

NO. 67856-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARK HOUGHTON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. Mark Houghton was denied his rights counsel and to be free from compelled self-incrimination as a result of police deception, contrary to the Fifth and Sixth Amendments and Article I, section 22.

2. The court erred by entering finding of fact (1)(j), which is not supported by substantial evidence.¹

3. To the extent conclusions of law (3)(a) and (b) are construed as findings of fact, they are not supported by substantial evidence.

4. The prosecution impermissibly used Houghton's failure to testify at a pretrial hearing as evidence against him, in violation of his rights to remain silent and to receive due process of law as protected by the Fifth and Fourteenth Amendments and Article I, sections 3, 9, and 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When law enforcement officers question a suspect about a crime, they may not deceive the suspect into waiving his right to counsel. Houghton asked if he should have his lawyer present for the police interrogation, but an arson investigator told Houghton

that he would no longer be considered a victim if he wanted counsel present. Was Houghton impermissibly deceived into waiving his right to remain silent and to have counsel present for police interrogation?

2. Prosecutors undermine the fairness of a trial when they encourage jurors to consider as evidence of guilt that an accused person's exercised his right to remain silent, or inject a witness's opinion of the accused's credibility into the trial. By eliciting evidence and arguing to the jury that Houghton should be convicted because he had not testified at a pretrial hearing and another witness thought Houghton was untrustworthy, was Houghton denied his right to a fair trial?

C. STATEMENT OF THE CASE.

Mark Houghton lived on a boat docked at a marina on Vashon Island. 9/7/11RP 63-64. Houghton did not own the boat – title belonged to its original owner David Parker -- but they had agreed that Houghton would make monthly payments in order to purchase the boat in full. 8/30/11RP 35; 9/7/09RP 61-62. In December 2008, Houghton still owed approximately \$14,000 of the \$15,000 sales price for the boat. 8/30/11RP 38-39. As part of the

¹ The written findings of fact from the CrR 3.5 hearing are attached as

sales agreement, Houghton paid insurance for the boat even though he did not own the boat outright. 8/30/11RP 45; 9/7/11RP 61-62, 153.

On December 25, 2008, a small fire ignited inside the boat, charring cushions, a sail, and some other items. 8/30/11RP 135-36. Houghton believed that some of his personal property was either taken by whoever started the fire or destroyed, and reported over \$2000 in loss of property to the insurance company. Ex. 10. The insurance company paid Parker, not Houghton, for damage to the boat. 8/31/11RP 81.

After determining that the fire had gone out on its own, firefighters investigated its cause. 8/30/11RP 149-50. They decided the fire was likely the result of arson and called a King County arson investigator Brian Pomeroy to investigate at the scene. 8/25/11RP 6-8.

Pomeroy arrived a few hours after the fire, met with the firefighters, then interviewed Houghton. 8/30/11RP 149-50, 154. Houghton had a volunteer job as a dock host at the Dockton Marina in exchange for free boat moorage, and Pomeroy took Houghton into a small office at the dock for a recorded interview.

Appendix A.

8/30/09RP 89. Pomeroy read Houghton his Miranda rights.

8/25/11RP 9. Pomeroy later explained that it is his policy to give Miranda warnings to all witnesses, but Houghton was the only witness to which he provided such warnings. 8/25/11RP 27-28.

When told he had the right to counsel, Houghton asked if he should contact his lawyer. 8/25/11RP 23; Ex. 18, p. 2. Pomeroy told him he was being interviewed as a "victim," and they should get the paperwork done, causing Houghton to agree to the interview without counsel. 8/25/11RP 23; Ex. 17; Ex. 18, p. 2.

Houghton was later charged with first degree arson and filing a false insurance claim. CP 21-22. At his jury trial, he testified that he saw someone flee from the dock close in time to when the fire started, which was not testimony that he had provided Pomeroy. 9/7/11RP 111. Houghton had told Pomeroy that there were problems with drug dealing as well as vandalism at the dock. 9/7/11RP 86.

Houghton also testified that he felt Pomeroy pressured him to make the statements he gave at the scene of the fire without having a lawyer. 9/7/11RP 149, 151. The prosecutor cross-examined Houghton about why he was present the pretrial suppression hearing and yet had not testified at this pretrial hearing

when the court was deciding whether Houghton's statements were elicited lawfully. 9/8/11RP 41-43. The court later decided that the prosecutor should not have asked Houghton about why he was silent during the suppression hearing and told the jurors not to refer to whether Houghton testified at the pretrial hearing during deliberations. 9/8/11RP 106.

Houghton was convicted of the charged offenses and received a standard range sentence. CP 60-64. Pertinent facts are discussed in further detail in the relevant argument sections below.

D. ARGUMENT.

1. **Where an officer obtained Houghton's withdrawal of his request for counsel by misleading him, Houghton did not knowingly and intelligently waive his right to have counsel present before answering questions**

a. Houghton had the right to counsel when he was questioned by law enforcement.

The right to counsel and the right to remain silent when accused of criminal activity are bedrock protections guaranteed by the Fifth and Sixth Amendments as well as article I, sections 9 and 22 of the Washington Constitution. Miranda v. Arizona, 384 U.S. 436, 458, 466, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

If, during questioning, an accused person requests counsel, “the interrogation must cease until an attorney is present.” Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (quoting Miranda, 384 U.S. at 474). So long as the accused has made “some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney,” questioning must end. Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Law enforcement officers may not resume interrogation until counsel has been made available. Edwards, 451 U.S. at 484-85. This is a “rigid rule” protecting an “undisputed right.” Id. at 485.

When Investigator Pomeroy questioned Houghton in the course of his arson investigation, the trial court ruled that “Miranda was applicable,” and the statements Pomeroy elicited required Houghton’s knowing, intelligent, and voluntary waiver of “his Miranda rights.” CP 73 (Conclusion of Law (4)(a)). Houghton was being questioned by a law enforcement officer about the criminality of a dangerous fire after firefighters on the scene “determined the fire was an arson” and requested the Sheriff’s office send an “arson investigator” to the scene of Houghton’s boat fire. CP 71 (Finding of Fact (1)(e)). Houghton was questioned while isolated in an office,

knew he was being questioned by an arson investigator, and was informed of his Miranda rights, all of which are indicia that inform a reasonable person he is not free to leave. 8/25/11RP 7, 10, 12, 28-29. Compare State v. Heritage, 152 Wn.2d 210, 219, 95 P.3d 345 (2004) (defendant not in custody when briefly questioned in public, while sitting on a bench with friends, and security guards explain they have no authority to arrest); State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) (Whether a defendant was in custody for Miranda purposes depends on “whether the suspect reasonably supposed his freedom of action was curtailed.”).

A “heavy burden” rests on the prosecution to demonstrate a defendant knowingly and intelligently waived his privilege against self-incrimination. Miranda, 384 U.S. at 475. The State must demonstrate that the defendant was fully advised of his rights, understood them, and knowingly waived them. State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). Houghton was pressured to waive his right to counsel by the investigating officer after he asked whether he should have his lawyer present and thus, he did not waive his right knowingly, intelligently and voluntarily.

b. The State failed to honor Houghton's request for counsel and used trickery to obtain a waiver of counsel.

Edwards dictates a "rigid rule" demanding law enforcement officers cease interrogation when a person being questioned requests counsel. 451 U.S. at 484-85. Police must stop questioning the person if he "articulates his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis, 512 U.S. at 459; see also Montejo v. Louisiana, 556 U.S. 778, 787, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (when suspect has invoked right to counsel, police may not badger him to give up that right)

"[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda, 384 U.S. at 476. Deception or trickery cast doubt on the constitutional validity of a waiver "if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

Police may not induce a waiver of the right to counsel by deception even though officers may engage in some degree of lying or misrepresenting facts when eliciting statements from a potential suspect. State v. Broadaway, 133 Wn.2d 118, 131-32, 942 P.2d 363 (1997). Deception casts doubt on the voluntariness and intelligence of the waiver of counsel. A waiver of constitutional rights is voluntary only if it is made with full awareness of the right being abandoned and the consequences of the decision to abandon it. Moran, 475 U.S. at 421.

At the outset of the investigator's questioning, Houghton stated his interest in consulting counsel before answering questions. Ex. 18, p. 2. Houghton said, "should I contact my lawyer?" Id. But the investigator pressured him to forgo that request by letting him know that he was participating in the interview as a "victim" and not as a suspect. Id.

In State v. Lewis, 32 Wn.App. 13, 15, 645 P.2d 722 (1982), the defendant voluntarily went to speak to an investigator from the prosecution and two prosecutors were present in the room. The defendant knew the State was investigating a financial crime. Id. After waiving his Miranda rights and agreeing to a recorded interview, a prosecutor asked Lewis to clarify whether he wanted

counsel. Id. at 16. Lewis said no, he would “cross that bridge” later if he wanted counsel. Id. Again, the prosecutor reminded him he had the right to have an attorney present and explained they planned to ask “deep” questions about the investigation and reminded him he had the right to have counsel present. Id. Lewis declined to request counsel. Id.

There are critical distinctions between Lewis and Houghton’s interaction with Pomeroy. As in Lewis, Houghton initially agreed to answer questions and to be recorded. But where Lewis obliquely referred to the possibility he might want counsel at a later time, Houghton immediately asked whether he should have his attorney present. In Lewis, the prosecutors then reminded the defendant that he had the right to counsel and to terminate the interview, and never implied they did not intend to ask incriminating questions. Unlike Lewis, Pomeroy did not try to clarify Houghton’s desire to have counsel. Instead, Pomeroy told Houghton that this was a “victim” interview. Pomeroy indicated that as a victim, Houghton would not need counsel to be present. Ex. 18, p. 2-3. Pomeroy further indicated that if Houghton sought a lawyer, he would not be considered a victim, and thus would be admitting guilt by asking for counsel. Id.

When Houghton began explaining that he thought he should have a lawyer because of problems he had with his ex-wife, Pomeroy changed the subject to ask whether his ex-wife had been present at the dock, implying that perhaps she was responsible for the fire. Ex. 18, p. 3. Then Pomeroy moved forward, and said, "Ok. All right. Let's just get the paperwork done here." Ex. 17.²

Consequently, Houghton was placed in the position where a request for counsel was as admission of guilt, which improperly interfered with Houghton's right to voluntarily choose whether he wanted counsel present for his interview with the law enforcement officer. Pomeroy distracted Houghton then moved forward after telling Houghton he would lose his status as a victim if he did sought the presence of counsel.

The court entered as finding of fact (1)(j) that Pomeroy followed this exchange by focusing Houghton on whether he wanted to tell him what happened. CP 72. In fact, Pomeroy changed the subject to ask whether Houghton's ex-wife could be responsible and then said "let's just get the paperwork done here." Ex. 17. By deceiving Houghton into thinking that he was just doing

² The transcript indicates that what Pomeroy said after "Ok. All right." is unintelligible, but the recording of the interview is readily discerned. Pomeroy clearly says, "well, let's just get this paperwork done." Ex. 17.

paperwork as a victim, rather than waiving his right to remain silent and his right to counsel, the officer improperly pressured Houghton into waiving his right to counsel.

The remedy for improperly interfering with a suspect's decision about whether to seek the advice of counsel is suppression of the illegally obtained evidence and any evidence obtained as a fruit of that illegality, unless the prosecution proves the evidence was obtained by an independent source. State v. Ladson, 138 Wn.2d 343, 359, 979 P.3d 833 (1999); State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). Courts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.5 hearing fails to offer supporting facts or argument. State v. Ibarra-Cisneros, 172 Wn.2d 880, 885, 263 P.3d 591 (2011). Houghton's statements to Pomeroy must be suppressed. Later statements to other detectives or law enforcement officers may be admitted only if the prosecution proves they were acquired by an independent source. All evidence obtained as a result of the illegally-elicited statement must be suppressed. Id. at 886.

Under the harmless error test, "a conviction will be reversed where there is any reasonable chance that the use of inadmissible

evidence was necessary to reach a guilty verdict.” State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The content of Houghton’s statements to Pomeroy, both what he said and did not say, were central to the prosecution’s case against him. Houghton never admitted responsibility for the fire, but gave inconsistent statements blaming others and describing the condition of the boat. These inconsistencies were used by the State to claim Houghton must have been the person who started the fire. Even if his later statements to other detectives are admissible, the State relied heavily on what he said and did not say to Pomeroy in his recorded statement on the night of the fire, and thus, its improper use against him undermines the verdict obtained. Guloy, 104 Wn.2d at 426.

2. By using Houghton’s right to remain silent against him and emphasizing a witness’s opinion of Houghton’s credibility, the prosecution encouraged the jury to convict Houghton for impermissible reasons

- a. A prosecutor may not use improper tactics to gain a conviction.

Trial proceedings must not only be fair, they must “appear fair to all who observe them.” Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A prosecutor’s

misconduct violates the “fundamental fairness essential to the very concept of justice.” Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

An accused person’s right to remain silent is a bedrock principle of our criminal justice system. Griffin v. California, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); U.S. Const. amend. 5; Const. art. I, § 9.³ The Fifth Amendment “forbids” any “comment by the prosecution on the accused’s silence.” Griffin, 380 U.S. at 615.

Accordingly, the prosecution may not comment on a defendant’s exercise of his right to remain silent. “[I]t is constitutional error for the State to purposefully elicit testimony as to the defendant’s silence.” State v. Romero, 113 Wn.App. 779, 790, 54 P.3d 1255 (2002).

A direct comment on the accused’s right to remain silent requires reversal unless the prosecution proves it was harmless beyond a reasonable doubt. Romero, 113 Wn.App. at 790. Even when a prosecutor may comment on a person’s silence, it may only

do so to impeach him, not imply it may be considered as substantive evidence of guilt. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Additionally, it has also been long-recognized that a prosecutor may not ask a witness to comment on the defendant's credibility. A prosecutor's efforts to induce an accused person to discuss another witness's truthfulness "rises to the level of flagrant misconduct." State v. Suarez-Bravo, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); see also State v. Boehning, 127 Wn.App. 511, 525, 111 P.3d 899 (2005) ("Asking one witness whether another witness is lying is flagrant misconduct."). It invades the province of the jury to ask "a witness to judge whether or not another witness is lying." Id. at 366.

b. The prosecution used Houghton's silence and a witness's opinion of his credibility as evidence against him.

Several times the prosecutor elicited Houghton's failure to testify at the pretrial suppression hearing, even though Houghton had no obligation to testify at that hearing. 9/8/11RP 41-43. When Houghton objected, the court overruled the objection. 9/8/11RP 41.

³ The Fifth Amendment provides that no person "shall ... be compelled in any criminal case to be a witness against himself." Article I, section 9 similarly provides, "[n]o person shall be compelled in any criminal case to give evidence

The prosecutor again asked Houghton why he had not told the court that Pomeroy pressured him to waive counsel, defense counsel objected to the comment on his right to silence and, without a court ruling on the objection, the prosecutor promised he would “move on.” Id. But rather than “moving on” as promised, the prosecutor again asked Houghton about his failure to testify at the pretrial hearing. 9/8/11RP 43. The court sua sponte directed the prosecutor to “move on.” Id.

At a later point in the trial, after the prosecutor had emphasized Houghton’s failure to offer his own testimony at the pretrial hearing, the prosecutor admitted there was no case law permitting him to question an accused person about his failure to testify at a pretrial hearing. 9/8/11RP 97. The prosecutor conceded that the court should instruct the jury to disregard this testimony. Id.

As an attempted curative instruction, the court reminded the jury that the prosecutor asked Houghton about a pretrial hearing on the admissibility of his statement to Pomeroy and told the jury “that testimony is stricken,” and explained this meant the jurors may not discuss that testimony during deliberations. 9/8/11RP 106. The

against him.”

court did not tell the jury it could not use the testimony for any purpose. Id.

The prosecutor engaged in several additional types of misconduct. He asked a witness whether he would “trust” Houghton’s “word”? 9/7/11RP 46. Witness Joe Van Hollenbeke replied, “not entirely.” Id. The prosecutor repeated and exaggerated Van Hollebeke’s testimony in his closing argument, saying, “When asked, do you trust Mr. Houghton’s word? He said, not really.” 9/8/11RP 154. The prosecutor urged the jury to use Van Hollebeke’s lukewarm opinion of Houghton’s credibility as evidence against him. Id. It is flagrant misconduct to ask one witness if another is lying or truthful. Boehning, 127 Wn.App. at 525.

Additionally, in closing argument, the prosecutor said that “justice . . . must first reside in the hearts and souls of citizens. And that’s you as you deliberate on this case asking for a verdict that is just, and a verdict that is honest.” 9/8/11RP 173. It is misconduct for a prosecutor to characterize a trial as a “search for truth,” because it undermines the presumption of innocence. State v. Emery, _ Wn.2d _, _ P.3d _, 2012 WL 2146783, *7 (June 14, 2012) (citing State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008)).

c. The prosecution's improper arguments require reversal.

Prosecutorial misconduct requires reversal when the error taints the trial and cannot be cured. Emery, 2012 WL 2146783 at *10. “[T]he constitutional harmless error standard applies to direct constitutional claims involving prosecutors’ improper arguments. See, e.g., State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) (prearrest silence); State v. Fricks, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979) (post arrest silence).” Id. at *7.

Here, the prosecution elicited testimony directly commenting on Houghton’s failure to testify at a pretrial suppression hearing. The court initially overruled a defense objection, and later tried to undo that harm by telling the jury not to discuss that testimony in its deliberations. This attempted cautionary instruction reminded the jury of the testimony and failed to demand the jurors not use the testimony for any purpose. 9/8/11RP 106. Even after the court gave this instruction to the jury, the prosecutor reminded the jury in his closing argument of Houghton’s failure to testify and implicitly suggested the jurors should think about Houghton’s failure to testify at the suppression hearing.

Furthermore, the prosecution violated the well-established tenets that it may not ask another witness his opinion on the

veracity of the accused or encourage the jury to render a verdict based on what they feel in their "hearts and souls." 9/7/11RP 46; 9/8/11RP 154, 172. These flagrant violations of established principles, considered together with the violation of Houghton's constitutional right to right to remain silent, affected the jury's verdict and denied Houghton his right to a fair trial.

E. CONCLUSION.

For the reasons stated above, Mark Houghton respectfully asks this Court to reverse his convictions due to the violation of his right to counsel and prosecutorial misconduct that denied him a fair trial.

DATED this 29th day of June 2012.

Respectfully submitted,



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APPENDIX A

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FILED
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MARK LYMAN HOUGHTON,

Defendant.

No. 10-1-06912-3 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENTS

A hearing on the admissibility of the defendant's statements was held on August 25, 2011, before the Honorable Judge Jim Rogers.

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

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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1 (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall
2 be mentioned to the jury unless he testifies concerning the statement at trial.

3 After being so advised, the defendant declined to testify at the hearing.

4 After considering the evidence submitted by the parties and hearing argument, to wit: the
5 sworn testimony of Fire Investigators Barry Pomeroy, Craig Muller and Tom Devine, the court
6 enters the following findings of fact and conclusions of law as required by CrR 3.5.

7 1. THE UNDISPUTED FACTS:

8 a. On December 25, 2009, at approximately 4:30 pm, members of the Vashon Island Fire
9 and Rescue Department responded to a 911 call reporting a boat fire at the Dockton Park marina
10 on Vashon Island.

11 b. Upon arrival, the firefighters were contacted at the dock by the defendant who advised
12 them it was his boat, a 30 foot Catalina sailboat, that was on fire.

13 c. The firefighters could smell a strong odor of gasoline coming from the boat. When
14 they entered the boat, they determined the fire had already gone out because the fire had become
15 "oxygen-starved."

16 d. The firefighters pulled materials out of the boat that were still smoldering, including
17 two fuel containers that had been punctured with a sharp object, burnt candles, and partially
18 burnt mattresses from the sleeping berth.

19 e. The firefighters determined the fire was an arson, and they placed a call to the King
20 County Sheriff's Office requesting an arson investigator be dispatched to Vashon Island.

21 f. King County Fire Investigator Barry Pomeroy was dispatched to Vashon Island, and he
22 arrived at approximately 7:00 pm.
23

1 g. Investigator Pomeroy met with the defendant in the park office and advised him of his
2 Miranda rights, a practice that Pomeroy stated he followed in every interview.

3 h. The defendant stated he understood his rights, and agreed to the statement being
4 recorded. He then said to Investigator Pomeroy, "Okay, mmm, I wonder if I should just call my
5 lawyer or not. Should I call a lawyer?"

6 i. Investigator Pomeroy replied, "For a victim statement?" The defendant said, "Huh,
7 yeah, I, okay, it's a vic -- that's what this is, a victim statement?"

8 j. Investigator Pomeroy again asked the defendant if he wanted to tell him what had
9 happened. The defendant said yes, and his recorded statement was then taken.

10 k. After the statement was taken, Investigator Pomeroy advised the defendant he was
11 going to examine the boat. He left the defendant in the office and spent approximately two hours
12 examining the boat and taking pictures.

13 l. After his examination of the boat was concluded, Investigator Pomeroy again met with
14 the defendant near the dock. He asked some additional questions of the defendant which were
15 not recorded.

16 m. At one point during this conversation, Investigator Pomeroy asked the defendant if
17 this was the act of a criminal meant to hurt people, or if it was an act of desperation by someone
18 in financial trouble. The defendant replied that it was more of a desperate act where no one was
19 meant to be hurt.

20 n. The defendant also told Investigator Pomeroy he did not have any fuel containers on
21 the vessel, and he did not use candles on the boat.

22 o. Investigator Pomeroy stated that after his initial interview of the defendant, when he
23 went to examine the burned boat, he had no idea where the defendant went. He testified he did

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

Daniel T. Satterberg, Prosecuting Attorney
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1 not order the defendant to remain there, and he had heard the defendant had actually left the
2 marina.

3 p. On January 28, 2010, the defendant was placed under arrest by King County Fire
4 Investigator Tom Devine. Investigator Devine advised the defendant of his Miranda rights,
5 which the defendant stated he understood and was willing to waive. The defendant did not agree
6 to Investigator Devine recording the statement, and no recording was made.

7 q. Supervisory Investigator Craig Muller joined Investigator Devine in questioning the
8 defendant. During the conversation, the defendant stated the fuel containers could have been his,
9 but he had not seen them in months and he believed somebody in the Parks Service might have
10 given them to a boater who needed gasoline. The defendant also said he might have had some
11 candles on the vessel, but he did not know where they were.

12 2. THE DISPUTED FACTS:

13 a. The defendant contended that he made an unequivocal request for a lawyer at the
14 beginning of his interview with Investigator Pomeroy on December 25, 2009.

15 b. The defendant contended that after his interview with Investigator Pomeroy, he was
16 told to stay at the marina, and his continued presence at the marina amounted to an arrest.

17 3. CONCLUSIONS AS TO THE DISPUTED FACTS:

18 a. The court finds that the defendant's statement to Investigator Pomeroy concerning
19 whether or not he needed a lawyer was ambiguous and equivocal and did not constitute a request
20 for counsel.

21 b. The court finds that the defendant's waiver of his Miranda rights with Investigator
22 Pomeroy was knowingly, voluntarily and intelligently made.

1 c. The court finds that after Investigator Pomeroy's taped interview of the defendant, and
2 while Investigator Pomeroy was examining the boat, the defendant was not under arrest.

3 d. The court finds that the statements of the defendant during his conversation with
4 Investigator Pomeroy at the dock after Investigator Pomeroy's examination of the boat were
5 knowingly, voluntarily and intelligently made.

6 e. The court finds the statements of the defendant to Investigator Devine and Supervisor
7 Muller on 1/28/10 were knowingly, voluntarily and intelligently made.

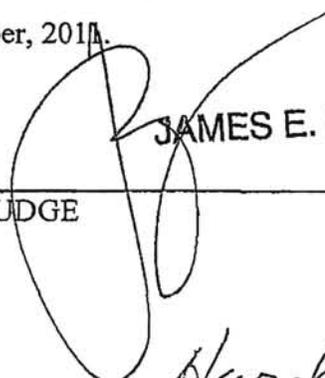
8 4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE
9 DEFENDANT'S STATEMENT:

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

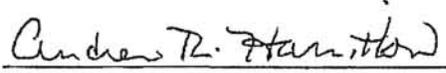
11 The recorded statement of the defendant to Investigator Pomeroy, the unrecorded
12 statement of the defendant to Investigator Pomeroy, and the unrecorded statement
13 of the defendant to Investigator Devine and Supervisor Muller are all admissible
14 in the State's case-in-chief:

15 These statements are admissible because Miranda was applicable and the defendant's
16 statements were made after a knowing, intelligent and voluntary waiver of his Miranda rights.

17 Signed this 7th day of October, 2011.

18 
19 JAMES E. ROGERS
20 JUDGE

21 Presented by:

22 
23 ANDREW R. HAMILTON 8312
Senior Deputy Prosecuting Attorney


HAL PALMER 33057
Attorney for Defendant

WRITTEN FINDINGS OF FACT AND
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67856-6-I
v.)	
)	
MARK HOUGHTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] MARK HOUGHTON 353698 MCC-WSR PO BOX 777 MONROE, WA 98272-0777	(X) () ()	U.S. MAIL HAND DELIVERY _____

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUN 29 PM 4:50

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JUNE, 2012.

X _____ 

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