No. 33953-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

V.

DESARAE DAWSON

BRIEF OF APPLELLANT

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A. Assignment of Errors

Assignment of Errors

1. The trial court erred in finding of fact #3 and conclusion of law #6 by finding Officer Kennedy properly advised Ms. Dawson of her *Miranda* warnings when the fifth mandatory warning was omitted.

2. The trial court erred by admitting the custodial statements of Ms. Dawson to Officer Kennedy and Detective Wendt.

Issues Pertaining to Assignment of Errors

1. Should the trial court have suppressed the custodial statements of Ms. Dawson to Officer Kennedy after she was given incomplete and erroneous *Miranda* warnings?

2. Should the trial court have suppressed the custodial statements of Ms. Dawson to Detective Wendt when his interrogation was not sufficiently attenuated from Officer Kennedy's interrogation?

B. Statement of Facts

Desarae Dawson was charged by Information with Possession of a Stolen Motor Vehicle. CP, 1. After a jury trial, she was found guilty. CP,

80. The court imposed a standard range sentence of 53 months. CP, 98. A timely notice of appeal was filed. CP, 91.

After Desarae Dawson was arrested driving a stolen vehicle, a police officer gave her incomplete and erroneous *Miranda* warnings. Ms. Dawson made several contradictory and incriminating statements that were later used against her at trial. She testified in her own defense and denied knowing the car was stolen. RP, 147. The jury convicted her of possession of a stolen vehicle. Ms. Dawson appeals arguing her custodial statements were erroneously admitted at trial.

CrR 3.5 Hearing

Prior to trial the court held a hearing pursuant to CrR 3.5. RP, 49. Officer Stephanie Kennedy testified she came into contact with Ms. Dawson soon after the traffic stop. Ms. Dawson was placed under arrest and handcuffed in the back of a patrol car. RP, 52, 67. No questions were asked of her prior to the arrest. RP, 52. Officer Kennedy started the contact by reciting her constitutional rights. RP, 52. Office Kennedy testified she does not normally use a pre-printed *Miranda* rights cards and, consistent with her normal practice, did not on this occasion. RP, 52-53. When asked to recite the *Miranda* rights in court, she was inconsistent with what rights she recited. On direct examination, she said, "I explained to her you have the right to remain silent. You have the right to an

attorney. If you cannot afford an attorney, one will be appointed for you before questioning if you so desire." RP, 53. Officer Kennedy confirmed those were the rights she "told" to Ms. Dawson. RP, 53. Later, on cross-examination, she stated she had "misspoke" earlier and asked to "read them over." RP, 65. This time, she said, "[A]t this time you have the right to remain silent. Anything you say can and will be used against you in the court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you without cost before any questioning if you so desire. Do you understand these rights as I've read them to you." RP, 65. According to Officer Kennedy, Ms. Dawson verbally acknowledged her rights and agreed to waive them. RP, 53.

The next day, Detective Wendt went to the jail to spoke with Ms. Dawson. RP, 28. She was still under arrest and not free to leave. RP, 28. At the beginning of the discussion, Detective Wendt read *Miranda* warnings to her using a preprinted card. RP, 29. Ms. Dawson signed a card with the Miranda warnings on them indicating she was willing to speak with the detective. RP, 30. After speaking with her about some unrelated matters, Detective Wendt then tuned the discussion to the stolen motor vehicle. RP, 32. He started the discussion by reminding her of her arrest the day before by Officer Kennedy, that Officer Kennedy had read her her rights, and asking her to repeat what she told Officer Kennedy. RP,

33-34. Ms. Dawson then summarized what she had told Officer Kennedy, including that she told Officer Kennedy that she knew the vehicle was stolen but had driven it anyway because she needed a ride. RP, 34-35. Detective Wendt asked who stole the vehicle was stolen, she said she did not know. RP, 36. She said she was not the person who stole it, but declined to tell the detective who did steal it. RP, 36.

After the testimony, the parties argued the CrR 3.5 issues. RP, 70. The State conceded Ms. Dawson was under arrest and *Miranda* warnings were required. RP, 70. Ms. Dawson argued the manner in which the "constitutional rights cards was administered" was objectionable because "officer [Kennedy] did not use a card and I understand it's not a terribly long card but by the same token, there is no card with my client's either ability to sign that she understood or an indication that she could not sign because she was handcuffed." RP, 71.

The court concluded Ms. Dawson was under arrest and *Miranda* warnings were required. RP, 73. The court was concerned about the fact that *Miranda* rights were not read from a card but were recited by Officer Kennedy. RP, 77. But, according to the court, when she was challenged on cross-examination to read back the rights from memory, she was "able to do so without a mistake as far as [the court] could tell." RP, 77. The court determined the statements were admissible. RP, 78. The court also

admitted the statements made to Detective Wendt. RP, 41. In ruling on Detective Wendt's testimony, the trial court commended the detective for using a written card with Ms. Dawson's signature. RP, 41-42.

The trial court later entered written findings of fact and conclusions of law. CP, 87. The court found in paragraph 3, " The arresting officer, Stephanie Kennedy, Mirandized Ms. Dawson of her 5th Amendment rights from memory." CP, 87. The court concluded in paragraph 6, "Ms. Dawson was given her Miranda rights when she spoke to Officer Kennedy and she waived her 5th Amendment rights." CP, 88.

Trial Testimony

At trial, the State called Jessica Ochoa, the vehicle's owner, to testify someone stole her 2001 Suburu Legacy from her driveway on December 1, 2014. RP, 97-98. She never gave permission for Ms. Dawson to drive her car. RP, 100.

Eight days later, on December 9, Officer Kennedy located the Suburu. She surveilled the vehicle for one hour and twenty minutes until Ms. Dawson got into the vehicle and began driving it. RP, 104. The vehicle was promptly stopped and Officer Kennedy contacted Ms Dawson. RP, 105.

According to Officer Kennedy, Ms. Dawson offered several explanations for how she came be driving the vehicle RP, 106. She first

said she borrowed the vehicle the night before from her sister, Tiffany Crawford, who had purchased the vehicle on Craigslist. RP, 106-07. She later provided a second story saying although she did not steal the vehicle, she knew it was stolen, but she needed to move her personal belongings and decided it was more important to move her things. RP, 113. She said this was the only stolen vehicle she had been in for a month. RP, 113

The next day, on December 11, Detective Wendt contacted Ms. Dawson at the jail. RP, 127. Prior to contacting her, he read Officer Kennedy's probable cause statement about her December 10 contact with Ms. Dawson. RP, 128. Detective Wendt started his interrogation of Ms. Dawson by reminding her she had spoken to Officer Kennedy the day prior. RP, 129. Ms. Dawson acknowledged she remembered the conversation. RP, 129. Ms. Dawson recounted she initially told Officer Kennedy she had received the vehicle from Tiffany Crawford who had purchased the vehicle on Craigslist. RP, 129. She then told Detective Wendt that she had made up that story and she knew the vehicle was stolen, although she did not know who had stolen it. RP, 130. She was driving the vehicle because she needed a ride. RP, 130. Detective Wendt then confronted her and asked if her if she did not know who stole it or was unwilling to tell who stole it. RP, 130. Ms. Dawson replied she did not want to tell. RP, 131. Detective Dawson asked again about Tiffany

Crawford and she said she had lied and made up the story about Ms. Crawford and Craigslist. RP, 131.

Ms. Dawson testified on her own behalf at trial. RP, 143. She disputed her statements to Officer Kennedy, saying she told her she bought the vehicle on Craigslist. RP, 145. She said she told Detective Wendt she was picked up because a car she bought turned out to be stolen. RP, 147. She denied telling either officer she knew the car was stolen. RP, 145.

C. Argument

1. The trial court erred by finding Officer Kennedy properly *Mirandized* Ms. Dawson.

Ms. Dawson objects to finding of fact #3 and conclusion of law #6. When reviewing a suppression motion, this Court must determine whether substantial evidence supports the trial court's findings and whether those findings support its conclusions of law. This Court considers any fact that is not objected to as a verity on appeal. Conclusions of law are reviewed de novo. *State v. Cheatam*, 112 Wn. App. 778, 51 P.3d 138 (2002). Regardless of whether a trial court labels something as a finding of fact or a conclusion of law, appellate courts will treat them as they really are. *Stastny v. Board of Trustees*, 32 Wn.App. 239, 647 P.2d 496 (1982).

Finding of fact #3 and conclusion of law #6 both find that Officer Kennedy read Ms. Dawson her *Miranda* rights. This finding is not supported by substantial evidence. Officer Kennedy testified she recited the *Miranda* warnings from memory without the benefit of reading from a preprinted card. She recited the warnings twice, once on direct examination for the prosecutor and once on cross-examination for defense counsel. In both versions, she failed to advise her that she had the right to stop answering at any time. The *Miranda* warning was incomplete and the trial court erred by finding otherwise.

2. Officer Kennedy provided erroneous and incomplete *Miranda* warnings to Ms. Dawson.

In the seminal case of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that prior to custodial interrogation, a suspect must be advised of his or her rights. Although this rule has been frequently referred to as "prophylactic," the basic rule has nevertheless been repeatedly upheld and has taken on a constitutional dimension. See *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

The primary federal case discussing whether the *Miranda* warning needs to be worded exactly in one form or another is *Duckworth v. Eagan*, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). In *Duckworth*, the

Court noted a variety of situations might necessitate a police officer improvising the warning, including, significant to Ms. Dawson's case, the possibility "the officer in the field may not always have access to printed *Miranda* warnings." *Duckworth* at 203. Because of these situations, the Court upheld a conviction where the warning given contained some language arguably inconsistent with the *Miranda* decision. See *Duckworth* at 215 (Justice Marshall, dissenting).

Although the Supreme Court does not require a word-for-word recitation of the *Miranda* warning, the warning given must still convey the "all of the bases required by *Miranda* " *Duckworth* at 203. As set out by the *Duckworth* Court, the five bases required by *Miranda* are (1) the right to remain silent; (2) that anything he said could be used against him in court; (3) that he had the right to speak to an attorney before and during questioning; (4) that he had the right to the advice and presence of a lawyer even if he could not afford to hire one; and (5) that he had the right to stop answering at any time until he talked to a lawyer. *Id* at 203.

The Washington Supreme Court recently cited the *Duckworth* decision while reversing a conviction. *State v. Mayer*, 184 Wn.2d 548, 362 P.3d 745 (2015). In *Mayer*, the Washington Supreme Court reviewed a situation where the suspect's questions after being advised of the *Miranda* warning were confusing and contradictory. The Court stressed "that the

rights set forth in what became known as the '*Miranda* warnings' must be explained fully prior to questioning. This explanation of rights must convey to the suspect that his right to silence—and his opportunity to exercise that right—applies continuously throughout the interrogation process." *Mayer* at 557.

Whether a suspect has been adequately advised of his or her *Miranda* warnings turns on the particular facts and circumstances surrounding each case. *Mayer* at 560-61 (citations omitted). In Ms. Dawson's case, Officer Kennedy decided to recite the *Miranda* warning from memory, rather than read it from a card or other document. By doing so, she took risk that the warning would not be complete. In this case, she recited the warning twice for the court. The first time, she omitted the phrase, "Anything you say can and will be used against you in the court of law." In both versions, she omitted warning that she had the right to stop answering at any time until she talked to a lawyer. Even assuming the facts most favorable to the State, she failed to properly advise Ms. Dawson of her *Miranda* warnings. Therefore, any waiver by Ms. Dawson of her *Miranda* warnings was not knowing and voluntary.

3. The trial court erred by admitting Ms. Dawson's post-arrest statements to both Officer Kennedy and Detective Wendt.

Having concluded Officer Kennedy provided incomplete and erroneous *Miranda* warnings, the next issue is what statements should have been suppressed. It is undisputed Ms. Dawson was in custody during both Officer Kennedy and Detective Wendt's interrogations and that *Miranda* warnings were required. The State did not seek to admit any pre-arrest statements. Given the incomplete and erroneous warning provided by Officer Kennedy, Ms. Dawson's statements to Officer Kennedy should have been suppressed.

The more difficult question is whether her statements to Detective Wendt should also have been suppressed. Unlike Officer Kennedy, Detective Wendt used a written *Miranda* form and Ms. Dawson signed that she was willing to waive her rights. The trial court found Detective Wendt properly advised her of her *Miranda* warnings and that finding is supported by substantial evidence.

But that does not end the inquiry. A police officer may not obtain a statement in violation of *Miranda*, then read *Miranda*, and have the suspect reiterate the earlier statement. *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). In *Seibert*, the Court said: "Because the question-first tactic effectively threatens to thwart *Miranda's*

purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible." *Seibert* at 617.

There are some obvious differences between the facts in *Seibert* and the facts in Ms. Dawson's case. In *Seibert*, the officers were identical and the interrogation was a single, lengthy session whereas in Ms. Dawson's case there were two independent officers on two consecutive days. Additionally, there was evidence in *Seibert* the officers were intentionally trying to circumvent the requirements of *Miranda,* whereas in Ms. Dawson's case, it is more likely Officer Kennedy negligently forgot to include the fifth *Miranda* warning. Based upon these differences, the State will undoubtedly argue that Officer Kennedy's erroneous warning was sufficiently attenuated from Detective Wendt's interrogation such that suppression is not required. See *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011) (although suspect was illegally arrested, subsequent statement was sufficiently attenuated to permit admission).

The problem with this theory is the manner in which Detective Wendt went about the interrogation. He started by reminding Ms. Dawson she had already confessed to Officer Kennedy. He then had her repeat

what she had told Officer Kennedy. After hearing her repeat her original story, he confronted her with what he perceived to be the inconsistencies in the story. Had Detective Wendt questioned Ms. Dawson de novo, the State would have a much stronger argument that his interrogation was attenuated from Officer Kennedy's confession. But instead, his decision to tie the subsequent interrogation directly to the earlier confession puts Ms. Dawson into the same position as Ms. Seibert. Essentially, Detective Wendt told Ms. Dawson, "I know you have already confessed to Officer Kennedy, so I need you to repeat what you told her and then clarify some inconsistencies." Under these facts, Detective Wendt's interrogation was not attenuated from Officer Kennedy's interrogation and is very similar to the statement that was suppressed in *Seibert*. Ms. Dawson's statements to both law enforcement officers should be suppressed.

4. Conclusion

This Court should reverse the trial court and order suppression of Ms. Dawson's custodial statements to both Officer Kennedy and Detective Wendt. A new trial should be ordered.

DATED this 1st day of July, 2016.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. DESARAE DAWSON, Defendant/Appellant.	Court of Appeals No.: 339530 DECLARATION OF SERVICE OF BRIEF OF APPELLANT

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action

On July 5, 2016, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Three; and designated said document to be transmitted electronically, through the Court of Appeals transmittal system, to the Spokane County Prosecuting Attorney, scpaappeals@spokanecounty.org.

On July 5, 2016, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

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c/o Spokane County Detention Services
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 5, 2016, at Bremerton, Washington.

Alisha Freeman

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