No. 44968-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

EUGENE ELKINS JR.

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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A. Assignments of Error

Assignments of Error

1. The trial court erred by admitting Mr. Elkins pretrial statements.

2. The trial court erred by denying Mr. Elkins' motion for a mistrial.

3. Mr. Elkins was improperly convicted of second degree felony murder, RCW 9A.32.050(1)(b), which is unconstitutionally vague when the underlying felony is assault.

Issues Pertaining to Assignments of Error

1 Did the Grays Harbor detectives scrupulously honor Mr. Elkins express desire to remain silent when they: (1) contacted him five hours after he invoked his rights; (2) did not re-advise him of his *Miranda* rights; (3) did not obtain a waiver of his constitutional rights; and (4) questioned him about the same investigation for which he had invoked?

2 Were Mr. Elkins' statements to Sergeant Kolilis in the patrol car during the four hour ride from Yakima to Montesano voluntary when: (1) they were the only two people in the patrol car; (2) Sergeant Kolilis initiated the conversation; and (3) Sergeant Kolilis subjectively hoped that

by starting the conversation the topic would eventually drift towards the investigation?

3. Was Mr. Elkins' written waiver of his *Miranda* rights and subsequent statement the "fruit" of an on-going constitutional violation of Mr. Elkins' right to remain silent and right to an attorney?

4 Did the trial court err by denying Mr. Elkins' motion for a mistrial when Sergeant Kolilis testified the defendant terminated the interview by invoking his right to an attorney?

5. Is RCW 9A.32.050(1)(b), which defines second degree felony murder to include felony assault, unconstitutionally vague as applied?

B. Statement of Facts

Eugene Elkins was charged by Information with one count of second degree felony murder by means of second degree assault. Supplemental Clerk's Papers. The victim of the homicide was Kornelia Engelmann, who was Mr. Elkins' girlfriend. RP, 243. Prior to trial the Court conducted a hearing pursuant to CrR 3.5 on March 19, 2013. Mr. Elkins filed an extensive motion arguing both federal and state constitutional law to exclude his pre-trial statements. CP, 9-15, 53-74. The trial court admitted all pre-trial statements. RP, 124.

Background Facts

On June 6, 2012, a date described by one witness as D-Day, police were notified of a possible homicide RP, 280. The homicide was reported at the home of Eugene Elkins, who lived in a double wide mobile home on 57 Clemons Road, space 58. RP, 353. Clifford Dotson lives in the same mobile home park, space 65. RP, 272. On that date, he heard "some awful rattling and clanking." RP, 273. There was also a woman screaming and hollering. RP, 273. The noise lasted for about 15 to 20 minutes and came from a mobile home four units away. RP, 273.

Later that morning, Brianne Slosson woke up around 6:00 and saw she had missed a phone call from Mr. Elkins. RP, 245, 280. After unsuccessfully trying to return the call, she finally connected with him around 7:30. RP, 246. Mr. Elkins said something was wrong with Kornelia, he said she was dead and to keep her mouth shut. Then he said he didn't know if she was dead and she should come over. RP, 246.

Ms. Slosson drove to Mr. Elkins' house. In the bedroom, she saw Ms. Engelmann face down and covered with a blanket. RP, 247. Ms Slosson, who is a Certified Nursing Assistant, checked for vital signs and discovered she had no pulse, her temperature was very cold, and she was very stiff, indicating rigor mortis had already set in. RP, 248. According to later expert testimony, this would have required her to be dead for at

least two hours. RP, 403. She was unclothed and was black and blue from the chest up. RP, 249.

Ms. Slossen asked Mr. Elkins what he had done and he said he had beaten her, but she was fine when they had gone to bed at midnight. RP, 249. He said she must have got up to use the bathroom and fell down the stairs. RP, 249. Mr. Elkins told her not to call 911 and then she helped him move put his stuff in his truck. RP, 250. He said to give him a ten minute head start and tell the police he was going to Oregon. RP, 250. As soon as he left, Ms. Slossen called 911. RP, 250.

Lieutenant David Porter was the first officer to arrive. RP, 290. He made contact with Ms. Slossen, who showed him where the dead body lay. RP, 291. In Deputy Porter's opinion, Ms. Engelmann was obviously deceased. RP, 292. Deputy Porter stayed at the scene and coordinated the investigation until Detective Sergeant Steve Shumate arrived and took over. RP, 295.

Detective Shumate was in charge of processing the crime scene. At trial multiple photographs and physical evidence were marked and admitted CP, 116-120.

Later that day, at about 1:00 in the afternoon, Mr. Elkins showed up unexpectedly at his friend Paul Hansen's house in Yakima County. RP, 280-81. Mr. Elkins did not appear to be injured. RP, 287. Mr. Elkins said

his girlfriend was not alive despite his efforts to revive her, so he got scared and left. RP, 281. He said he had shoved her around the night before but he did not hit her. RP, 283. Mr. Elkins said he wanted to have one beer and then he was going to turn himself in. RP, 283.

Autopsy evidence indicated Ms. Engelmann had numerous bruises to the head, neck, and torso. RP, 411. Pooled blood was found inside the skull cavity. RP, 417. There was no evidence of broken bones or cartilage in the neck area, which would normally be found in a case of strangulation. RP, 418. There were several broken ribs and bruising on the lung in the torso. RP, 418. The liver was lacerated. RP, 423. Dr. Emmanuel Lacsina's conclusion was that she died of internal bleeding as a result of multiple blunt force injuries to the head, chest, and torso.

RP, 432. Death would have occurred within four to five hours of the injuries. RP, 437.

<u>CrR 3.5 Hearing</u>

The following facts were elicited at the CrR 3.5 hearing on March 19, 2013.

Acting on a tip Mr. Elkins may be in Yakima County, the Grays Harbor Sheriff's Office requested an agency assist. RP, 11-12. Yakima County Sheriff's Deputy Chad Michael was able to locate Mr. Elkins at a residence in Yakima County at 3:34 p.m. on June 6, 2012. RP, 12, 21, 27.

Mr. Elkins was arrested and handcuffed RP, 12. Deputy Michael asked if he had any weapons and he said he did not. RP, 12. He then read Mr. Elkins his *Miranda* warnings. RP, 13. Although he did not recall his exact response, Deputy Michael remembered that Mr. Elkins indicated he did not want to talk to him at that time RP, 14. Yakima Sheriff's Chief Stew Graham was standing nearby and observed Deputy Michael read the *Miranda* warnings. RP, 20. Chief Graham asked Mr. Elkins if he wished to speak with them and he said, "No." RP, 21. Deputy Michael and Chief Graham did not ask any further questions. RP, 21.

Grays Harbor Sergeant Don Kolilis, who was processing the murder scene, learned of Mr. Elkins' arrest soon thereafter and immediately made arrangements to drive to Yakima. RP, 27. Detective Keith Peterson accompanied him. RP, 27. They arrived a little after 8:00 p.m. and Chief Graham arranged for them to use an interview room at the Yakima County Sheriff's Office. RP, 22. Chief Graham notified the Grays Harbor authorities that Mr. Elkins had been read his *Miranda* warnings and had invoked his right to remain silent. RP, 24-25, 28.

When Mr. Elkins arrived at 8:35, he was ushered into a small interview room. RP, 45, 74 The three men were "huddled" around a "little itty bitty table." RP, 45. The detective offered him drinks and an opportunity to use the restroom. RP, 29. Detective Peterson asked if he remembered his rights and if he understood they were still in effect. RP,

29. According to Sergeant Kolilis, Mr. Elkins "advised he was willing to speak with us." RP, 29. The detectives did not, however, re-advise Mr. Elkins of his *Miranda* rights. RP, 44. Mr Elkins was interviewed for a half an hour and he then became upset and asked for a lawyer. RP, 32, 46. The interview was terminated. RP, 32 The interview was audio and video recorded, although Mr. Elkins was not apprised of that fact. RP, 42. The detectives knew the interview was being recorded but made no effort to tell Mr. Elkins. RP, 42.

The next day, June 7, the detectives picked Mr. Elkins up at the jail and began the transport to Grays Harbor RP, 32. Mr. Elkins was riding in the back seat on the passenger side of Sergeant Kolilis' patrol car. RP, 33. On the trip, Sergeant Kolilis and Mr. Elkins engaged in small talk about subjects such as snacks for the road and white water rafting in the Titan Valley. RP, 34. Sergeant Kolilis did not mention the small talk in his report and the first time Mr. Elkins' lawyer learned of it was during the CrR 3.5 hearing. RP, 48. The small talk was initiated by Sergeant Kolilis when they stopped for gas and drinks. RP, 49. On cross-examination, Sergeant Kolilis admitted he was hoping by initiating small talk Mr. Elkins would eventually start to talk about the case because, as he put it, "Stuff like that does happen." RP, 50-51. When they passed White Pass, Mr. Elkins started mumbling to himself and Sergeant Kolilis said he could not understand him. RP, 34. Sergeant Kolilis could hear him say that "he really loved her." RP, 51. Mr. Elkins said something about knowing about

guns and wanted to make some kind of deal. RP, 35. Sergeant Kolilis, who knew firearms were not involved in the murder of the victim, made it clear he was concerned about the existence of guns that could potentially hurt someone. RP, 53 Sergeant Kolilis asked him about the location of the guns knowing that it was likely to produce an incriminating response. RP, 54. Mr. Elkins then asked if it was better to talk to the detectives or not. RP, 35. Sergeant Kolilis said he thought he had already made that decision. RP, 35. Mr. Elkins said he wanted to come forward and talk. RP, 35. Sergeant Kolilis said it was his choice and he needed to make his own decision. RP, 36 He said he would need to be re-advised of his rights RP, 36. Mr. Elkins said he was aware of his rights and would wait until they reached the police station. RP, 37. No further questions were asked in the car. RP, 36.

At the Grays Harbor Sheriff's Office, Mr. Elkins was advised of his *Miranda* warnings in writing. RP, 37. A *Miranda* form was filled out and Mr. Elkins went over it. RP, 38. Mr. Elkins signed it. RP, 38. Sergeant Kolilis told Mr. Elkins that he was re-advising him of his rights because he had already invoked his right to a lawyer. RP, 39 The detectives then questioned him about the circumstances. RP, 39. As Mr. Elkins gave details, Sergeant Kolilis wrote out what he said. RP, 39. At the end of the written statement, Mr. Elkins was given the opportunity to make corrections, which he did. RP, 39. Mr. Elkins signed the statement

on the bottom of each page. RP, 40. At the end, Mr. Elkins added a paragraph in his own handwriting. RP, 40.

Prior to the hearing, the issue of the admissibility of Mr. Elkins' statements in the vehicle was discussed. Defense counsel said, "Those – I would agree -- Mr. Elkins would agree that those statements were not the product of interrogation, Sergeant Kolilis didn't ask the detective – or didn't ask Mr. Elkins any questions during the transport in the vehicle I'm not concerned about those statements." RP, 9. The Court asked, "So you're not objecting to the admissibility of the statements of the vehicle on the trip." To which defense counsel responded, "We're going to see how the testimony pans out, but I don't anticipate those are going to be an issue." RP, 9. During the hearing, the State objected to questions pertaining to the admissibility of the statements in the vehicle. RP, 54. Defense counsel stated, "But it ties in to the – but it ties into his subsequent statement. I'm not objecting to the statements themselves, but it's the lead up." RP, 55.

<u>Mr. Elkins' Statements and Mistrial Motion</u>

At trial, the jury heard the substance of Mr. Elkins' statements to detectives.

In the first statement, on June 6 taken at the Yakima County Sheriff's Office, Mr. Elkins said the arguing occurred on Friday, which

would have been June 1. On that date, he and Ms. Engelmann had been drinking and they got into an argument that escalated into pushing and shoving. RP, 459. He said Ms. Engelmann knew how to push his buttons. RP, 459. At one point Ms. Engelmann scratched him and he hit her with an open hand. RP, 460. He said he hit her quite a few times. RP, 460

Sergeant Kolilis confronted him about the number of bruises on the body and suggested there was a substantial amount of bruising. RP, 460. Mr Elkins lowered his head and looked emotional. RP, 460. The Sergeant then told the jury, "He said he didn't want to speak with us any further at that point and didn't know if he should talk to attorney or not .... when I clarified him that he wanted to speak with an attorney or what. --" RP, 461. Defense counsel promptly objected and the objection was sustained. RP, 461. The Court instructed the jury to "disregard the statement." RP, 461. Mr. Elkins then moved for a mistrial. RP, 461. After much deliberation, the court denied the mistrial. RP, 468-70.

The transport from Yakima County to Grays Harbor County was not the subject of detailed testimony for the jury. The jury was told there was conversation between Sergeant Kolilis and Mr. Elkins where he indicated he wished to speak further with the detectives about what had happened. RP, 473. Mr. Elkins indicated it was okay to wait until they arrived at Montesano. RP, 474. Once they arrived at Montesano, a written statement was taken from Mr. Elkins. RP, 474. Mr. Elkins was given an

opportunity to make corrections, which he made a couple of changes. RP, 475. He signed each page. RP, 475. The statement was admitted without any commentary by the Sergeant. RP, 476

The written statement of June 7 is six pages long, with some portions redacted for the jury. Trial exhibits 73 and 74. In general terms, the statement says that on June 1, 2012, Mr. Elkins and Ms. Engelmann were arguing over her perceived flirting with a mutual friend. The argument escalated into pushing, shoving, scratching, and hitting. He struck her several times with his fist. The next day he could tell he had hit her too hard. On Tuesday (June 5) they were drinking and arguing, but nothing was physical. When Mr. Elkins went into the bedroom and discovered Ms. Engelmann lying on the floor next to the closet. He tried to revive her with CPR but was unable to do so. He then called Bree (Ms. Slosson) and asked her to come down and check on her. He knew he should have called 911 but he was really scared. He saw the bruises and "knew what it would look like." He "thought [he] could go to prison and was scared." He concluded the statement in his own handwriting saying, "I gene [sic] wish the world it was me that passed not Kornelia. I truly loved her and will live with this every day for the rest of my life."

C. Argument

1 The trial court erred by admitting Mr. Elkins pretrial statements.

The pretrial statements of Mr. Elkins can be divided into three sets of statements. The first set of statements was made at the Yakima County Sheriff's Office on June 6. The second set of statements was made in the patrol vehicle during the transport from Yakima to Montesano on June 7. The third set of statements occurred at the Gray Harbor County Sheriff's Office on June 7. Each of these statements will be analyzed chronologically.

1a. The Grays Harbor detectives did not scrupulously honor Mr. Elkins express desire to remain silent.

Mr. Elkins first statements were made to Grays Harbor Sheriff's detectives almost exactly five hours after his arrest. At the time of his arrest he was advised of his *Miranda* rights and he promptly invoked his right to remain silent. The issue is whether the Grays Harbor County detectives scrupulously honored his request

When a suspect invokes his right to remain silent, the Fifth Amendment of the United States Constitution requires that the police "scrupulously honor" the request and cease questioning. Michigan v. Mosley, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Normally, this requires police "immediately cease[] the interrogation,

resume[] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[] the second interrogation to a crime that had not been a subject of the earlier

interrogation." Mosley at 106. The last requirement, that the interrogation be about an unrelated crime, has been the subject of some debate, but the other requirements have remained essentially unchanged. See State v. Brown, 158 Wn.App 49, 240 P.3d 1175 (2010).

Washington Courts have interpreted the Mosely case as setting forth a four-pronged analysis. Whether a defendant validly waives his previously asserted right to remain silent depends on: (1) whether the police scrupulously honored the defendant's right to cut off questioning, (2) whether the police continued interrogating the defendant before obtaining a waiver, (3) whether the police coerced the defendant to change his mind, and (4) whether the subsequent waiver was knowing and voluntary. State v. Brown, 158 Wn.App. 49, 240 P.3d 1175 (2010), citing State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). In Brown, the Court concluded that officers had scrupulously honored the defendants expressed desire to remain silent when they contacted him two hours later, re-advised him of his *Miranda* warnings, and obtained a written waiver of his *Miranda* rights.

In this case, there is no question that Mr. Elkins expressly invoked his right to remain silent to Chief Graham and Deputy Michael. Five

hours later, Sergeant Kolilis and Detective Peterson contacted him. They were told of his invocation by Chief Graham. But they did not re-advise him of his *Miranda* rights. And although Mr. Elkins indicated he was "willing to talk", the officers did not did not obtain an express waiver of those rights. The questioning was about the same subject as the earlier arrest.

Under Mosely and Brown, the officers did not scrupulously honor his request to remain silent. Although a five hour delay can theoretically be a sufficient passage of time, the absence of a re-advisement of rights and an express waiver of those rights renders the subsequent statements inadmissible. The constitutional violation was further aggravated by the fact that the questioning was about the same offense. The statements made by Mr. Elkins in Yakima should have been suppressed and the trial court erred by concluding otherwise.

1b. The statements in the patrol car were made in response to statements by Sergeant Kolilis that were reasonably likely to elicit an incriminating response.

The next set of statements occurred the next day during the transport to Grays Harbor County. Although the trial court admitted the statements, any error in admitting them is concededly harmless because the statements themselves were not introduced to the jury. Having said that, it is still important to analyze the statements because of their impact on the third set of statements

The United States Supreme Court has defined interrogation any

action by police that is "reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980). There are some superficial similarities between the facts of Innis and the facts of Mr. Elkins' case. In Innis, after the defendant was *Mirandized* and invoked his rights, he was placed in the back of a patrol car with three officers. The officers immediately started having a conversation about how the murder weapon had not yet been found and they would hate to see it found by a child and for someone to get hurt. The defendant then volunteered to show them where the weapon was hidden. The conversation occurred within one mile of the arrest. The Supreme Court concluded this was not interrogation largely because it was a conversation between officers, rather than directly with the defendant. The Court further noted there was nothing in the record to suggest that the officers' comments were designed to elicit a response. See footnote 9.

In Mr. Elkins' case, the conversation was a much longer dialogue stretched over a four hour period rather than the remarkably short conversation at issue in Innis. The conversation was initiated by Sergeant Kolilis. Although the conversation started as small talk, it then moved into the area of firearms and, eventually, the murder itself. There being no one else in the car, the conversation was between Mr. Elkins and Sergeant Kolilis, unlike Innis where the conversation was between officers.

Further, Sergeant Kolilis admitted on cross-examination he hoped that by initiating small talk with Mr. Elkins, he would eventually start to

talk about the case. This is significant because the determination must be whether the officer's statements are reasonably likely to elicit an incriminating response. As the Court explained in Innis, a few "offhand remarks" which are not designed to get the suspect talking are not likely to elicit an incriminating response. Innis at 303. But in Mr. Elkins case, the Sergeant purposely engaged in a four hour conversation designed to get him talking in the hopes the conversation would drift the circumstances of the murder, because, as the Sergeant put it, "stuff like that does happen." RP, 50-51. It is important to note that Washington law recognizes that the subjective intent of the officer is a factor that may be considered in determining whether a constitutional violation has occurred. See State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) (finding a pretextual traffic stop illegal because the officer's subjective intent was to search the vehicle).

Finally, it is important to view the conversation in the patrol car in the larger context of what had happened the day before. Sergeant Kolilis had contacted him and interrogated him the day before in violation of his right to remain silent. The "small talk" interrogation in the patrol car was part of the continuing constitutional violation of Mr. Elkins' expressed desire to both remain silent and have an attorney. The statements of Mr. Elkins in the car should have been suppressed.[1]

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[1] The State may argue Mr. Elkins waived his objection to the statements in the patrol car. But at the hearing, although defense counsel equivocated

1c. Mr. Elkins' written statement was the product of an on-going constitutional violation of Mr. Elkins' right to remain silent and right to an attorney.

The final set of statements is contained in the written statement of Mr Elkins at the Grays Harbor Sheriff's Office These statements should be viewed as the "fruit of the poisonous tree" of the earlier constitutional violations Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S.Ct. 407 (1963).

After an accused has asserted his right to counsel during custodial interrogation, police may not initiate further communication with the accused. As the Supreme Court has explained, "We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police " Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981). Even if the accused has been afforded the opportunity to consult with counsel, no further interrogation may take place until counsel is physically present. Minnick v. Mississippi,

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somewhat, he did not waive his objection, saying, "We're going to see how the testimony pans out, but I don't anticipate those are going to be an issue." RP, 9. Additionally, there is evidence in this record that Sergeant Kolilis did not include details about the small talk in his report and defense counsel learned of the small talk for the first time at the CrR 3.5 hearing. In any event, as noted, the statements were not introduced at trial.

498 U.S. 146, 163, 111 S.Ct. 486, 112 L.Ed. 489 (1990). Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities. Minnick v. Mississippi.

There is no question Mr. Elkins invoked his right to an attorney at the conclusion of the interview on June 6. Whether the written statement of June 7 was admissible turns, therefore, on the question of whether Mr. Elkins was the one who re-initiated contact with Sergeant Kolilis or vice versa. As we have already seen, every contact with Mr. Elkins up to this point was initiated by law enforcement in violation of his express desire not to talk, first at the Yakima County Sheriff's Office and later in the patrol car. Because law enforcement initiated the contact, the statement should have been suppressed.

There is another way of analyzing this case. When law enforcement takes an initial statement in violation of *Miranda*, they are not permitted to take a later statement and claim it is free from the constitutional violation. Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2003). Justice Breyer felt this issue was very simple, saying, "Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith. I believe this is a sound and workable approach to the problem this case presents. Prosecutors and judges have long understood how to apply the 'fruits'

approach, which they use in other areas of law." Seibert at 617 (Justice Breyer, concurring) (citations omitted.)

In this case, law enforcement failed to scrupulously honor Mr Elkins request to remain silent by interviewing him five hours later without a knowing and intelligent waiver of his right to remain silent. They then ignored his request for an attorney by subjecting him, first to small talk, and then full interrogation, without ever trying to put him in touch with a lawyer. The court should not have rewarded the constitutional violations of the officers by admitting his written statement. Any subsequent waiver of his *Miranda* rights should be deemed involuntary and the written statement fruit of the poisonous tree.

2. The trial court erred by denying Mr. Elkins' motion for a mistrial.

Even a cursory view of the facts in this case shows that Mr. Elkins' statements to law enforcement were a central part of the State's case. Although Mr. Elkins engaged in some odd behavior after discovering the body, including calling Ms. Slossen and running away to Yakima, this behavior was more important to demonstrate a "consciousness of guilt" than actual guilt. See State's Closing Argument, RP, 538. The State's central theory was that Ms Engelmann's death was the result of a brutal domestic violence assault perpetrated by Mr. Elkins. This theory was significantly bolstered by his statements to law enforcement. The State's closing argument repeatedly referenced the statement. At one point, the

State argued for three consecutive pages of the transcript the relevance of the statements. RP, 562-64.

Given the importance of Mr. Elkins' pretrial statements, the decision of the trial court to deny his motion for a mistrial is nearly impossible to understand. Sergeant Kolilis told the jury Mr. Elkins had terminated the first interview by invoking his right to a lawyer. This was clearly error and the trial court recognized it as such by sustaining the objection and promptly telling the jury, "And you will disregard the statements." RP, 461 But this instruction was insufficient to cure the violation. The only proper remedy was a mistrial.

The State may not introduce evidence of a suspect's post-arrest silence. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). As the Court explained in Easter, "Courts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda* constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty. The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process." Easter at 236.

In this case, as everyone in the courtroom recognized, the Sergeant clearly violated this constitutional requirement by commenting on Mr. Elkins' decision to invoke his right to any attorney during the first interrogation. The issue before this Court is whether the trial court's admonition to the jury to "disregard the statements" is sufficient to cure

the constitutional violation such that a mistrial was unnecessary. In Easter, the Court held that a violation of the rule prohibiting comments on post-arrest silence can be "harmless only if [the Court is] convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." Easter at 242. In this case, the error cannot be said to be harmless given the fundamental impermanence Mr. Elkins' statements played in the trial.

The trial court erred by concluding that its prompt instruction to "disregard the statement" was sufficient to cure the constitutional defect. As Justice Jackson once put it: "The naïve assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 US 440, 453, 93 L.Ed 790, 69 S. Ct 716, 723 (1949) (Justice Jackson, concurring) (citation omitted). As one federal court pungently observed: "If you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v United States, 307 F.2d 883, 886 (5th Cir. 1962), quoted in United States v. Garza, 608 F. 2d 659, 666 (5th Cir. 1979).

In determining whether an improper comment requires a new trial, Washington Courts have looked at the nature and extent of the comment. For instance, in one recent case, the Washington Supreme Court held that it was error, but not reversible error, for the officer to describe the suspect, who had never invoked his right to remain silent, as being "evasive" while

giving a statement. State v. Hager, 171 Wash.2d 151, 248 P.3d 512 (2011).

Mr. Elkins' case is more analogous to Easter than Hager. Sergeant Kolilis' testimony was that Mr. Elkins' terminated the interrogation by requesting an attorney. This is not the same as being evasive during an on-going interrogation. Mr. Elkins' statements played a central role in the State's prosecution of him. The error was not harmless beyond a reasonable doubt and a new trial is necessary.

3. Second degree felony murder, RCW 9A.32.050(1)(b), is unconstitutionally vague when the underlying felony is assault.

Current RCW 9A.32.050(1)(b) says a person commits second degree murder when he or she "commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participant." In Mr. Elkins case, the State alleged second degree murder as the underlying felony. For the remainder of this brief, "felony murder" will be used to refer to second degree murder committed in the course of and in furtherance of second degree assault.

Felony murder has a troubled history in the state of Washington. The cases of In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981

(2002), and <u>In re Pers. Restraint of Hinton</u>, 152 Wn.2d 853, 100 P.3d 801 (2004) held that former RCW 9A.32.030(1)(c) did not clearly indicate a legislative intent to include felony assaults among the felonies that could serve as a predicate for second degree felony murder. The Court noted that the petitioner brought both a constitutional and a statutory challenge to felony murder, but the Court specifically declined to address the constitutional challenges, choosing instead to decide the case on statutory grounds.

In response to <u>Andress</u>, the legislature amended the statute to make clear that felony assault is included among the predicate felonies. The Supreme Court has acknowledged the change, most notably in dicta in <u>Bowman v. State</u>, 162 Wn.2d 325, 172 P.3d 681 (2007). In <u>Bowman</u>, the Court addressed whether to extend the logic of <u>Andress</u> to the crime of drive-by shooting. The Court declined to do so. It then made passing reference to the amendment, saying, "Nevertheless, it is appropriate for this court to bear in mind that, while felony murder can, and does in some circumstances, result in unfairly harsh treatment that is not commensurate with the defendant's culpability, the legislature has expressed its intent to maintain the felony murder statutes." <u>Bowman</u> at 335. In <u>State v. Gordon</u>, 153 Wn.App. 516, 223 P.3d 519 (2009), <u>reversed on other grounds</u>, 172 Wn.2d 671, 260 P.3d 884 (2011), Division I of the Court of Appeals upheld the constitutionality of the amended statute.

Despite the holding of Gordon and the dicta of Bowman, however, the Supreme Court has not directly addressed the constitutionality of amended RCW 9A.52.050. This Court should review anew the constitutionality of the statute and hold the statute is unconstitutionally vague as applied. A statute is vague if either it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 98 P.3d 1184 (2004).

The test to be applied by the court in determining whether a statute is unconstitutional depends on the allegation made. When it is alleged that a statute is wholly unconstitutional, the court looks not to the conduct of the defendant, but to the face of the statute to determine whether any conviction under the statute could be constitutionally upheld. If, upon such an examination, the court finds that no conviction could be upheld, the statute is unconstitutional on its face.

Although the actual conduct of the defendant is irrelevant when a statute is alleged to be unconstitutional on its face, the conduct of defendant is relevant when it is alleged that the statute is unconstitutional only in part, or the court, although not finding the statute to be unconstitutionally vague on its face, finds the statute to be potentially vague as to some conduct. In such cases, the court must look to

defendant's conduct to determine whether the statute, as applied to that conduct, is unconstitutional This is because while a statute may be vague or potentially vague as to some conduct, the statute may be constitutionally applied to one whose conduct clearly falls within the constitutional "core" of the statute. State v. Maciolek, 101 Wn 2d 259, 262-63, 676 P.2d 996 (1984), quoting State v. Hood, 24 Wn.App. 155, 600 P.2d 636 (1979) (other citations omitted).

Although the Court in Andress declined to review the constitutionality of the statute, and the legislature has indicated its intent to apply the statute to felony assaults, the logic of the Andress Court still applies. The Court held that the "in furtherance of" language in former RCW 9A 32 050(1)(b) "makes no sense if applied where assault is the predicate felony," and that there is an "undue harshness of using assault as the predicate felony for second degree felony murder," particularly because manslaughter is not a lesser included offense of felony murder. Andress at 615-16

At common law, second murder was reserved for situations where a person acted intentionally. While the felony murder statute has its proper place, it is not appropriate to convict a person of second degree murder when the death resulted from a non-intentional homicide. Second degree murder, which requires the assault itself be intentional, only requires the resulting injury be inflicted recklessly. RCW 9A.36.021(1)(a).

Therefore, a person such as Mr. Elkins who never intended to actually harm someone, can be convicted second degree murder.

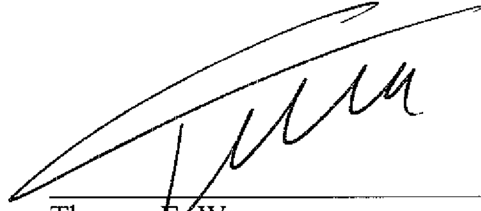
The State emphasized this distinction several times in its closing argument. For instance, near the beginning of its closing the State said, "In looking at the jury instructions, it's important to note the State does not have to prove that Mr. Elkins intended to kill Ms. Engelmann. The State has to prove that he intentionally assaulted her and that that caused substantial bodily harm and it resulted in the death of Ms. Engelmann." RP, 535. Later, the State said, "So in the end what the State is required to prove is that Mr. Elkins assaulted Ms. Engelmann." RP, 540. The State closed its rebuttal argument by saying, "When you consider all that has been presented and you know, you have an abiding believe that Mr. Elkins assaulted Ms. Engelmann and that assault led to her death." RP, 567.

This Court should hold that current RCW 9A.32.050(1)(b) is unconstitutionally vague and reverse Mr. Elkins' conviction. On retrial, the State should be required to prove Mr. Elkins murdered Ms. Engelmann intentionally. Failing that, the jury should be presented with the option of convicting of the lesser included offenses of first or second degree manslaughter.

D. Conclusion

This Court should reverse and remand for a new trial. At the new trial, all of Mr. Elkins' post-arrest statements should be suppressed.

Dated this 12th day of March, 2014



Thomas E. Weaver
WSBA # 22488
Attorney for the Defendant

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

STATE OF WASHINGTON, Respondent, vs. EUGENE ELKINS JR., Defendant.	Grays Harbor Case No.: 12-1-00263-3 Court of Appeals No.: 44968-4-II AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On March 12, 2014, I filed electronically, a copy, of the SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS, MOTION FOR EXTENTION TO DATE OF FILING and BRIEF OF APPELLANT to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300 Tacoma, WA 98402.

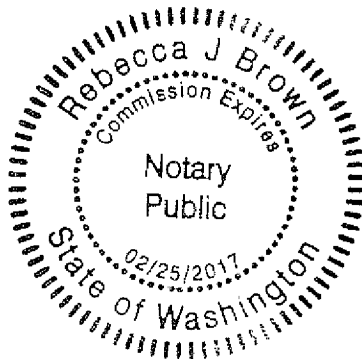
The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

1 On March 12,2014, I sent a copy, postage prepaid, of the SUPPLEMENTAL
2 DESIGNATION OF CLERK'S PAPERS, MOTION FOR EXTENTION TO DATE OF FILING
3 and BRIEF OF APPELLANT to the Grays Harbor Prosecutor's Office, 102 W. Broadway, room
4 102 Montesano, WA 98563

5 On March 12, 2014, I sent an original, postage prepaid, of the SUPPLEMETNAL
6 DESIGNATION OF CLERK'S PAPERS to the Grays Harbor Superior Court Clerk, 102 W.
7 Broadway, room 203 Montesano, WA 98563

8 On March 12, 2014, I sent a copy; postage prepaid, of the DESIGNATION OF
9 CLERK'S PAPERS, MOTION FOR EXTENTION TO DATE OF FILING and BRIEF OF
10 APPELLANT to Mr. Eugene Elkins Jr. Inmate # 844475, Washington State Penitentiary, 1313
11 North 13th Avenue, Walla Walla, WA 99362
12
13 Dated this 12th day of March, 2014

14
15 Thomas E. Weaver
WSBA #22488
16 Attorney for Defendant
17
18 SUBSCRIBED AND SWORN to before me this 11th day of March, 2014.
19



20
21 Rebecca J. Brown
NOTARY PUBLIC in and for
22 the State of Washington.
My commission expires: 02/25/2017
23
24
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The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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