No. 46291-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CAITLYN LEDERER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Appellant Caitlyn Lederer and her companion Dudley Kirby were under arrest when the police found a plastic baggie with less than a gram of methamphetamine in Mr. Kirby's pants pocket. Neither Ms. Lederer nor Mr. Kirby were given Miranda warnings but both were asked about the drugs. Mason County Sheriff Deputy Leiter interrogated Ms. Lederer and she said the substance was hers. Only then did Corporal Ripp read Miranda warnings to her, but without telling her he knew the first statement was illegally obtained and "no good" in court. The cat was out of the bag. Shrugging her shoulders, Ms. Lederer agreed to another round of questioning with Corporal Ripp and repeated what she had disclosed a minute and a half earlier to the officers. All this pre- and post-Miranda questioning took place in the backseat of Corporal Ripp's squad car.

The flawed Miranda-in-the-middle interrogation deprived the appellant of a meaningful opportunity to determine whether to exercise her constitutional right not to incriminate herself. The trial court should have granted the defense motion to suppress all of her statements, including what she said post-Miranda.

Separately, because no evidence corroborated the notion that Ms. Lederer had constructive possession over what was on Mr. Kirby's person, the trial court should have excluded the confession on corpus delicti grounds.

Ms. Lederer's conviction for one count of possession of a controlled substance must be reversed and dismissed.

B. ASSIGNMENTS OF ERROR

1. Trial court erred in denying the defense CrR 3.5 motion to suppress.

2. Trial court erred in finding the appellant made a knowing, intelligent, and voluntary waiver of her constitutional right to remain silent.

3. Trial court erred in not recognizing that objective evidence showed the Miranda-in-the-middle approach failed to give Ms. Lederer a meaningful opportunity to determine if she wanted to consent to any of the police questioning.

4. Trial court erred in finding that the police did not conduct a purposeful two-step interrogation and excusing the procedural flaws below as a "mistake." RP 47.

5. Trial court erred in finding that the two-step interrogation was not "deliberate" as the term is used in Missouri v. Seibert and United States v. Williams.

6. Trial court erred in allowing the prosecution to use Ms. Lederer's statements at trial, in violation of the Fifth Amendment and Fourteenth Amendment.

7. Trial court erred in allowing admission of Ms. Lederer's statements at trial, in violation of the corpus delicti rule.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Before every custodial interrogation, police are to alert a suspect of her constitutional right to remain silent and the impropriety of a two-step interrogation may taint a post-Miranda statement. Under Missouri v. Seibert, courts analyzing whether a flawed Miranda-in-the-middle interrogation requires suppression of both statements do not defer to the subjective intent of the officers and must consider objective evidence of the interplay between the pre- and post-Miranda questioning. Did the trial court err in finding that Ms. Lederer knowingly waived her right to remain silent, where ninety seconds after an un-Mirandized interrogation the police followed-up with a second period of questioning, in the same place, about the same crime, and without

letting the appellant know they recognized her first statement would be inadmissible in court?

2. The corpus delicti rule requires that the prosecution produce independent evidence corroborating a confessed-to criminal offense. The State prosecuted Ms. Lederer of being in constructive possession of a substance that Mr. Kirby, who did not testify at trial, had hidden in his pocket. In the absence of any other evidence the appellant had dominion and control over the drugs, did the trial court err in denying a defense motion to exclude appellant's admissions on corpus delicti grounds?

D. STATEMENT OF THE CASE

On March 13, 2014, Mason County Sheriff's Office Corporal Timothy Ripp and Deputy Michael Leiter set out to serve Caitlyn Lederer with an arrest warrant at her home. RP 6-7, 21. A man answered the door and Deputy Leiter detained him. RP 7, 21. Corporal Ripp came inside, found Ms. Lederer in a bedroom, and handcuffed her. RP 21-23. He then took Ms. Lederer outside and frisked her by his

squad car. RP 22. A digital audio/video recording preserved much of what followed.[1]

At the start of the footage, Ms. Lederer can be seen leaning against the car. She is handcuffed. About a minute later Corporal Ripp takes her out of sight. A different officer walks a man wearing a white t-shirt to the left side of the screen. That man is also handcuffed.[2] Four minutes into the footage, the dash-cam point of view changes and now records the back seat of Corporal Ripp's squad car. Ms. Lederer's arms remain bound behind her. She is quiet. Corporal Ripp is in the driver's seat. RP 24. He still has not told Ms. Lederer that she has the right to remain silent and the right to an attorney. RP 30.

Four minutes and forty-eight seconds into the recording Deputy Leiter pulls the rear passenger door and fires off at Ms. Lederer:

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[1] Corporal Ripp's squad car was equipped with a "dash-cam." The recording was admitted as Exhibit 1 at the pretrial evidentiary hearing on the defense CrR 3.5 motion to suppress. RP 12. It was also admitted at trial. There were delays with getting a working copy of the exhibit available for appellate review. A supplemental designation of this exhibit was filed on December 18, 2014.

[2] The man in white, Dudley Kirby, is discovered to have his own misdemeanor warrant. RP 7, 16. Deputy Leiter searched Mr. Kirby "incident to arrest," and found "a clear plastic bag in his pocket that contained a crystal-like substance... methamphetamine." RP 7. Deputy Leiter did not advise Mr. Kirby of his Miranda rights upon arrest but questioned him anyway. RP 10, 16-17.

Q: "Is that your meth he had on him?"

A: "What's that?"

Q: "Is that your meth he had on him?"

A: "Yeah."

Q: "Is it?"

A: "Yeah."

Q: "Where was it?"

A: "In my trailer."

Q: "Where did he have it on him though?"

A: "In his pocket."

Q: "Which pocket?"

A: "His right one."

Q: "OK. OK."

Deputy Leiter shuts the door.[3] Ninety seconds later, Corporal Ripp starts his turn:

"Hey Caitlyn, I'm going to read you your Miranda rights since I have you in custody. You have the right to remain silent. Anything you say can be used against you in a court of law. You

[3] Deputy Leiter then went back to Mr. Kirby, whom he had also questioned without Miranda warnings, this time to engage in a post-Miranda interrogation. RP 8, 10, 17.

have the right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you, for any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each right as I've explained to you?"

Ms. Lederer says she understands and Corporal Ripp asks: "Having these rights in mind, do you wish to talk to me now?" She shakes her head a little, but she does not answer out loud. Corporal Ripp follows with: "Is that a yes or no?" She replies: "Sure, yes." Corporal Ripp does not tell Ms. Lederer he believed Deputy Leiter questioning her without Miranda warnings was a "mistake," or that he recognizes "she needs to be Mirandized before she was talked to," or that he knew what Deputy Leiter had talked to her about was improperly obtained. RP 25, 29, 31.

Instead, Corporal Ripp asks: "Regarding the methamphetamine, whose is it? The, the, bag, baggie, that he, uh, my other deputy found?" and "I'm just trying to ask you straight up, is it yours?" Just as she did

moments earlier when Deputy Leiter asked her the same thing, Ms. Lederer answers: "It's mine."

The State conceded Ms. Lederer's un-Mirandized statement obtained during the first half of the interrogation was inadmissible. RP 1. At the conclusion of the CrR 3.5 hearing, the trial judge stated: "there was no purposeful violation of Miranda in this case. There was a mistake made by the second officer, Officer - Deputy Leiter, that the arresting officer, Corporal Ripp, had given Ms. Lederer Miranda rights." RP 47. At trial to the bench, the State introduced Ms. Lederer's post-Miranda admissions she had constructive possession over the drugs found in Mr. Kirby's pants pocket. RP 72-74, 92-93. Mr. Kirby did not testify. RP 49. The trial court denied the defense motion to exclude this statement on corpus delicti grounds. RP 114.

E. ARGUMENT

1. APPELLANT'S STATEMENTS OBTAINED IN VIOLATION OF MIRANDA SHOULD HAVE BEEN EXCLUDED

a) The police violated Miranda requirements which must be scrupulously honored to protect the constitutional right to be free from self-incrimination.

The federal and state constitutions provide the accused the right not to incriminate herself.[4] U.S. Const. amends. V, XIV; Const. art. I, § 9. Due to the coercive nature of police custody, police officers must advise a suspect of her constitutional rights prior to custodial questioning. Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The appellant had an absolute right to refuse to be questioned by her captors and should have been so informed. But, Corporal Ripp had Ms. Lederer in custody for over five minutes without doing what the law requires. "I just didn't [Mirandize her] at that point." RP 31. Before any officer questioned her Ms. Lederer should have been unequivocally advised of her right to remain silent, that anything she said may be used against her in court, that she has the right to have an attorney present if she chooses to make a statement, and that an attorney will be appointed for her if she cannot afford one. Id. at 479. Warnings given to her were too little, too late.

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[4] The Fifth Amendment provides that no person "shall be compelled in any criminal action to be a witness against himself" and is applicable to the States through the Fourteenth Amendment. Article 1, section 9 of the Washington Constitution states, "No person shall be compelled in any criminal case to give evidence against himself" and is given by the Washington Courts the same interpretation as the United States Supreme Court has given the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

The Miranda warnings have been constitutionally mandated for nearly half a century, but here, the police acted as if the rule was new, or did not apply to them. Deputy Leiter made no attempt to verify if Ms. Lederer had been Mirandized by any other officer and did not advise her himself before starting his interrogation. RP 19. In his dealings with Mr. Kirby, he likewise chose to question first, warn second: "I just asked him if it was his." RP 17. "[I]f a suspect in custody does not receive an adequate warning effectively apprising him of his rights before he incriminates himself, his statements may not be admitted as evidence against him." United States v. Williams, 435 F.3d 1148, 1152 (9th Cir. 2006), citing to Miranda, 384 U.S. at 479. The unwarned statements were properly excluded and the post-advisement admissions should have been excluded too.

An individual may knowingly and intelligently waive their constitutional rights and answer questions or provide a statement to the police. Id. "The question whether the accused waived his rights is 'not one of form, but rather of whether the defendant in fact waived the rights delineated in the Miranda case.'" Fare v. Michael C., 442 U.S. 707, 724, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979) (quoting North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286

(1979)); "[I]t would be absurd to think that mere recitation of the litany suffices to satisfy Miranda in every conceivable circumstance." Missouri v. Seibert, 542 U.S. 600, 611, 124 S. Ct. 2601, 2610, 159 L. Ed. 2d 643 (2004) (Reversing murder conviction where a deliberate two-step interrogation failed to effectively advise the accused of her right to remain silent.)

"The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." Miranda, 384 U.S. at 469. Suspects must be warned of their right to remain silent and given a meaningful opportunity to exercise it throughout the interrogation. Id. at 479.

If an interrogation continues without an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id. at 475. The government must establish that (1) the waiver was voluntary and (2) the defendant understood both the rights he was abandoning and the consequences of a decision to waive those rights. Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); Fare, 442 U.S. at 725. On appeal, the adequacy of a Miranda warning and the

voluntariness of a suspect's statements are questions of law that are reviewed de novo. Williams, 435 F.3d at 1151, citing United States v. San Juan-Cruz, 314 F.3d 384, 387 (9th Cir. 2002); United States v. Bautista, 362 F.3d 584, 589 (9th Cir. 2004).

The arresting officers only read Ms. Lederer her Miranda warnings after getting her to incriminate herself. When an officer interrogates a suspect without giving the warnings, obtains a confession, gives the warnings, then continues the interrogation and obtains another confession, the warnings cannot "function effectively as Miranda requires." Seibert, 542 U.S. at 611-12.

The dash-cam video shows a puzzled look washing over Ms. Lederer's face[5] when Corporal Ripp asks her if she wants to answer his questions just ninety seconds after Deputy Leiter ended his interrogation. There is resignation in her voice and she shrugs her shoulders. As Justice Souter predicted in Seibert, the video caught the futility of a Miranda-in-the-middle advisement:

> A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point,

[5] Exhibit 1, dash-cam recording at 6:25.

> bewilderment being an unpromising frame of mind for knowledgeable decision.

Seibert, 542 U.S. at 613-14.

Corporal Ripp tells Ms. Lederer that what she says "can and will be used against her," but hides his awareness that Deputy Leiter's pre-Miranda interrogation was "probably [] no good," meaning unusable for court because improperly obtained. RP 31. This too is evidence that Ms. Lederer was not afforded a meaningful opportunity to decide whether or not to talk to the police:

> What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.

Seibert, 542 U.S. at 613.

Under these circumstances, Ms. Lederer did not make a knowing waiver of her right to remain silent, because

> when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to

understand the nature of his rights and the consequences of abandoning them."

Seibert at 542 U.S. at 613-14, quoting from Burbine 475 U.S. at 424.

b) Under Missouri v. Seibert, the mid-interrogation warning did not effectively advise Ms. Lederer of her rights.

"A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition." Darwin v. Connecticut, 391 U.S. 346, 350-51, 88 S.Ct. 1488, 1490, 20 L.Ed.2d 630 (1968) (Harlan, J., concurring). Washington State was one of several jurisdictions that followed the "cat-out-of-the-bag" doctrine first announced in United States v. Bayer, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947). See State v. Lavaris, 99 Wn.2d 851, 852-53, 664 P.2d 1234, 1235 (1983) ("[O]nce a criminal defendant has let the "cat out of the bag", the subsequent giving of Miranda warnings alone will not erase the taint inherently associated with the pre-Miranda confession. Absent some kind of insulating factor to separate the two confessions, the second confession is as inadmissible as the first.")

Under Missouri v. Seibert "a trial court must suppress postwarning confessions obtained during a deliberate two-step

interrogation where the midstream Miranda warning was objectively ineffective." Williams, 435 F.3d at 1150. (Discussing implications of fractured Seibert opinion.); State v. Hickman, 157 Wn. App. 767, 775, 238 P.3d 1240, 1244 (2010) (Adopting Williams interpretation of Seibert and reversing for deliberate Miranda-in-the-middle interrogation technique that "failed to apprise Hickman of knowledge essential to his ability to understand the nature of his Fifth Amendment right to remain silent.")

Seibert modified Oregon v. Elstad, 470 U.S. 298, 318, 105 S. Ct. 1285, 1297-98, 84 L. Ed. 2d 222 (1985). which held that there is no absolute rule calling for exclusion of all statements obtained through two-step interrogations and "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." The factual relationship between the two halves of a Miranda-in-the-middle interrogation is key.

Williams explained that "[t]he objective inquiries into deliberateness and effectiveness function practically as an analysis of whether the facts of a particular case more closely resemble those in Seibert or Elstad." Id., at 1162 n.16.

In Oregon v. Elstad, the police took a suspect into custody at his parents' home where he was briefly questioned about a burglary. He said he had been at the scene. This was deemed a voluntary statement, despite the lack of Miranda warnings. Elstad was then driven away to a police station. An hour passed. He was advised of his Miranda rights, agreed to be interrogated, and gave a detailed statement. On those facts, a majority of the Supreme Court was satisfied with barring just the first unwarned statement and allowing the prosecution to use the second post-Miranda confession. A comparison of the facts surrounding the two-step interrogation experienced by Ms. Lederer more closely resembles what occurred in Seibert than Elstad.

In terms of timing, the police in Seibert split their two rounds of questioning with a "pause of only 15 to 20 minutes." Seibert at 616. The officers who interrogated Ms. Lederer barely paused at all.[6] Elstad's second interrogation was in a completely different setting than the first, but the pre- and post-Miranda questioning that Seibert and Ms. Lederer were subjected to were done in the same place. The Elstad pre-Miranda statement was limited, but both the Seibert and Ms. Lederer's pre-Miranda statements were complete, and overlapping. "When the

[6] Unlike Seibert, Ms. Lederer was not treated to any coffee or cigarettes. Seibert at 605.

police were finished there was little, if anything, of incriminating potential left unsaid." Seibert at 616. Ms. Lederer admitted to Deputy Leiter the drugs found in Kirby's pocket were hers and repeated this when questioned by Corporal Ripp. Exhibit 1. The two cases are likewise similar in terms of continuity of the interrogating officers. Some nine minutes and twenty-two seconds into the dash-cam recording Deputy Leiter interjects into Corporal Ripp's post-Miranda questioning. Deputy Leiter asked "I'm just trying to find out whose it is" and Ms. Lederer's answered with "if anything it's ours. I'll take it." Deputy Leiter persisted: "But you were both doing it right?" Corporal Ripp was present when Deputy Leiter started the interrogation. By the time of the second round, the officers had talked about how the first half of the interrogation was done without Miranda warnings, but nonetheless felt free to tag-team the appellant. RP 9, 23.

Finally, it is valuable to note that in suppressing the post-Miranda statements in Seibert, Justice Souter remarked that the interrogators in that case "did not advise that her prior [unwarned] statement could not be used" if Seibert asserted her Fifth Amendment right to remain silent. Seibert, 616. In that respect Ms. Lederer's experience was also like that of Seibert.

Seibert does differ from Ms. Lederer's situation in that the interrogators there followed a departmental policy of intentionally withholding Miranda warnings, with an overarching plan to get a suspect to restate an initially unwarned confession. While the Mason County Sheriff's Officers who arrested and interrogated Ms. Lederer did not make a similar admission that the two-step procedure they employed was deliberate from the start, this does not mean the inquiry is over and the post-Miranda statement comes in. "[T]he intent of the officer will rarely be as candidly admitted as it was here." Seibert, 542 U.S. at 617 n. 6 (Souter, J., plurality opinion).

c) The objective evidence shows this was a deliberate two-step interrogation; the trial court misapplied Seibert.

The rule announced in Williams, already adopted by this Court in State v. Hickman, is as follows:

> Consistent with our sister circuits, we hold that in determining whether the interrogator deliberately withheld the Miranda warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning.

Williams, at 1158.[7]

In other words, a police admission, like that in Seibert, that the Miranda-in-the-middle procedure was deliberately used to interfere with Miranda's purpose would lead to suppression. But, on the other hand, a police denial of such intentional action, as what is present here, is not dispositive. The trial court must consider the relevant objective evidence which "would include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." Williams, at 1159. "[A]vailable expressions of subjective intent suggesting that the officer acted deliberately to undermine and obscure the warning's meaning and effect" remain relevant as well. Id., at 1160.

Engaging in an analysis of the Williams factors for testing deliberateness, the trial court below set off on the right path, but reached the wrong result. RP 41-47. The trial court correctly found that the two halves of Ms. Lederer's interrogation were "very close in

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[7] Seibert was a fractured opinion; "[t]his test functions appropriately as a combination of Justice Souter's plurality opinion and Justice Kennedy's concurrence." Williams, at 1158 n 12. See State v. Hickman, 157 Wn. App. at 772-75 (Discussing Seibert and adopting Williams test.)

time." RP 45. Indeed, the pause between the unwarned and warned parts of the police questioning of Ms. Lederer was so short that treating what occurred as one ongoing event is more accurate than pretending there were two interrogations. "[I]t would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle." Seibert, 542 U.S. at 614.

Next, the trial court correctly acknowledged that the setting of Ms. Lederer's questioning remained the same both pre- and post-Miranda. RP 45-46. The trial court correctly noted that in terms of continuity of interrogating personnel, "they were the same two officers." RP 46. Last, the trial court got it right when it said "these statements overlap." RP 46. Five of the five objective factors that speak to deliberateness were present. This should have been enough to find the process "deliberate" as the term is used in Seibert and Williams.

However, the trial court veered off course, focusing on Deputy Leiter's claims that he thought Corporal Ripp had Mirandized Ms. Lederer before Deputy Leiter opened the door and asked "Is that your meth he had on him?" RP 46, 47. But, objective evidence cannot play

second fiddle to what the police say about their failure to obey Miranda's command, precisely because "the intent of the officer will rarely be as candidly admitted as it was here," Seibert, 542 U.S. at 617 n. 6 (Souter, J., plurality opinion). There would be no need for the objective part of the analysis, if the officers' testimony could be outcome-determinative.[8]

On these facts all objective evidence signaled that Ms. Lederer did not receive an effective advisement of her rights due to a deliberate two-step process. In addition, the officers' actions revealed more about their intent than the trial court cared to acknowledge. First, Deputy Leiter employed a two-step interrogation procedure not only against Ms. Lederer, but also against Mr. Kirby, and there was no mistaking that fact. RP 8, 10, 16-17. It is dubious he would think – but not verify – that Corporal Ripp Mirandized Ms. Lederer when he himself had chosen not to Mirandize the suspect he put in cuffs. Second, Corporal Ripp, with knowledge that he was paying attention to Deputy Leiter conduct an illegal interrogation, chose not to interrupt, even though he very well could have. ("It may not be the only way but that's what I chose to do at the time." RP 29.) Third, the police attempt to "remedy"

[8] The dissenters in Seibert also rejected the notion of an intent-based test as not practicable. Seibert, at 622-29. (O'Connor, J., dissenting).

their errors evidence no real motivation to make sure that Ms. Lederer receive an effective advisement of her Miranda rights. If that had been the case, Corporal Ripp would not have gone ahead with his half of the interrogation an instant after the unwarned questioning and in the same place.

The drive to the jail was twenty to thirty minutes. RP 27. Even waiting that long to resume the questioning of Ms. Lederer would have been better because it would have changed the setting and put in a buffer between the first unwarned half of the interrogation. But, Corporal Ripp did not "see a problem" with starting-up a second interrogation of Ms. Lederer right then and there at the scene. RP 31.

Truth be told, there is evidence that his decision to strike while the iron was hot was conscious and deliberate. Corporal Ripp understood that waiting carried with it the possibility that, once informed of her Miranda rights, Ms. Lederer would choose to assert them and not talk. He testified from experience: "just because they're talkative at one point doesn't mean they're going to be talkative when I talk to them." RP 31-32. Corporal Ripp took advantage of the fact that in a closely related Miranda-in-the-middle questioning such as this one, a suspect may "regard the two sessions as parts of a continuum" and

find it "unnatural to refuse to repeat at the second stage what had been said before." Seibert, at 617. Some police may find such a tactic desirable, but it is unconstitutional: "These circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id.

The trial court's conclusion was contrary to the sum of the evidence present, objective and subjective. A review of a few other post-Seibert decisions likewise demonstrates the error below. In United States v. Capers, 627 F.3d 470, 472-73 (2d Cir. 2010), a postal investigator testified he did not read the suspect his rights because he was in a hurry to track down missing money order evidence he worried might get lost in the large mail-sorting facility.

The Second Circuit Court of Appeals did not find this excuse persuasive and held that the "initial interrogation conducted by an investigator aware of the obvious need for a Miranda warning, followed 90 minutes later by a second, post-Miranda interrogation by the same investigator, on the same subject matter, under similar circumstances and with no explicit curative language amounted to a deliberate, two-

step interrogation technique designed to undermine the defendant's Miranda rights." Id.

In United States v. Barnes, 713 F.3d 1200, 1206 (9th Cir. 2013), the Ninth Circuit applied the Williams test and also reversed, ordering suppression, because federal agents deliberately withheld Miranda warnings. The fact that the agents' subjective "ultimate goal of the interrogation" was to gather information about a different suspect was of little consequence in light of the objective evidence regarding the Miranda-in-the-middle interrogation that, like Ms. Lederer's case, more closely resembled Seibert than Elstad. See also State v. Hickman, 157 Wn.App. at 772. (Affirming suppression where detective used Miranda-in-the-middle technique to interrogate a sex offender about his registration failures and the first half of the interrogation had the guise of a having an "administrative," and not criminal, function.)

d) The error requires reversal and dismissal.

When an interrogator has deliberately employed the two-step strategy, Seibert requires the court then to evaluate the effectiveness of the midstream Miranda warning to determine whether the second statement is admissible. Williams, at 1160, citing to Seibert, 542 U.S. at 615, (Souter, J., plurality opinion); Id. at 622 (Kennedy, J.,

concurring in the judgment). The "effectiveness" analysis is similar to the deliberateness test. Here, the two are sufficiently intertwined that for practical purposes, they merge.[9] As argued above, the State did not establish that Ms. Lederer received an effective advisement or that she made a knowing, intelligent, and voluntary waiver.

On appeal, the adequacy of the required Miranda warning is reviewed de novo. Williams, 435 F.3d at 1151. (Remanding for a new suppression hearing, rather than reversing, as the trial court in that case issued its ruling before Seibert.) "On direct review, the government's commission of a constitutional error requires reversal of a conviction unless the government proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " United States v. Garibay, 143 F.3d 534, 539 (9th Cir.1998) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). Here, the wrongfully admitted statements were the very reason Ms. Lederer was prosecuted in the first place.[10] The conviction must be reversed and the case dismissed for insufficient evidence.

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[9] The parties below agreed that the question of deliberateness was dispositive. RP 27-28.

[10] The prosecutor below said that "if the statements are suppressed... the State will not be moving forward and will be dismissing this case." RP 2.

2. THE TRIAL COURT ERRED IN ADMITTING THE STATEMENTS IN VIOLATION OF THE CORPUS DELICTI RULE AND THAT TOO REQUIRES REVERSAL.

The 0.7 of a gram of methamphetamine at issue here was inside a small plastic baggie in Mr. Kirby's trousers. Mr. Kirby, who was also arrested for this crime, did not testify. RP 49. The State argued that Ms. Lederer had constructive possession over the same drugs. RP 115-16.

Actual possession means that the goods are in the personal custody of the person charged with possession, while constructive possession is established when the person charged with possession has dominion and control over either the drug, State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969), or the premises. State v. Davis, 16 Wn.App. 657, 659, 558 P.2d 263 (1977).

Corpus delicti means the body of the crime and must be proved by evidence sufficient to support the inference that there has been a criminal act. State v. Brockob, 159 Wn. 2d 311, 327, 150 P.3d 59, 68 (2006), as amended (Jan. 26, 2007), citing State v. Aten, 130 Wn. 2d 640, 927 P.2d 210 (1996).

A defendant's incriminating statement alone is not sufficient to establish that a crime took place and the State must present other

independent evidence to corroborate a defendant's statement. Aten, 130 Wn.2d at 655-56. Here, the State failed to corroborate the notion that Ms. Lederer had constructive possession over the very same baggie that Mr. Kirby actually had on his person. "[T]he State must present evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred." Brockob at 328. (Emphasis in the original.)

"The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement." Id. (Emphasis in the original.) To determine whether there is sufficient independent evidence under the corpus delicti rule, the evidence is reviewed in the light most favorable to the State. Brockob, at 328; Aten at 658. However, "[i]f the facts suggest there is an innocent hypothesis for the events, the State's evidence is insufficient to corroborate a defendant's confession." Brockob, at 335. Aten at 646-47, 660. The defendant in Aten confessed to smothering an infant, but because the pathologist who testified about the child's death could not conclude that infant died as a result of human action, the Supreme Court reversed her conviction on corpus delicti grounds.

In Brockob, the Supreme Court applied the corpus delicti rule and reversed the defendant's conviction for the crime of unlawful possession of pseudoephedrine and/or ephedrine with the intent to manufacture methamphetamine. Brockob had stolen packets of Sudafed and admitted his intent to sell them to someone who was going to manufacture methamphetamine. Brockob, at 332. However, outside that admission, there was no other evidence regarding Brockob's intent beyond theft. The court found "the State's evidence was insufficient "to support an inference that he committed the crime with which he was charged." Id. (Emphasis in the original.)

In ruling against the defense motion to exclude Ms. Lederer's statements, the trial court relied on a Division I case, State v. Solomon, 73 Wn.App. 724, 870 P.2d 1019 (1994) which affirmed a conviction for possession of a controlled substance. In Solomon, the police executed a search warrant to seize narcotics at a Seattle apartment. A Yolanda Philips lived there, but defendant Solomon arrived on the scene, told the police he was Ms. Philips' boyfriend, that he lived there too, that he was a user, "and that Phillips probably found the cocaine in his pants and had taken it out in order to confront him with it." Id. at 726. The drugs in question were found in a nightstand. Unlike Ms.

Lederer's case, no one was in actual possession of the drugs. Solomon, not Philips, was prosecuted on a constructive possession theory.

Solomon moved to exclude his admission of ownership of the drugs on corpus delicti grounds but the motion was denied and he was convicted. On appeal, he argued "that the crime of possession of cocaine is analogous to those crimes where the identity of the accused is included as an element of the corpus delicti." Id. at 727, citing to Bremerton v. Corbett, 106 Wn.2d 569, 573–74, 723 P.2d 1135 (1986); State v. Hamrick, 19 Wn.App. 417, 419, 576 P.2d 912 (1978)).

Acknowledging that "Washington courts have recognized that there are certain crimes where the identity of a particular person must be established as part of the corpus delicti (*e.g.*, reckless or drunken driving, attempt, conspiracy, perjury," the Solomon court said "[p]ossession of a controlled substance is not a crime of that nature." Id. (Internal citations omitted.) The opinion went on to say that "in a possession case, it is clear that a crime occurred if drugs are in the possession of someone; identity is not essential to establish the fact that a crime occurred." Id.

This case, however, is factually inapposite and Solomon cannot dictate its outcome. In Solomon, no one had actual possession of the

drugs, but it stood to reason that *someone* had constructive possession over them. Here, a known someone (Mr. Kirby) had actual possession of the drugs – and that was certainly *a crime* – but it does not stand to reason that *someone else* must have had constructive possession of the same drugs – which would be *a different crime* altogether.

A defendant's statement is admissible if the State presents evidence that corroborates "not just a crime but the specific crime with which the defendant has been charged." Brockob, at 329. (Emphasis in the original.) Under Washington law, mere proximity, without more, is insufficient to establish constructive possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); State v. Portrey, 102 Wn.App. 898, 902, 10 P.3d 481 (2000).

Setting Ms. Lederer's statements aside, all that the evidence below indicated was that Mr. Kirby had an exclusive ownership interest in what was in his pocket, not that someone else was simultaneously in constructive possession of the baggie. Ms. Lederer being near the drugs, or even in the same trailer from which Mr. Kirby emerged, is not enough. The trial court erred in short-circuiting the relevant analysis: "the State need only offer proof that someone committed the crime. They have done so." RP 114.

The analysis of the sufficiency of the corroboration for corpus delicti purposes does not turn on a finding the accused is actually innocent. Brockob, at 332. However, there is insufficient corroboration when the evidence is equivocal: "evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either." State v. Aten, 79 Wn.App. 79, 91, 900 P.2d 579, 585 (1995) aff'd, 130 Wn.2d 640, 927 P.2d 210 (1996).

Like in Aten, the statements should have been excluded. Accordingly, the conviction must be reversed and the case dismissed for insufficient evidence.

F. CONCLUSION

The trial court improperly admitted Ms. Lederer's statements in violation of Miranda and the corpus delicti rule. Without Ms. Lederer's statements there is insufficient evidence to support the charge. The conviction must be reversed and dismissed.

DATED this 2nd day of January 2015.

Respectfully submitted,

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Attorney for Appellant

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

STATE OF WASHINGTON, Respondent, v. CAITLYN LEDERER, Appellant.	)))))))))	NO. 46291-5-II

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