**IN THE STATE COURT OF HENRY COUNTY**

**STATE OF GEORGIA**

STATE OF GEORGIA )

 )

vs. ) CASE NO.: 17SR3337

 )

DARIUS ALEXANDER PINDER, )

 )

 Defendant. )

**ORDER DENYING DEFENDANT’S MOTIONS TO EXCLUDE REFUSAL OF IMPLIED CONSENT TESTING**

The above-styled case comes before the Court on Defendant’s motions to exclude his refusal of implied consent testing. In his motions, Defendant challenges the accuracy of the state implied consent notice and contends that his refusal constitutes an exercise of his privilege against self-incrimination under the U.S. and Georgia Constitutions which may not be used against him at trial. Specifically, Defendant argues that the introduction of such refusal would infringe upon his constitutional right against compelled self-incrimination set forth under Article I, Section I, Paragraph XVI of the Georgia Constitution. However, the proffered evidence does not violate the Defendant’s constitutional privileges and is not otherwise inadmissible. For the reasons discussed below, Defendant’s motion is hereby **DENIED**.

1. **FACTS**

On September 2, 2017, around 1:35 a.m., Officer William Watson of the Henry County Police Department (HCPD) was dispatched to an accident on Jodeco Road in Henry County, Georgia. Other officers, including Officer Kenneth Palmer of the HCPD responded to the scene where both officers observed that Defendant’s Infiniti G37 sedan had been involved in a rear-end collision with another vehicle. At hearing, both officers testified that Defendant’s Infiniti had damage to its front right side, whereas the other vehicle was struck in the rear. During the accident investigation, Officer Palmer made contact with Defendant at which time he determined Defendant appeared to be under the influence.

Having conducted roughly 1,000 DUI investigations in his six years as a law enforcement officer, Officer Palmer noticed that Defendant had bloodshot, glassy eyes and he detected an odor of alcohol emanating from Defendant. Officer Palmer subsequently asked Defendant how many drinks he has prior to the accident; Defendant admitted to having “a couple” two hours earlier. He then told Officer Palmer that he in fact had two twelve ounce Heineken beers. He also admitted to Officer Palmer that he bumped the other vehicle.

As the encounter progressed, Defendant told Officer Palmer that he did not want to perform field sobriety evaluations, but did submit to a roadside breath test; the results registered as positive. Continuing with protocol, Officer Palmer then performed the horizontal gaze nystagmus (HGN) evaluation. He testified that Defendant met all six possible clues of impairment. Officer Palmer determined, in the totality of the circumstances, that Defendant was under the influence of alcohol to the extent that he was less safe to drive. Officer Palmer then arrested Defendant and read him Georgia’s implied consent notice. When asked by Officer Palmer to submit to a State-administered breath test, Defendant refused.

The State entered Officer Palmer’s flashlight video into evidence, which revealed that during the post-arrest search, Defendant’s Infiniti contained what appeared to be a Yeti tumbler that contained a clear alcoholic beverage. The Georgia implied consent notice card was additionally entered into evidence. Also at hearing, Officer Palmer testified that Defendant was very cooperative throughout the investigation and that no threats or coercion were made upon Defendant.

1. **THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE GEORGIA CONSTITUTION EXTENDS TO BREATH TESTS UNDER GEORGIA’S IMPLIED CONSENT LAW, AND REFUSALS THEREOF**

The Fifth Amendment to the U.S. Constitution provides, in part, that “[n]o person … shall be compelled in any criminal case to be a witness against himself.” However, the U.S. Supreme Court has held that the Fifth Amendment does not extend to acts like submitting to a blood-alcohol test, *Schmerber v. California,* 384 U.S. 757 (1966); refusing a blood alcohol test, *South Dakota v. Neville*, 459 U.S. 553, 564-565 (1983); or giving a voice exemplar, *United States v. Dionisio*, 410 U.S. 1 (1973).

The Georgia Constitution also affords individuals protection from being forced to incriminate themselves. Ga. Const. 1983, Art. 1, Sec. 1, Par. XVI provides that “[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating.” Dating as far back as the 1877 Constitution and *Day v. State*, 63 Ga. 668, 669(2) (1879), the Supreme Court of Georgia noted “that the right [against self-incrimination] ‘protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature.’” *Olevik v. State*, S17A0738, \_\_\_ Ga. \_\_\_, 806 S.E.2d 505, at \*7 (Ga. Oct. 16, 2017) (quoting *Calhoun v. State*, 144 Ga. 679, 680-681 (1916)). Thus, the Georgia Constitution provides broader protection from self-incrimination than the United States Constitution. Consistent with this historic interpretation of the provision, the Supreme Court of Georgia recently recognized that the privilege against self-incrimination found in the Georgia Constitution extends to breath tests pursuant to Georgia’s implied consent law. *Olevik*, at \*1.

We must then consider whether either the U.S. Constitution or the Georgia Constitution categorically prohibits the State from presenting evidence of a defendant’s refusal to perform an act that may be incriminating.

1. **EVIDENCE OF REFUSAL OF A BREATH TEST IS NOT CATEGORICALLY EXCLUDED UNDER THE U.S. OR GEORGIA CONSTITUTIONS**
2. **Under the United States Constitution.** Defendant contends that, because he has a constitutional right to refuse a State-administered breath test, his exercise of that right may not be used against him in evidence. But the State is only prohibited from presenting evidence or commenting on the invocation of the privilege in limited circumstances, not generally.

*Miranda*-induced silence is excluded by due process, because it is not fair to tell a suspect that he has the right to remain silent, then use his silence against him. “*Miranda* warnings emphasize the dangers of choosing to speak (‘whatever you say can and will be used as evidence against you in court’), but give no warning of adverse consequences from choosing to remain silent.” *South Dakota v. Neville*, 459 U.S. 553, 564-565 (1983). See also *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). But because taking or refusing a breath test does not implicate the Fifth Amendment, *Miranda* was not read to Defendant here, and his silence is thus not excluded on that basis.

The U.S. Constitution does not require the exclusion of a defendant’s pre-*Miranda* silence generally.

The privilege against self-incrimination ‘is an exception to the general principle that the Government has the right to everyone's testimony.’ *Garner v. United* *States,* 424 U.S. 648, 658, n. 11, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976). To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who ‘“desires the protection of the privilege ... must claim it”’ at the time he relies on it. [*Minnesota v. Murphy,* 465 U.S. 420, 427, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (quoting *United States v. Monia,* 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943)].

*Salinas v. Texas*, 570 U.S. 178(II)(A) (2013). The only exceptions to this rule recognized by the U.S. Supreme Court are the defendant’s right not to be forced to affirmatively assert the privilege at trial, *Griffin v. California,* 380 U.S. 609, 613–615, (1965), and circumstances “where governmental coercion makes his forfeiture of the privilege involuntary,” such as the threat of loss of public employment, *Garrity v. New Jersey,* 385 U.S. 493, 497 (1967). *Salinas, supra.* But contrary to the language of the *Miranda* warning, “the Fifth Amendment guarantees that no one may be ‘compelled in any criminal case to be a witness against himself’; it does not establish an unqualified ‘right to remain silent.’” *Salinas* at (II)(B).Thus,*Salinas* held that where defendant agreed to talk to police in a non-custodial interview, and answered some questions but not others, without invoking his Fifth Amendment rights, evidence of his failure to answer was properly admitted. Even defendant’s post-*Miranda* silence is admissible where he fails to expressly invoke his Fifth Amendment privilege. *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (defendant’s silence for two hours, forty-five minutes did not require officers to terminate interrogation without an express invocation of defendant’s right to remain silent).

**B. Under the Georgia Constitution.** Analysis under the Georgia Constitution is different because, as noted above, the Georgia protection against self-incrimination is broader that under the Fifth Amendment to the U.S. Constitution. Whereas the Fifth Amendment has always been limited to actual speech, the Georgia provision, at least since 1877, has been interpreted to include compelled acts as well. Thus, in *Day v. State*, 63 Ga. 668, 669(2) (1879), the Georgia Supreme Court excluded evidence that the sheriff had forced the defendant to put his foot into a footprint at the scene of a burglary. The Court explained that the provision was the embodiment of the common-law maxim, “no man is bound to accuse himself of any crime or to furnish any evidence to convict himself of any crime.” *Calhoun v. State*, 144 Ga. 679, 680-681 (1916). Through three subsequent constitutions, the constitutional protection against self-incrimination has remained, for all practical purposes, identical in scope, language and effect.[[1]](#footnote-1) Thus, in deciding the scope of the modern provision, the Georgia Supreme Court in *Olevik* looked to understanding of the provision from prior constitutions, and rejected the State’s argument that “testimony” should be given its plain meaning under modern usage. *Olevik* concluded that, “although Paragraph XVI refers only to testimony, its protection against compelled self-incrimination was long ago construed to also cover incriminating acts and, thus, is more extensive than the Supreme Court of the United States’s interpretation of the right against compelled self-incrimination guaranteed by the Fifth Amendment.” *Olevik* at \*8. *See also Aldrich v. State*, 220 Ga. 132, 135 (1964) (framers of 1945 Constitution intended for privilege against self-incrimination to have same meaning as that given by our constitution in Day, Calhoun, and other cases).

[T]he adoption of a new constitution containing materially identical language already clearly and authoritatively construed by this Court is strongly presumed to have brought with that language our previous interpretation. This is so regardless of whether those holdings were well-reasoned at the time they were decided. The people of Georgia, by ratifying that constitutional text, ratified the scope of Paragraph XVI as *Day* explained it.

*Olevik* at \*8. In looking to the meaning of the current constitutional provision, then, we seek to ascertain what the provision meant when originally adopted in 1877. Was a defendant’s out-of-court silence admissible against him in 1877? The answer may well be very different from the one we would give in a post-*Miranda* world. Indeed, as the Georgia Supreme Court noted in *Olevik*,

[i]f we were construing Paragraph XVI in the first instance, we might conclude that the scope of Georgia’s right against compelled self-incrimination is coterminous with the right guaranteed by the Fifth Amendment to the United States Constitution, which is limited to evidence of a testimonial or communicative nature. [Cits.] But we are not meeting Paragraph XVI for the first time; this constitutional provision has been carried over from prior constitutions, and it has brought with it a long history of interpretation. The State argues that our historical interpretation of this provision is wrong, both as a matter of text and in the light of the legislative history of a previous constitution. Nevertheless, this history compels our conclusion today.

*Olevik* at \*5.

Before *Miranda*, Georgia case law only excluded a defendant’s silence in limited circumstances, such as when a defendant refused to testify in a criminal or civil trial, *Simpson v. State*, 233 Ga. 17, 20 (1974), *Harrison v. Powers*, 76 Ga. 218 (1886), or before a grand jury, *Loewenherz v. Merchants and Mechanics Bank*, 144 Ga. 556, 559 (1916). But in upholding this principle in *Gravett v. State*, 74 Ga. 191, 200 (1884), the court also criticized an earlier decision, *Higdon v. Heard*, 14 Ga. 255, 258 (1853), which held that “[a] defendant cannot be obliged to discover [that is, produce in discovery] what may subject him to a penalty or forfeiture, or criminal accusation,” and “that the party himself cannot ‘even waive this protection, for the law is, in this regard, his guardian.’” *Gravett* expressed doubt on this holding: “[t]his case does not require us to go to the extreme length laid down by the last cited, and it is proper to say that, without qualification, we cannot give our sanction to the doctrine there announced,” *Id.* at 200.

A long line of pre-*Miranda* cases approved the admission of a defendant’s post-arrest silence, and a jury charge that silence where a denial is called for may be construed as an admission. *Bennett v. State*, 231 Ga. 458(2) (1973); *Bloodworth v. State*, 216 Ga. 572, 573 (1961); *Kalb v. State*, 195 Ga. 544, 550(2) (1943); *Emmett v. State*, 195 Ga. 517 (1943); *Wright v. State,* 136 Ga. 130 (1911). This practice was never thought to offend the Georgia Constitution of 1877, or any subsequent iteration thereof. And as noted in *Olevik*, the Georgia Constitution was consistently held to allow such evidence, and an accompanying jury charge; however in 1976, the Georgia Supreme Court recognized that the practice was inconsistent with *Miranda* and its progeny, and that line of cases was overruled “in view of *Miranda*” by *Howard v. State*, 237 Ga. 471 (1976). *Howard* has not been extended beyond the limits of *Miranda*, however, nor has any other case held that pre- or post-arrest silence in the face of a request to perform an incriminating act, such as the implied consent request here, would be categorically inadmissible under any Georgia Constitution.

Post-*Miranda*, the Georgia Supreme Court determined that a *Miranda* warning should precede any request for post-arrest field sobriety evaluations. *See, e.g., Price v. State*, 269 Ga. 222 (1998); *State v. Dixon*, 267 Ga.App. 320, 320-321 (2004). The Georgia cases so holding are grounded in former OCGA § 24-9-20(a) (now OCGA § 24-5-506(a), “[n]o person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.”), not the Georgia Constitution. *State v. O'Donnell,* 225 Ga.App. 502, 504(2) (1997) (whole court); *State v. Whitfield*, 214 Ga.App. 574(3) (1994).

But *Olevik* finds no “textual or historical basis” for “a *Miranda*-style prophylactic rule to protect suspects’ Paragraph XVI rights” under the Georgia Constitution. *Olevik* at \*14 n.13.[[2]](#footnote-2) And unlike the *Miranda* warning, the Georgia implied consent warning expressly gives notice that the Defendant’s refusal may be introduced into evidence against him. See O.C.G.A. § 40-5-67.1(b) (“Your refusal to submit to the required testing may be offered into evidence against you at trial.”). “[I]t [is] unrealistic to say that the warnings given here implicitly assure[s] a suspect that no consequences other than those mentioned will occur.” *Neville* at 566. Thus, the due process problem caused by *Miranda* does not exist here.

Having determined that the evidence is not categorically constitutionally prohibited, we must then ask: is it categorically excluded under Georgia evidence law?

1. **EVIDENCE OF REFUSAL OF A BREATH TEST IS NOT CATEGORICALLY EXCLUDED UNDER CURRENT GEORGIA EVIDENCE LAW**

**A. Under pre-2013 Georgia evidence law.** It was not until *Mallory v. State*, 261 Ga. 625 (1991) that the Georgia Supreme Court ruled that a defendant’s pre-arrest silence was categorically to be excluded. The basis for this ruling, however, was statutory, not constitutional. The U.S. Supreme Court had held, in *Jenkins v. Anderson,* 447 U.S. 231 (1980), “that where no government action has induced a defendant's silence prior to his arrest, and where the defendant waives his privilege against self-incrimination by testifying at trial, the state may comment at trial upon the fact that he did not come forward voluntarily.” *Mallory at* 630. What type of government action would be held to induce silence? *Miranda* warnings. “In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand,” *Fletcher v. Weir*, 455 U.S. 603, 629-630 (1982). But the U.S. Supreme Court had also commented that states were “free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial.” *Jenkins,* 447 U.S. at 240, 100 S.Ct. at 2130. Thus, the Georgia Supreme Court in *Mallory*, citing to OCGA § 24-3-36 (“Acquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission.”), held “that in criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative” and that “such a comment will not be allowed even where the defendant has not received Miranda warnings and where he takes the stand in his own defense.” *Mallory* at 630(5).  But in the federal courts, there is a split among the circuits on this issue, and the Eleventh Circuit has held that pre-arrest, pre-*Miranda* silence may be admitted and commented upon by the government. *U.S. v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). Compare *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (“use of a defendant’s prearrest silence as substantive evidence of guilt violates the Fifth Amendment’s privilege against self-incrimination.”).

In numerous cases since the advent of the 2013 Evidence Code, the Georgia Supreme Court has noted that *Mallory* is no longer controlling authority and has suggested that it is no longer good law. See *Simmons v. State*, 299 Ga. 370, 374 (2016) (“This Court has repeatedly noted that *Mallory* was decided on the basis of former OCGA § 24-3-36, a provision that has been repealed by the enactment of the new Evidence Code, which became effective January 1, 2013….”); *Seabolt v. Norris*, 298 Ga. 583, 587 n.3 (2016); *State v. Sims*, 296 Ga. 465, 471(3) (2015).

1. **Under the 2013 Georgia Evidence Code.** Does the new Evidence Code categorically prohibit the use of such evidence? We have no direct answer to that question from the Georgia appellate courts yet, but the likely answer would seem to be no.
2. **Rule 801.** The 2013 Evidence Code, is modeled, of course, on the Federal Rules Evidence, including OCGA § 24-8-801(d)(2)(B), which provides an exception to the hearsay rule: “Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is (A) The party’s own statement, … or (B) A statement of which the party has manifested an adoption or belief in its truth.” Neither the Federal Rules nor the Georgia Code exclude either type of admission from use against criminal defendants; in fact, the Advisory Committee Notes on Federal Rule 801(d)(2)(B), while noting “troublesome questions” that arise in that context, conclude that “the rule contains no special provisions concerning failure to deny in criminal cases.”[[3]](#footnote-3) At least one noted commentator has pointed out that 801(d)(2)(B) “is an almost complete departure from how Georgia previously dealt with the issue in the case of a criminal defendant”[[4]](#footnote-4) – which is true of Georgia law from 1991-2012 (the *Mallory* period); but in fact, application of this rule to criminal defendants’ silence is actually a return to pre-*Mallory* Georgia evidence law, as shown above.

With no Georgia appellate authority yet under the 2013 Evidence Code, we turn to interpretation of the relevant federal rule by the U.S. Supreme Court and the Eleventh Circuit Court of Appeals. Ga. L. 2011, p. 99, § 1 (not codified); *Olds v. State*, 299 Ga. 65, 69(2) (2016); *Parker v. State*, 296 Ga. 586, 593(3)(a) (2015). There is a split among federal circuits on this question, but the Eleventh Circuit has held that “[t]he government may comment on a defendant’s silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings,” *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991).

1. **Rule 403.** The 2013 Evidence Code still allows for exclusion of evidence which, though otherwise relevant, as defined in OCGA § 24-4-401,[[5]](#footnote-5) has probative value which is “substantially outweighed by the danger of unfair prejudice.” OCGA § 24-4-403. The Georgia Supreme Court has held that

“Unfair prejudice” under this rule “means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” (Citations and punctuation omitted.) *United States v. Smalls*, 605 F.3d 765, 787(II)(C) (10th Cir. 2010). We have held that this rule of exclusion is “an extraordinary remedy which the courts should invoke sparingly, and the balance should be struck in favor of admissibility.” (Citations and punctuation omitted.) *Carter v. State*, \_\_ Ga. \_\_ (2)(a) (Case No. S17A1126; decided October 2, 2017). “The ‘major function’ of Rule 403 is to ‘exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.’” (Citation and punctuation omitted.) *Hood v. State*, 299 Ga. 95, 103(4) (786 S.E.2d 648) (2016).

*Pierce v. State*, S17A0828, \_\_\_ Ga. \_\_\_ (1)(d), 2017 WL 4870991 (October 30, 2017). *Accord, Flading v. State*, 327 Ga.App. 346, 351-352 (2014) (citing *United States v. Sumner*, 522 Fed. Appx. 806, 810 (11th Cir. 2013)).

 Recalling, then, the Supreme Court’s holding under the prior evidence code that all comment on defendant’s silence is “far more prejudicial than probative,” *Mallory* at 630(5), there is substantial reason to doubt that it applies in this context, if at all. First, the Supreme Court itself has noted that *Mallory* is no longer “controlling authority,” *Wilson v. State*, 295 Ga. 84, 88 (fn. 6), 757 S.E.2d 825 (2014), and has repeatedly refused to endorse it (see cases cited above, plus *Seabolt v. Norris*, 298 Ga. 583, 587(n. 3) (783 S.E.2d 913) (2016); *Romer v. State*, 293 Ga. 339, 343 (n. 4) (745 S.E.2d 637) (2013); and *Yancey v. State*, 292 Ga. 812, 817 (n. 9) (740 S.E.2d 628) (2013)). Second, although *Mallory* recites the same words as OCGA § 24-4-403, it does so without recognition that Rule 403 is an “extraordinary remedy” requiring comparison of the probative value of the evidence with the prejudicial effect thereof in each case.

[T]he probative value of evidence derives in large part from the extent to which the evidence tends to make the existence of a fact more or less probable. Generally speaking, the greater the tendency to make the existence of a fact more or less probable, the greater the probative value. And the extent to which evidence tends to make the existence of a fact more or less probable depends significantly on the quality of the evidence and the strength of its logical connection to the fact for which it is offered. See Milich, Georgia Rules of Evidence § 6.1 (2015) (“Probative value refers to the strength of the connection between the evidence and what it is offered to prove.”). Probative value also depends on the marginal worth of the evidence—how much it adds, in other words, to the other proof available to establish the fact for which it is offered. The stronger the other proof, the less the marginal value of the evidence in question. See 2 Weinstein's Fed. Evid. § 404.21[3][a] (“[T]he availability of other, less prejudicial, evidence on the same point ordinarily reduces the probative value of a given item of extrinsic evidence.”). And probative value depends as well upon the need for the evidence. When the fact for which the evidence is offered is undisputed or not reasonably susceptible of dispute, the less the probative value of the evidence.

*Olds v. State*, 299 Ga. 65, 75-76(2) (2016). This must be compared with the risk of unfair prejudice, which the Advisory Committee’s Note to Rule 403 defines as “an undue tendency to suggest decision on an improper basis, commonly though not necessarily, an emotional one.” In short, Rule 403 “calls for a careful, case-by-case analysis, not a categorical approach,” *Olds, supra,* at 76(2); *Pierce*, supra. *Mallory* did not apply the 403 balancing test and runs counter to the approach required by our Supreme Court’s decisions under the 2013 Evidence Code.

 Applying the balancing test to this case leads this Court to conclude that evidence of defendant’s breath test refusal is not substantially more prejudicial than probative. Georgia case law has variously stated that evidence of refusal may establish that defendant would have tested positive, *Walker v. State*, 262 Ga.App. 872 (2003), *Nelson v. State*, 237 Ga.App. 620 (1999); that he was intoxicated, *Johnson v. State*, 249 Ga.App. 29 (2001), *Vanorsdall v. State*, 241 Ga.App. 871 (2000); and that he was conscious of his impairment and guilt, *Taylor v. State*, 278 Ga.App. 181 (2006); *Kelly v. State*, 242 Ga.App. 30 (2000).[[6]](#footnote-6) “‘[T]he refusal to submit to a blood alcohol test ... created an inference that the test would reveal the presence of a prohibited substance and bears directly on the issue of the sufficiency of the evidence.’ (Citations and punctuation omitted.) *Stephens v. State,* 271 Ga.App. 634, 635 (610 S.E.2d 613) (2005).” *Alewine v. State*, 273 Ga.App. 629, 631 (2005). Depending on which formulation one uses, the evidence clearly tends to make the existence of defendant’s alcohol consumption/ impairment/consciousness of guilt more probable. While there is other evidence of record to support the same conclusions – a collision, a limited acknowledgment of drinking, an apparent open container of alcoholic beverage in the vehicle, bloodshot, glassy eyes, an odor of alcohol coming from his person, a positive reading on a portable screening device, and six clues on the HGN test – there are also limitations to the State’s evidence – no officer saw defendant drive, no evidence of erratic driving beyond a routine traffic accident, he refused other field sobriety evaluations, and his appearance on video does not mark him as deeply intoxicated. While the evidence thus may not be of the most critical importance, then, it certainly has more than “scant or cumulative” probative value.

 Undoubtedly, it also is prejudicial to the defendant – as, indeed, all State’s evidence is expected to be. But “‘it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter.’ *Wilson v. State*, 336 Ga.App. 60, 63(2)(b) (2016).” *Chase v. State*, 337 Ga.App. 449, 455 (2016) (emphasis in original). And “[i]n close cases, ‘the balance is struck in favor of admissibility.’” *Chase*, again quoting *Wilson*. What inferences shall be drawn are ultimately up to the jury, but on the issue of admissibility, the Rule 403 balancing test clearly favors admission of the evidence in this case.

1. **Rule 506.** Rule 506(a) states that “[n]o person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.” As noted in Section III.B. of this Order, above, the Georgia Supreme Court has held that the precursor of this provision (former OCGA § 24-9-20(a), which read identically) required the reading of a *Miranda* warning to a DUI arrestee before an officer could request post-arrest field sobriety evaluations. *Price*, supra, 269 Ga. 222 (1998); *see also* *State v. Whitfield,* 214 Ga.App. 574(3) (1994). In fact, numerous decisions of the Court of Appeals reached the opposite conclusion, see, e.g., *State v. Lord*, 236 Ga.App. 868 (1999), but those decisions were based on the mistaken belief that implied consent didn’t implicate self-incrimination. *Olevik* overruled many of those decisions “to the extent they hold that Paragraph XVI of the Georgia Constitution does not protect against compelled breath tests or that the right to refuse to submit to such testing is not a constitutional right,” *Olevik* at \*12. It was in this context that *Olevik* rejected a defense contention that *Miranda* or some Georgia-equivalent should be applied in the implied consent context, see Section III.B. of this Order, above, and instead proceeded to analyze whether the circumstances of defendant’s test were unduly coercive, which we shall undertake in Section V, below.
2. **Rule 417.** Finally, it is worth noting that the 2013 Evidence Code includes a provision not found in the Federal Rules, which specifically admits evidence based upon a defendant’s refusal of implied consent. OCGA § 24-4-417(a) allows for admission of other DUI offenses where a defendant has either refused a test altogether, or “refused in the current case to provide an adequate breath sample for the state administered test.” Cases decided under Rule 417 presuppose that the fact of the refusal will be admitted as part of the evidence; that the evidence will be used to explain why the defendant refused testing; and that the jury will be charged on what inferences it may draw from the refusal. *See State v. Frost*, 297 Ga. 296, 305 (2015) (other offenses “offer an explanation for why the accused refused the test on this occasion, namely, that he was conscious of his guilt and knew that the test results likely would tend to show that he was, in fact, under the influence of a prohibited substance to an extent forbidden by OCGA § 40–6–391(a)”); *Gibbs v. State*, 341 Ga.App. 316 (2017); *Kim v. State*, 337 Ga.App. 155 (2016) (trial court properly admitted evidence of defendant’s prior DUI “because it explained Kim’s understanding of his choice to take or refuse the field sobriety and state-administered chemical tests.”). It would be odd, at least, if the legislature intended to categorically exclude evidence of refusals, but allowed refusals to trigger admission of other evidence – especially evidence used to explain a fact of which the jury must be unaware. Indeed, a reasonable juror hearing such evidence might well wonder why she is hearing evidence of testing in a prior case, but not the one on trial. Reading the various provisions of the Evidence Code (which are all the product of a single legislative act) *in pari materia*,[[7]](#footnote-7) it is impossible to conclude that the General Assembly intended the 2013 Evidence Code to categorically exclude evidence of implied consent refusals.
3. **UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST, DEFENDANT’S SILENCE WAS VOLUNTARY, NOT COERCED**

Having determined that the evidence is not categorically excluded, the Court must then determine whether the evidence in this case should be excluded because of coercion by the State. Two arguments have been advanced for this argument – that the implied consent warning is per se coercive, and that, in the totality of the circumstances, the defendant was coerced into refusing.

**A**. **The implied consent warning.** Georgia’s implied consent warning is not inherently coercive. *Olevik* at \*14. Prior decisions of the Georgia courts have held the same. See *State v. Nicholson*, 342 Ga.App. 118, 121 (2017); *Kendrick v. State*, 335 Ga.App. 766, 769-771 (2016) (implied consent notice is not coercive in failing to inform suspect of right to refuse); *State v. Clay*, 339 Ga.App. 473, 476 (2016) (“our Court has recently declined to find that the reading of the implied consent notice is coercive in and of itself because ‘there is no unlawful coercion . . . the officer merely informs the arrestee of the permissible range of sanctions that the State may ultimately be authorized to impose.’”). As stated in *Olevik*, the notice expressly advises defendants of their right to refuse testing; and while the notice regarding the likelihood of suspension “is not entirely accurate,” this “does not, by itself, render the notice per se coercive regardless of other circumstances.” *Olevik* at \*14.

In its analysis of the implied consent notice, the court in *Olevik* rejected the defendant’s contention that the notice is misleading, and noted that “a significant factor in a due process inquiry is whether a deceptive police practice caused a defendant to confess or provide an incriminating statement.” *Olevik* at (3)(b). The Georgia courts have repeatedly held that a misleading advisement invalidates implied consent. See, e.g., *Wallace v. State*, 325 Ga.App. 142 (2013) (statement that consent or refusal couldn’t be used against defendant was misleading); *State v. Peirce*, 257 Ga.App. 623 (2002) (Georgia can’t suspend out-of-state licenses), *State v. Leviner*, 213 Ga.App. 88 (1994) (confusing extraneous information). The *Olevik* Court expressly found that “the implied consent notice is not per se coercive on its face.” *Olevik* at 3(a)(i).[[8]](#footnote-8)

The United States Supreme Court has held that States may impose evidentiary and license consequences upon DUI defendants for refusing implied consent testing—even where such refusal amounts to exercise of a constitutional right. See *Birchfield v. North Dakota*, 579 U.S. \_\_, 136 S.Ct. 2160, 2187 (2016) (“Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply,” even while finding a Fourth Amendment right to refuse a blood test); See also *Missouri v. McNeely*, 569 U.S. 141, 161 (2013); *Neville*, 459 U.S. at 560. Thus, both the U.S. and Georgia Supreme Courts have found no coercion under the circumstances presented here.[[9]](#footnote-9)

1. **Totality of the circumstances.** “In determining whether a defendant’s statement was voluntary as a matter of constitutional due process, a trial court must consider the totality of the circumstances.” *Olevik*, at \*13. “[T]he totality of the circumstances test to determine the voluntariness of an incriminating statement or act for due process purposes is the same test used to determine the voluntariness of a consent to chemical testing in the DUI context.” *Id*.; See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The Court looks to various factors such as whether “the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent.” *Jacobs v. State*, 338 Ga.App. 743, 748 (2016).

In applying the totality of the circumstances test here, Defendant fails to show how his silence was coerced by Officer Palmer. The flashlight video introduced by the State shows that Officer Palmer was courteous and professional throughout the encounter. He did not raise his voice, act aggressively, draw a weapon, or make any threats toward Defendant. *State v. Nicholson*, 342 Ga.App. 118, 122 (2017) (citing officer’s friendly demeanor and tone of voice, responses to driver’s questions); *McKibben v. State*, 340 Ga.App. 89, 94 (2017) (no threats, intimidation, or lengthy delay); *State v. Young*, 339 Ga.App. 306, 311-312 (2016) (officers didn’t use “fear, intimidation, threat of physical punishment, or lengthy detention”; officers and defendant “conducted themselves calmly”); *Jacobs, supra*, at 749 (no show of force; defendant’s injuries didn’t impair his ability to choose). Additionally, no other officers appeared to be hovering nearby. Defendant did not appear to be extremely intoxicated, scared, or confused to the point that his decisions were not the product of his own free will. *State v. Osterloh*, 342 Ga.App. 668 (2017) (consent involuntary where defendant sustained head injuries rendering him “incapable of making any kind of rational decision”); *State v. Brogan*, 340 Ga.App. 232 (2017) (test results properly suppressed based on driver’s extreme intoxication and confusion). *See also State v. Depol*, 336 Ga.App. 191, 198 (2016) (Mere intoxication not enough to exclude evidence; “[i]f the evidence is sufficient to establish that the defendant’s statement was the product of rational intellect and free will, it may be admitted even if the defendant was intoxicated when he made the statement.”); *Kendrick v. State*, 335 Ga.App. 766, 769-770 (2016). To the contrary, Defendant recognized that he had the option to decline the officer’s request for field sobriety evaluations and a breath test, and did decline them. Therefore, under the totality of the circumstances test, Defendant’s silence was not coerced.

1. **CONCLUSION**

Nothing in the U.S. Constitution, the Georgia Constitution or Georgia’s current evidence law appears to prohibit admission of Defendant’s implied consent refusal. Thus, the State may introduce Defendant’s refusal to submit to the State-administered breath test at trial. Defendant’s Motion to Suppress is accordingly **DENIED**.

**SO ORDERED**, this \_\_\_\_ day of January, 2018.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**BEN W. STUDDARD,** Chief Judge

State Court of Henry County

1. *Olevik* at \*7(2)(c)(ii); Ga. Const. 1877, Art. I, Sec. I, Par. VI (“No person shall be compelled to give testimony tending in any manner to criminate himself.”); Ga. Const. 1945, Art. I, Sec. I, Par. VI (same); Ga. Const. 1976, Art. I, Sec. I, Par. XIII (same); Ga. Const. 1983, Art. I, Sec. I. Par. XVI (“No person shall be compelled to give testimony tending in any manner to be self-incriminating.”). [↑](#footnote-ref-1)
2. One recent decision of the Georgia Court of Appeals, *State v. Licata*, \_\_\_ Ga.App. \_\_\_, 806 S.E.2d 292, 296(2) (October 26, 2017) (physical precedent only), has “acknowledge[d] that there is at least arguably tension between our Supreme Court’s opinion in *Price* and Art. I, Sec. I, Para. [XVI] of the Georgia Constitution of 1983.” [↑](#footnote-ref-2)
3. The Georgia Court of Appeals has noted that “[u]nlike ordinary legislative history … advisory committee notes … are ‘assuredly persuasive scholarly commentaries - ordinarily *the* most persuasive - concerning the meaning of the [r]ules,’ *Tome v. United States*, 513 U.S. 150, 167, 115 S.Ct. 696, 706, 130 L.Ed.2d 574 (1995) (Scalia, J., concurring in part and concurring in the judgment) (emphasis original).” *State v. Almanza*, A17A1270, \_\_\_ Ga.App. \_\_\_, 2017 WL 5504908, n.4 (October 31, 2017). [↑](#footnote-ref-3)
4. Goger, Daniel’s Georgia Handbook on Criminal Evidence, §8:3 (2017 ed.). [↑](#footnote-ref-4)
5. “[T]he term ‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The Georgia Supreme Court has repeatedly called this a “liberal” standard. *See, e.g., State v. Jones*, 297 Ga. 156, 159, n.2 (2015). [↑](#footnote-ref-5)
6. While it is clear that the trial court may not charge the jury on any inference other than the presence of alcohol, *Wagner v. State*, 311 Ga.App. 589 (2011), some case law seems to confuse the question of what the court may charge with the question of what inferences the prosecution may argue from refusal. Compare *Cordy v. State*, 315 Ga.App. 849 (2012) (rejecting defense charge request that no inference of intoxication may be drawn from refusal as “inaccurate and argumentative”) with *Shaheed v. State*, 270 Ga.App. 709, 710 (2004) (refusal “does not create an inference that [defendant] had impaired driving ability as a result of drinking alcohol.”). *See also State v. Frost*, 297 Ga. 296, 305 (2015) (“a trier of fact may infer from … a refusal that, if the accused had submitted to the test, it would have shown some presence of an intoxicant”). [↑](#footnote-ref-6)
7. *See Stinski v. State*, 281 Ga. 783, 787(4)(b) (2007) (criminal discovery provisions read *in pari materia*); *Pitts v. State*, 293 Ga. 511, 514(1) (2013) (provisions of mandatory education statute read *in pari materia*); *Diaz v. State*, 245 Ga.App. 380 (2000) (driver’s licensing provisions read *in pari materia*; “statutes relating to the same subject matter must be construed together and harmonized.”). [↑](#footnote-ref-7)
8. This is especially interesting in light of the Georgia Supreme Court’s recent grant of cert. on this issue in *Elliott v. State*, S17G0716 (cert. granted December 11, 2017) (“Given that Article I, Section I, Paragraph XVI of the Georgia Constitution preserves the right to refuse to submit to chemical breath tests [citing *Olevik*], may the State nevertheless introduce into evidence the fact that a defendant declined to submit to a chemical breath test?”) Should the Court find in *Elliott* that the State may not offer a refusal of a breath test into evidence, it would mean that the implied consent warning threatens a consequence for refusal that it may not impose – admission of that refusal into evidence against the defendant. Under the other case law cited above, such a baseless threat would be inherently coercive, meaning that neither refusals nor breath tests would be admissible. *Olevik* itself would thus need to be overruled to the extent that it found the implied consent warning to be non-coercive. [↑](#footnote-ref-8)
9. The South Dakota Supreme Court reached the same conclusion on remand of *Neville v. South Dakota*, 346 N.W.2d 425 (1984). South Dakota’s Constitution, like Georgia’s, protects against compulsion to perform self-incriminating acts. But the South Dakota court found that the option between taking a test and refusing, with that refusal admissible in evidence at trial, was not the same as the choice between interrogation and silence, which they held was inadmissible. “Commenting on a defendant's silence would impose a penalty for exercising a constitutional privilege,” they held, but in the implied consent context, “[t]he alternative to refusal is the option to submit to the test, which option would involve no penalty or consequences. … Thus, since the conduct, i.e., the refusal which is the subject of the challenged evidence was not compelled and a defendant has, in fact, an option to submit to the test, the admission of this evidence is not prohibited by the constitutional protection against self-incrimination.” *Id*. At 429-430 (internal quotes omitted). They nevertheless excluded the evidence because South Dakota’s implied consent warning, unlike Georgia’s, did not warn that a refusal could be used in evidence against the defendant. [↑](#footnote-ref-9)