31272-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ETHAN D. YORK, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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# BRIEF OF RESPONDENT

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### COURT RULES

## I.

## ASSIGNMENTS OF ERROR

1. The trial court erred in concluding Mr. York was not in custody at the time of his contact with Detective Welton. CrR 3.5 Hearing Conclusion of Law No. 1, CP 18.

2. The trial court erred in concluding the entire contact between Detective Welton and Mr. York did not constitute an interrogation by the detective. CrR 3.5 Hearing Conclusion of Law No. 2, CP 18.

3. The trial court erred in admitting Mr. York's statements to Detective Welton into evidence.

## II.

## ISSUES

A. DID THE TRIAL COURT PROPERLY APPLY THE FINDINGS OF FACT TO THE CONCLUSIONS OF LAW?

## III.

## STATEMENT OF THE CASE

The State accepts the general timeline of the defendant's Statement of the Case. However, the State disputes portions of the Statement. On page five of the

defendant's Statement, he claims that Det. Welton and Det. Moser were in uniform and their guns were exposed. Brf. of App. 5. The record does not support this claim. The defendant claims Det. Moser stood in the front foyer during the entire interview "effectively blocking that exit." Brf. of App. 6. There was nothing in the record indicating how many exits the living room contained. Further, the record fails to indicate that Det. Moser stood in the doorway with the intention of blocking anything.

## IV.

## ARGUMENT

It is well settled that the State may not use the statements of the defendant made in response to a custodial interrogation absent being advised of his rights and a voluntary waiving of those rights. *See State. Lavaris*, 99 Wn.2d 851, 856-57, 664 P.2d 1234 (1983). There is no dispute that rights were not read to the defendant prior to questions being asked by Detective Welton.

The key phrase in this case is "*custodial*" interrogation.

"'Interrogation' involves some degree of compulsion." *Miranda* was concerned with protecting the privilege against self-incrimination "during 'incommunicado interrogation of individuals in a police-dominated atmosphere.'" *Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990)

(*quoting Miranda v. Arizona*, 384 U.S. 435, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). " *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995).

> We conclude there is no more foundation existing in Washington law for a principle of independent review of the record in a confession case than in one involving search and seizure. We hold that the rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.

*State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

"When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence." *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996)

Some of the defendant's factual claims do not appear to reflect the record. For example, the defendant claims both detectives were in uniform and their guns were exposed. Brf. of App. 11. Det. Welton testified that sometimes he wears a sidearm and sometimes he does not. RP 57. Det. Welton could not remember. The defendant's blanket statement that both detectives had sidearms is not supported by the record. The defendant also makes more of the testimony than is justified. The defendant claims that Detective Welton was "...in uniform..." Brf. of App. 11. Conceivably, one might stretch the items actually being worn to fit the term "uniform" but the description was more casual than perhaps the

impression the defendant wished to impart. Det. Welton testified that he was wearing a pair of green khaki pants and a polo shirt with a badge embroidered on the front along with two patches, corporal stripes and his name. None of Det. Welton's testimony indicated a heavy uniform usually associated with a service belt having the accoutrements of a street officer.

Detective Welton testified that the other officer, Dep. Kevin Moser, was on modified duty due to an injury and was not working the street. RP 45. According to Det. Welton, Dep. Moser was wearing "plain clothes" as well. According to Det. Welton's testimony, Dep. Moser was not wearing a uniform "*per se*." RP 45.

Despite the defendant's claims, the detective testified that he did not tell the defendant that he was not free to leave. RP 59, 60. The defendant was never told he was under arrest. RP 59. The defendant argues that somehow the officer's intent to eventually arrest him proved "custodial." If the defendant was never told he was under arrest, it is difficult to see how the officer's unspoken intent had any bearing on the "custodial interrogation."

The defendant's attempt to show a cowering, youthful person being intimidated by the police fails. Aside from the testimony regarding what the officers were wearing and how they behaved, the questions were asked in a location being used by the defendant as a residence with his girl-friend by his side and the girl-friend's mother in the room.

Additionally, this was hardly the defendant's first contact with the law. RP 208-11.

The defendant's assignments of error pertain only to the Conclusions of Law stated by the trial court. The defendant has not challenged the Findings of Fact in this case. Consequently, the Findings of Fact contained in the trial court's CrR 3.5 document are verities. CP 17-19.

As this Court has noted:

> The CrR 3.5 findings of fact set the stage for the *Thompson* legal inquiry. Accordingly, the trial court's CrR 3.5 conclusions of law address whether a reasonable person in the defendant's situation would have believed "he or she was not at liberty to terminate the interrogation and leave." *Thompson,* 516 U.S. at 112, 116 S.Ct. 457; *see also Short,* 113 Wash.2d at 41, 775 P.2d 458 (stating that the reviewing court determines whether the defendant "reasonably supposed his freedom of action was curtailed")

*State v. Solomon*, 114 Wn. App. 781, 60 P.3d 1215 (2002).

The only support the defendant has for his arguments is supposition. The defendant did not testify at the CrR 3.5 hearing. The facts show that the defendant was in the basement when the officers arrived and the defendant went to the officers. The defendant was not threatened, handcuffed or otherwise intimidated. There simply is no factual basis to claim that the trial court's CrR 3.5 Conclusions of Law were incorrect.

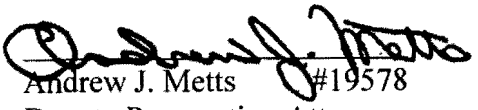
V.

CONCLUSION

The State respectfully requests that the defendant's convictions be affirmed.

Dated this 2nd day of July, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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| STATE OF WASHINGTON, Respondent, v. ETHAN D. YORK, Appellant, | ) | NO. 31272-1-III<br>CERTIFICATE OF MAILING |

I certify under penalty of perjury under the laws of the State of Washington, that on July 2, 2013, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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7/2/2013 (Date) Spokane, WA (Place) Kathleen Proctor (Signature)