

NO. 64017-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FEISAL MOHAMED OMAR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD McDERMOTT

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. To constitute “interrogation,” questions by law enforcement officers must, when viewed objectively, be “reasonably likely to elicit an incriminating response.” Here, the detective asked an in-custody suspect whether he wanted to talk about the incident. Does this question constitute “interrogation” or is it the sort of preliminary, background question to which Miranda does not apply?

2. Should the Court accept the State’s concession that the trial court erred in imposing certain conditions of community custody?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Feisal Omar was charged, and convicted by a jury, of a felony violation of a no-contact order. CP 1, 37. Omar received a sentence within the standard range. CP 39-42. Omar has filed a timely appeal. CP 49.

B. FACTUAL BACKGROUND.

On June 23, 2008, a Kent Municipal Court judge entered an order prohibiting Feisal Omar from contacting Hattie Lee. Ex. 1; 4RP 15-17, 24-25. On June 26, 2008, the court modified the order,

continuing the prohibition against Omar having contact with Lee and setting a termination date of June 26, 2010. Ex. 2; 4RP 15-17, 24-25.

On January 23, 2009, at approximately 11:45 p.m., Auburn police were called to Hattie Lee's residence. 3RP 9-11. When the responding officer arrived, Omar answered the door to Lee's residence. 3RP 11; 4RP 23, 28-30. Hattie Lee was present in the living room of the apartment and the officer spoke with her for 45 minutes. 3RP 11-13; 4RP 23-24. Omar was about 20 feet away from Lee when he answered the door. 4RP 24. Omar was arrested and transported to the City of Auburn jail. 3RP 13.

Two days later Auburn Detective Jordan spoke with Omar at the jail.¹ 4RP 33-36. Det. Jordan introduced himself to Omar and asked if he would like to talk to him about the incident. 4RP 35-36. Omar told the detective that there was nothing to talk about since there was a no-contact order in place and he was there in violation of the order. 4RP 36. Omar spoke with an accent, but the detective could understand what he was saying. 4RP 38.

Omar had two prior convictions for violating protection orders:
(1) In June of 2006, judgment and sentence was imposed on Omar

¹ Det. Jordan's testimony at the CrR 3.6 hearing is set forth in the argument section, below.

for two counts of “violation of a no contact order – domestic violence.”
Ex. 6; 4 RP 39-41. (2) In July of 2006, judgment and sentence was
imposed on Omar for “domestic violence misdemeanor violation of a
court order.” Ex. 5; 4RP 39-41.

III. ARGUMENT

A. **TRIAL COURT PROPERLY ADMITTED OMAR’S INITIAL STATEMENT TO DET. JORDAN.**

Omar argues that Det. Jordan’s preliminary question as to
whether Omar wanted to talk about the incident constitutes
“interrogation” and that his response should have been suppressed
because it was not preceded by Miranda warnings. Considering
the circumstances of this case in their entirety, and viewed
objectively, Det. Jordan’s question was not reasonably intended to
elicit an incriminating response. Accordingly, it is the sort of
background question to which Miranda does not apply.

1. **Relevant facts: CrR 3.5 hearing.**

The trial court held a CrR 3.5 hearing at which the following
facts were established:

On January 25, 2009, City of Auburn Detective Jordan
visited Omar in the City of Auburn jail. 2RP 6-7; CP 44 (FF 1.a).

The detective went to the jail for the purpose of interviewing Omar. 2RP 8; CP 44 (FF 1.b). Det. Jordan had Omar brought to a hallway outside of a holding cell. 2RP 9, 15; CP 44 (FF 1.c). Omar was not in handcuffs. 2RP 15. The conversation between Det. Jordan and Omar was held in a normal tone of voice. 2RP 15-16.

Det. Jordan introduced himself and told Omar he was investigating the case. 2RP 13; CP 44 (FF 1.d). The detective said: "I'd like to talk to you about this incident" and asked: "Would you like to talk to me about this incident?" 2RP 13; CP 44 (FF 1.d). Omar responded: "There was nothing to talk about, [that] there was a no contact order in place, and he (Omar) was at the location." 2RP 13-14; CP 44 (FF 1.e).

This statement was allowed by the trial court. Everything that follows was suppressed by the court, but is included here for completeness.

Jordan told Omar what the charge was. 2RP 14; CP 44 (FF 1.f). Omar asked why he was being charged with a felony. Jordan told him it was because he had three prior convictions. Omar said: "Yes, but they were with a different woman." 2RP 14; CP 44 (FF 1.f). Jordan asked Omar again if he would like to talk about the incident and Omar repeated that there was nothing to talk about since

he was there in violation of the order. 2RP 14-15; CP 44 (FF 1.g). The conversation then concluded. 2RP 19; CP 44 (FF 1.h). At no time during this exchange did Jordan inform Omar of his constitutional rights. 2RP 19.

No other witnesses testified at the CrR 3.5 hearing. After hearing argument by the parties, the trial court found that Det. Jordan's initial inquiry as to whether Omar wanted to talk about the incident was not intended to elicit an incriminating response and that it was reasonable for the detective not to expect an incriminating response. 2RP 31-32, 33-35; CP 44 (CL 4.a). Accordingly, the trial court admitted the initial response by Omar to the detective that: "There's nothing to talk about, there was a no contact order in place and I (Omar) was at the location." 2RP 31-32.

The court suppressed all of the subsequent statements by Omar because, in light of Omar's initial response, the detective should have expected that further conversation would lead to incriminating responses. 1RP 33. The trial court's CrR 3.5 findings of fact and conclusions of law were memorialized in a written order. CP 43-47 (attached as Appendix A).

2. Legal standard: “interrogation.”

Miranda warnings are required when an agent of the State engages in custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602 (1966). Thus, whether a defendant must be advised of Miranda rights depends on whether the questioning is: (a) custodial, (b) interrogation, and (c) by an agent of the State. Miranda, 384 U.S. at 444; State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988); State v. Wilson, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). In this case, there is no dispute that Omar was in custody and that Det. Jordan was an agent of the State. The only issue is whether Omar’s initial statement to the detective was a product of “interrogation.”

The United States Supreme Court defined “interrogation” for Fifth Amendment purposes in Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297 (1980). The Court held that interrogation occurs, and Miranda protections apply, “whenever a person in custody is subjected to either express questioning or its functional equivalent.” Innis, 446 U.S. at 300-01. The Court further stated:

That is to say, the term “interrogation” under Miranda refers not only to express questioning, but also to any words or actions on the part of the police. . . . that the

police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Innis, 446 U.S. at 301 (footnotes omitted); see also Sargent, 111 Wn.2d at 650. The Court observed that: “[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” Innis, 446 U.S. at 301-02; see also State v. Grisby, 97 Wn.2d 493, 505, 647 P.2d 6 (1982); State v. Braun, 82 Wn.2d 157, 509 P.2d 742 (1973); Wilson, 144 Wn. App. at 184.

The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts. Accordingly, the subjective intentions of the officer are not at issue. See Sargent, 111 Wn.2d at 651.

The facts of Innis are instructive. In that case, the defendant was arrested for murder and kidnapping. A shotgun was involved in the murder and had not been located at the time of his arrest. The defendant was given Miranda warnings and exercised his right to remain silent. However, after overhearing two officers discuss

the possibility of a disabled child injuring herself if she found the murder weapon, defendant relented and told the officers the location of his hidden shotgun. The United States Supreme Court held on appeal that the police should not have reasonably known their action would elicit an incriminating response because “[t]his is not a case where the police carried on a lengthy harangue in the presence of the suspect. . . [and] the record [does not] support the respondent’s contention that, under the circumstances, the officers’ comments were particularly ‘evocative.’” Innis, 446 U.S. 295-303.

3. Standard of review.

Washington courts have traditionally reviewed the trial court’s determination as to whether questioning by a State agent constitutes “interrogation” as a question of fact, subject to the clearly erroneous standard of review. See State v. Walton, 64 Wn. App. 410, 413-14, 824 P.2d 533 (1992); State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633 (2009).

As Omar has observed in his brief on appeal, it is arguable that this is actually a mixed question of law and fact. As such, the trial court’s factual determinations would be reviewed under a clearly erroneous standard and then the relevant legal standard applied to the “historical facts” and reviewed *de novo*. See, e.g.,

Thompson v. Keohane, 516 U.S. 99, 110, 116 S. Ct. 457, 464 (1995) (applying a mixed questions of fact and law standard of review when determining whether defendant is “in custody” for purpose of Miranda).

This issue does not need to be resolved in the present case because, under even the more stringent standard of review, the trial court did not err in concluding that Det. Jordan’s question was not “interrogation.”

4. The trial court properly concluded that Det. Jordan’s question was not “interrogation.”

Det. Jordan asked Omar whether he would like to talk with him about the incident. Viewed objectively, and from Omar’s perspective, this inquiry was not an interrogation: it was neither a direct question about the alleged violation of the no-contact order nor “words or actions” that Det. Jordan should have known were reasonably likely to elicit an incriminating response. Rather, this was simply the detective introducing himself to Omar and trying to determine whether Omar wanted to make a statement. The question required nothing more than a “yes” or “no” response. Considering the circumstances of this encounter in their entirety, Omar’s response discussing the incident was neither required,

expected, necessary, nor compelled. This is not the level of “interrogation” required to invoke Miranda protections.

The Washington Supreme Court has considered a remarkably similar set of facts in Matter of Pirtle, 136 Wn.2d 467, 965 P.2d 593 (1998), an aggravated first degree murder case. In Pirtle, the Court rejected the suggestion that an even more direct question, constituted interrogation:

. . . Pirtle contends his due process rights were violated because the State introduced an involuntary, non-Miranda statement. The key question to Pirtle's claim is whether or not he was being interrogated. If he was being interrogated by Deputy Walker upon his arrest, Pirtle argues the statement would have been excluded under Miranda. . . . However, Deputy Walker asked Pirtle if he knew why he was being arrested, which occurred at the time of the arrest. *The expected response to Deputy Walker's question was likely "yes" or "no" and falls into the background questioning category under which Miranda warnings are not applicable.*

Pirtle, 136 Wn.2d at 486 (citations and footnote omitted, emphasis added). Det. Jordan's question was far less pointed than the question in Pirtle and also only called for a “yes” or “no” response. The detective's inquiry was clearly a background question to which Miranda does not apply.

The cases cited by Omar on appeal demonstrate the sort of questioning that does constitute interrogation. In State v. Wilson,

144 Wn. App. 166, 184-85, 181 P.3d 887 (2008), Wilson was in jail for stabbing Thrush. Wilson had claimed that she had been strangled and had no memory of what had occurred. She then requested counsel and the interview ended. Subsequently, an officer again spoke with Ms. Wilson and informed her that Thrush had died. Wilson then collapsed, saying, "I didn't mean to kill him. I didn't mean to stab him." Id. at 174.

In reversing Wilson's conviction, the Court of Appeals stated: "Given Ms. Wilson's situation, the officer should have known that the death notification was reasonably likely to elicit an incriminating response. The officer should not have initiated a conversation with Ms. Wilson by stating that Mr. Thrush had died. The court erred by allowing Ms. Wilson's statement after she invoked her right to counsel." Id. at 185.

Wilson is a far cry from the facts of the present case. Given Wilson's potential self-defense claim, her denial that she could remember what had happened, the inconsistencies between her version of events and the crime scene, and her request for counsel, the Court of Appeals correctly concluded that providing her with a "death notification" was reasonably likely to elicit an incriminating response. Wilson does not stand for the proposition that a

generalized inquiry by an officer, at the beginning of an interview, as to whether the suspect wants to discuss the incident constitutes “interrogation.”

Omar has also incorrectly interpreted State v. Grieb, 52 Wn. App. 573, 761 P.2d 970 (1988). In Grieb, the defendant repeatedly stated that he did not want to “waive his rights” but officers nevertheless continued to question him. Not surprisingly, the Court of Appeals agreed that the defendant’s subsequent statements were properly suppressed:

Mr. Grieb asserted his Miranda rights by stating he did not want to waive them. At that point, his rights should have been “scrupulously honored” and the interview should have immediately terminated. His equivocally stated desires are of no moment. Since the officers intended to question Mr. Grieb regarding his suspected involvement in specific burglaries, it was foreseeable the questioning could elicit an incriminating response. To justify a continuance of an interview which seeks to obtain incriminating statements, the record must unequivocally establish a knowing waiver of his Miranda rights. That is not the situation here. Thus, Mr. Grieb’s admissions were properly suppressed.

Grieb, 52 Wn. App. at 576, 761. The present case, unlike Grieb, does not involve a detective continuing to question a suspect after the invocation of the right to be silent.

The out-of-jurisdiction cases cited by Omar are no more persuasive. For example, in State v. Christmas, 980 A.2d 790, 793 (Vt. 2009), the detective did not honor the defendants right to remain silent and made up stories that the detective admitted were designed to invoke an incriminating response.²

Likewise, Cuervo v. State, 967 So.2d 155 (Fla. 2007), involved continued questioning by police after the defendant had invoked his right to remain silent. Again, this questioning was intended to subtly coerce the defendant into giving a statement.³ Id. at 164.

² “The district court recognized that much of defendant’s interaction with the detective at the station was unrelated to an investigatory purpose, but that the detective, admittedly, recounted personal stories of a kind intended to evoke an inculpatory response. The court thus concluded that the detective’s “conduct exceeded the normal incidents of custody which were permissible under the circumstances, because he actively used his interactions to convince the defendant to make a statement.” The district court found that the detective’s “offers of rest and refreshments were intended to create a rapport, in order to convince the defendant to trust him.” Furthermore the detective admitted that “it was likely that he told [defendant] ‘personal’ stories apparently based on his own life, that were intended to demonstrate that he had experience that was in some way related to the defendant’s current situation.” Finally, the court found that ninety minutes after defendant invoked his right to remain silent, and before administering Miranda warnings, the detective again directly asked defendant whether he was ready to talk about the shooting. As the district court found, “[the detective] had no intention of accepting the defendant’s initial refusal as his final word, and he *deliberately* took advantage of these opportunities both to build rapport with the defendant and to encourage him to change his mind.”

Christmas, 980 A.2d at 793 (emphasis added in original).

³ “In this case, the officers engaged in conduct they could reasonably anticipate would elicit an incriminating response. After Cuervo invoked his right to remain silent and signed the rights form, Palmieri instructed Garcia to tell Cuervo that he

State v. Hoeplinger, 206 Conn. 278, 537 A.2d 1010 (Conn. 1988), is also not on point. In Hoeplinger, police questioned a murder suspect over a thirteen-hour period without reading him his Miranda rights. The primary issue on appeal was whether the suspect was in custody during this questioning.⁴ It was undisputed that the questioning constituted interrogation. Moreover, in Hoeplinger, the chief of police specifically asked the defendant for a written statement concerning the events in question, not simply whether he wanted to give a statement. Id. at 281-82.

could give “his side of the story.” Garcia then told Cuervo, “[N]ow would be your opportunity if you wish to speak and explain your side of your story, your version of what happened.” Garcia added that although Cuervo was not obligated to talk, if he wished to talk ‘there’s still time.’ These remarks undermined the warning to Cuervo that *anything* he said could be used *against him* in a court of law. In addition, the officer’s statement created the impression that, despite his expressed desire not to talk, Cuervo had a brief window in which to vindicate himself. Cuervo again declined to talk, but significantly, he felt compelled to provide an explanation for foregoing this “opportunity” to tell his ‘side of the story.’”

Cuervo, 967 So.2d at 164 (emphasis in original).

⁴ “The defendant had been ‘covered with blood’ when the officer arrived at his home; the defendant had been escorted twice to the police cruiser at the crime scene; an officer had stood outside the cruiser to which the defendant had been escorted; the defendant had been taken directly to the police station in the police chief’s vehicle; the defendant had not been allowed to go to the bathroom alone in order to prevent him from washing his hands; and the defendant had never been informed that he was free to leave. . . . We also note that the defendant was at the police station for over thirteen hours except for a trip to a hospital in a police car. During all of this time, except when talking to his lawyer or when he was permitted to use the telephone, he was in the presence of police officers. When not in their presence, he was under continuous surveillance. Both the physical surroundings of interrogation and its duration are important factors in determining whether a suspect is in custody. . . . Moreover, the defendant had no personal means of transportation to return to his home. . . .”

Hoeplinger, 206 Conn. at 287-88 (citation omitted).

Contrary to Omar's suggestion, the above cases do not stand for the position that whenever an officer asks a defendant for "his side of the story" interrogation has occurred. But even if this was the case, this was not the question posed by Det. Jordan, who only asked if Omar wanted to speak with him about the incident.

Omar argues that Det. Jordan's inquiry constituted "express questioning." But express questioning must be about the case under investigation. If this were not so, then even completely innocuous questions by officers would have to be preceded by Miranda warnings simply to protect against the situation in which the suspect might blurt out an incriminating response. The United States Supreme Court's made clear that this is not required when it stated in Innis:

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in Miranda noted:

"Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.* . . . Volunteered statements of any kind are not barred by the Fifth

Amendment and their admissibility is not affected by our holding today.”

It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. “Interrogation,” as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

Innis, 446 U.S. 291, 299-300 (internal citation and footnote omitted, emphasis and ellipses in original).

Omar argues that any question automatically constitutes “express questioning.” It is on this basis that Omar seeks to distinguish “express questioning from” its “functional equivalent.” But as the Supreme Court in Innis made clear, the real question is whether “there is a measure of compulsion” above and beyond “custody itself.” It is in this context that the Court concluded that a “practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.” Innis, 446 U.S. at 301.

As Omar recognizes, a voluntary statement by a defendant not in response to an officer’s question is admissible, regardless of whether the defendant is in custody. See, e.g., Miranda, 384 U.S. at 478; Innis, 446 U.S. at 299, 300; State v. Bradley, 105 Wn.2d

898, 904, 719 P.2d 546 (1986). The threshold issue, of course, is whether officers engaged “interrogation.” If the officer did not do so, then the suspect’s unforeseen and unanticipated response is voluntary and admissible.

Contrary to Omar’s assertion on appeal, this case does not turn on a “semantic difference.” The issue is straightforward: viewed objectively, did the detective’s query reasonably likely elicit an incriminating response. None of the cases relied upon by Omar come close to suggesting that a simple question posed by a detective as to whether the suspect wants to speak about the incident constitutes interrogation. Under the circumstances of this case, Det. Jordan’s inquiry did not create a “measure of compulsion” above and beyond custody itself. Viewed objectively, the detective should have known this question was reasonably likely to elicit an incriminating response. At best Omar’s response was a voluntary admission. This court should conclude that the trial court correctly concluded that Det. Jordan’s inquiry did not constitute interrogation.

5. Any error in admitting Omar's answer to Det. Jordan's question was harmless.

Assuming for the sake of argument that the admission of Omar's statement was error, it was nevertheless harmless beyond a reasonable doubt. Admission of statements in violation of Miranda is an error of constitutional magnitude. Wilson, 144 Wn. App. at 185. Constitutional evidentiary error is harmless only if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error; the State bears the burden of establishing harmless error in this context. See, e.g., State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

In the present case, the following facts were established beyond a reasonable doubt: there was a no-contact order in place between Omar and Hattie Lee. Omar was discovered in Lee's apartment. The responding officer spoke with Lee for about 45 minutes and (although Lee did not testify) was able to confirm her identity from a certified copy of Lee's driver's license. Omar had two prior violations of a no-contact order, which elevated this crime to a felony. This evidence alone, without reference to Omar's

statement, is sufficient to conclude that Omar was guilty beyond a reasonable doubt.

Omar contends that the State could not carry its burden of proof because there was no testimony that the no-contact orders were translated for Omar at the time they were entered. Of course, there was also no evidence in the record that Omar did not speak or understand English and that he needed to have the orders translated. Both no-contact orders, in English, signed by Omar, were introduced into evidence. The State's burden of production and proof was satisfied with the introduction of these documents into evidence, absent contrary evidence. In this context, absent any contrary evidence, any error in admitting Omar's statement is harmless. See, e.g., State v. France, 129 Wn. App. 907, 911, 120 P.3d 654 (2005) (error in admitting defendant's non-Miranda statement admitting awareness of no-contact order was when record contained certified copy of no-contact order with defendant's signature on it).

Nor is it sufficient for Omar to assert that the jury was aware that he had an interpreter during trial. The fact that an interpreter was used is not, by itself, evidence. Indeed, an interpreter may be made available upon the defendant's request. In any event, in the

present case, the record establishes that Omar was not in fact reliant on the interpreter to understand the proceedings. Omar's lengthy pre-trial discussion with the court, which was conducted in English, establishes this fact. 1RP 11-20.

B. CERTAIN COMMUNITY CUSTODY CONDITIONS IMPOSED AT SENTENCING MUST BE STRICKEN.

For the reasons set forth in Omar's brief on appeal, and pursuant to the law in effect at the time this incident occurred, the State agrees that the trial court lacked authority to impose the following community custody conditions: (1) that Omar not consume any non-prescribed drugs, (2) that Omar obtain a substance abuse evaluation and comply with treatment recommendations, and that (3) Omar enter and complete a state certified domestic violence batterer's treatment program. CP 42. This case should be remanded so that the judgment and sentence can be amended to address these errors.

As Omar recognizes, however, there was evidence in the record to support the conclusion that Omar consumed alcohol on the day of the incident and that this contributed to his decision to violate the no-contact order. 5RP 7-9. Consistent with the court's sentence, Omar should be required to obtain an alcohol evaluation

and follow all treatment recommendations as a condition of community custody.

IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that Omar's conviction for violating a no-contact order be affirmed.

DATED this 29th day of March, 2010.

Respectfully submitted,

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EXHIBIT A

CrR 3.5 Findings of Fact & Conclusions of Law

CP 43-47

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	
vs.)	
)	
FEISAL M. OMAR,)	
)	Defendant.
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No. 09-1-02243-3 KNT
WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on July 7, 2009 before the Honorable Judge McDermott. The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

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ORIGINAL

1 After considering the evidence submitted by the parties and hearing argument, to wit: the
 2 testimony of Detective Michael Jordan, the court enters the following findings of fact and
 3 conclusions of law as required by CrR 3.5.

4 1. THE UNDISPUTED FACTS:

5 a. The defendant was in-custody at the Auburn Municipal Jail after being arrested on
 6 January 23, 2009 for Felony Violation of a Court Order;

7 b. Detective Jordan went to the jail to make contact with the defendant;

8 c. Detective Jordan requested that a jail officer bring the defendant ^{from his holding} ~~out into the~~
 9 ~~cell into the booking area hallway~~ ^{hallway} so that Detective Jordan could speak with him;

10 *RAM* d. The defendant and Detective Jordan spoke in the hallway. Detective Jordan

11 introduced himself to the defendant, told the defendant he was investigating the
 12 case, ^{saying, "I'm Detective Jordan. I'd like to talk} and asked the defendant if he would like to speak with him about the incident.

13 *RAM* e. The defendant replied, "there was nothing to talk about, there was a no-contact
 14 ^{to you about this incident. Would you like to} ~~order in place and he was at the location."~~ ^{talk to me about this incident?"}

15 f. The detective informed the defendant of the charges he was being held on and the
 16 defendant then asked the detective why he was being held on a felony. The
 17 detective told him that it was because he had three prior convictions. The
 18 defendant then said, "yes, they were with a different woman."

19 g. The detective again asked the defendant if he would like to talk to him about the
 20 incident and the defendant repeated, "there was nothing to talk about, there was a
 21 no-contact order in place and he was at the location."

22 h. The detective then left the jail.

23
 24 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 4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S
2 STATEMENT(S):

3 a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

4 The following statement(s) of the defendant is/are admissible in the State's case-
5 in-chief:

6 "there was nothing to talk about, there was a no-contact order in place and he was
7 at the location."

8 This/These statement(s) is/are admissible because Miranda was not applicable
9 because the court finds that the detective's question to the defendant asking if he
10 was willing to talk about the incident was not a question designed to elicit an
11 incriminating response from the defendant; and was not a question that the officer
12 should have known was reasonably likely to elicit an incriminating response from
13 the defendant.

14 b. ADMISSIBLE FOR IMPEACHMENT

15 The following statement(s) of the defendants is/are admissible only for
16 impeachment because the custodial statements were not knowingly and
17 intelligently made after waiver of Miranda rights, but the statement(s) was/were
18 voluntary:

19 No findings were made.

20
21 In addition to the above written findings and conclusions, the court incorporates by
22 reference its oral findings and conclusions.

23
24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 4

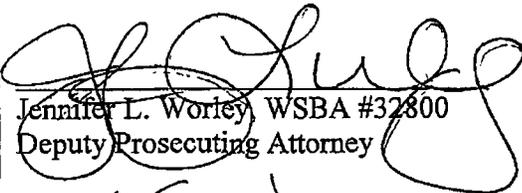
Daniel T. Satterberg, Prosecuting Attorney
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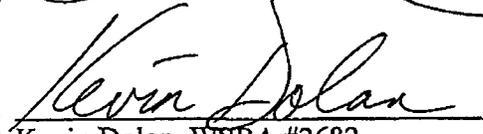
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Signed this 24 day of July 2009.


JUDGE
RICHARD F. McDERMOTT

Presented by:


Jennifer L. Worley, WSBA #32800
Deputy Prosecuting Attorney


Kevin Dolan, WSBA #2682
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 Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FEISAL MOHAMED OMAR, Cause No. 64017-8-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

3/29/10
Date 3/29/10

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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