

70444-3

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NO. 70444-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
MOHAMED OSMAN,
Appellant.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LeROY McCULLOUGH

BRIEF OF RESPONDENT

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A. CROSS-ASSIGNMENTS OF ERROR¹

1. To the extent that the trial court found that more than two police officers were present at the time of the defendant's statements inside the Kent City Library, the trial court erred in so doing.

2. The trial court erred in finding that the defendant's freedom of movement was curtailed to the degree associated with formal arrest at the time of his statements inside the Kent City Library.

B. ISSUES PRESENTED

1. A trial court may not convey to the jury the judge's personal opinion of the evidence. The trial court's ER 404(b) limiting instruction referred to "evaluating the reasonable fear of the complainant," but did not suggest what, if anything, the jury should find the victim feared, nor whether any particular fear was reasonable. Did the trial court maintain the necessary balance

¹ The State did not cross-appeal the trial court's ruling regarding the admissibility of the defendant's statements because the State was not seeking affirmative relief. *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). However, the State assigns error to parts of the trial court's ruling in urging additional grounds for affirmance. *Id.*; *State v. Sims*, 171 Wn.2d 436, 442-43, 256 P.3d 285 (2011).

between its obligations to give a satisfactory limiting instruction and to refrain from commenting on the evidence?

2. Miranda² warnings are not required unless a suspect is subjected to custodial interrogation. The defendant's freedom of movement was not restricted to the degree associated with formal arrest, and an officer's requests for the defendant's name and identification were not likely to elicit an incriminating response. Did the trial court correctly rule that the defendant's responses were not the result of custodial interrogation?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Mohamed Osman, was charged by amended Information with two counts of felony stalking – domestic violence, one count of felony harassment – domestic violence, and one count of domestic violence misdemeanor violation of a court order. CP 23-26. The State also alleged, as an aggravating factor on the felony charges, that the offenses were part of an ongoing pattern of psychological, physical, or sexual abuse. CP 23-25.

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

A jury found Osman guilty of both counts of felony stalking – domestic violence and the domestic violence misdemeanor violation of a court order. CP 163-66, 169. The jury found Osman not guilty of felony harassment, and could not reach a verdict on a lesser included offense of misdemeanor harassment. CP 167-68. The jury did not find that the aggravating factor had been proven beyond a reasonable doubt. CP 181-83.

Osman received standard range sentences of 20 months on the two felonies and 364 days on the misdemeanor, to be served concurrently. CP 187-90, 195. He timely appealed. CP 185-86.

2. SUBSTANTIVE FACTS.

Khadro Jama married the defendant, Mohamed Osman, in a religious ceremony in Maine in 2005. 23RP³ 34-36. They had two children together, born in 2007 and 2008. 23RP 38-40. Jama secured a religious divorce from Osman in 2008 due to Osman's frequent absences and failure to support the family, which had caused numerous arguments. 23RP 38-40. Jama left Osman

³ The State adopts the system of referencing the report of proceedings set out in the Brief of Appellant at p. 2, n. 2.

behind and returned to her extended family in Washington in November of 2008, taking her children with her. 23RP 49.

For the next year and a half, Jama supported herself and her children with no participation by Osman. 23RP 49-53. When Osman would call her and refer to the possibility of him coming to Washington, Jama always told him that she did not want him to do so. 23RP 54. Then, in February or March of 2010, Osman suddenly showed up at Jama's door in the middle of the night, without warning and without invitation. 23RP 54, 57. Jama allowed Osman to stay with her for two weeks, but made it clear that he would then need to leave. 23RP 58.

When the two weeks were up, Osman resisted leaving even when Jama threatened to call the police. 23RP 59-60. The visit culminated in a confrontation wherein Osman punched Jama in the neck as she was trying to get Osman and his belongings out of her home. 23RP 60. Osman was briefly jailed. 26RP 89-90.

Over the following ten months, a series of domestic violence incidents occurred, such as Osman assaulting Jama and taking her money, and Osman entering Jama's house without permission in violation of a no-contact order. 23RP 62-74. Osman pled guilty to criminal trespass in the latter incident in exchange for a reduction

from residential burglary. 26RP 121-22. Afterward, Osman continued to violate court orders prohibiting him from contacting Jama, frequently breaking into Jama's home. 27RP 75-78.

Despite Osman being jailed for several months in the spring of 2011, the violations of court orders continued once Osman was released from custody. 23RP 81-83; 26RP 89-90. One day in May of 2011, Osman came to Jama's workplace, told Jama's coworker that he was Jama's brother in order to get Jama to come outside, and was waiting for Jama when she got home with her children at the end of the day. 23RP 81-89.

When Jama told him to leave and said she would call the police, Osman threatened to kill her if she did so. 23RP 90. Believing Osman to be capable of carrying out his threat, Jama nevertheless called 911 for assistance, and made the decision to move out of her home.⁴ 23RP 91. At trial, Osman denied having had any contact with Jama on that day. 26RP 133-34.

When Osman was arrested several days later, he confidently told the officer that he would beat any charges that were filed

⁴ Count III, felony harassment – domestic violence, and Count IV, domestic violence misdemeanor violation of a court order, stem from this incident on May 12, 2011. CP 25-26.

against him. 22RP 55. Osman again spent some time in jail before being released. 26RP 89-90.

In October of 2011, another series of incidents occurred wherein Osman contacted Jama in violation of court orders, showed up uninvited at Jama's work, her home, and her children's daycare, and called and texted Jama incessantly.⁵ 22RP 21-22; 23RP 102; 24RP 3-12. Osman was jailed from late October of 2011 until early July of 2012.

Despite continued no-contact orders, Osman resumed texting and calling Jama within days of his release from jail. 24RP 42-44; 26RP 89-90. Throughout the month of July, Osman made threats against Jama's brother, referenced the fact that Jama was cooperating with the police investigation against him, and told Jama he knew her new address, which she had tried to keep secret from him. 24RP 51-54. He also followed her car, showed up at her work and her children's daycare, sent dozens of text messages, and threatened Jama that "you have no idea what I'm capable of."⁶ 22RP 76-79, 129; 24RP 57; 25RP 95-100. Due to Osman's

⁵ Count I, felony stalking – domestic violence, stems from this series of incidents from October 14, 2011, through November 3, 2011. CP 23.

⁶ Count II, felony stalking – domestic violence, stems from these events between July 8th and July 29th, 2012. CP 24.

behavior, Jama began making sure that her father or brother accompanied her whenever she went out in public. 22RP 109-10.

Osman was finally arrested at the Kent City Library on July 29, 2012, after Jama called 911 to report that Osman had approached her outside the library, having already threatened her over the phone that morning. 21RP 135; 24RP 57, 80-81. As he was transported to jail, Osman boasted that he would be out of jail in no time, and that the charges would not stick because Jama would never testify against him. 26RP 55-58.

Additional facts are included below in the sections to which they pertain.

D. ARGUMENT

1. THE LIMITING INSTRUCTION DID NOT CONSTITUTE A JUDICIAL COMMENT ON THE EVIDENCE.

Osman asserts that his stalking convictions⁷ must be reversed because the wording of the ER 404(b) limiting instruction constituted an unconstitutional judicial comment on the evidence. This claim should be rejected. The trial court's limiting instruction,

⁷ Although Osman argues for reversal of "his convictions" generally, he offers no explanation for how the verdict on domestic violence misdemeanor violation of a court order could possibly have been affected by the errors he alleges.

taken in context and as a whole, did not suggest to the jury that any particular relevant fact had been proven. Furthermore, the issue may not be reviewed for the first time on appeal, and any error was harmless.

a. Relevant Facts.

At trial, both parties proposed instructions limiting the jury's use of evidence that had been admitted pursuant to ER 404(b). CP 114, 117, 209. Osman proposed two separate instructions, one regarding prior convictions that had been admitted and one regarding a specific prior incident involving Jama in 2010. CP 114, 117. Osman's proposed instruction regarding the specific prior incident stated that the evidence could be considered "only for the purpose of weighing: whether Ms. Jama had reasonable fear for purposes of the stalking and harassment charges and Mr. Osman's intent required for the stalking charges." CP 117.

The trial court chose to combine the State's proposed limiting instruction and Osman's two proposed instructions into a single instruction, which addressed both the prior convictions and all instances of misconduct prior to the charged offenses. CP 131. The court's instruction stated that evidence of the prior incidents

could be considered “only for the purposes of evaluating the reasonable fear of the complainant, the delay in reporting of the complainant, and the intent of the defendant.” CP 131.

Osman objected to the court’s limiting instruction solely on the grounds that “we believe that the defense proposed instructions with regard to the 404(b) evidence more clearly and accurate -- more accurately related the Court’s pretrial rulings.” 29RP 41. The court noted Osman’s objection, but ruled that “I don’t believe that we need to be as specific as defense has requested. I think that the arguments can illuminate further which acts are to be considered in which ways, but I think [the court’s version of the instruction] is clear and it’s easy for the jury to work with.” 29RP 51.

b. This Issue May Not Be Raised For The First Time On Appeal.

Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An objection in the trial court on different grounds than those argued on appeal is not sufficient to

preserve the alleged error. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). Here, Osman objected to the court's limiting instruction only on the grounds that Osman's proposed instruction "more clearly and . . . accurately related the Court's pretrial rulings." 29RP 41. No concerns were raised regarding possible judicial comment on the evidence. 29RP 41.

Because Osman did not object to the alleged judicial comment on the evidence at trial, in order to have the claim reviewed on appeal he must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. A claim of judicial comment on the evidence indisputably alleges an error of constitutional dimension. Wash. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.").

However, not every alleged constitutional error is a manifest constitutional error. State v. Lynn, 67 Wn. App. 339, 342-46, 835 P.2d 251 (1992) ("[I]t is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals."). This Court should

decline to review Osman's claim because the alleged error is not manifest.

A manifest error is "an error that is 'unmistakable, evident or indisputable,'" and that has "practical and identifiable consequences in the trial of the case." State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (quoting State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)). The mere possibility of prejudice is insufficient—the defendant must show that the alleged error actually affected his rights at trial. Kirkman, 159 Wn.2d at 926-27.

Here, Osman does not, and cannot, show that the court's reference to "evaluating the reasonable fear of the complainant" actually affected the trial. As discussed below, when viewed in the context of the trial as a whole, the wording of the limiting instruction did not actually communicate to the jury the judge's opinion of the evidence or imply that an element of the crime had been established as a matter of law. As such, Osman fails to raise a manifest constitutional error that may be reviewed for the first time on appeal.

Even if this court chooses to reach the merits of Osman's claim, his convictions should be affirmed for the reasons stated below.

c. The Trial Court's Limiting Instruction Was Not A Comment On The Evidence.

Article IV, section 16 of the Washington State Constitution prohibits a judge from making a comment that conveys to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Thus, a court may not instruct the jury that matters of fact have been established as a matter of law. State v. Hartzell, 156 Wn. App. 918, 938, 237 P.3d 928 (2010). A jury instruction challenged as a judicial comment on the evidence is reviewed de novo, in the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

In evaluating whether a trial court's words or actions amount to a comment on the evidence, the appellate courts look at the facts and circumstances of the particular case. Jacobsen, 78 Wn.2d at 495. A trial court must strike a balance between the obligation to give a satisfactory limiting instruction and the obligation to refrain

from commenting on the evidence. Hartzell, 156 Wn. App. at 940-41. The fact that a limiting instruction could have been worded differently to more clearly avoid any issue of comment on the evidence does not necessarily mean that the wording used was improper. Id. at 939-40.

When the limiting instruction here is viewed as a whole and in context, it is apparent that the judge's reference to "evaluating the reasonable fear of the complainant" did not have the effect of suggesting that an element of the offense had been established. The mere existence of "reasonable fear" itself is not an element of stalking—what the State had to prove for the stalking charges was that Jama "reasonably feared that the defendant intended to injure her."⁸ CP 144, 146 (emphasis added).

Had the jury believed that Jama reasonably feared that Osman would forever disrupt her life with constant calls and text messages, that would not have been sufficient to convict him. The judge's instruction thus merely directed the jury's attention to an area where the ER 404(b) evidence could be considered; it did not

⁸ The trial court likely intentionally omitted from the limiting instruction any reference to what Jama was alleged to have feared for the sake of clarity, as the stalking and harassment charges required the jury to assess whether Jama reasonably feared different things. See CP 144, 150.

suggest what, if anything, the jury should conclude Jama feared, nor whether any particular level of fear was reasonable.

The same grammatical structure arose again later in the same sentence of the limiting instruction, when the trial court referenced evaluating “the intent of the defendant.” One of the alternative elements of stalking required the State to prove that Osman “intended to frighten, intimidate, or harass Khadro Jama.” CP 144, 146. Osman correctly concedes that this clause did not constitute a judicial comment, because the instruction did not suggest to the jury what it should conclude the defendant intended to do. Brief of Appellant at 26. However, Osman fails to recognize that the reference to “evaluating the reasonable fear of the complainant” did not constitute a judicial comment for the same reason.

Osman attempts to distinguish the two clauses by claiming that an element of stalking is satisfied “if reasonable fear exists at all.” Brief of Appellant at 26. As noted above, this is legally incorrect, as the relevant element for stalking was satisfied only if the jury found that Jama reasonably feared a particular thing—that the defendant intended to injure her. CP 144, 146. For felony harassment, the relevant element was satisfied only if the jury

found that Jama reasonably feared that the threat to kill her would be carried out. CP 150.

There is thus no reasonable basis to distinguish the trial court's reference to evaluating "the reasonable fear of the complainant" from the reference to evaluating "the intent of the defendant." Both merely identified an area in which the jury could consider the ER 404(b) evidence, and neither suggested a particular outcome for the jury's analysis. Like the reference to evaluating "the intent of the defendant," the trial court did not comment on the evidence when it told the jurors that they could use the ER 404(b) evidence in "evaluating the reasonable fear of the complainant."

d. Any Error Was Harmless.

Where a trial court comments on the evidence, the error is presumed to be prejudicial, and reversal is required "unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted." Hartzell, 156 Wn. App. at 937. In this case, even if this Court finds that the trial court's reference to "evaluating the reasonable fear of the complainant" did constitute a judicial comment on the evidence,

Osman's convictions should be affirmed because the record affirmatively shows that Osman was not prejudiced by the error.

The trial court instructed the jury at the beginning and the end of the trial to disregard any potential comments on the evidence, and jurors are presumed to follow the court's instructions. CP 49; 20RP 8; Kirkman, 159 Wn.2d at 937. Furthermore, the prosecutor made clear in closing argument that the limiting instruction meant that the jury could consider the prior incidents in determining whether Jama reasonably feared that Osman intended to injure her or carry out the threat to kill her. 29RP 85. Additionally, both the prosecutor and defense counsel made it clear in closing argument that whether Jama reasonably feared that Osman intended to injure her or carry out the threat to kill her was a question that the jury needed to determine for itself. 29RP 84-85; 30RP 6, 14-17.

The jury's verdicts in this case also indicate that Osman was not prejudiced by the alleged judicial comment. The felony harassment charge and the misdemeanor violation of a court order charge both stemmed from the May 12, 2011, incident in which, according to Jama, Osman had threatened to kill her. CP 25-26; 23RP 90. Osman testified that he had not had any contact with

Jama that day. 26RP 133-34. In closing argument regarding the harassment charge, defense counsel primarily focused on arguing that Jama did not actually fear that Osman would kill her. 30RP 16-17, 35.

By convicting Osman of violating the no-contact order, the jury indicated that it believed Jama's testimony that Osman had indeed contacted her and did not believe Osman's testimony that no contact had occurred that day. CP 169. By acquitting Osman of felony harassment, the jury indicated either that the State had not proved that the threat to kill occurred, or, more likely, that the State had not proved that Jama reasonably feared that the threat would be carried out.⁹ CP 167.

There was no evidence suggesting that Jama's testimony about the existence of the threat was any less credible than her testimony that Osman had contacted her, which the jury clearly believed, but defense counsel was able to point to evidence that suggested Jama did not actually fear that Osman would actually kill

⁹ The elements of felony harassment in this case were "(1) That on or about May 12, 2011, the defendant knowingly threatened to kill Khadro Jama immediately or in the future; (2) That the words or conduct of the defendant placed Khadro Jama in reasonable fear that the threat to kill would be carried out; (3) That the defendant acted without lawful authority; and (4) That the threat was made or received in the State of Washington." CP 150. The latter two elements were not in dispute.

her. 30RP 16-17. If the jurors had been affected by the alleged judicial comment suggesting that the existence of the necessary reasonable fear had been established, one would expect them to have returned a verdict of guilty on the charge of felony harassment.

The fact that they did not do so, despite their verdict regarding the violation of the no-contact order, affirmatively shows that the jury was not affected by the alleged judicial comment, and the defendant was therefore not prejudiced by it. See State v. Stephens, 83 Wn.2d 485, 488-89, 519 P.2d 249 (1974) (citing fact that jury convicted defendant of charges to which he confessed on the stand, but acquitted him of charge he denied, in holding that defendant was not prejudiced by comment alleged to have undermined his credibility).

Osman contends that because the question of whether Jama reasonably feared that Osman intended to injure her was a “central and disputed” issue at trial, he was therefore necessarily prejudiced by the alleged comment on the evidence. However, whether the subject of a judicial comment was a disputed issue is not determinative. State v. Jackman, 156 Wn.2d 736, 744-45, 132 P.3d 136 (2006). In this case, the record affirmatively shows that

the jury's verdicts were not affected by the alleged judicial comment.

2. THE TRIAL COURT CORRECTLY RULED THAT OSMAN'S PRE-ARREST STATEMENTS WERE NOT THE RESULT OF CUSTODIAL INTERROGATION.

Osman contends that the trial court erred in admitting the statements Osman made in response to Officer Rogers' questions about Osman's identity. This claim should be rejected. Because the challenged statements were not the result of custodial interrogation, Miranda warnings were not required and the statements were properly admitted.

a. Relevant Facts.

On July 29, 2012, several officers of the Kent Police Department responded to the Kent City Library in response to a report by Khadro Jama that Osman was following her in violation of a no-contact order. 8RP 41-42. The officers were told that Osman had gone into the library and was wearing a black shirt, a black skull cap, blue jeans, and white shoes. 8RP 42-43. Officer Rogers and Officer Ross entered the library to look for him. 8RP 43.

Officer Eads and Officer Quinonez initially participated in the search as well, but Eads departed after a short time. 8RP 43, 73.

At first, the officers did not find anyone matching the suspect description. 8 RP 43. Rogers and Ross eventually saw a man toward the back of the library who matched the description except for the fact that he was wearing a white undershirt instead of the black shirt Jama had described. 8RP 43-45, 61, 73. At the time, Quinonez was by herself toward the front of the library. 8RP 73. When Rogers and Ross radioed that they needed a more detailed description, Quinonez exited the library and contacted Jama to get the needed information. 8RP 44, 73. Quinonez had not yet had any contact with Osman. 8RP 73.

Rogers and Ross were then provided with the additional details that the suspect had a clean-shaven head, a chipped tooth, and a small scar above his right eye. 8RP 45. The officers were able to observe that the man who nearly matched the clothing description did indeed have a shaved head. 8RP 45.

The two officers then approached the man, who was later identified as Osman, and Rogers asked if Osman had identification on him, in an attempt to verify whether he was the person they were looking for. 8RP 46. Osman stated that he did not have any

identification on him.¹⁰ 8RP 46. Rogers then asked Osman if he was Mohamed Osman, and Osman said “no.” 8RP 48, 99. After the officers began speaking with Osman, they were able to observe that Osman did have a chipped tooth and a scar above his eye as described by Jama. 8RP 45.

When asked what his name was and whether he’d ever had identification in any state, Osman said that he had an identification card out of Arizona, but provided a name and date of birth for which there was no record in either Arizona or Washington. 8RP 46. Rogers did not consider Osman to be free to leave during their interaction. 8RP 57.

Rogers and Ross escorted Osman to the front of the library where Jama could see him, in order to confirm whether he was in fact Jama’s ex-husband. 8RP 49. Jama identified him with certainty. 8RP 49. Osman was then arrested, handcuffed, and read Miranda warnings. 8RP 58, 76; 9RP 101.

Pursuant to CrR 3.5, the trial court held a pre-trial hearing to determine the admissibility of the statements Osman made to Rogers and Ross inside the library, among others. 8RP 32.

¹⁰ Osman later admitted at trial that he did in fact have Washington identification with him that day. 28RP 34-35.

Officers Rogers and Quinonez testified at the hearing to the facts set forth above. 8RP 32-76. Osman did not testify at the hearing. 9RP 54.

In argument, the only aspect of the officers' testimony that defense counsel disputed was Officer Rogers' subjective motivation in asking Osman for identification. 9RP 62-65. The State argued that Osman's statements were admissible in the absence of Miranda warnings because Osman was not in custody at the time and because the questions did not constitute interrogation. 9RP 67; CP 268.

The trial court made findings of fact consistent with the officers' testimony,¹¹ and found that Rogers and Ross's purpose in asking Osman for his identification and name was not to elicit incriminating information, but to confirm his identity.¹² 9RP 99-101; CP 97, 99. The court ruled that Osman's statements were "custodial" because "it was clear that he could not go anywhere" and it was "a controlled environment." 9RP 100. However, the

¹¹ The only possible exception is the trial court's finding that there were "several" officers present at the time of Osman's statements. 9RP 100. To the extent this Court interprets the trial court's finding as stating that more than two officers were present, this finding not supported by any evidence, as the undisputed testimony established that only Officers Rogers and Ross were present at the relevant time. 8RP 43, 73.

¹² Osman does not assign error to any of the trial court's findings; they are thus verities on appeal. State v. Harris, 106 Wn.2d 784, 790, 725 P.2d 975 (1986).

court found that the officers' basic questions about Osman's identity did not constitute "interrogation." 9RP 100-03; CP 99. The court therefore ruled that Osman's statements were admissible even in the absence of Miranda warnings. 9RP 104; CP 99.

b. The Miranda Requirement.

In order to preserve a defendant's Fifth Amendment right against compelled self-incrimination, the police must inform a suspect of his rights prior to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Statements made in response to custodial interrogation are inadmissible if not preceded by such warnings. State v. Lavaris, 99 Wn.2d 851, 856, 664 P.2d 1234 (1983). To constitute a statement in response to custodial interrogation, (1) the individual making the statement must be in custody, and (2) the statement must be in response to interrogation. Rhode Island v. Innis, 446 U.S. 291, 298, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). If either requirement is not met, the statement is admissible even in the absence of Miranda warnings. See State v. Sargent, 111 Wn.2d 641, 649-51, 762 P.2d 1127 (1988).

This Court may uphold the trial court's ruling that Miranda warnings were not required on any grounds that are supported by the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). Although the trial court correctly found that the statements were not the product of interrogation, it erred in ruling that Osman was in custody at the time of his statements. This court should uphold the admissibility of the statements on the grounds that Osman was not in custody and the statements were not made in response to interrogation.

c. Osman Was Not In Custody.

A trial court's determination of whether a defendant was in custody for purposes of Miranda is reviewed de novo. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). In evaluating that issue, a suspect is "in custody" if a reasonable person in the suspect's position would feel that his or her freedom of movement is curtailed to the degree associated with formal arrest. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citing Berkemer v. McCarty, 468 U.S. 420, 441-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

A routine investigative stop under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), does not rise to the level of “custody” for the purposes of Miranda. Heritage, 152 Wn.2d at 218. Although the subject of such a stop is not free to leave, the detaining officer “may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect ‘in custody’ for the purposes of Miranda.” Id. Furthermore, because the test for whether a suspect is in custody is an objective one that focuses exclusively on the suspect's freedom of movement, it is irrelevant whether the officers subjectively planned to arrest the suspect or had probable cause to do so. Lorenz, 152 Wn.2d at 37.

In this case, when Officers Rogers and Ross approached Osman and asked if he had any identification, Osman's freedom of movement was no more restrained than any person who is the subject of a Terry stop. At the time of the questions, Osman had not yet been handcuffed, moved, or told that he was the suspect of a criminal investigation. 8RP 44-58. The restriction on his freedom of movement was only that Osman was not free to simply walk away—a minimal level of restraint associated with every Terry stop. State v. Marcum, 149 Wn. App. 894, 909, 205 P.3d 969 (2009)

(“By definition, someone subject to a Terry investigative detention is not ‘free to leave.’”). Furthermore, the officers asked only a few questions, all designed to determine Osman’s identity—precisely the scenario that the Washington Supreme Court has held does not render a suspect “in custody” for Miranda purposes. Heritage, 152 Wn.2d at 218.

The trial court seems to have relied on the fact that Osman was approached by more than one officer and was not free to leave in finding that Osman’s freedom of movement was restricted to the degree associated with formal arrest. 9RP 100; CP 98-99. Osman relies on those same facts in his appeal, as well as the fact that there were four officers total who responded to the library and that Osman was immediately afterward brought to the front of the library, identified by Jama, and arrested.¹³ Brief of Appellant at 29.

However, as noted earlier, the question of custody turns solely on an objective assessment of the degree of restraint a reasonable person would have felt on his freedom of movement

¹³ Osman asserts that the record shows that he was handcuffed immediately after he answered the officers’ questions, before being identified by Jama. Brief of Appellant at 29. In the event this Court believes that the amount of time between Osman’s statements and the handcuffing is relevant, it should be noted that Officer Rogers’ uncontested testimony was that Osman was handcuffed “after we were able to determine [that he was Mohamed Osman],” which did not occur until Jama identified him. 9RP 58.

at the time of the statements. Heritage, 152 Wn.2d at 218. The location of officers of whom Osman was unaware has no bearing on whether Osman was in custody at the time of the statements, nor do the events that followed the statements.

Additionally, this Court has explicitly held that the presence of multiple officers does not convert an investigative detention into “custody” for purposes of Miranda. Marcum, 149 Wn. App. at 909 (defendant not “in custody” even though multiple police cars blocked him in while officer questioned him about smell of marijuana in vehicle).

Osman’s reliance on State v. France, 121 Wn. App. 394, 88 P.3d 1003 (2004), for the proposition that he was “in custody” is misplaced for several reasons. First, France’s holding that the defendant was in custody for Miranda purposes was based on the court’s conclusion that a reasonable person would not have felt free to leave, which is not the correct standard. France, 121 Wn. App. at 400, on reconsideration, 129 Wn. App. 907, 910-11, 120 P.3d 654 (2005). Second, the critical fact cited by the court was that France was told that he was a suspect in a crime and that he would not be permitted to leave until the issue had been “cleared up.” Id. Finally, the France court, in reaching the same result upon

reconsideration, relied on its belief that the police had possessed probable cause to arrest France but had delayed doing so to avoid giving Miranda warnings before questioning him.¹⁴ 129 Wn. App. at 911.

In this case, in contrast, Osman was neither told that he was the suspect of a crime nor told that he would not be permitted to leave until the issue was resolved. Rogers and Ross also did not delay arresting Osman in order to question him before giving Miranda warnings—they simply acted conscientiously to ensure that they had the correct person before taking any further action.

When Rogers and Ross approached Osman and asked for his name and identification, Osman's freedom of movement was restricted only to the basic extent inherent in every investigative stop. It was in no way restricted to the extent associated with formal arrest, and thus Osman was not in custody for purposes of Miranda.

¹⁴ The Washington Supreme Court had ordered Division Two of the Court of Appeals to reconsider the opinion cited by Osman in light of the Supreme Court's decisions in Heritage, 152 Wn.2d 210, and State v. Hilliard, 89 Wn.2d 430, 573 P.2d 22 (1977). France, 129 Wn. App. at 908.

d. Osman's Statements Were Not Made In Response To Interrogation.

Washington courts review a trial court's finding that police conduct did not constitute interrogation under a "clearly erroneous" standard.¹⁵ State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633 (2009); State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992). Reversal is warranted only if the finding is not supported by "substantial evidence," meaning sufficient evidence to persuade a fair-minded person of the truth of the finding. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

For the purposes of evaluating whether custodial interrogation occurred, "interrogation" means express questioning, as well as all "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." Innis, 446 U.S. at 301; State v. Webb, 64 Wn. App. 480, 485, 824 P.2d 1257 (1992).

¹⁵ Osman cites two Ninth Circuit decisions for the proposition that a finding of interrogation is reviewed de novo. Brief of Appellant at 31. However, both decisions rely on a line of cases that traces back to United States v. Poole, 794 F.2d 462, amended by 806 F.2d 853 (9th Cir. 1986), which initially held that the appropriate standard of review was de novo, overturning prior cases to the contrary. However, that line of cases overlooks the fact that Poole was amended to hold that the "clearly erroneous" standard is in fact the proper standard, not de novo. Poole, 806 F.2d 853. Regardless of which standard of review this Court applies, the officers' questions did not constitute interrogation.

A request for routine information necessary for basic identification purposes is generally not interrogation. State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992). This is true regardless of whether the information later turns out to be incriminating. E.g., id. (no interrogation where defendant was asked for his address during booking, even though statement used at trial to prove possession of drugs later found in the house); United States v. McLaughlin, 777 F.2d 388 (8th Cir. 1985) (no interrogation where defendant was asked about address and employment during pre-trial services interview, even though false responses later used at trial to attack defendant's credibility).

This principle most commonly comes up in relation to biographical questions necessary to complete the booking process, but it is the nature of the question that is decisive, not the procedure during which the question is asked. State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). The logic that exempts requests for "booking" information is not limited to actual booking procedures. See United States v. Perez, 776 F.2d 797, 799 (9th Cir. 1985) (finding no interrogation where defendant was asked his name in open court after denying he was person named in charging document, on grounds that question "involved only

routine 'booking' information"), overruled on other grounds by United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2003).

Here, Rogers' request for Osman's identification and name was not likely to elicit an incriminating response because the fact that Osman did or did not have identification on him, and Osman's knowledge of his own name, was not incriminating. See Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 554-56, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990) (Fifth Amendment is implicated by producing an object only to extent that act of production communicates information regarding existence, possession, or authenticity of the item—Amendment does not protect against "incrimination that may result from the contents or nature of the thing demanded."); Pennsylvania v. Muniz, 496 U.S. 582, 611 n.1, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (Marshall, J., concurring in part) (asking DUI suspect the date of his sixth birthday was interrogation because likely response—inability to calculate the date—would indicate impairment and therefore be incriminating).

Instead, Rogers' questions were necessary to ensure that the officers were detaining the person they meant to detain and

were likely to elicit nothing beyond that information. See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty., 542 U.S. 177, 189-91, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004) (disclosing one's name is "so insignificant in the scheme of things as to be incriminating only in unusual circumstances. In every criminal case, it is known and must be known who has been arrested and who is being tried." (citations omitted)).

Despite Osman's contention that identifying himself would incriminate him in a violation of the no-contact order, there is no indication that Osman was close enough to Jama to be violating the order at the time officers contacted him. What incriminated Osman was Jama identifying him as the Mohamed Osman who had recently approached her in violation of the order. 8RP 49. Osman's answers themselves were not likely to "furnish a link in the chain of evidence needed to prosecute him." Hiibel, 542 U.S. at 190 (internal quotation marks omitted).

Ignoring that fact, Osman conflates what actually happened—he lied in response to the questions—with the response that the question was intended and likely to elicit—his name. He offers no authority for the proposition that a question must be considered likely to elicit an incriminating response simply

because the person questioned may give a false response. If that were true, every question that a suspect might answer falsely (which in effect would be every question an officer might possibly ask) would *always* be interrogation. This is clearly not the case. E.g., McLaughlin, 777 F.2d 388.

Because Osman's possession of identification and knowledge that his name was Mohamed Osman were not themselves incriminating facts, the trial court correctly found that Officer Rogers' questions were not interrogation for Miranda purposes.¹⁶

e. Any Error Was Harmless.

The erroneous admission of statements in violation of Miranda is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result had the error not occurred. State v. Nysta, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012).

¹⁶ Although the trial court phrased its ruling in terms of whether the questions were intended to elicit an incriminating response rather than whether they were likely to do so, the misstatement is inconsequential in this case, as the likely response and the intended response were one and the same.

Here, the statements by Osman in response to Officer Rogers' questions did not contribute to the verdict in any way. The only charge that included the date on which the statements were made was count two, which charged Osman with stalking during the time period of July 8, 2012, through July 29, 2012. However, the fact that Osman gave false responses to the officers was not probative of any of the necessary elements of stalking.¹⁷

Osman relies greatly on his characterization that "the prosecutor specifically argued this incident showed consciousness of guilt." Brief of Appellant at 37. However, the only mention of consciousness of guilt arose when, having bypassed the opportunity to address the issue in pre-trial motions, defense counsel objected in front of the jury to Officer Rogers' testimony that he was not able to verify the name that Osman had provided,

¹⁷ In order to convict Osman in count two, the State had to prove: "(1) That during the time intervening between July 8, 2012 through July 29, 2012, the defendant intentionally and repeatedly harassed and followed Khadro Jama; and (2) That Khadro Jama reasonably feared that the defendant intended to injure her; and (3) That the defendant (a) intended to frighten, intimidate, or harass Khadro Jama; or (b) knew or reasonably should have known that Khadro Jama was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her; and (4) That the defendant acted without lawful authority; and (5) That the defendant (a) had been previously convicted of a crime of harassment involving Khadro Jama; or (b) violated a protective order protecting Khadro Jama; and (6) That any of the defendant's acts occurred in the State of Washington." CP 146-47. The State did not need to prove that Osman was violating the protection order due to the agreed proof that he had previously been convicted of a crime of harassment against Jama. 26RP 121; 27RP 124; CP 159.

on the grounds that it called for hearsay. 21RP 133. When asked for a response, the prosecutor stated only that “it goes to the state of mind, guilty conscious [sic] of the defendant.” 21RP 133.

In closing argument, not once did either the prosecutor or defense counsel mention Osman’s statements to Rogers or any argument that Osman’s conduct on that day implied a consciousness of guilt—the State’s argument that it had proved Osman’s guilt beyond a reasonable doubt rested entirely on other evidence. 29RP 76-110; 30RP 48-61.

The evidence of stalking in this case was overwhelming, and owed nothing to Osman’s denial that he had identification or that he was Mohamed Osman. The lack of any reference to Osman’s statements in closing argument confirms that the statements were in no way pertinent to the proof of the State’s case, and it is clear beyond a reasonable doubt that any reasonable jury would have reached the same verdict had Osman’s statements been excluded. Any error in admitting the statements was therefore harmless.

E. CONCLUSION

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

DATED this 17th day of April, 2014.

Respectfully submitted,

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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 Jennifer J. Sweigert, 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. MOHAMED OSMAN, Cause No. 70444-3-1, 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.

Dated this 18th day of April, 2014.



Name

Done in Seattle, Washington