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Division III
State of Washington
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Supreme Court No. 96004-6
Court of Appeals No. 34936-5-III

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

MARK NYUTU,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Mark Nyutu asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS' DECISION

The Court of Appeals issued its opinion affirming Mr. Nyutu's conviction for second degree assault on April 19, 2018. The Court of Appeals denied Mr. Nyutu's motion for reconsideration on May 17, 2018. Copies of these rulings are attached in the appendix.

C. ISSUES PRESENTED FOR REVIEW

1. To admit custodial statements elicited from the accused, the prosecution must prove that the defendant was provided complete and accurate Miranda warnings. These warnings must convey that, before any questioning: (1) the suspect has the right to remain silent; (2) anything said can be used against the suspect; (3) the suspect has the right to have counsel present before and during questioning, and (4) if the suspect cannot afford counsel, one will be appointed. In this case, the sole evidence was a police report, which stated Mr. Nyutu "was advised of his constitutional rights." But the report provided no details or explanation as to what this meant. Did the trial court err in ruling that the prosecution had met its burden to prove that complete and accurate Miranda warnings were provided to Mr. Nyutu?

2. After holding a CrR 3.5 hearing, the trial court ruled that statements elicited from Mr. Nyutu while in custody were admissible because Mr. Nyutu had been provided adequate Miranda warnings and waived his rights. Mr. Nyutu challenged this conclusion on appeal, contending the prosecution had not met its burden to prove the foregoing. An argument that the burden of proof was not satisfied is properly raised on appeal. RAP 2.5(a)(2). Did the majority opinion by the Court of Appeals err by refusing to review Mr. Nyutu's assignment of error?

D. STATEMENT OF THE CASE

A complete recitation of the facts can be found in Mr. Nyutu's opening brief. For purposes of this petition, a short summary suffices.

Mark Nyutu was arrested after a confrontation with a bouncer at a bar. CP 3. Following his arrest, Mr. Nyutu's interactions with police were captured on a body camera worn by Officer Thomas Cornish. RP 177-78; Ex. 4. In response to police questioning, Mr. Nyutu made statements to the police about what had happened. Ex. 4. Mr. Nyutu was later charged with second degree assault with the bouncer as the alleged victim. CP 5-6; RCW 9A.36.021(1)(a).

The trial court held a CrR 3.5 hearing. RP 4-11. The only evidence offered by the prosecution was the probable cause document written by Officer Cornish. CP 3. In this report, Officer Cornish wrote that Mr.

"Nyutu was advised of his constitutional rights." Based solely on this written report, the court admitted Mr. Nyutu's statements to the police, finding that Mr. Nyutu was "read his full Miranda rights." RP 10-11.[1]

The video, which included Mr. Nyutu's statements, was used at trial and cited by the prosecution as evidence in support of its case and to convince the jury to convict. RP 178-79, 268-88; Ex. 4. A jury convicted Mr. Nyutu as charged. RP 292.

Mr. Nyutu argued on appeal that the trial court erred at the CrR 3.5 hearing in admitting his custodial statements elicited by law enforcement. He argued the written report, which was the sole evidence before the court, was insufficient to support the trial court's ruling that the prosecution had met *its burden* of proving that complete, accurate, and nonconflicting Miranda warnings were provided to Mr. Nyutu. Br. of App. at 16-20; Reply Br. at 1-4.

Although not conceding error, the prosecution confessed the evidence before the trial court was a "very poor example of how to prove that the defendant was advised of his rights" and "meekly" submitted there was a valid Miranda waiver. Br. of Resp't at 11. The prosecution did not

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

argue that the issue raised by Mr. Nyutu was not properly before the Court of Appeals. Br. of Resp't at 1-15.

Nevertheless, without calling from a response from Mr. Nyutu,[2] a majority of the Court of Appeals refused to review the issue. Despite the issue simply being whether the State had submitted sufficient evidence to meet its burden at the CrR 3.5 hearing to prove compliance with Miranda, the majority reasoned that Mr. Nyutu was making a new argument and that RAP 2.5(a)(3) did not permit him to raise the claimed error for the first time on appeal as manifest constitutional error. Slip. op. (majority) at 6. Judge Siddoway issued a short opinion concurring in the result, concluding that the written statement was adequate because there was no evidence indicating inadequate Miranda warnings. Slip. op. (concurrence) at 1.

Mr. Nyutu filed a motion to a reconsider, explaining why the issue was properly before the Court and why the concurring opinion erred in rejecting Mr. Nyutu's arguments on the merits, but the Court of Appeals denied the motion without comment.

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[2] Ordinarily, the appellate court will decide issues based on the briefs of the parties. RAP 12.1(a). Although the appellate court retains discretion to decide the case based on an issue not raised by a party, RAP 12.1(b), the court will ordinarily request briefing on the matter. State v. Aho, 137 Wn.2d 736, 741, 975 P.2d 512 (1999). The court did not request briefing from Mr. Nyutu on RAP 2.5(a).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. A report stating that the defendant was "advised of his constitutional rights" is insufficient to prove that complete and accurate *Miranda* warnings were provided to the defendant. The Court of Appeals should have held that the trial court erred in admitting Mr. Nyutu's statements.

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these constitutional rights, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before interrogation. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). Absent a valid waiver, statements obtained from custodial interrogation are inadmissible. Miranda, 384 U.S. at 475.

It is firmly established that *the government* bears the burden of showing compliance with Miranda. J.D.B. v. North Carolina, 564 U.S. 261, 269-70, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011); State v. Mayer, 184 Wn.2d 548, 558-59, 362 P.3d 745 (2015). To meet this burden, *the government* must show that the Miranda warnings were accurate, although the exact words from the Miranda opinion need not be used. Mayer, 184 Wn.2d at 548. "The Government cannot and should not presume that individuals are already aware of what rights they possess prior to being

questioned." United States v. San Juan-Cruz, 314 F.3d 384, 389 (9th Cir. 2002).

The warnings must convey to the suspect that, before any questioning, (1) the suspect has the right to remain silent; (2) anything said can be used against the suspect; (3) the suspect has the right to have counsel present before and during questioning, and (4) if the suspect cannot afford counsel, one will be appointed. In re Woods, 154 Wn.2d 400, 434, 114 P.3d 607 (2005). Conflicting or confusing sets of warnings may invalidate a defendant's waiver. Mayer, 184 Wn.2d at 562. A legal conclusion concerning the adequacy of the Miranda warnings is an issue of law reviewed de novo. Id. at 548.

If a statement of an accused person is to be offered into evidence, the court must hold a hearing to determine the admissibility of the statement, at which the prosecution bears the burden of proof. CrR 3.5(a). The State sought to admit Mr. Nyutu's statements to the police into evidence. CP 8.

The court held a hearing on December 9, 2016. RP 4. At the hearing, the sole evidence consisted of the certification of probable cause, i.e., a police report, written by Officer Cornish. RP 6-7; CP 2-4.

Concerning his interaction with Mr. Nyutu, Officer Cornish wrote that Mr. Nyutu "was advised of his constitutional rights," but provided no further details:

> I asked Nyutu to tell me what happened between Laolagi and him. Nyutu was heavily intoxicated. Nyutu said he was getting a beer from the bar. He said he inadvertently bumped into a female. Initially Nyutu said Laolagi punched him, but later said Laolagi only pushed him. He did not know that Laolagi was an employee. He said he defended himself. I asked him to explain to me what he meant by defended himself. Nyutu would not elaborate. I placed Nyutu under arrest for Assault in the 2nd Degree. Nyutu was advised of his constitutional rights and that he was being audio and visually recorded. Nyutu said he understood. Once at the station Nyutu said he wanted to tell his side of the story. Nyutu said Laolagi pushed him at the bar. He said Laolagi was not wearing a 'staff' shirt and he did not know Laolagi was an employee. He said he reacted and punched Laolagi with his right hand. He said they both fell to the ground. He said he punched Laolagi because he felt like he was getting attacked. He said the beer bottle was in his hand, but he was unsure how the bottle got broken. He said it happened so fast he could not recall his exact actions after being pushed.

CP 3 (emphasis added). The other parts of the report relate to Officer Cornish's observations and statements made by others. CP 3.

The court admitted all of Mr. Nyutu's statements. RP 10-12. The court ruled that Mr. Nyutu had been "given his full Miranda warnings" and that Mr. Nyutu validly waived his rights by acknowledging them and speaking with the police. RP 10-11.

The State failed to prove that Mr. Nyutu was provided complete, accurate, and nonconflicting Miranda warnings. The only evidence before the court on this issue was that "Nyutu was advised of his constitutional rights." CP 3. It is unclear what "constitutional rights" the officer is referring to. There are many constitutional rights. Even if it could be inferred that this meant that Mr. Nyutu was read Miranda warnings, this does not establish that the warnings were adequate. Thus, the State failed to meet its burden. See Mayer, 184 Wn.2d at 566 (State failed to meet burden establishing valid waiver of Miranda rights because explanation of rights was deficient).

Judge Siddoway, who authored the concurring opinion, rejected the foregoing argument because there was "nothing to suggest an insufficient advisement." Slip op. at 1 (Siddoway J., concurring in result). But this does not matter because Mr. Nyutu did not bear the burden of proof. Importantly, the absence of evidence or a finding at a suppression hearing is construed against the State because it is the party with the burden of proof. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Thus, the absence of evidence supports Mr. Nyutu's position that the State failed to prove adequate and complete Miranda warnings were provided.

Judge Siddoway quoted from a Court of Appeals' decision stating that a "trial court's determination of voluntariness will not be disturbed on appeal" if there is substantial evidence in the record to establish voluntariness. Slip op. at 1 (Siddoway J., concurring) (quoting State v. Woods, 34 Wn. App. 750, 759, 665 P.2d 895 (1983)). But Woods dealt with an argument about whether the evidence showed a voluntary waiver. Woods, 34 Wn. App. at 759. The Woods court concluded the evidence did because the defendant signed a "standard waiver of rights form." Id. In this case, no comparable evidence was submitted to the trial court at the CrR 3.5 hearing. Therefore, the holding of Woods does not show there was no error in this case. Further, the quote from Woods appears to conflate the due process voluntariness test with the Miranda rule. See Dickerson v. United States, 530 U.S. 428, 432-35, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (explaining differences).

A cursory statement in a report that a person was read his "constitutional rights" is inadequate to prove compliance with Miranda. The trial court and the concurring opinion's contrary conclusions conflict with this Court's decisions setting out the State's burden and what is required to prove compliance with Miranda. RAP 13.4(b)(1); Woods, 154 Wn.2d at 434; Mayer, 184 Wn.2d at 562. Because the defendant's constitutional right against self-incrimination is at issue, the watering

down of what evidence is necessary to satisfy this burden should not be tolerated. Review should be granted on this important constitutional issue that is a matter of public concern. RAP 13.4(b)(3), (4).

2. **Whether the evidence supported the trial court's ruling was squarely before the Court of Appeals. An argument that the prosecution failed to carry its burden is an issue properly raised for the first time on appeal under RAP 2.5(a)(2). The majority opinion's contrary conclusion merits this Court's review.**

Sua sponte, a majority on the panel deciding Mr. Nyutu's appeal ruled that the foregoing issue was improperly raised for the first time on appeal. Slip. op (majority) at 6-7. The majority reasoned the claimed error was not properly before court as manifest constitutional error under RAP 2.5(a)(3) because the error was not "manifest." Slip. op (majority) at 6-7. Although the prosecution bore the burden of proof, the court reasoned:

> Here, the facts necessary to adjudicate the claimed error are not present in the record before us. Specifically, we do not know exactly what rights and warnings Officer Cornish provided to Mr. Nyutu prior to custodial questioning. As mentioned previously, Mr. Nyutu offered no evidence or argument at the CrR 3.5 hearing. He did not argue that the Miranda warnings were inadequate. Because Mr. Nyutu failed to make this argument below, the State did not request to reopen the record so it could call Officer Comish to explain the nature and extent of the warnings he provided. We conclude that the unpreserved claim of error is not manifest and decline to consider Mr. Nyutu's argument.

Slip. op at 6-7 (majority).

Mr. Nyutu moved for reconsideration. He argued the majority should reconsider its decision because an issue concerning the burden of proof is properly raised for the first time on appeal under RAP 2.5(a)(2).

RAP 2.5(a)(2) provides that an appellant may raise for the first time on appeal, as matter of right, the "failure to establish facts upon which relief can be granted." Gross v. City of Lynnwood, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978). This provision allows parties to raise an issue as to failure by a party to sustain their burden of proof for the first time on appeal. Gross, 90 Wn.2d at 399-401 (argument that age discrimination suit could not be maintained because plaintiff was too young to fall within the protection of the statute properly raised on appeal); State v. D.E.D., 200 Wn. App. 484, 489 n.3, 402 P.3d 851 (2017) ("Sufficiency of the evidence is an issue that may be presented for the first time on appeal.") (citing RAP 2.5(a)(2)).

For example, the Court of Appeals' opinion in T.A.W. is instructive. In re Adoption of T.A.W., 188 Wn. App. 799, 354 P.3d 46 (2015) affirmed, 186 Wn.2d 828, 383 P.3d 492 (2016). There, a parent who had his rights involuntarily terminated argued that plaintiffs had failed to satisfy the "active efforts" of the Indian Child Welfare Act. Id. at 806-807. This argument was not made in the trial court. Id. at 807. Still, the court reviewed the claimed error because it involved "the 'failure to

establish facts upon which relief can be granted,' which can be raised for the first time on appeal under RAP 2.5(a)(2)." Id. at 808. The court rejected the argument that the issue could not be considered because the record did not show what remedial services could have prevented termination. Id. at 805 n.5.

Analogously, for the prosecution to be entitled to introduce statements elicited from Mr. Nyutu during custody, the State bore the burden of establishing the necessary facts. As explained earlier, establishing that Mr. Nyutu was read his Miranda rights and that he provided a valid waiver were facts *the prosecution* bore the burden of proving. That Mr. Nyutu did not argue the facts were insufficient below at the CrR 3.5 hearing, and instead deferred to the trial court on the issue, does not preclude Mr. Nyutu from raising the issue on appeal. RAP 2.5(a)(2). The trial court made a ruling that the evidence proved that Mr. Nyutu "was read his full *Miranda* rights." RP 9. That ruling was fair game for Mr. Nyutu to challenge on appeal and was squarely before the Court of Appeals.

The majority opinion from the Court of Appeals implies that this result is unfair. The court quoted from an earlier case noting the potential for abuse in allowing parties to raise new issues for the first time on appeal. Slip. op at 6 (citing State v. Lazcano, 188 Wn. App. 338, 356, 354

P.3d 233 (2015)). The Court of Appeals then reasoned that had Mr. Nyutu made his argument below, the State could have "request[ed] to reopen the record so it could call Officer Cornish to explain the nature and extent of the warnings he provided." Slip. op at 7.

The result is not unfair. The prosecution bore the burden of proof and the law of Miranda is well established. Holding the prosecution to its burden of proof and giving it one bite at the apple is not unfair. See State v. Hickman, 135 Wn.2d 97, 101-06, 954 P.2d 900 (1998) (prosecution bears burden to prove all requirements as set out in the jury instructions and failure to do so requires dismissal with prejudice). For example, in a case where the State assumed the added burden of proving venue and defense counsel realized the State would not prove this requirement, the Court of Appeals reasoned it was not invalid for the defense to remain quiet about the proposed jury instructions. State v. Hobbs, 71 Wn. App. 419, 424, 859 P.2d 73 (1993). The appellate court explained that "[d]efense counsel is an advocate for her client, not a 'law clerk for the prosecutor":

> The State now characterizes this defense strategy as 'lying in the weeds' on a 'technicality'. We disagree. This was a valid defense strategy under these circumstances. Defense counsel is an advocate for her client, not a 'law clerk' for the prosecutor.

Id. Similarly, defense counsel had no duty to point out the flaw in the State's evidence at the CrR 3.5 hearing. This was a valid defense strategy.

Raising an issue concerning a failure by the State to meet its burden of proof is proper under RAP 2.5(a)(2). The Court of Appeals' failure to recognize this conflicts with precedent. RAP 13.4(b)(1), (2). Mr. Nyutu was entitled to challenge the trial court's ruling that the evidence satisfied the prosecution's burden at the CrR 3.5 hearing. The dereliction by the appellate court of its duty to review the trial court's ruling is an issue of substantial public interest meriting review. RAP 13.4(b)(4). And because criminal defendants have a state constitutional right to appeal, the matter is also a significant constitutional issue meriting review. RAP 13.4(b)(3); Const. art. I, § 22; State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

F. CONCLUSION

The evidence did not prove that Mr. Nyutu was "read his full Miranda rights." Mr. Nyutu properly raised this issue concerning the prosecution's failure to meet its burden of proof on appeal. The Court of Appeals should have addressed Mr. Nyutu's argument and held the obvious: that more is needed to prove that complete and accurate Miranda warnings were provided to defendant than a cursory statement that a

defendant was “read his constitutional rights.” This Court should grant review and reverse.

DATED this 18th day of June, 2018.

Respectfully submitted,

/s Richard W. Lechich

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Appendix

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CASE # 349365
State of Washington v. Mark Njoroge Nyutu
WHITMAN COUNTY SUPERIOR COURT No. 161000651

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and <u>two copies</u> of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 34936-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
MARK NJORGE NYUTU,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Mark Njorge Nyutu appeals after his conviction for second degree assault. He argues that the trial court erred by admitting his custodial statements without adequate proof that the arresting officer provided proper *Miranda*[1] warnings. Mr. Nyutu did not raise this argument below. Because the claimed error is not manifest, we decline to review it and affirm Mr. Nyutu's conviction.

FACTS

Faatuiolemoutu Laolagi was working as a bouncer at Stubblefields, a large bar in Pullman, Washington. All bouncers at Stubblefields wear a shirt that says "Stubblefields"

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

on the front and “Staff” on the back. Report of Proceedings (RP) at 116. Shortly before closing time at 2:00 a.m., Mr. Laolagi noticed Mr. Nyutu leaning up against the bar with his back, which is against bar policy. Mr. Laolagi approached Mr. Nyutu, moved him away from the bar, and told him he could not lean against the bar. Mr. Nyutu refused, and Mr. Laolagi told him he was a bouncer. Mr. Nyutu became upset and agitated, and began swearing at and threatening Mr. Laolagi. Several security cameras at the bar recorded portions of the incident.

Because Mr. Nyutu was making threats, Mr. Laolagi signaled other employees to come over and informed Mr. Nyutu that he had to leave the bar. DeMaundray Woolridge, another employee, came over to assist Mr. Laolagi. At the same time, Mr. Nyutu signaled one of his friends to come over. After a brief conversation, the employees began moving Mr. Nyutu down some stairs and out of the bar. Mr. Nyutu had a beer bottle in his left hand.

At this point, Mr. Nyutu swung at and punched Mr. Laolagi with his right hand and said, “man, I told you.” RP at 164. Mr. Laolagi tackled him in response and the two men both went down. The beer bottle shattered at some point. Mr. Laolagi was on top of Mr. Nyutu, who continued to punch Mr. Laolagi in the head but now with the hand

holding the beer bottle. Mr. Laolagi suffered substantial injuries to his head. Law enforcement officers arrived at the scene.

Officer Thomas Cornish conducted a preliminary investigation and determined there was probable cause to arrest Mr. Nyutu. Officer Cornish provided *Miranda* warnings to Mr. Nyutu, and Mr. Nyutu said he wanted to provide a statement. At the police station, Officer Cornish told Mr. Nyutu that the interview was being recorded. During the interview, Mr. Nyutu acknowledged he knew he had a broken beer bottle in his hand when he punched Mr. Laolagi.

The State charged Mr. Nyutu with second degree assault. The trial court held a CrR 3.5 hearing to determine the admissibility of Mr. Nyutu's statements to police. At the hearing, the State submitted Officer Cornish's affidavit of probable cause. Mr. Nyutu did not object to the State's submission; had he, it likely would have prompted the State to call Officer Cornish as a witness. The State did not call any witnesses. The trial court asked Mr. Nyutu whether he had any evidence to offer, and he said he did not.

The trial court considered Officer Cornish's affidavit and read it into the record. The portion relevant to the appeal reads:

> "I placed Nyutu under arrest for assault in the second degree. *Nyutu was advised of his constitutional rights*, and that he was being audio and digitally recorded. Nyutu said he understood. Once at the station, Nyutu said he wanted to tell his side of the story. Nyutu said Laolagi pushed him

> at the bar. He said Laolagi was not wearing a staff shirt, and he did not know Laolagi was an employee. He said he reacted and punched Laolagi with his right hand. He said they both fell to the ground. He said he punched Laolagi because he felt like he was getting attacked. He said the beer bottle was in his hand, but he was unsure how the bottle got broken. He said it happened so fast he could not recall his exact actions after being pushed."

RP at 8-9 (emphasis added).

The State provided argument why Mr. Nyutu's statements were admissible at trial. The trial court then asked Mr. Nyutu if he had any argument. Mr. Nyutu replied, "No comment, Your Honor. We'll just let the Court rely on the record." RP at 10.

The court then orally ruled:

> According to this report, defendant was placed under arrest, given his full *Miranda* warnings . . . . He did acknowledge that he understood the rights . . . [and] once he arrived at the police station, Mr. Nyutu . . . initiated making a statement saying he wanted to tell his side of the story . . . .
>
> [T]he Court is satisfied that he was advised of [his constitutional] rights, acknowledged that he understood, he initiated the contact to tell his side of the story. So my conclusion here will be that *Miranda* was honored, that he understood his rights, and he knowingly, voluntarily, and intelligently made the decision to waive those rights, so I will admit all statements at trial.

RP at 10-11.

At trial, Officer Cornish testified about Mr. Nyutu's statements. The State also showed the jury portions of the recording containing Mr. Nyutu's statements. During

closing arguments, the State again referred to Mr. Nyutu's statements and played the recording.

The jury found Mr. Nyutu guilty of second degree assault, and the trial court sentenced Mr. Nyutu to three months of confinement. He now appeals.

ANALYSIS

RESORT TO ORAL FINDINGS AND CONCLUSIONS

Preliminarily, Mr. Nyutu notes that the trial court failed to enter findings and conclusions following the CrR 3.5 hearing. He recognizes that remand for entry of such findings and conclusions is not necessarily required.

A trial court's failure to enter written findings and conclusions is harmless when the court's oral ruling is sufficient to permit appellate review. *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003). Here, the trial court's oral ruling is sufficient for our review.

FAILURE TO PRESERVE ISSUE

Mr. Nyutu contends the State did not meet its burden to prove law enforcement gave him adequate *Miranda* warnings. His central argument is that the State only provided Officer Cornish's probable cause affidavit at the CrR 3.5 hearing, which was

not specific enough to support the trial court's finding that adequate warnings were given. But Mr. Nyutu did not make this argument below.

A party generally may not raise an argument on appeal that the party did not make to the trial court. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *State v. Lazcano*, 188 Wn. App. 338, 356, 354 P.3d 233 (2015).

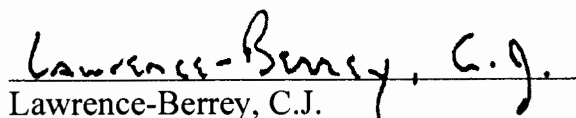
RAP 2.5(a)(3) is a commonly invoked exception that permits review of an unpreserved claim of error. "To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate that (1) the error is manifest and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wn.2d at 333.

Here, the facts necessary to adjudicate the claimed error are not present in the record before us. Specifically, we do not know exactly what rights and warnings Officer Cornish provided to Mr. Nyutu prior to custodial questioning. As mentioned previously,

Mr. Nyutu offered no evidence or argument at the CrR 3.5 hearing. He did not argue that the *Miranda* warnings were inadequate. Because Mr. Nyutu failed to make this argument below, the State did not request to reopen the record so it could call Officer Cornish to explain the nature and extent of the warnings he provided. We conclude that the unpreserved claim of error is not manifest and decline to consider Mr. Nyutu's argument.

Affirmed.[2]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Lawrence-Berrey, C.J.

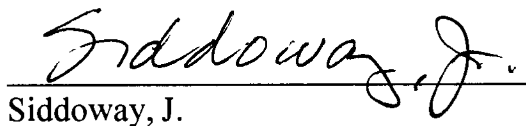
I CONCUR:

Korsmo, J.

[2] Although the record on appeal is insufficient for us to consider Mr. Nyutu's claimed error, he may raise the issue in a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

No. 34936-5-III

SIDDOWAY, J. (concurring in result) — I agree that Mark Njorge Nyutu's conviction should be affirmed. "Where the record indicates there is substantial evidence upon which a trial court could find by a preponderance of evidence that a confession was given voluntarily, the trial court's determination of voluntariness will not be disturbed on appeal." *State v. Woods*, 34 Wn. App. 750, 759, 665 P.2d 895 (1983) (citing *State v. Snook*, 18 Wn. App. 339, 348, 567 P.2d 687 (1977)). While the affidavit of probable cause stated only that "Nyutu was advised of his constitutional rights," Clerk's Papers at 3, there was no evidence presented to the trial court during the CrR 3.5 hearing to suggest that Mr. Nyutu's advisement of his rights was not adequate. Given the applicable burden of proof and nothing to suggest an insufficient advisement, the trial court could reasonably find from the statement in the affidavit of probable cause that the officer or officers who undertook to advise Mr. Nyutu of his rights did so correctly and sufficiently.



Siddoway, J.

Renee S. Townsley
Clerk/Administrator

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CASE # 349365
State of Washington v. Mark Njoroge Nyutu
WHITMAN COUNTY SUPERIOR COURT No. 161000651

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration. A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review within 30 days after the Order Denying Motion for Reconsideration is filed. Please file the Petition for Review electronically through the court's e-filing portal or, if in the paper format, only the original petition need be filed. RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

FILED
MAY 17, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

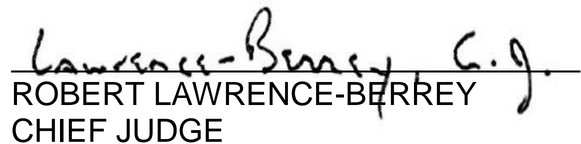
STATE OF WASHINGTON,	)	**No. 34936-5-III**
	)	
Respondent,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
MARK NJORGE NYUTU,	)	**RECONSIDERATION**
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of April 19, 2018, is denied.

PANEL: Judges Lawrence-Berrey, Korsmo, and Siddoway

FOR THE COURT:



ROBERT LAWRENCE-BERREY
CHIEF JUDGE

IN THE SUPREME COURT OF STATE OF WASHINGTON

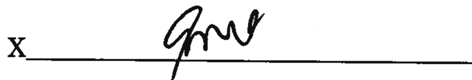
STATE OF WASHINGTON,	)	
RESPONDENT,	)	
v.	)	COA NO. 34936-5-III
MARK NYUTU,	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF JUNE, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURTR** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENIS TRACY, PROSECUTOR WHITMAN COUNTY PROSECUTOR'S OFFICE PO BOX 30 COLFAX WA 99111-0030 [denist@co.whitman.wa.us]	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] MARK NYUTU 1031 12TH ST NE AUBURN, WA 98002	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF JUNE, 2018.

X 

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