

NO. 62118-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DEMEKO HOLLAND,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

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**BRIEF OF RESPONDENT**

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2008 SEP -2 11 40:37  
COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
CHRISTOPHER WASHINGTON

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A. ISSUES PRESENTED

1. The State bears the burden of showing a voluntary, knowing and intelligent waiver of Miranda rights by a preponderance of the evidence, based on the totality of the circumstances. There is no dispute that Holland was advised of his constitutional rights and acknowledged understanding them. No threats or promises were made to induce Holland to speak. Holland freely spoke to police and never invoked his rights. Did substantial evidence support the trial court's finding that Holland was fully aware of his rights and knowingly, intelligently and voluntarily waived his rights?

2. The State is permitted to respond to a defense closing argument with a pertinent reply as long as the response is not incurably prejudicial. The defendant has the burden of proving impropriety and substantial and enduring prejudice if there is no objection to a prosecutor's argument. There was no objection to one challenged argument, which simply noted that the remarks of the defense lawyer were not evidence of the effects of a drug. The objection to the second argument that questions could have been asked on cross-examination of police witnesses apparently was not heard by the trial judge and no curative instruction was requested.

Has the defendant failed to establish the flagrant and ill-intentioned, incurable misconduct that would be reversible error, where the State's arguments were a fair response to the defense closing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Demeko Holland, was charged by amended information with murder in the first degree and unlawful possession of a firearm in the first degree. CP 30-31. A firearm enhancement was alleged with respect to the murder charge. CP 30. Both charges related to a shooting that occurred on August 18, 2003. CP 30-31.

A hearing pursuant to CrR 3.5 was held regarding the admissibility of statements that Holland made to police officers after the shooting. 2RP 11-153;<sup>1</sup> 3RP 1-27. The trial court found that all of the statements were admissible and entered written findings to that effect. CP 78-82 (attached as Appendix 1); 4RP 2-3.

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<sup>1</sup> The verbatim report of proceedings consists of 16 volumes, which will be referred to in this brief as follows: 1RP (6-2-08); 2RP (6-3-08); 3RP (6-4-08); 4RP (6-5-08); 5RP (6-9-08); 6RP (6-10-08); 7RP (6-11-08); 8RP (6-12-08); 9RP (6-16-08); 10RP (6-17-08); 11RP (6-18-08); 12RP (6-19-08); 13RP (6-23-08); 14RP (6-24-08); 15RP (6-25-08); and 16RP (8-6-08).

Holland was tried in King County Superior Court beginning on June 2, 2008, the Honorable Christopher Washington presiding. 1RP 1. A jury found Holland guilty of murder in the second degree with a firearm enhancement and unlawful possession of a firearm in the first degree. CP 72-74. The judge imposed a standard range sentence based on an offender score of seven on the murder conviction. CP 83-89.

## 2. SUBSTANTIVE FACTS.

Fourteen-year-old David Chhin<sup>2</sup> was riding his bicycle at the intersection of 35<sup>th</sup> Avenue SW and SW Juneau Street in West Seattle at about 11:20 a.m. on August 18, 2003, when he was shot dead. The shooter was an Afro-American man on foot, who continued to shoot as Chhin faced the shooter with his hands raised. 6RP 10, 18-25. After the shooter emptied his gun, Chhin collapsed and the shooter fled west on SW Juneau Street on foot. 6RP 25-26.

Chhin had been shot in the back twice, one bullet lacerating his lung and heart. 6RP 91-94. The penetrating gunshot wound to the heart was fatal. 6RP 94-95. Chhin also was shot in the back of

his right arm and had a gunshot injury on his left forearm. 6RP 94-95, 102-03. He had stippling marks on his right arm that indicated that a gun was fired in close proximity to the arm. 6RP 96-97.

Michael Anderson, who saw the final shots fired, saw the shooter run west on SW Juneau, toward Fauntleroy Way SW, and pursued him, finally losing sight of him around 38<sup>th</sup> Avenue near an alley. 6RP 28-33. Anderson never got closer than a block away from the man. 6RP 31. Later police brought Anderson to see Holland and Anderson said that he could identify Holland as the shooter with 70 percent accuracy. 6RP 36-38.

Julian Medina and Wade Bartlett, who were working nearby, heard the shots, went to investigate, and saw an Afro-American male run westbound on SW Juneau. 5RP 3, 7-10, 22-25. Medina saw a gun in the man's hand. 5RP 9.

James Olsen also heard shots fired and saw the man run westbound on SW Juneau, followed him, and finally lost him in the alley just before Fauntleroy. 6RP 70-77, 111-14. Olsen thought he saw the man drop something as he ran down Juneau, and saw a red bandanna near the spot. 6RP 134-35, 138. Detective Norton

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<sup>2</sup> In the verbatim report of proceedings the victim's name is spelled "Chinn" but the correct spelling of his family name is "Chhin," as reflected in the charging document, in the instructions, and in the judgment and sentence. CP 30, 55, 60, 83, 86.

collected that red bandanna on Juneau between 36<sup>th</sup> and 37<sup>th</sup>. 9RP 73-75. Detective Norton found a South Pole jacket in a recycling bin in an alley west of Fauntleroy, in the 5600 block. 9RP 76-80. Further north in the alley, in the 5400 block, Norton found a red South Pole T-shirt in another recycling bin. 9RP 84.

Adam Wallace and Michael Jacinto saw an Afro-American male run westbound across in the 5600 block of Fauntleroy. 6RP 145-49; 7RP 9-10.

William Arnett and Mark Griswold were neighbors on the 5400 block of 40<sup>th</sup> Avenue SW. 7RP 17, 48. They saw a man coming quickly from an alley, between their houses, and across 40<sup>th</sup> Avenue. 7RP 20-23, 48-50.

A year and a half later, William Arnett found a 9mm Smith & Wesson semi-automatic pistol under some bushes in his yard. 7RP 34-36; 10RP 21-22. A ballistics expert determined that all of the shell casings recovered at the intersection of 35<sup>th</sup> and SW Juneau on August 18, 2003, had been fired from that gun. 7RP 102-03; 11RP 130-31.

Most of the civilian witnesses who did not see the shooting itself were given the opportunity to view a photo montage but were not able to identify Holland as the man they saw run by them. 9RP

111-15. James Olsen was brought to view Holland near the scene of the arrest, but Olsen had not gotten a good enough view of the shooter's face to identify Holland, whose clothes were different than Olsen had seen the shooter wearing. 6RP 117-18.

At 11:46 a.m., Seattle Police Officer Heideman saw Holland running on 40<sup>th</sup> Avenue SW. 2RP 17; 8RP 24-25. Officer Heideman jumped out of his car and yelled for Holland to stop—Holland did so. 2RP 18; 8RP 25. Holland spontaneously asked why he was being stopped, claiming that he was "just out jogging." 2RP 18; 8RP 25. Holland's clothing was dirty and was stained, apparently with blackberries. 8RP 53; 9RP 99-100.

A few minutes earlier, Seattle Police Officer Velliquette saw a sweating Holland walking down the street in the 5000 block of 41<sup>st</sup> Avenue, then Holland started running, fleeing down steps toward Fauntleroy. 8RP 40-41, 59-60. Velliquette soon heard that Officer Heideman had Holland in custody. 8RP 41-42.

At about 11:45 a.m., Graciella Martinez had seen an Afro-American man running north and then hiding under a tree in the 5000 block of 41<sup>st</sup> SW. 7RP 65-68. She described his clothing and direction of flight to Seattle Police Officer Hairston, who was passing in his patrol car. 7RP 70-71; 8RP 47-49. Officer Hairston

got out and pursued Holland on foot down the steps. 8RP 49. He caught up with Holland after Heideman had stopped Holland. 8RP 50-51.

Officer Hairston helped Officer Heideman take Holland into custody. 2RP 37-38; 8RP 52. Seattle Police Sergeant Lee arrived at this location at about the same time as Officer Hairston. 2RP 46; 8RP 52; 9RP 12-13. After Holland was handcuffed, he was put in the back seat of Sergeant Lee's patrol car. 2RP 38, 47; 8RP 52; 9RP 13. Defendant Demeko Holland identified himself as Damarius Daniel Holland, and gave a false date of birth. 2RP 38, 47; 8RP 53.

Sergeant Lee advised Holland of his constitutional rights by reading them from her Miranda warnings card. 2RP 47, 131-33. At the time, Holland was in the back seat of Sergeant Lee's patrol car and Lee was standing outside the open back door of the car, about two and a half feet away. 2RP 47-48, 54. Officer Hairston heard Sergeant Lee advise Holland of his constitutional rights. 2RP 38-39; 9RP 18. Following advice of those rights, Holland acknowledged that he understood his rights. 2RP 47-48, 53, 55, 133.

After Officer Hairston observed Sergeant Lee advise Holland of his rights, Hairston questioned Holland about his activities. 2RP 38-40. Holland said he was out jogging. 2RP 39; 8RP 53. Officer Hairston asked Holland if he knew why he had been stopped; Holland replied, "Is this about the shooting?" and then asked if "the kid" was all right. 2RP 40; 8RP 53-54.

Seattle Police Detective Steiger then arrived at the scene of the arrest and questioned Holland about his activities. 2RP 59; 9RP 44. Holland first denied knowledge of the shooting, claiming that he had been doing yard work and jogging, then claimed that he had just gotten off the Number 56 bus, and finally admitted that he may have been in the area of the shooting when it occurred. 2RP 60-61, 124; 9RP 45.

Officer Hairston transported Holland to the Seattle Police Homicide Unit, where he was questioned by Seattle Police Detectives Donna O'Neal and Rob Blanco. 2RP 40-41, 69, 94; 9RP 94, 123. Holland described in detail what he had done the previous night and the morning of the murder, but claimed that he could not remember whether he had shot anyone that morning because he had been smoking "sherm" the night before. 2RP 72-73, 77-79, 96-103; 9RP 100-04, 125-26. Holland said that he may

have done the shooting, may have gotten the gun from a friend the night before, and may have been protecting himself. 2RP 80, 102-03; 9RP 104-05, 126-27.

When Detective Blanco showed Holland the South Pole jacket that had been recovered in the alley off SW Juneau, Holland said that his brother had a jacket like that and that Holland might have worn it that morning. 2RP 81-82; 9RP 105-06, 127. Holland said that his brother had a t-shirt like the one recovered and said that Holland might have worn the t-shirt that morning as well. 2RP 82; 9RP 106-07, 127.

Holland again had identified himself to the detectives as Damarius Holland. 2RP 72, 96; 9RP 97-98, 128. When he was told at the end of the interview that he was going to be booked into jail, he admitted his true identity, saying that he had claimed his brother's identity because he had warrants and did not want to go to jail. 2RP 83, 128.

Detectives Blanco and O'Neal asked Holland if he would be willing to provide a blood sample and Holland agreed. 2RP 83-84; 9RP 107-08, 128. At that point, Detective Blanco asked Holland if he really had been jogging and Holland shook his head no. 2RP 84, 106; 9RP 108, 128.

After the blood was drawn, Detective O'Neal brought food to Holland. 2RP 106; 9RP 128-29. Holland asked the detective to sit with him while he ate, and she did so. 9RP 129. When Holland started crying, Detective O'Neal said to him that "obviously he needed to talk about it to make himself feel better." 9RP 129. Holland said that "he had slipped up and that something happened and he felt bad for it." 9RP 129.

Detective O'Neal suggested that Holland could write a letter to the victim's family, saying that he was sorry and explain. 9RP 129. Holland said, "[T]hat's a good idea. Maybe I'll do it later." 9RP 129. O'Neal asked Holland to give a written statement but Holland refused, saying that he did not want to because he had given statements after two prior arrests and had "been burned." 2RP 107.<sup>3</sup>

As the detectives were taking Holland to be booked into jail, Detective O'Neal asked Holland to disclose the location of the gun and Holland responded that if they found the gun, he would be

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<sup>3</sup> This refusal to give a written statement and explanation relating to prior arrests was evidence presented only during the CrR 3.5 hearing.

charged with a weapon enhancement. 2RP 85, 108; 9RP 130.

DNA profiles were obtained from two locations on the recovered red bandanna. 10RP 104-05. Both were mixtures of profiles from multiple people. 10RP 107-08. Holland was a possible contributor to the mixture of DNA on the fold of the bandanna, and the likelihood of a random person's profile fitting that sample was 1 in 46. 10RP 108. Holland was a possible contributor to the mixture of DNA on the knot of the bandanna, and the likelihood of a random person's profile fitting that sample was 1 in 95. 10RP 107-08.

DNA profiles obtained from the South Pole jacket also were mixtures of multiple people. 10RP 90-92. Holland was a possible contributor. 10RP 92. Holland was a possible contributor to the mixed DNA profile found on a pen that was inside the South Pole jacket. 9RP 80; 10RP 102-03.

A DNA profile was obtained from the logo of the South Pole T-shirt that was collected. 10RP 82-83. The profile was a mixture of at least two people. 10RP 86-88. Holland was a possible contributor and it is estimated that 1 in 26,000 people in the United States population is a potential contributor to the profile. 10RP 88.

The frequency of the profile in the Afro-American population is 1 in 35,000. 10RP 89-90.

C. ARGUMENT

1. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S CONCLUSION THAT HOLLAND KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS.

Holland argues that the trial court erred in finding that he knowingly, intelligently and voluntarily waived his constitutional rights. His argument does not apply the correct standard of review of the trial court's finding. That court's finding of a voluntary and intelligent waiver is supported by substantial evidence and, therefore, should be affirmed.

a. Findings Of The Trial Court.

The trial court's findings pursuant to CrR 3.5 are attached as Appendix 1. Relevant undisputed findings regarding actions of the police are as follows:

The defendant was stopped at 11:46 a.m. on August 18, 2003 by Officer Heideman.... Prior to being questioned, the defendant spontaneously asked why he had been stopped and claimed he had been out jogging. These statements were not the result of custodial interrogation.

....

Sgt. Lee read the defendant the Advisement of Rights portion of her Miranda warnings card. Following advice of those rights, the defendant stated that he acknowledged and understood them. She did not read the waiver portion or the juvenile warnings.

....

No threats or promises were made to induce the defendant to speak.

The defendant never asked for an attorney or in any other way indicated anything other than a complete willingness to speak with the police.

CP 79-81.

The trial court concluded in pertinent part:

The defense argued that because the defendant was not specifically read the "waiver" portion of the Miranda form, he did not waive his rights. After consideration of case law, the Court finds that specific waiver language need not be conveyed, nor is a written or explicit waiver from a defendant necessary- waiver may be implied by the facts and circumstances. The Court finds that in view of all the facts and circumstances, the defendant was fully aware of his rights and knowingly, intelligently and voluntarily waived those rights by continuing to speak freely with officers and detectives in the absence of any threats, promises or coercion.

All the defendant's statements offered by the State are admissible in the State's case in chief. The statements to Officer Heideman are admissible because Miranda was not applicable since the statements were volunteered by the defendant and were not the product of custodial interrogation. The statements made to Officers Hairston and Velliquette as well as those to Detectives Steiger, Blanco and [O'Neal] are admissible because Miranda was applicable and the defendant's statements were made after he knowingly, intelligently and voluntarily waived his Miranda rights.

CP 81-82.

b. Holland Knowingly, Intelligently And Voluntarily Waived His Constitutional Rights.

The State bears the burden of showing a voluntary, knowing, and intelligent waiver of Miranda<sup>4</sup> rights by a preponderance of the evidence, based on the totality of the circumstances. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). The United States Supreme Court explicitly adopted the preponderance of the evidence standard in Lego v. Twomey, 404 U.S. 477, 486-89, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). The Court in Lego v. Twomey observed that "it is very doubtful that escalating the prosecutor's burden of proof" in suppression hearings would sufficiently increase the deterrent effect of the rules "to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." Id. at 489.

The trial court in this case found that Holland "was fully aware of his rights and knowingly, intelligently and voluntarily waived those rights by continuing to speak freely with officers and detectives in the absence of any threats, promises or coercion." CP 82.

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<sup>4</sup> Miranda v. Arizona, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The appellate courts will not disturb a trial court's conclusion that a waiver was voluntarily made if substantial evidence in the record supports that finding. Athan, 160 Wn.2d at 380; State v. Cushing, 68 Wn. App. 388, 393, 842 P.2d 1035, rev. denied, 121 Wn.2d 1021 (1993). The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

Holland does not challenge the finding that he was advised of his Miranda rights. Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The court's finding that, "Following advice of those rights, the defendant stated that he acknowledged and understood them," was supported by the testimony of Sergeant Lee. Lee testified about Holland's acknowledgement on four occasions during the CrR 3.5 hearing:

Q. Did he indicate affirmatively that he understood those rights?

A. Yes, he did.

2RP 48.

Q. ...[A]re there any statements that Mr. Holland made to you?

A. Other than when I asked him his name he gave me his name and the birth date and then I read him his rights. He acknowledged it and then we had no further conversation.

2RP 53.

Q. Now, when you were done reading Mr. Holland his rights...

A. Yes.

Q. –did he say, yes, I understand?

A. I don't recall his exact words, but he acknowledged his rights to me. So it was affirmative that he understood.

Q. It could have been a simple nod up and down?

A. It could have been.

Q. But when he acknowledged that he understood he did not waive his rights?

A. I didn't ask him to. I just read him his rights and asked him if he understood. He said that he did and that was it.

2RP 55.

Q. What follows that subsection that says waiver?

A. One, yes. Do you understand each of these rights I have explained to you.

Q. And did you ask that question of the defendant?

A. Yes.

Q. And what did he say?

A. Yes.

2RP 133.

Holland claims on appeal that the finding that Holland stated that he acknowledged his rights is unsupported because on cross-examination, Sergeant Lee conceded that it could be that Holland's acknowledgement was by nodding his head. App. Br. at 16. Sergeant Lee's repeated descriptions of a statement of

acknowledgement constitute substantial evidence in support of the finding that Holland stated his acknowledgement.

In any event, if Holland's acknowledgement of his rights was by nodding his head, it has no effect on the analysis of the voluntariness of his waiver. No evidence contradicted the testimony that Holland, either verbally or by physical action, affirmatively acknowledged his understanding of his constitutional rights. Holland does not claim that the evidence does not support that acknowledgement.

A defendant need not understand all of the legal subtleties of his exercise or waiver of his constitutional rights in order to be found to have knowingly and intelligently waived those rights. "[T]he test is whether a person knew he had the right to remain silent, and that anything he said could be used against him in a court of law, not whether he understood the precise legal effect of his admissions." State v. Harrell, 83 Wn. App. 393, 402, 923 P.2d 698 (1996), citing State v. Aiken, 72 Wn.2d 306, 434 P.2d 10 (1967). This Court has observed that it would be surprised if many adults "understand the full import of the exercise or waiver of their constitutional rights." Harrell, 83 Wn. App. at 402.

As the court found in Harrell, even a juvenile with a learning disability and attention deficit hyperactivity disorder has the capacity to knowingly and intelligently waive constitutional rights, when he is a functioning individual who can understand well enough to act to his own benefit. Id. at 401-04. The Washington Supreme Court has held that a 16-year-old can make a statement voluntarily and intelligently, noting that many defendants of a similar age or younger have been found to have voluntarily confessed. State v. Unga, 165 Wn.2d 95, 108-09, 196 P.3d 645 (2008). The United States Supreme Court has reached the same conclusion. Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979). While Holland was a young man at the time of this murder, he was 20 years old; his relative youth is irrelevant to whether he knowingly and intelligently waived his rights.

Even people of quite low intelligence may be capable of knowingly and intelligently waiving their rights. *E.g.*, State v. Hutchinson, 85 Wn. App. 726, 739-41, 938 P.2d 336 (1997), rev'd on other grounds, 135 Wn.2d 863, 959 P.2d 1061 (1998) (IQ 79); Cushing, 68 Wn. App. at 392-95 (diagnosed as "mildly mentally retarded"). Suspects who are mentally ill also may be capable of intelligently waiving their rights. *E.g.*, State v. McDonald, 89 Wn.2d

256, 571 P.2d 930 (1977), overruled on other grounds, State v. Sommerville, 111 Wn.2d 524, 760 P.2d 932 (1988) (paranoid schizophrenic defendant who was delusional and was found incompetent to stand trial); Cushing, 68 Wn. App. at 392-95 (mentally ill defendant). As the Supreme Court explained in McDonald, "The test is whether defendant knew that he had the right to remain silent, not whether he understood the precise nature of the risks of talking." McDonald, 89 Wn.2d at 264.

There is no evidence that Holland was incapable of understanding his rights. There is no indication that he was of other than normal intelligence. There is no question that Holland was aware that he was being questioned about a shooting, a serious crime. Courts have focused on that elementary awareness as a basis for finding that waivers were intelligent. Unga, 165 Wn.2d at 109; State v. Massey, 60 Wn. App. 131, 142, 803 P.2d 340, rev. denied, 115 Wn.2d 1021 (1990), cert. denied, 499 U.S. 960 (1991).

On appeal, Holland claims that he had only two hours of sleep the night before he was arrested for this murder and that he had smoked sherm that day. App. Br. at 17. The only evidence presented to the trial court to support these assertions were the

statements that Holland made at the time of his arrest. Holland told police that he had smoked sherm the night before the murder. 2RP 72, 96-97, 99. There is no reason to believe that these statements are any truer than the false identification that Holland provided.

Even if Holland's statements to police are taken at face value, there was no evidence that Holland was affected by any drugs or by alleged lack of sleep during his contacts with the police between 11:45 a.m. and 9 p.m. That Holland coughed, was sweaty, and eventually cried does not indicate that he lacked capacity to understand the situation – this behavior is equally consistent with his flight from police and his understanding all too well that he was a suspect in a murder investigation.

On appeal, Holland cites to a stipulation to a lab test result that was not before the trial court at the time of the CrR 3.5 hearing. App. Br. at 17, citing 12RP 60-61. Even if the trial court had the stipulation before it, the substances and quantities detected have no significance without expert testimony to explain the conclusions that might be drawn based on the lab results.

Only police officers testified during the CrR 3.5 hearing about what substance is meant by the term "sherm." Detective O'Neal testified that she knew only that it was an illegal drug. 2RP

99. Detective Blanco believed that it was formaldehyde. 2RP 74-75. Holland did not testify at the CrR 3.5 hearing, nor was there any other evidence about what he may have smoked, when he smoked it, or what its effects on Holland were.

Holland had no difficulty communicating with the police. Holland responded appropriately to police commands at his arrest. 2RP 18. Holland repeatedly lied about his identity, possibly because he had warrants outstanding. 2RP 38, 47, 72, 96. He acknowledged the advice of his rights. 2RP 47-48, 53, 55, 133. Police officers had no difficulty communicating with him and had no indication that he did not understand either the advice of rights or the questions they asked of him. 2RP 18, 39-40, 48, 76-77, 99-100. Responsiveness and the ability to walk and talk is evidence that may overcome the assertion that a suspect who is under the influence of alcohol or drugs and was sleep deprived was not able to knowingly and voluntarily waive his rights. Hutchinson, 85 Wn. App. at 740.

Holland also made thoughtful decisions about which questions he would answer during police questioning, refusing to reveal the location of the gun because he did not want to be subject

to the firearm enhancement,<sup>5</sup> and refusing to give a written statement because of prior experiences giving written statements. 2RP 107. The decision to decline to answer some questions indicates that a suspect understands his rights. State v. Parra, 96 Wn. App. 95, 977 P.2d 1272, rev. denied, 139 Wn.2d 1010 (1999).

Holland's claim that the lack of an explicit waiver is fatal to a finding of a voluntary waiver also is without merit. The Supreme Court has concluded that a waiver of Miranda rights need not be explicit. State v. Terrovona, 105 Wn.2d 632, 646-47, 716 P.2d 295 (1986). Implied waiver may be found if the defendant understood his rights and answered questions freely and voluntarily, without duress, promise or threat. Id. In two different cases, Washington courts have concluded that there was an implied waiver of Miranda rights even when the suspect had specifically refused to sign a waiver of those rights. Athan, 160 Wn.2d at 380-81; Parra, 96 Wn. App. at 96.

There has been no allegation of duress, promise, or threats in this case, nor is there any evidence to suggest that Holland had experience in the criminal justice system, demonstrated by his own description of providing statements after

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<sup>5</sup> 2RP 85, 108.

prior arrests, and the warrants outstanding at the time of this arrest. There is no dispute that he was properly advised of his rights. The trial court's findings that his free, voluntary, and selective answers to police questions constituted an implied knowing and intelligent waiver of his rights was supported by substantial evidence.

2. THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT DID NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF.

Holland claims that in the State's rebuttal closing argument the prosecutor made two comments in response to the defense closing argument that improperly shifted the burden of proof. The claim is without merit. The prosecutor's comments that specific facts cited by the defense attorney were not in evidence did not shift the burden of proof. These comments were a fair response to the defense argument and were not prosecutorial misconduct. Further, Holland has not established the enduring and incurable prejudice that would be necessary to warrant reversal where no effective objections were lodged in the trial court.

a. Relevant Facts

The jury in this case was informed by written instruction:

The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 48.

During the defense closing argument, the defense attorney argued that Holland was addicted to unspecified drugs and, as a result, has no memory of what happened at the time of the murder:

The worst of it is the thing that he has to live with everyday is that he doesn't even really know what happened. He doesn't even really know the truth of it.

If he did ... or not and he only has himself to blame for this uncertainty because in his youthful ignorance, in his ordinary life, he was heedless of ... the dangers that so many have faced before him. Sooner or later when you have an addiction the bill comes due and you have to pay. The price that he has paid is the loss of his memory for those critical hours, PCP and marijuana in his system that day.

Now because of what he's done he has to rely on blind faith. He can't come in and tell you what he doesn't know.

14RP 18-19. She later reiterated that Holland had no memory of the critical time:

...Holland continued to tell them the only thing he could. That he couldn't remember, that he might have done it, that he might not have.

14RP 32.

The defense attorney argued over and over that the police had an agenda, manipulated the evidence, withheld evidence, and lied in their testimony. 14RP 24-32. In the course of that line of argument, she argued that Holland could have heard the age of the victim by overhearing officers on cell phones:

[Officer Hairston] had to be brought back so he could sidestep and backtrack and to tell you about how even if there were radio conversations that don't get recorded that Demeko Holland couldn't have possibly learned anything about a kid being involved that way.

.... But even setting aside south radio and south tactical and what was or wasn't said, cellular phones and MDC's setting it all aside.

You have to remember that these are police officers they're buddies .... When they get together they talk about what is going on.

14RP 24. The reference to cell phones is repeated soon after:

Could [Holland] have heard something on south tact, cell phone, absolutely. That's reasonable doubt.

14RP 26. The defense attorney later summarized:

[Y]ou only see these statements through the prism of the police officers manipulation. You only hear that they want you to hear. That's done deliberately. They purposely take things out of context to try to make it look like Demeko Holland was the shooter and they don't tell you everything

because if they did tell you everything you would have doubts.

14RP 28-29.

Holland objects to the prosecutor's response to two of those arguments, during the rebuttal closing argument. First, Holland objects to this argument:

[The defense attorney] talked to you about the ugly consequences of addiction and how the defendant can't get up here and tell you what he doesn't remember because of it. Really? Is there any testimony about the defendant's addiction to sherm or any other drug? Is there any testimony at all about the effects of sherm that he smoked that night? Is there any testimony about how it might or might not affect your memory, no.

14RP 59. The prosecutor went on to explain:

Why is it that the defendant's lawyer is up here suggesting there was some evidence on that point. I'll suggest to you the reason is because they're stuck with it. [It's] what the defendant said and he can't escape what he said. Despite remembering all the details what he did that morning, what he [ate], what he fed to his girlfriend's son, where he went, how they got there, he claims some blackout for the one period of time that he knew if he actually told the truth he'd be held accountable.

14RP 59-60. There was no objection to any part of this argument.

14RP 59-60.

The second argument to which Holland objects occurred later in the State's rebuttal closing. The prosecutor explained at

some length how the testimony established that Holland could not have overheard radio communications that included the age of the victim before he asked Officer Hairston, "How's the kid?" 14RP 60-61. The argument continued:

[The defense attorney] suggests that this could have been overheard on the phone. By golly, those witnesses were up there. Why didn't she ask them[?]

Ms. Brandes: Objection, burden shifting.

Mr. Barber: She has argued to you that the defendant could have heard this over the telephone, over the cell phone. Is there any evidence that anybody at the scene of 40<sup>th</sup> and Edmonds when Demeko Holland was arrested was ever having a conversation on a cell phone, no.

14RP 61-62. There is no indication that the judge heard this objection, as he did not respond in any way. 14RP 62.

b. The Challenged Remarks Did Not Constitute Prosecutorial Misconduct.

When a defendant claims improper argument, the defense bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. State v. Brown, 132 Wn.2d 529, 564, 940 P.2d 546 (1997), aff'd on other grounds, Uttecht v. Brown, 551 U.S. 1 (2007). Allegedly improper arguments are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions

given. Id. "To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict." Id.

If the defendant fails to object to the prosecutor's argument in the trial court, any error is waived "unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

There was no objection in this case to the prosecutor's remark concerning the lack of evidence of the effects of sherm on memory. 14RP 60. Although on appeal Holland refers to a "timely objection" to alleged burden-shifting,<sup>6</sup> the only objection made was the objection after the argument relating to cell phone calls—that cannot be considered a timely objection to an argument made on a different topic (the effects of sherm), some time earlier.

The objection to the comment concerning possible telephone conversations did not preserve any error, as there is no indication that the judge heard the objection. The objection was not repeated

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<sup>6</sup> App. Brief at 13.

then or later, and no curative instruction was requested. The judge was not given the opportunity to respond to the objection and cure any potential error. Even when there is an objection in the trial court, reversal is not required if any "error could have been obviated by a curative instruction which the defense did not request." Id. at 85, citing State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

The prosecutor may comment on the absence of specific evidence if someone other than the defendant could have testified on that issue. State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969); State v. Jackson, 150 Wn. App. 877, 887, 209 P.3d 553 (2009). With respect to the asserted effects of sherm, if there was evidence to support the claims of the defense attorney, family, friends, treatment providers, or independent experts could have testified to the defendant's usage, common effects of the drug, or the significance of the blood results. With respect to the possible telephone conversations, all of the relevant witnesses were police officers who did testify at trial and could have been asked, which was the point of the prosecutor's comment.

Even if remarks of the prosecutor are improper, they are not reversible if they are a pertinent response to defense counsel's

argument. Russell, 125 Wn.2d at 86. The Supreme Court has explained the limits of proper response:

Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

Id., citing State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

In Russell, the Washington Supreme Court held that it is proper argument to note that a defendant's acquaintances who testified at trial did not know where he was at the time of the charged murders. Russell, 125 Wn.2d at 91. Although the defense claimed that the argument was equivalent to a comment on the defendant's failure to testify, the court held: "While the remarks point to absence of alibi, they do not refer to Russell's failure to testify. These comments did not violate his right to remain silent or shift the burden of proof." Id.

In the case at bar, the prosecutor's references in rebuttal to the arguments made in the defense closing were provoked by and in direct response to specific arguments made by defense counsel in her closing argument. It is proper for the prosecutor to respond

to defense arguments with a contention that the defense theories are not supported by the evidence. State v. Babiker, 126 Wn. App. 664, 669, 110 P.3d 770 (2005). The defense attorney further particularly invited and provoked the response regarding telephone conversations describing the victim as a child—the defense argument theme was that the police were manipulating and hiding evidence, so it was a fair response to point out that they were not asked this question.

The prosecutor made the gist of his response clear at the beginning of his rebuttal, when he reminded the jurors of the instruction that the arguments of the lawyers are not evidence. 14RP 57; CP 45. The prosecutor said, "I wonder if the defense has hoped that you've forgotten what the evidence actually was or forgotten what the evidence wasn't and are going to substitute instead of the evidence the words of [the defense attorney]." 14RP 57. The challenged remarks in this case properly pointed out that the defense arguments, as to the effects of sherm and that police officers must have described the person killed in telephone conversations at the scene of the arrest, were not supported by the evidence.

The three cases on which Holland relies are distinguishable. In two of the cases the prosecutor argued broadly that there was no evidence favorable to the defendant because the defendant did not present favorable evidence. State v. Fleming, 83 Wn. App. 209, 214-15, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997); State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 54, rev. denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Here, by contrast, the State argued that the specific facts asserted by the defense attorney in closing were not supported by evidence at trial. There is no impropriety in this response to a defense argument that interjects facts not in evidence.

Holland emphasizes that the third case he relies upon was reversed for prosecutorial misconduct. App. Br. at 24, citing State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009). In Dixon, the prosecutor argued that the defendant should have testified, which the State conceded was improper. Dixon, 150 Wn. App. at 57-58. Holland has not claimed that the arguments here were comments on his failure to testify.

The court in Dixon held that the State could properly respond to the defense argument that lack of information about a second, unknown person in the car created a doubt about the defendant's

dominion and control over drugs in the defendant's purse. Id. at 57. The court said that it was a proper and adequate response to point to the lack of evidence that the passenger put anything in that purse. Id. The court held that the prosecutor went too far with an argument "that Dixon should have produced the passenger for live testimony" and "when coupled with the argument that Dixon should have testified, [that] was so prejudicial that a jury instruction could not have cured the prejudice." Id. The prosecutor's arguments in this case fell within the bounds of proper response pointing out the lack of evidence to support the facts introduced by the defense attorney's arguments.

c. Any Impropriety Was Harmless.

While Holland claims that the State must prove that any misconduct was harmless beyond a reasonable doubt, that standard of review has not been adopted by the Washington Supreme Court on review of prosecutorial arguments that may touch on constitutional rights. State v. Warren, 165 Wn.2d 17, 26 and n.3, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009); Jackson, 150 Wn. App. at 886 n.2. The defendant bears the burden of establishing that there is a substantial likelihood that the

improper arguments affected the jury's verdict. Brown, 132 Wn.2d at 564.

Holland relies on Fleming, supra, and Cleveland, supra, as authority for the constitutional error standard, but neither engages in analysis of the proper standard of review and they cannot be read as intending to overrule longstanding Supreme Court precedent.

Both Fleming and Cleveland discuss State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148, rev. denied, 106 Wn.2d 1007 (1986), and may have imported the standard of review applied there. In analyzing misconduct, the court in Traweek stated that "[w]hen a comment also affects a separate constitutional right, such as the privilege against self-incrimination, it is subject to the stricter standard of constitutional harmless error." 43 Wn. App. at 108. In making this statement, the court cited to footnote 1 of State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).

However, Davenport did not establish the rule for which it was cited. In Davenport, the Supreme Court stated that trial irregularities do not independently violate a defendant's constitutional rights. Davenport, 100 Wn. 2d at 761-62. In footnote 1, the Court contrasted situations where defendants'

constitutional rights are violated. Specifically, the Court cited to State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981), followed by the parenthetical "(improper comments on the defendant's right to remain silent)." Davenport, at 761 n. 1. Apparently, this language in the parenthetical was interpreted by the Court of Appeals in Traweek to mean that improper comments by the prosecutor about a defendant's right to remain silent must be reviewed under a different standard. This is not the case.

Evans was distinguished by the court in Davenport because it involved "trial error," witness testimony that was a comment on silence, not a "trial irregularity." In Evans, testimony was improperly admitted of Evans' post-arrest silence. Two officers testified that after being advised of his right to remain silent, Evans declined to talk about the incident, suggesting guilt from the exercise of his constitutional right. Evans, 96 Wn.2d at 3. It is this trial error that was reviewed, appropriately, under a constitutional harmless error standard. Id. at 4.

Prosecutorial misconduct also was alleged in Evans, involving the prosecutor's questions about the defendant's post-arrest silence. Id. at 5. The misconduct was analyzed under a different standard. The Court reviewed the alleged misconduct to

determine "whether there was a substantial likelihood that the misconduct affected the jury's verdict, thereby depriving the defendant of his right to a fair trial." Id. Thus, contrary to the assertion in Traweck, neither Davenport nor Evans stands for the proposition that there is more than one standard for reviewing alleged misconduct in closing argument.

The court in Warren noted that the constitutional error standard of review, if it is ever applicable to prosecutorial argument, would be appropriate only if the prosecutor directly commented on the exercise of a constitutional right. Warren, 165 Wn.2d at 26 n.3. The court did not apply a constitutional error standard in that case, where the misconduct was serious but the jury was properly instructed about the correct burdens of proof. Id. The remarks to which Holland objects were not direct comments placing the burden of proof on Holland, so the well-established standard of review for misconduct should be applied in this case. Under that standard, it is the defense burden to establish prejudice in the total context of the case. Id. at 26, 28.

In analyzing potential prejudice, improper comments are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. Id. at

28. The written instructions here properly stated the State's burden of proof and that the defendant has no burden of proving that a reasonable doubt exists. CP 48. The instructions informed the jury that the defendant is not compelled to testify and his failure to testify cannot be used to his prejudice. CP 51. The prosecutor also properly stated the State's burden of proof. 14RP 12.

Holland has not explained how either challenged comment caused specific prejudice, asserting only that the State's case was weak. App. Br. at 25-26. To the contrary, the case was quite strong. Holland was observed running from the area of the murder, dirty and scratched. He lied about jogging and lied about his identity. A witness to the shooting identified Holland as the shooter with seventy percent certainty. Clothing concealed in different locations along the path between the scene of the shooting and the location where Holland was arrested contained DNA profiles that all included Holland as a possible contributor. Holland admitted that he might have been wearing those items of clothing that morning. Holland asked one of the arresting officers "How's the kid?", when he had no means of knowing that a child was involved unless he was the shooter. Holland repeatedly told detectives that he might have done the shooting, and eventually cried and admitted that he

had done "something bad." He agreed that he should write a letter to the victim's family saying that he was sorry and explaining how it happened. When asked to reveal the location of the gun, he did not deny knowing where it was, but told detectives that if he did so he would get a weapon enhancement.

The jury had been directed not to consider the remarks of the lawyers as evidence, and it is unclear what prejudice can be asserted in the State's reminder that the remarks of the defense attorney concerning the effects of sherm were not supported by evidence.

There has been no objection on trial or on appeal to the argument the prosecutor made that there was no evidence that anyone at the scene was having a conversation on a cell phone. 14RP 62. The prosecutor's argument that the defense attorney could have asked the State's witnesses about cell phone conversations, if error, was not prejudicial. The argument did not suggest what the answer to the questions would have been or that an inference should be drawn that the answers would be unfavorable. It was a fair response in light of the defense theme that the police were hiding evidence.

The jury in this case was properly instructed and is presumed to have followed its instructions. Warren, 165 Wn.2d at 28. No reasonable juror would consider the challenged remarks, in context, an implication that the defense had a burden of disproving the case. They were a proper response to the defense arguing specific theories not supported by the evidence.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Holland's convictions.

DATED this 2<sup>nd</sup> day of December, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Donna L. Wise  
DONNA L. WISE, WSBA #13224  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
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# **Appendix 1**



1 Caryn Lee and Detectives Steiger, Blanco and O'Neill, the court enters the following findings of  
2 fact and conclusions of law as required by CrR 3.5.

3 1. THE UNDISPUTED FACTS: Fourteen year old David Chhin was shot and killed at 35<sup>th</sup>  
4 St. SW and SW Juneau in Seattle at 11:18 AM on August 18, 2008. A number of witnesses saw  
5 the shooter flee on foot down Juneau street and then lost him as he headed North in an alley. A  
6 number of other witnesses at various locations saw a man running north and west from the scene  
7 of the shooting. One of them, Grace Martinez, saw the defendant at 11:43 AM hiding from  
8 helicopters underneath a tree across the street from her house. She called 911, then pointed out  
9 the direction of his flight and described his clothing to Officer Hairston, who was passing by in  
10 his patrol car. Hairston then abandoned his patrol car and pursued the defendant on foot.

11 The defendant was stopped at 11:46 AM on August 18, 2003 by Officer Heideman at 40<sup>th</sup>  
12 St. SW and SW Edmonds in Seattle, three blocks from Ms. Martinez's house. Prior to being  
13 questioned, the defendant spontaneously asked why he had been stopped and claimed he had  
14 been out jogging. These statements were not the result of custodial interrogation.

15 Officer Hairston arrived on foot immediately thereafter and helped take the defendant  
16 into custody. Sgt. Lee arrived around the same time as Hairston, and when the defendant was  
17 arrested he was placed into the back seat of Sgt. Lee's patrol car. The defendant gave Sgt. Lee a  
18 false name of Damarius Daniel Holland and a false date of birth of 7/24/1986- which would have  
19 made him a juvenile. The defendant later admitted his real name is Demeko Holland and that he  
20 was not a juvenile at the time of his arrest.

21 Sgt. Lee read the defendant the Advisement of Rights portion of her Miranda warnings card.  
22 Following advice of those rights, the defendant stated that he acknowledged and understood  
23 them. She did not read the waiver portion or the juvenile warnings.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

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1           Officer Hairston listened to Sgt. Lee advise the defendant of his Miranda rights then  
2 questioned him about his activities. The defendant said he was a landscaper and had been out  
3 jogging, but would not explain where he had been working or describe the route of his jog.  
4 Officer Hairston asked the defendant if he knew why he had been stopped and the defendant  
5 replied "This is about the shooting. How's the kid doing?"

6           Detective Steiger arrived at the scene of the arrest and was aware that the defendant had  
7 been read his rights. Steiger questioned the defendant about his activities in the presence and  
8 earshot of Officer Velliquette. The defendant first denied any knowledge of the shooting and told  
9 the officer and Detective he had been doing yard work and jogging near the Alaska Junction. He  
10 then claimed he had just got off the #56 bus near Lincoln Park, and admitted he "may have" been  
11 in the area of the shooting when it occurred.

12           Officer Hairston transported the defendant to the Seattle Police Department Homicide  
13 Unit, where he was questioned by Detectives Oneal and Blanco, both of whom were aware that  
14 he had been advised of his Miranda rights. The defendant spoke freely with the detectives and  
15 ultimately indicated he "may have" done the shooting, "may have" obtained the gun from a  
16 friend the night before and "may have" been protecting himself. He told the detectives he could  
17 not remember because he had been smoking "sherm" the night before. The defendant was able to  
18 recall the events of the day leading to the shooting with significant detail, but claimed a lack of  
19 memory during the time of and after the murder.

20 ~~None of the officers or detectives who had contact with the defendant observed anything~~  
21 ~~that would suggest to them the defendant was under the influence of any alcohol or drugs or that~~  
22 ~~he had any difficulty understanding their questions and/or responding to them.~~

23           No threats or promises were made to induce the defendant to speak.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 3

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1 The defendant never asked for an attorney or in any other way indicated anything other  
2 than a complete willingness to speak with the police.

3 2. THE DISPUTED FACTS:

4 Detective Steiger testified that he heard Sgt. Lee read the defendant his Miranda  
5 warnings. Sgt. Lee testified that she recalled the detective arriving after she read the rights. ~~(In an  
6 attempt to clarify this apparent confusion, prosecutors spoke later with Detective Steiger who  
7 indicated he may have been mistaken and may simply have heard that the rights had been read as  
8 opposed to actually having heard them being read.)~~

9 3. CONCLUSIONS AS TO THE DISPUTED FACTS:

10 The Court concludes that Detective Steiger was either confused or mis-spoke, and that in  
11 any event the difference is not material because it is undisputed that the defendant had been read  
12 his Miranda rights, acknowledged those rights, and impliedly waived them prior to Detective  
13 Steiger asking him any questions.

14 4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE  
15 DEFENDANT'S STATEMENT(S):

16 The defense argued that the defendant should have been read the juvenile portion  
17 of the warnings by Sgt. Lee. After consideration of case law, the Court finds that defendant lied  
18 about his age, was not a juvenile at the time and should not benefit from his deception. Thus the  
19 Court concludes this adult defendant was not entitled to be read the warnings intended for  
20 juveniles.

21 The defense argued that because the defendant was not specifically read the "waiver"  
22 portion of the Miranda form, he did not waive his rights. After consideration of case law, the  
23 Court finds that specific waiver language need not be conveyed, nor is a written or explicit

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 4

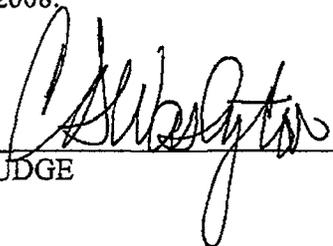
Daniel T. Satterberg, Prosecuting Attorney  
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1 waiver from a defendant necessary- waiver may be implied by the facts and circumstances. The  
2 Court finds that in view of all the facts and circumstances, the defendant was fully aware of his  
3 rights and knowingly, intelligently and voluntarily waived those rights by continuing to speak  
4 freely with officers and detectives in the absence of any threats, promises or coercion.

5 All the defendant's statements offered by the State are admissible in the State's case in  
6 chief. The statements to Officer Heideman are admissible because Miranda was not applicable  
7 since the statements were volunteered by the defendant and were not the product of custodial  
8 interrogation. The statements made to Officers Hairston and Velliquette as well as those to  
9 Detectives Steiger, Blanco and O Neal are admissible because Miranda was applicable and the  
10 defendant's statements were made after he knowingly, intelligently and voluntarily waived his  
11 Miranda rights.

12 In addition to the above written findings and conclusions, the court incorporates by  
13 reference its oral findings and conclusions.

14 Signed this 6 day of <sup>August</sup> ~~July~~, 2008.

15  
16   
17 \_\_\_\_\_  
18 JUDGE

19 Presented by:

20 \_\_\_\_\_  
21 Deputy Prosecuting Attorney

22 \_\_\_\_\_  
23 Attorney for Defendant

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 5

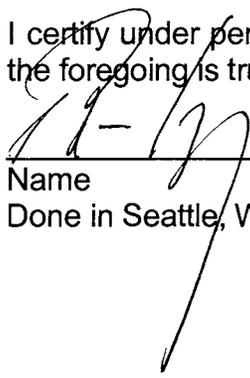
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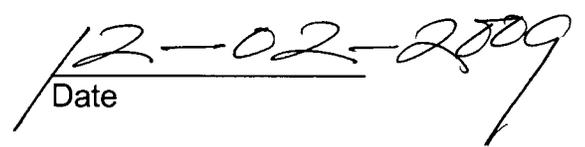
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila J. Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DEMEKO HOLLAND, Cause No. 62118-1-I, in the Court of Appeals, Division I, for the State of Washington.

FILED  
STATE OF WASHINGTON  
2009 DEC -2 PM 4:31

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

  
\_\_\_\_\_  
Date