

62659-1

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NO. 62659-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC DAY,

Appellant.

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

The Honorable Christopher Washington

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The trial court erroneously admitted Mr. Day's statements, made during custodial interrogation without a knowing and voluntary waiver of his rights under the Fifth Amendment of the United States Constitution.

2. The trial court erroneously entered the following finding of fact not supported by substantial evidence:

After the conclusion of the polygraph, the detective drove the defendant back to the Burien Fred Meyer. During that relatively short drive, the defendant further discussed the incident involving A.N. with the detective. Again, no promises or threats were made to the defendant. He remained out of custody and free to leave at any time. He was dropped off in the parking lot of the Fred Meyer and the detective had no further contact or interaction with the defendant.

CP 34.

3. The trial court erroneously entered the following conclusion of law not supported by substantial evidence:

Statements made to officers are only subject to *Miranda* when a defendant is both in custody and subject to interrogation. At no time during the defendant's interaction with either Detective Gordon or Jason Brunson was the defendant in custody, thus it was unnecessary for the investigators to read the defendant his *Miranda* rights.

CP 34.

4. The trial court erroneously entered the following conclusion of law not supported by substantial evidence:

The defendant spoke with the detective and Mr. Brunson willingly and voluntarily. To any extent that *Miranda* did apply, the defendant waived his rights knowingly, voluntarily, and intelligently. The defendant made multiple verbal statements, none of which were the product of threats or coercion.

CP 35.

5. The trial court erroneously entered the following conclusion of law not supported by substantial evidence:

Accordingly, the statements made by the defendant on June 13, 2007 and June 19, 2007 regarding the facts of this case are admissible in the State's case-in-chief.

CP 35.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Before initiating a custodial interrogation, an officer must inform the suspect of his *Miranda*¹ rights, or the ensuing statements must be suppressed. An individual is in custody for purposes of *Miranda* if a reasonable person in his situation would not feel free to terminate the investigation and leave. When Mr. Day was in a police detective's car, leaving a polygraph

¹ *Miranda v. Arizona*, 384 U.S. 436, 460-61, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).” \s

examination many miles from home, and having already made incriminating statements, was he in custody, requiring *Miranda* warnings? (Assignments of Error 1-5)

2. Findings of Fact must be supported by substantial evidence. Did the court err in finding without substantial evidence that Mr. Day “remained out of custody and free to leave at any time” on the drive home from the polygraph examination?

(Assignment of Error 2)

3. To the extent it is a Finding of Fact, did the court err in entering, without substantial evidence, a Conclusion of Law stating “[a]t no time during the defendant’s interaction with... Detective Gordon... was the defendant in custody, thus it was unnecessary for the investigator[] to read the defendant his *Miranda* rights.”

(Assignment of Error 3)

4. To the extent it is a Finding of Fact, did the court err in entering, without substantial evidence, a Conclusion of Law stating Mr. Day “spoke with the detective and Mr. Brunson willingly and voluntarily.” (Assignment of Error 4)

5. To the extent it is a Finding of Fact, did the court err in entering, without substantial evidence, a Conclusion of Law stating “the statements made by the defendant on... June 19, 2007

regarding the facts of this case are admissible.” (Assignment of Error 5)

C. STATEMENT OF THE CASE.

On June 12, 2007, Detective Michael Gordon of the King County Sheriff's Office contacted Eric Day to interview him about an incident of sexual misconduct which was alleged to have occurred several years prior. CP 33 (FF 1), 8/11/08RP 13. Over the phone, Mr. Day agreed to meet with Detective Gordon in person. CP 33 (FF 1); 8/11/08RP 17. The next day, Detective Gordon picked Mr. Day up as arranged, and drove to a nearby parking lot, where Detective Gordon interviewed Mr. Day about the allegations. CP 33 (FF 2); 8/11/08RP 19. After some discussion, Mr. Day agreed to give a tape-recorded statement; Detective Gordon read Mr. Day his *Miranda* rights on the tape. CP 33 (FF 4-5); 8/11/08RP 19-23. Detective Gordon then asked Mr. Day if he would take a polygraph examination; Mr. Day agreed, and Detective Gordon later took him home. CP 33 (FF 6); 8/11/08RP 24.

On June 19, 2007, Detective Gordon picked Mr. Day up in Burien and took him to the Regional Justice Center in Kent. CP 34 (FF 7); 8/11/08RP 25. There, King County Sherriff's Department

Polygraph Examiner Jason Brunson advised Mr. Day of his rights and administered a polygraph test, while Detective Gordon watched through an observation window. CP 34 (FF 8); 8/11/08RP 26.

After the polygraph, Detective Gordon drove Mr. Day back to Burien and on the way, interviewed him further about the allegations. CP 34 (FF 9); 8/11/08RP 26.

At the conclusion of the CrR 3.5 hearing, the court ruled that all of Mr. Day's statements – to Detective Gordon on June 13 and June 19, as well as to Jason Brunson – were willing and voluntary, and to the extent *Miranda* applied, Mr. Day properly waived his rights. CP 34-35 (CL 2-3). The court also ruled the fact that Mr. Day had taken a polygraph would not be admissible at trial. CP 35 (CL 5).

At trial, A.N. testified that six to eight years earlier, when she was ten to twelve years old, she spent a great deal of time at the home of her best friend, Samantha Scott. Also living in the home were Samantha's mother, younger brother, and older sister, Teresita Haider, and at times, Teresita's then-boyfriend and father of her child, Eric Day. 8/13/08RP 7-9, 20-22.

A.N. testified that one night she, Ms. Haider, and Mr. Day were all sitting together on one couch watching television, and Ms. Haider fell asleep. 8/13/08RP 26. At the time A.N. was twelve and Ms. Haider and Mr. Day were both sixteen years old. 8/13/08RP 28. A.N. alleged Mr. Day put his hand up her pajama shorts and put his finger under her panties and in her vagina. 8/13/08RP 28-29. The baby then started crying, Mr. Day jumped up to take care of him, and A.N. ran to Samantha's room. 8/13/08RP 29.

A.N. told Samantha and Samantha's mother about the incident, but Samantha's mother did nothing. 8/13/08RP 31. A few years later, she told her own mother, who reported the incident to the police. 8/13/08RP 32, 60-62.

Detective Gordon testified he received the report of this incident in December 2006 and interviewed A.N. about a month later. 8/13/08RP 52, 54. When he interviewed Mr. Day on June 13, 2007, he told him A.N. had said he put his finger in her underwear and touched her vagina. 8/13/08RP 58. Mr. Day said, "I did it," but it was over her clothing, no skin-to-skin contact. 8/13/08RP 59.

Jason Brinson (identified as an "investigator/interview specialist) testified on June 19, 2007, Mr. Day admitted to rubbing

A.N.'s crotch over her clothing for about 10 seconds. 8/13/08RP 84. Mr. Day thought A.N. was confused about him inserting his finger in her vagina, thought it was possible he had done it, but could not remember. 8/13/08RP 84.

Detective Gordon testified that in the car on the way back from the interview with Mr. Brinson, Mr. Day stated maybe there had been skin-to-skin contact or maybe not, he was not sure. 8/13/08RP 69. He also said he had wanted to touch A.N.'s vagina. 8/13/08RP 70.

A jury convicted Mr. Day of child molestation in the second degree. CP 58-67.

The court first denied Mr. Day's request for a Special Sex Offender Sentencing Alternative (SSOSA) but then granted it. CP The SSOSA was subsequently revoked, leaving Mr. Day with a standard range sentence of 15 months.

D. ARGUMENT

1. MR. DAY'S FIFTH AMENDMENT RIGHTS WERE VIOLATED, WHERE HE WAS SUBJECTED TO CUSTODIAL INTERROGATION WITHOUT *MIRANDA*.

a. Custodial interrogation poses special risks to the privilege against self-incrimination. The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Article 1, § 9 of the Washington Constitution provides "[n]o person shall be compelled in any criminal case to give evidence against himself." The privilege against self-incrimination "is fully applicable during a period of custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 460-61, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The Supreme Court in *Miranda* found "an intimate connection between the privilege against self-incrimination and police custodial questioning." *Id.* at 458. The Court has repeatedly recognized the special dangers inherent in *all* custodial interrogation. "Even without employing brutality, the 'third degree' or [other] specific stratagems... custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Dickerson v. United States*, 530 U.S. 428, 435, 120

S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting *Miranda*, 384 U.S. at 455).

Custodial interrogation poses a special risk to the privilege against self-incrimination because it is inherently coercive. *Id.* It “blurs the line between voluntary and involuntary statements” by heightening the risk a person will be compelled to incriminate himself, thus violating his constitutional privilege. *Id.*

To combat the pressures of custodial interrogation and “permit a full opportunity to exercise the privilege against self-incrimination,” the Court in *Miranda* fashioned a bright-line rule. *Miranda*, 384 U.S. at 467. Under *Miranda*, police must “adequately and effectively” apprise a suspect of his rights and “the exercise of those rights must be fully honored.” *Id.* The rule forbids the use of a defendant’s custodial statements in the prosecution’s case-in-chief, “unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Id.* at 444.

Miranda requires police to do more than merely inform a suspect of his right to be silent; police must also provide a meaningful opportunity to exercise the right. “The circumstances surrounding in-custody interrogation can operate very quickly to

overbear the will of one merely made aware of his privilege by his interrogators.” *Miranda*, 384 U.S. at 469. Suspects must be warned of their right to be silent and given an opportunity to exercise the right throughout the interrogation. *Id.* at 479. Only “[a]fter such warnings have been given, and such opportunity afforded him, [may] the individual . . . knowingly and intelligently waive these rights and agree to answer questions or make a statement.” *Id.*

b. Mr. Day was in custody while returning from the polygraph examination. Whether a person is in custody for *Miranda* purposes is determined by an objective test. *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S.Ct. 3138, 82 L.E.2d 317 (1984). Under the test, the sole inquiry is “whether a reasonable person would have felt that his or her freedom was curtailed to the degree associated with a formal arrest.” *Id.*; *State v. Harris*, 106 Wn2d 784, 789, 725 P.2d 975 (1986).

Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: [was] there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Thompson v. Keohane, 516 U.S. 99, 113, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (internal quotations omitted).

For example, a reasonable person would not feel free to leave when a state officer has walked away with his identification. See *State v. Aranguren*, 42 Wn.App. 452, 457, 711 P.2d 1096 (1985) (individuals were seized when officer took their identification cards back to his patrol car to check for warrants); *State v. Crane*, 105 Wn.App. 301, 305-06, 19 P.3d 1100 (2001) (defendant seized when officer retained his identification while calling in warrants check on hand-held radio); *State v. Thomas*, 91 Wn.App. 195, 200, 955 P.2d 420, *rev. denied*, 136 Wn.2d 1030, 972 P.2d 467 (1998) (defendant seized when officer retained his identification and took three steps back to call in warrants check on hand-held radio); *State v. Dudas*, 52 Wn.App. 832, 834, 764 P.2d 1012 (1988) (defendant seized when officer took his identification back to patrol car). In that situation, a reasonable person would feel he literally could not leave, since to do so would mean giving up his identification.

The Supreme Court recently held “a series of police actions may meet constitutional muster when each action is

viewed individually, but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively.” *State v. Harrington*, __P.3d__, 2009 WL 4681239 (Dec. 10, 2009) at 5 (citing *State v. Soto-Garcia*, 68 Wn.App. 20, 841 P.2d 1271 (1992), *abrogated on other grounds by State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996), *overruled on other grounds by State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)). In both *Harrington* and *Soto-Garcia*, the encounters between the defendants and the police began consensually, but the officers’ further actions and additional circumstances “matured into a progressive intrusion,” to the point that a reasonable person would not have felt free to leave. *Harrington*, slip op. at 6. In *Soto-Garcia*, the defendant actually approached the officer, but “considering all the circumstances surrounding the encounter,” the defendant was seized when the officer asked if he had any cocaine and if he could search him. *Soto-Garcia*, 68 Wn.App. at 24-25. In *Harrington*, what began as a social contact progressively became a seizure when the officer asked the defendant about his activities that evening, asked him to take his hands out of his pockets, and asked to frisk him. *Harrington*, slip op. at 6. Here, although Mr. Day consented to the polygraph and Detective Gordon’s offer to transport him there and

back, the combined circumstances, as in *Harrington* and *Soto-Garcia*, created a police-controlled atmosphere and transformed the situation into a seizure.

Mr. Day was in Detective Gordon's police car in Kent, about 12 miles away from his home in Burien, when Detective Gordon began interrogating him again about the allegations. Although Detective Gordon testified that if Mr. Day had asked him to, he would have pulled over and let him out, the detective's unstated thoughts "have no bearing on the question whether a suspect was 'in custody' at a particular time." *State v. Solomon*, 114 Wn.App. 781, 790, 60 P.3d 1215 (2002), quoting *Berkemer*, 486 U.S. at 442.

Applying the objective analysis, it would be an unrealistic proposition for Mr. Day to expect he could leave the car at any time, as it would leave him stranded, miles from home, with no apparent way to get back. Like one whose identification has been taken away, a reasonable person in Mr. Day's position would not have felt free to leave. Mr. Day was therefore in custody.

c. The prior *Miranda* warnings were insufficient for the interrogation in the car. Detective Gordon testified he did not advise Mr. Day of his *Miranda* rights in the car because he knew polygraph examiner Jason Brinson had already done so.

8/11/08RP 26. However, that advisement had occurred some time earlier, in a separate place, by another person. Presumably, Mr. Day did not even know Detective Gordon witnessed Mr. Brinson advising Mr. Day of his rights, since Detective Gordon watched from an observation room intended to hide the observer from view. 8/11/08RP 26; 8/13/08RP 68. The *Miranda* warnings given by Mr. Brinson could no longer be effective.

d. The error was not harmless. The erroneous admission of these statements could not be harmless. *Dickerson*, 530 U.S. at 444. In the car, Mr. Day stated he was not sure whether or not he had skin-to-skin contact with A.N. 8/13/08RP 69. Although this was similar to his earlier statement to Mr. Brinson, the repetition of this statement certainly would have prejudiced him further in the eyes of the jury.

More importantly, Mr. Day told Detective Gordon he “wanted” to touch A.N.’s vagina, whether or not he actually did. 8/13/08RP 70. The main focus of defense counsel’s argument to the jury was that the State had failed to prove Mr. Day acted “for the purpose of gratifying sexual desires.” In response, the State relied on Mr. Day’s statement that he “wanted” to touch A.N. sexually.

Thus, admission of these statements caused actual prejudice and the conviction must be reversed. *State v. France*, 121 Wn. App. 394, 403, 88 P.3d 1003 (2004).

2. THE TRIAL COURT'S FINDINGS OF FACT WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

a. Findings of Fact must be supported by substantial evidence. When reviewing conclusions of law based on findings of fact, a reviewing court must still determine whether the lower court's findings of fact are supported by substantial evidence, and if so, whether the findings support the conclusions of law. *State v. Sommerville*, 111 Wn.2d 524, 534, 760 P.2d 932 (1988); *State v. Graffius*, 74 Wn.App. 23, 29, 871 P.2d 1115 (1994). Substantial evidence exists to support a finding of fact when the record contains a sufficient quantity of evidence to persuade a fair-minded person of the truth of the declared premise. *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987); *Graffius*, 74 Wn. App. at 29. Reversal may be warranted where the facts are not supported by substantial evidence. *State v. Stimson*, 41 Wn.App. 385, 391, 704 P.2d 1220 (1985) (citing *Mood v. Banchemo*, 67 Wn.2d 835, 838, 410 P.2d 776 (1966)); see also *State v. Williamson*, 100 Wn.App. 248, 257, 996 P.2d 1097 (2000) (“[A] judge abuses his or her

discretion when findings of fact supporting the discretionary [evidentiary] decision are not supported by the evidence.”); *State v. Ramirez*, 109 Wn.App. 749, 757, 37 P.3d 343 (2002) (“An evidentiary decision may be an abuse of discretion if it is based upon facts that are not supported by the evidence,”).

b. The CrR 3.5 Ruling and the Findings of Fact on which it is based are unsubstantiated or contradicted by the evidence in the record. Finding of Fact 9 and Conclusions of Law 1, 3, and 4 are not supported by substantial evidence in the record. CP 34-35.

As discussed above, a reasonable person in Mr. Day’s position – in Detective Gordon’s vehicle after the polygraph examination, dependent on him for transportation – would not have felt free to leave. Therefore, the evidence indicates Mr. Day was in custody, *Miranda* applied, Mr. Day did not waive his rights on this occasion, and his statements on this occasion therefore were not willing, voluntary, knowing, and intelligent.

The above Findings and Conclusions should therefore be stricken and the resulting ruling reversed.

E. CONCLUSION.

For the reasons stated above, Mr. Day respectfully requests this Court reverse his conviction and remand for further proceedings.

DATED this 17th day of December, 2009.

Respectfully submitted,



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ERIC DAY,)	
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