IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 65870-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
NICKLAS EDWARD RIVAS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 16, 2012
	)	

Ellington, J. — Nicklas Rivas argues the State impermissibly presented evidence about his assertion of his Miranda[1] rights at trial, and that this error was not harmless beyond a reasonable doubt. We affirm.

BACKGROUND

Rivas was arrested on June 4, 2005 after his car collided with a taxicab. He was charged in King County District Court with driving while under the influence (DUI).

Each party gave an opening statement describing the evidence the jury would hear. The prosecutor focused on Rivas' prearrest conduct. The defense attorney described the arrest procedure, including the fact that Rivas had refused to give a breath test until he spoke with an attorney.[2] Defense counsel asserted the officers did

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

[2] "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 . . . and based upon his conversation

not ask Rivas the questions typically asked of a DUI suspect.

The arresting officer, Deputy David Jeffries, testified that he twice advised Rivas of his Miranda rights and gave an implied consent warning for a breath test. There was no objection. The prosecutor asked Jeffries about Rivas' response, still without objection:

> 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 was over with, I go back in and then 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 . . . clear on what was going on, and he was. And then I asked him if he wanted to submit to the breath test.
>
> . . . .
>
> Q. Okay. And . . . so, he talked on the phone. Did you--at what point did you present the implied consent warnings that you spoke of earlier; was it before the conversation, or after?
>
> A. Actually it was both. I--once we got to the police station, I presented a--- both to him because prior to him talking to the attorney, I want to make sure that he knows what to talk to the attorney about. So, I give him that information, and then I call the attorney, let him talk to the

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he declined to give a sample." Transcript of Hearing (Oct. 24, 2007) at 11. "We're just giving you an outline so that when witnesses give you testimony you'll have some sort of outline . . . . [W]e'll show you that there's 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." Clerk's Papers at 609.

attorney, and then we go from there.[3]

After Rivas spoke with the attorney, he refused to submit to the breath test.

The defense later elicited testimony about Rivas' request for an attorney from both Rivas and one other defense witness.

The jury found Rivas guilty.

Rivas sought direct appeal to King County Superior Court, where he argued ineffective assistance of counsel and corpus delicti. The superior court affirmed his conviction.

Rivas petitioned for discretionary review in this court, raising, for the first time, an allegation of improper comment upon his assertion of Miranda rights. We granted review. Subsequently we granted the parties' motions to supplement the record with materials pertaining to the "improper comment" issue, including transcriptions of the court's preliminary instructions to the jury and the parties' opening statements.

DISCUSSION

Under the Fifth and Sixth Amendments of the United States Constitution, a criminal suspect has the right to remain silent and the right to an attorney, which are referred to as Miranda rights. If a criminal suspect invokes these rights at any time before questioning, all interrogation must cease.[4] The State violates a defendant's Fifth, Sixth, and Fourteenth Amendment rights by introducing evidence of his exercise of Miranda rights as substantive evidence of guilt.[5]

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[3] Report of Proceedings (Oct. 25, 2007) at 325-27.

[4] Miranda, 384 U.S. at 473-74.

[5] State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); see also State v.

Rivas does not contend he was questioned in violation of Miranda. Rather, he contends the prosecutor committed constitutional error when he elicited testimony that Rivas exercised his right to consult an attorney before agreeing to a breath test. Rivas claims the State invited the jury to infer that he exercised his right to silence because he was guilty.

As a threshold matter, the State points out that Rivas failed to raise this argument either at trial in the district court or on direct review in the superior court and thus failed to preserve his argument for review here. We nonetheless address Rivas' argument in this case.[6] Review is de novo.[7]

Our courts distinguish between comments on, as opposed to mere references to, a defendant's silence.[8] A comment on silence occurs when a witness or prosecutor mentions a defendant's right to silence and the State uses the defendant's silence as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.[9] In contrast, a mere reference to silence occurs when a witness or prosecutor references actions or statement that the jury could interpret as an attempt to invoke the right to silence.[10]

Nemitz, 105 Wn. App. 205, 214, 19 P.2d 480 (2001).

[6] A panel of judges granted Rivas' motion for discretionary review on the record before it. Subsequent filings present us with a more complete record, under which we doubt review would have been granted. Nonetheless, we address the issue presented.

[7] State v. Curtis, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002).

[8] State v. Porttorf, 138 Wn. App. 343, 346-47, 156 P.3d 955 (2007); State v. Slone, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006).

[9] See State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996); Curtis, 110 Wn. App. at 13; State v. Romero, 113 Wn. App. 779, 786-95, 54 P.3d 1255 (2002).

[10] State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999).

Rivas claims Officer Jeffries' testimony was an impermissible comment on his assertion of his Miranda rights. He points to State v. Curtis and State v. Nemitz in support. In Curtis, the officer testified on direct examination that the defendant refused to speak to him and asked for an attorney.[11] We reversed, holding the prosecutor violated Curtis' Miranda rights.[12] Although the prosecutor did not directly refer to Curtis' post-Miranda refusal to speak without an attorney present, knowledge of that fact may have added weight to the State's inference that Curtis knew he had done something wrong.[13]

In Nemitz, a DUI case, the prosecutor elicited testimony that the defendant handed the arresting officer his attorney's business card, on the back of which were printed his rights if stopped on suspicion of drunk driving, including his rights to silence and to an attorney.[14] We held the testimony violated Nemitz's Fifth and Sixth Amendment rights because it supported an inference that only a person disposed to drink and drive would take anticipatory steps to avoid self-incrimination and assert the right to counsel in the context of a DUI stop and was irrelevant to the elements of the offense.[15]

But here, the defense itself brought up the issue in opening statement, telling the jury Rivas had invoked his Miranda rights and that they would learn that officers did not

[11] Curtis, 110 Wn. App. at 9.

[12] Id. at 15-16.

[13] Id. at 13.

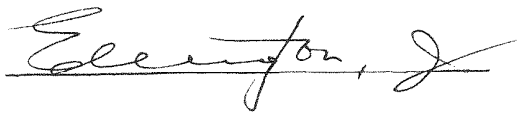
[14] Nemitz, 105 Wn. App. at 208, 215.

[15] Id. at 214-15.

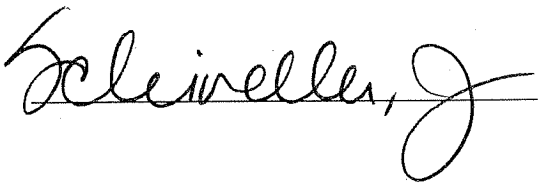
adhere to typical investigation procedures for a DUI case.

The purpose of an opening statement is to provide an outline of the anticipated evidence and the reasonable inferences to be drawn therefrom.[16] The defense clearly revealed its intent to elicit testimony about the officers' procedures, Rivas' request to speak with an attorney, and his refusal to submit to the breath test. Anticipating the theory described by the defense in opening, the prosecutor elicited testimony about the procedure used at Rivas' arrest. The testimony was responsive to the defense theory of the case, and was not an improper comment on Rivas' exercise of his Miranda rights.

Affirmed.



WE CONCUR:



[16] State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984); see also State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) ("[c]ounsel may anticipate testimony in opening argument as long as there is a good faith belief that the testimony will be produced at trial").