision entered in a proceeding to

review a decision of a court of limited jurisdiction will be accepted only [under enumerated circumstances]").

In addition to reviewing the decision of the superior court, the Court of Appeals reviews only the record that was considered by the superior court on direct appeal. Specifically, RAP 9.1(e) provides, "[u]pon review of a superior court decision reviewing a decision of a court of limited jurisdiction pursuant to rule 2.3(d), the record shall consist of the record of proceedings and the transcript of electronic record as defined in RALJ 6.1 and 6.3.1." The record transmitted to the Court of Appeals contains only "the original record of proceedings and transcript of electronic record as *was considered by the superior court* on the appeal from the decision of the court of limited jurisdiction." RAP 9.1(e) (emphasis added); see also RALJ 6.4 ("When a party has filed a notice for discretionary review of the superior court decision, the record of proceedings and the transcript of the electronic record *considered by the superior court on direct appeal* shall be transmitted to the appellate court.") (emphasis added).

This case demonstrates the procedural problems inherent in raising an issue for the first time on discretionary review. Because Rivas raised different issues in his direct appeal to superior court,

significant portions of the district court record were not designated or transmitted to the superior court, and relevant portions of the electronic record were not transcribed.² Under RALJ 6.2, the parties are "encouraged to designate only documents and exhibits needed to review the issues presented to the superior court." Similarly, the report of proceedings "shall contain only those portions of the electronic recording necessary to present the issues raised on appeal." RALJ 6.3.1(c). Because the parties are encouraged to tailor the district court record to the issues before the superior court on direct appeal, there is likely to be a gap in the record whenever an appellant is allowed to raise an issue for the first time on discretionary review to the Court of Appeals. The Rules of Appellate Procedure do not provide an obvious mechanism for designating parts of the record that were not considered by the superior court, however, because the rules do not envision a scenario in which the Court of Appeals reviews an issue that was not considered by the superior court.

² Specifically, the defendant's designation of witnesses, the defendant's trial memorandum, and the parties' opening statements at trial are relevant to the issue before this Court but were not part of the record considered by the superior court.

Because the superior court did not consider the issue Rivas now raises on discretionary review, this Court should not consider his claim of error. Accordingly, this Court should affirm the superior court.

b. A Party May Not Raise An Issue For The First Time On Discretionary Review.

RAP 2.5(a) provides that a party may raise a manifest constitutional error "for the first time in the appellate court."³ This provision allows an appellant to raise a constitutional error for the first time *on direct appeal*, not through a motion for discretionary review. By failing to raise his claimed error on direct appeal to the superior court, Rivas has failed to preserve this error for discretionary review by this Court.

The "appellate court," as used in RAP 2.5(a), refers to any court in which a direct appeal is taken. See RALJ 1.1 ("These rules establish the procedure, called appeal, for review by the superior

³ RAP 2.5(a) codifies the pre-existing common law rule regarding preservation of claimed error. See Peoples Nat'l Bank of Wash. v. Peterson, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973). Therefore, the common law rule would govern RALJ proceedings to the extent that the Rules of Appellate Procedure do not supplement and inform the Rules for Appeal of Decisions of Courts of Limited Jurisdiction.

court of a final decision of a court of limited jurisdiction");
RAP 2.1(a)(1) ("Review as a matter of right [is] called 'appeal'").
When a superior court reviews the district court proceedings on
RALJ appeal, "the Superior Court [sits] as an appellate court."
State v. Basson, 105 Wn.2d 314, 317, 714 P.2d 1188 (1986) (citing
RCW 3.02.020; RALJ 9.1); see also RAP 2.1 cmt. (2000) ("Review
of decisions of the superior court sitting as an appellate court are
dealt with in RAP 2.3(d)"); RALJ 9.1 (specifying the superior court's
standards of review when it sits as an appellate court).

When a case originates in a court of limited jurisdiction, a
defendant has a right of direct appeal to superior court and a right
to seek discretionary review in the Court of Appeals. See RALJ
1.1(a); RALJ 2.3(a); RALJ 4.1(a); RALJ 9.1(a), (b). The court rules
provide a defendant with only one right of direct appeal, not two.
See RAP 2.2(c) ("If the superior court decision has been entered
after a proceeding to review a decision of a court of limited
jurisdiction, a party may appeal *only* if the review proceeding was a
trial de novo and the final judgment is not a finding that a traffic
infraction has been committed.") (emphasis added). Absent
extraordinary circumstances, it is well established that the Supreme
Court will not review an issue that was not raised on direct appeal

in the Court of Appeals. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983); Peoples Nat'l Bank, 82 Wn.2d at 830. Under the appellate framework established by court rule, the Court of Appeals should decline to exercise discretionary review of any issue that was not raised on direct appeal to the superior court.

By raising an issue for the first time on discretionary review, Rivas attempts to transform discretionary review of a RALJ appeal into a direct appeal. As discussed in section (a), above, there is no court rule that allows a direct appeal to the Court of Appeals from a court of limited jurisdiction. Even assuming the court rules allowed an appellant to bypass RALJ and appeal directly to the Court of Appeals, there is still no authority for an appellant to exercise two separate and distinct *direct appeals*—first in the superior court and then in the Court of Appeals. Instead, there is contrary authority from the Washington Supreme Court expressly disproving of such a practice: "Where [constitutional] issues could have been raised on the first appeal, we hold they may not be raised in a second appeal." Sauve, 100 Wn.2d at 87; see also City of Bothell v. Barnhart, 172 Wn.2d 223, 234-35, 257 P.3d 648 (2011) (declining

to review an issue that was not raised in response to a direct appeal in the superior court).

In addition to asserting a claim of error beyond the scope of RAP 2.5(a), Rivas' second direct appeal thwarts several other facets of the appellate system. First, Rivas has effectively petitioned this Court for direct review of the district court. RAP 4.3 provides for direct review of district court decisions in the Supreme Court, not the Court of Appeals. Furthermore, direct review is only available if the trial court makes specific written findings, and the party seeking direct review provides a "Statement of Grounds for Direct Review." RAP 4.3(a), (c); see also RAP 3.4. Rivas' motion for discretionary review under RAP 2.3(d) has effectively replaced RAP 4.3 as the de facto mechanism for deciding which district court decisions are sufficiently significant to merit direct review. In sum, Rivas now seeks to exercise a direct review procedure for which there is no authority, and he has completely circumvented the criteria for direct review that would otherwise apply to his appeal.

Second, Rivas' appeal has created a situation that renders the RALJ appeal process superfluous. On direct appeal to superior court, Rivas claimed that he received ineffective assistance of counsel and that the district court erred in denying a motion brought

under the corpus delicti rule. On discretionary review, he abandoned his earlier claims of error and now claims a separate and distinct constitutional error. Because all constitutional claims of error are likely to meet the criteria for discretionary review under RAP 2.3(d)(2) and RAP 2.5(a), nothing would stop a party from cherry-picking the issues to raise before the RALJ court and reserving all significant constitutional issues for the Court of Appeals.

Finally, although RALJ 1.2(a) and RAP 1.2(a) indicate that the rules of procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits," this Court should not be persuaded to consider the merits of Rivas' appeal. In *every* case where issues of waiver are raised, the appellant will necessarily have a competing interest in resolving a case on its merits. Nevertheless, doctrines of waiver exist and are frequently applied by appellate courts. As recognized by the Washington Supreme Court, there is a point at which the judicial system's interest in finality and judicial economy outweighs an appellant's interest in resolving the merits of a case. "Even though an appeal raises issues of constitutional import, at some point the appellate

process must stop." Sauve, 100 Wn.2d at 87. In this case, that point is the transition from direct appeal to discretionary review.⁴

This Court should decline to review Rivas' claim of error and affirm the superior court because Rivas cannot raise a claim of error for the first time on discretionary review.

2. DEFENSE COUNSEL'S OPENING STATEMENT INTRODUCED AND DREW ATTENTION TO THE FACT THAT RIVAS EXERCISED HIS CONSTITUTIONAL RIGHTS AFTER ARREST.

Even where constitutional rights are involved, the invited error doctrine precludes appellate review of a trial court error. State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44, 47 (1982); see also State v. Young, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991).

Under the related "open door doctrine," "a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence." State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (quoting

⁴ Even if this Court declines to review Rivas' claim of error, Rivas would not be left without a remedy. "He may choose to apply for a personal restraint petition under RAP 16.3, 16.4, and with a prima facie showing of actual prejudice arising from constitutional error would be entitled to a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12." Sauve, 100 Wn.2d at 87 (citation and quotation marks omitted).

Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66–67 (5th ed. 2007)); see also State v. Rivers, 129 Wn.2d 697, 711, 921 P.2d 495 (1996) (holding that defense counsel's opening statement opened the door to an otherwise irrelevant subject); accord State v. Rupe, 101 Wn.2d 664, 687-88, 683 P.2d 571 (1984).

Here, Rivas' attorney was the first to raise Rivas' invocation of his right to an attorney before the jury. In opening statement, the defense attorney told the jury that they would hear the "rest of a story that has not been told to you," implying that the prosecutor was hiding facts from them. Supplemental RP 8. The "rest of" the story included Rivas' invocation of his right to counsel:

They took him to the police station. Mr. Rivas was not going to give them any sample until he was able to speak to an attorney. He learned that he was given access to a public defender and based upon his conversation, he declined to give a sample of his [breath].

Supplemental RP 11. Defense counsel also highlighted specific questions the officers did not ask Rivas---questions that would have been asked in a post-arrest interview if Rivas had not invoked his right to remain silent---and suggested that the officers had conducted an incomplete investigation by failing to ask those

questions.⁵ Id. The prosecutor's opening statement did not mention Rivas' conversation with an attorney or Rivas' right to remain silent. Supplemental RP 1-8.

"Counsel may anticipate testimony in opening argument as long as there is a good faith belief that the testimony will be produced at trial." State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Through his opening statement, Rivas' attorney clearly revealed his intent to elicit testimony about Rivas' conversation with a public defender and the arresting officer's failure to question Rivas about his alcohol consumption. The defense attorney fulfilled his promise to the jury during the defense case-in-chief, in which Rivas and his friend, Mr. Erickson, repeatedly testified that Rivas invoked his right to an attorney. CP 483-84, 522, 526.

Rivas cannot now claim that he was prejudiced by the very same testimony that he intentionally called to the jury's attention and then incorporated into his theory of the case. This Court

⁵ Immediately after discussing Rivas' post-arrest conversation with counsel, the defense attorney told the jury: "You won't find out what the officers generally do when they investigate a DUI is where did you come from? How long were you there? Were you drinking? How much did you drink? The name of the establishment 'cause these are things that police officers ask. . . . [the officers] set aside all other procedures, type of uh rules and processes which the police officer is trained they're required to do." Supplemental RP 11 (punctuation altered).

should affirm the superior court because Rivas invited the testimony that he now challenges on appeal.

3. ANY ERROR IN ELICITING TESTIMONY ABOUT RIVAS' EXERCISE OF CONSTITUTIONAL RIGHTS WAS HARMLESS.

When the petitioner properly raises a claim of manifest constitutional error for the first time on appeal, courts review the claim de novo. State v. Curtis, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002). This Court should affirm the superior court because Deputy Jeffries' testimony did not amount to a comment on Rivas' exercise of constitutional rights. Even if this Court holds that the State improperly commented on Rivas' exercise of rights, however, this Court should still affirm the superior court because the State presented overwhelming untainted evidence of Rivas' guilt such that any error regarding Rivas' constitutional rights was harmless beyond a reasonable doubt.

a. The State Did Not Comment On Rivas' Constitutional Rights.

The Fifth Amendment right against self-incrimination prohibits the State from commenting on a defendant's exercise of

the right to remain silent or the right to counsel. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996). The State comments on a defendant's Fifth Amendment rights when it uses the defendant's exercise of rights as substantive evidence of guilt or implies that the defendant's exercise of rights is an admission of guilt. State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996).

At trial, the prosecutor's closing arguments properly focused on substantive evidence of Rivas's guilt. The prosecutor never argued that *any* of Rivas' actions suggested consciousness of guilt, let alone that the jury should infer consciousness of guilt specifically from Rivas' invocation of constitutional rights. Accordingly, the record does not support Rivas' argument that the State used, or attempted to use, Deputy Jeffries' testimony as evidence of guilt.

Although Rivas acknowledges that the prosecutor did not discuss Rivas' exercise of rights in closing argument, Appellant's Opening Br. at 12, he argues that the prosecutor's direct examination of Deputy Jeffries, in and of itself, amounted to an impermissible comment on his constitutional rights. His argument relies heavily on this Court's decisions in State v. Curtis, 110 Wn. App. 6, and State v. Nemitz, 105 Wn. App. 205, 19 P.3d 480 (2001). In both of those cases, however, the State was the first

party to call the jury's attention to the defendant's invocation of rights, and the challenged testimony was "injected into the trial for no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer." Curtis, 110 Wn. App. at 14. Accordingly, the only inference that could be drawn from this testimony was an improper inference of guilt. Id.

Here, in contrast to Curtis and Nemitz, the State was not the first party to call the jury's attention to Rivas' exercise of rights, and there was a valid reason for the prosecutor to elicit testimony on the subject. Defense counsel told the jury that Rivas invoked his right to counsel at the police station and refused the breath test on the advice of his attorney. The attorney then suggested that the officers conducted an incomplete investigation because they failed to ask Rivas specific questions about his alcohol consumption.

After defense counsel's opening statement, the State reasonably believed that defense counsel would cross-examine Trooper Jeffries about Rivas' exercise of rights at the police station. If the State had not elicited this testimony in its direct examination, the jury would think either that Deputy Jeffries had violated Rivas' constitutional rights or that the State had attempted to hide testimony that was significant to the defense. Therefore, the State

asked Deputy Jeffries whether Rivas invoked his right to counsel, and whether Deputy Jeffries provided Rivas with a lawyer---the very same testimony that the defense attorney had discussed in opening statement. The State elicited no further testimony regarding Rivas' exercise of constitutional rights, and made no argument on the subject whatsoever.

Notably, the defense attorney did not object to the prosecutor's particular line of questioning, even though he objected to numerous other questions throughout the trial. When viewed as a whole, the trial proceedings strongly suggest that the defense attorney did not object to the prosecutor's direct examination on this subject because he considered the testimony to be helpful to his client's case. This interpretation is supported by the evidence presented in the defense case-in-chief. After the State rested, the defense actively and repeatedly elicited testimony that Rivas exercised his constitutional rights. Two defense witnesses, including Rivas himself, freely testified that Rivas demanded "his right to an attorney" at the scene of the accident and became frustrated when he felt his constitutional rights were violated. CP 483-84, 522, 526, 539. According to the defense theory of the

case, it was Deputy Jeffries, not Rivas, who became angry and aggressive when Rivas invoked his right to an attorney. CP 484.

To the extent that Deputy Jeffries referred to Rivas' right to silence, as opposed to Rivas' right to counsel, the reference was indirect and narrowly tailored to Rivas' conversation with his attorney regarding the breath test:

Q: And did he waive those rights?

A: No, he didn't. He actually asked for an attorney.

Q: Okay. And did you provide an attorney for him that day?

A: Yes, I did.

...

Q: Okay. And following the conversation, what happened?

A: Well, once that conversation is over with, I go back in and make sure that he understands because once he's talked to the attorney, basically *I don't ask any more questions* except for information like his address and stuff like that, and ask him if he was---you know he was clear on what was going on, and he was. And then I asked him if he wanted to submit to the breath test.

CP 375-77 (emphasis added). Deputy Jeffries testified that *he* did not ask Rivas any more questions once Rivas had spoken to an

attorney.⁶ Unlike State v. Romero, 113 Wn. App. 779, 785, 793-94, 54 P.3d 1255 (2002), in which the officer testified that *the defendant* invoked his right to silence and was "uncooperative," Deputy Jeffries never directly testified that Rivas asserted his right to silence or refused to answer questions. Nor did Deputy Jeffries provide any testimony implying that Rivas' invocation of his constitutional rights was evidence of Rivas' guilt.

"It is not a constitutional error for a police witness to make an indirect reference to the defendant's silence absent further comment from either the witness or the State. Such a reference is not reversible error unless the defendant can show resulting prejudice." Romero, 113 Wn. App. at 789-91; accord Lewis, 130 Wn.2d at 706-07 ("Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence.").

Here, any prejudice that might have otherwise flowed from Deputy Jeffries' testimony was dissolved when defense counsel

⁶ This testimony directly rebutted defense counsel's suggestion that Deputy Jeffries conducted an incomplete investigation by failing to interrogate Rivas about his alcohol consumption. See Supplemental RP 11.

intentionally drew the jury's attention to Rivas' invocation of rights and turned that invocation of rights into a material component of Rivas' defense. Under these circumstances, the jury would have inferred guilt from Rivas' invocation of rights only if the prosecutor had expressly argued such an inference---a scenario that Rivas concedes did not happen in this case.

The State did nothing more than elicit the very same testimony that the defense told the jury it would hear---that Rivas invoked his right to counsel, spoke to counsel, and then refused the breath test. Because Deputy Jeffries' testimony was not elicited for an improper purpose, and was never exploited by the State to suggest guilt, this Court should affirm the superior court and hold that the State did not improperly comment on Rivas' constitutional rights.

b. Any Error In Eliciting Testimony About Rivas' Rights Was Harmless.

Even if this Court were to hold that the State improperly commented on Rivas' invocation of rights, the error was harmless beyond a reasonable doubt. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any

reasonable jury would have reached the same result in the absence of the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980) (internal quotations omitted).

In determining whether an error was harmless beyond a reasonable doubt, Washington courts apply the "overwhelming untainted evidence test." State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). When applying this test, the appellate court reviews the untainted evidence to determine if it necessarily leads to a finding of guilt. Id. (internal citations omitted).

The State presented overwhelming evidence of Rivas' guilt. At trial, the State presented the testimony of five witnesses who personally interacted with Rivas on the night he was arrested for Driving While Under the Influence. Four of those witnesses, Deputy Schene, Deputy Becker, Deputy Jeffries, and Ms. Gonzalez, testified that Rivas was intoxicated or under the influence of alcohol. CP 219, 281, 330, 365.

Ms. Gonzalez and Mr. Boger agreed that Rivas had caused the collision, and Deputy Schene testified that their explanation of

the accident was consistent with the damage he observed.

CP 280-81. Deputy Schene, Deputy Becker, and Deputy Jeffries all testified that Rivas had an odor of intoxicants on his breath.

CP 273, 330, 357. Deputy Jeffries and Ms. Gonzalez testified that Rivas exhibited bloodshot, watery eyes and spoke with slurred speech. CP 220, 357. Deputy Becker, Deputy Jeffries, and Ms. Gonzalez each noted that Rivas appeared unsteady on his feet. CP 220, 330, 356.

Deputy Jeffries also found an open can of Budweiser beer in the passenger compartment of Rivas' car. CP 268. It was cold and wet to the touch, which suggested that it had recently been consumed. CP 268-70. Additionally, Rivas exhibited bizarre and aggressive behavior consistent with intoxication, including his use of extremely offensive, racially-charged language against Mr. Boger and Deputy Jeffries. CP 217-20, 224-25, 335, 357-63.

Viewed in the context of the State's overwhelming evidence, Rivas' explanation of events---that he had not caused the accident and had not consumed a drop of alcohol the entire evening---was facially unbelievable. Rivas' description of the collision was inconsistent with that of his own witness, Mr. Erickson, and inconsistent with the damage to the vehicles. CP 276, 280-81, 481,

508, 532-33. Although Rivas claimed he had not consumed alcohol, three law enforcement officers testified that Rivas smelled of intoxicants, another independent eyewitness testified that Rivas appeared intoxicated, and an open can of beer was found in the passenger compartment of Rivas' car. CP 219, 268-70, 273, 281, 330, 357, 365. Furthermore, Rivas spontaneously refused to take a portable breath test, even though no such test was ever offered to him, and refused to provide a breath sample at the police station. CP 356, 392-97, 432-33.

Because the State presented overwhelming untainted evidence of Rivas' guilt at trial, this Court should hold that Deputy Jeffries' testimony was harmless beyond a reasonable doubt.

D. CONCLUSION

Because Rivas has cited no authority that would allow him to pursue two direct appeals, first in the superior court and then in the Court of Appeals, this Court should hold that Rivas' claim of error has not been preserved for discretionary review. In the alternative, this Court should hold that Deputy Jeffries' testimony was not an improper comment on Rivas' exercise of constitutional rights because the record, viewed in its entirety, shows that the State did

not use Deputy Jeffries' testimony on this subject as evidence of Rivas' guilt.

For the foregoing reasons, the State respectfully asks this Court to affirm the superior court.

DATED this 9th day of January, 2012.

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 Ryan Robertson, the attorney for the appellant, at Robertson Law PLLC, 800 Fifth Avenue Suite 4000, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. NICKLAS RIVAS, Cause No. 65870-1-I, 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.


Name Jessica Murphy Manca
Done in Seattle, Washington

Jan. 9, 2012
Date Jan. 9, 2012

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