33953-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DESARAE M. DAWSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENTS OF ERROR

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 warning 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.

II. ISSUES PRESENTED

1. Does *Miranda* require a fifth warning - that the defendant be advised of the right to stop answering at any time until he or she talks to a lawyer - as a prerequisite to the admissibility of any of the defendant's statements?

2. If *Miranda* warnings are given, but are not totally complete, are later statements of the defendant admissible where the subsequent statements were given at a separate location to a different officer after a separate and complete advisement of the *Miranda* warnings?

III. STATEMENT OF THE CASE

On December 9, 2014, the defendant was stopped while she was driving a stolen motor vehicle. RP 102-105. An information was filed on December 11, 2014, charging the defendant with possession of a stolen

motor vehicle. CP 1. After continuing her case for trial for almost a year,[1] the defendant was convicted as charged by a jury on November 17, 2015. CP 80. The defendant was sentenced November 25, 2015, to a 53-month standard range sentence. CP 94-108.

Facts relating to *Miranda* warnings.

After being arrested, Officer Stephanie Kennedy *Mirandized* Ms. Dawson, advising her of her Fifth Amendment rights. CP 87, Finding of Fact No. 3. Officer Kennedy testified she informed Ms. Dawson she had the right to remain silent, that anything she said could and would be used against her in the court of law. RP 65. She informed the defendant she had the right to an attorney, and that if she could not afford one, one would be appointed for her without cost before any questioning if she so desired. *Id.* She was asked if she understand these rights as they were read to her.[2] Ms. Dawson never asked for an attorney, and was coherent and appeared to understand what was going on. RP 62-63. Ms. Dawson voluntarily agreed to waive her Fifth Amendment rights and speak to Officer Kennedy CP 87, Finding of Fact No. 4; RP 62.

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[1] The defendant moved for a continuance on May 12, 2015, noting she had been charged with first degree robbery. CP 6-8. She also moved for a continuance after her robbery charge had been adjudicated, apparently because she was having issues with Child Protective Services. CP 23-26.

[2] "Do you understand these rights as I've read them to you[?]" RP 65.

The day after the defendant was arrested, and the day after Officer Kennedy had talked with her, Detective Wendt discovered she was in jail and contacted her at jail to discuss some *other* cases in which she was a suspect,[3] as well as to attempt to determine if she could tell him who had stolen the vehicle she was driving the day before. RP 28, 129-131. As a Detective, it was his job to find out who stole the vehicle. RP 131. Prior to speaking with Ms. Dawson, Detective Wendt read the constitutional rights to Ms. Dawson (*Miranda*). She waived those rights and acknowledged that she waived by signing the card provided to her. RP 28-30; CP 88, Findings of Fact Nos. 8, 9.[4]

[3] It is not clear if this was the robbery case defendant was acquitted on, or some other case. *See* CP 6-8 (continuing this case for defendant's other first degree robbery case). Detective Wendt did not have Officer Kennedy's police report from this incident, all he had was the bare bones affidavit of probable cause. RP 28, 128-29; CP 2-3, Affidavit of Probable Cause.

[4] The defendant concedes that there was no issue with the warnings or the waiver as to the rights given her by Detective Wendt. Appellant's Br. at 11. Moreover, the defendant does not challenge the voluntariness of the statements given to either Officer Kennedy or Detective Wendt.

IV. ARGUMENT

A. DEFENDANT'S RELIANCE ON *DUCKWORTH v. EAGAN* FOR THE PROPOSITION THAT OFFICER KENNEDY DID NOT PROPERLY MIRANDIZE HER CANNOT BEAR THE WEIGHT OF THE CONTRARY AUTHORITY SET FORTH BY OUR STATE SUPREME COURT IN *IN RE WOODS*.

Defendant asserts, citing *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), that *Miranda* requires the following *five* warnings to be given, for any waiver to be deemed knowing and voluntary: (1) the right to remain silent; (2) that anything she said could be used against her in court; (3) that she had the right to speak to an attorney before and during questioning; (4) that she had the right to the advice and presence of a lawyer even if she could not afford to hire one; and (5) *that she had the right to stop answering at any time until she talked to a lawyer*. Appellant's Br. at 9 (emphasis added). The defendant suggests that the absence of the *fifth warning* renders her knowing and voluntary waiver invalid. Appellant's Br. 10. This contention is incorrect.[5]

[5] Article I, section 9 of the Washington State Constitution affords the same protection as U.S. Const. amend. V. *See State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991); *and see State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

In *Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195, 175 L.Ed.2d 1009 (2010), the Supreme Court reiterated what warnings *Miranda* had prescribed:

> Intent on "giv[ing] concrete constitutional guidelines for law enforcement agencies and courts to follow," 384 U.S., at 441-442, 86 S.Ct. 1602, *Miranda* prescribed the following four now-familiar warnings:
>
> > "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.*, at 479, 86 S.Ct. 1602.

Powell, 559 U.S. at 59-60.

There is no set-in-stone requirement for the fifth warning as argued by defendant. In fact, this very argument was rejected by our State Supreme Court in *In re Woods*, 154 Wn.2d 400, 114 P.3d 607 (2005):

> Woods seems to contend that there is a fifth warning that must be added to the *Miranda* warnings—the right to stop answering at any time until he talks to a lawyer. *See* Am. Pet. at 207. For support, he relies on *Duckworth.* In *Duckworth,* the police department advised the defendant of his *Miranda* rights from a form that included the statement, "'You also have the right to stop answering at any time until you've talked to a lawyer.'" *Duckworth,* 492 U.S. at 198, 109 S.Ct. 2875. The actual issue presented in *Duckworth* was whether the *Miranda* rights given, with the language "'[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court,'" properly complied with *Miranda. Id.* at 198, 109 S.Ct. 2875.

> The United States Supreme Court held that the warnings "touched all of the bases required by *Miranda.*" *Id.* at 203, 109 S.Ct. 2875. Citing this language from *Duckworth*, Woods argues that a proper *Miranda* warning must include the language, "you also have the right to stop answering questions at any time until you've talked to a lawyer." This argument is flawed. Just because the Supreme Court stated that the warnings given in *Duckworth* touched all bases does not mean that *all* elements in the *Duckworth* warnings must be present for the warnings to be effective.

Woods, 154 Wn.2d at 434-35.

Finding meritless the exact argument made in the present case, the Court laid out the warnings actually given by the Spokane Sheriff's officers in that case and found them effective:

> The actual *Miranda* warnings read to Woods by Detective Grabenstein were as follows:
>
> > I am Mark Henderson and Rick Grabenstein, deputy sheriff. You have the right to remain silent. Anything you say can and will be used against you in a court of law.
> >
> > You have the right to talk to an attorney before answering any questions… You have the right to have your attorney present during the questioning. If you cannot afford an attorney, one will be appointed for you without cost before any questioning if you so desire.
>
> RP at 2733. From the above excerpt, it is clear that Woods was given proper *Miranda* warnings. Although they are not word for word from *Miranda v. Arizona*, the message they convey is clear.

Woods, 154 Wn.2d at 435.

In the instant case, Officer Kennedy conveyed an almost identical message to the one found acceptable in *Woods*, *supra*:

> [Y]ou 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 one, 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 66.

These warnings properly conveyed the required message as re-enunciated in *Powell, supra*, - that Defendant had the right to remain silent, anything she said could be used against her in a court of law, she had the right to an attorney prior to any questioning, and that if she could not afford an attorney, one could be appointed to her *before* any questioning. The trial court did not err by finding the rights given to the defendant by Officer Kennedy properly met the requirements of *Miranda*.[6]

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[6] Defendant improvidently relies on *State v. Mayer*, 184 Wn.2d 548, 362 P.3d 745 (2015). That case dealt with misleading and confusing warnings that misinformed Mayer as to when his rights attached, linking his rights to a future point in time:

> Instead, Dennison's explanation of Mayer's right to counsel places this case squarely in the category that *Duckworth* explicitly distinguished: cases where the police link the right to appointed counsel to a future point in time after the police interrogation. *Duckworth*, 492 U.S. at 204, 109 S.Ct. 2875 (quoting *Prysock*, 453 U.S. at 360, 101 S.Ct. 2806). By creating such a linkage, Dennison's explanation of Mayer's

B. THE DEFENDANT'S ARGUMENT THAT THIS CASE IS CONTROLLED BY *MISSOURI v. SEIBERT*, 542 U.S. 600, 124 S.CT. 2601, 159 L.ED.2D 643 (2004), IS WITHOUT SUPPORT - EVEN IF THE STATEMENTS MADE TO OFFICER KENNEDY OCCURRED WITH SOME, BUT NOT ALL OF THE REQUIRED WARNINGS, THIS CASE WOULD BE CONTROLLED BY *OREGON v. ELSTAD*, 470 U.S. 298, 105 S.CT. 1285, 84 L.ED.2D 222 (1985).

The defendant argues that the statements[7] she made in the separate and properly *Mirandized* interview to Detective Wendt, as well as the statements she made to Officer Kennedy, must be suppressed under the holding of *Missouri v. Seibert*. This argument fails because the initial statements to Officer Kennedy were properly admitted. It also fails even if those statements should have been suppressed. *Missouri v. Seibert* considered an interrogation technique where a law enforcement officer questions a witness first, then gives *Miranda* warnings, and attempts to elicit the same answers given before the warnings. *Seibert*, 542 U.S. at 604-07. Here, this technique was not used. *Missouri v. Seibert* is inapplicable. Police here did not employ a *planned tactic* of omitting

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> Fifth Amendment rights under *Miranda* became unclear at best and misleading at worst.

Mayer, 184 Wn.2d at 566. In Ms. Dawson's case, it was clear that she had a right to an attorney "before any questioning." RP 66.

[7] Defendant asserts that the statements she made to Detective Wendt after being properly Mirandized were the same as those given previously to Officer Kennedy. Appellant's Br. 12-13.

Miranda warnings in order to get a confession.[8] Rather, the defendant concedes the arresting officer in this case, Officer Kennedy gave the defendant four of the claimed five *Miranda* warnings prior to questioning her. Thereafter, she was booked into jail. This was not a continuing course of interrogation. Rather, a detective investigating *different matters*[9] discovered she was booked into jail and interviewed her, only after administering full *Miranda* warnings. There is no evidence of collusion here. In fact, there is no evidence that Detective Wendt even spoke with Officer Kennedy prior to seeing the defendant. Simply put, Defendant's argument distorts the holding in *Seibert*. More apt is *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). There the court held

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[8] In *Seibert*, pursuant to police protocol, after the police arrested Seibert, the officer *deliberately* withheld *Miranda* warnings to elicit a confession. 542 U.S. at 604-05. Specifically, an officer questioned Seibert for 30 to 40 minutes without giving any *Miranda* warnings. *Seibert*, 542 U.S. at 604-05. After Siebert confessed, officers gave her a 20-minute coffee and cigarette break. *Seibert*, 542 U.S. at 605. When she returned, an officer turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained her signature on a waiver of rights form. *Seibert*, 542 U.S. at 605. The officer resumed the questioning by reminding her of her earlier admissions, and she again confessed. *Seibert*, 542 U.S. at 605.

[9] Detective Wendt testified that he went to see Ms. Dawson in jail to discuss some *other* cases he had with her, as well as to attempt to determine in the present matter if the defendant could tell him who had stolen the vehicle she was driving the day before. RP 28, 129-131. As a Detective, it was his job to find out who stole the vehicle. RP 131.

that a noncoerced,[10] pre-*Miranda* admission by a suspect does not taint the subsequent post-*Miranda* warnings statement. Thus, regardless of whether her first statement should have been suppressed, Ms. Dawson's statements following her second waiver of rights were properly admitted. Because the statements given to Officer Kennedy are alleged by the defendant to be the same as the statements given to Detective Wendt, any failure to suppress the statements given to Officer Kennedy would be harmless because they are merely cumulative. Evidence that is merely cumulative of overwhelming untainted evidence is harmless. *See State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008); *see also* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 319 (1995) ("Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative").

There was no violation of *Miranda* and its progeny. The trial court properly admitted the statements.

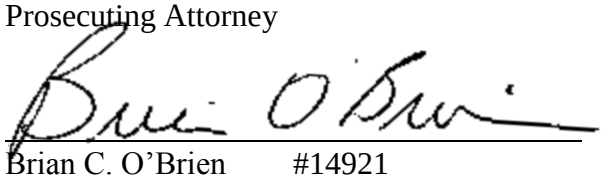
[10] There was no allegation or suggestion of coercion in the instant case, only the suggestion that less than full warnings were given.

V. CONCLUSION

There was no violation of *Miranda* and its progeny. The trial court properly admitted the defendant's statements.

Dated this 19 day of August, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. DESARAE M. DAWSON, Appellant.	NO. 33953-0III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 19, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Thomas E. Weaver
tweaver@tomweaverlaw.com

8/19/2016 (Date) Spokane, WA (Place) (Signature)