

NO. 35030-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

VERNON LEE HAFFNER,

Appellant.

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

The Honorable Roger A. Bennett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting appellant's alleged statements to the police, because the failure of police investigators to electronically record his interrogation violated appellant's right to due process under the Washington Constitution.

2. The trial court erred in entering Conclusion as to Disputed Facts No. 3: "The Court finds pursuant to CrR 3.5 the defendant, knowingly, and voluntarily and intelligently waived his rights to remain silent." Supp. CP 316.

3. The court erred in failing to suppress the alleged confession.

4. The court exceeded its authority by imposing a sentence beyond the statutory maximum term.

Issues pertaining to assignments of error

1. Did the police investigators' failure to electronically record appellant's interrogation violate appellant's right to due process under the Washington Constitution?

2. Where the statutory maximum term for attempted first degree robbery is ten years, must the sentence imposed by the court of 128 months confinement and 18 to 36 months community custody be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

On February 24, 2006, the Clark County Prosecuting Attorney charged appellant Vernon Haffner, together with Shaun Wills¹, with first degree burglary, committed on January 27, 2006. CP 1-2; RCW 9A.52.020(1)(b). The state subsequently added two counts of attempted first degree robbery. CP 5-6; RCW 9A.28.020(1); RCW 9A.56.200. The case proceeded to jury trial before the Honorable Roger A. Bennett. The court dismissed one count of attempted robbery, and the jury returned guilty verdicts on the remaining counts. CP 37-38, 292. The court imposed sentence, and Haffner filed this timely appeal. CP 295, 307.

2. Substantive Facts

a. **CrR 3.5 hearing**

Clark County Sheriff's Detective Gordon Conroy interviewed Vernon Haffner at the Oregon Department of Corrections office in Portland on February 23, 2006. Haffner was in custody at the time. 2RP² 94-95. Conroy considered Haffner a suspect in the burglary case, based

¹ Shaun Wills pled guilty and was not a party to this trial.

² The Verbatim Report of Proceedings is contained in three consecutively paginated volumes, designated as follows: 1RP 6/12/06; 2RP—6/13/06; 3RP—6/22/06.

on statements of two of the participants, Shaun Wills and Crystal French. 2RP 94, 105.

Conroy testified at the CrR 3.5 hearing that he read Haffner his Miranda rights from a preprinted card at the start of the interview. Haffner said he understood his rights, he did not ask any questions about his rights, and he had no difficulty communicating. 2RP 95-97. Conroy did not remember asking Haffner if he agreed to waive his rights, and he did not ask Haffner to sign a written waiver. 2RP 98, 109. Conroy then proceeded to ask Haffner about the incident, telling Haffner that Wills and French had already implicated him, and Haffner made incriminating statements. 2RP 103. 2RP 101, 103. According to Conroy, Haffner never asked for an attorney, never indicated he wanted to stop the questioning, and did not try to limit the subject matter of the interrogation. 2RP 102.

Clark County Detective Phillip Sample accompanied Conroy to the interview, to serve as a witness. 2RP 95, 120. No independent witness was asked to sit in on the interrogation, however. 2RP 111, 116. Sample did not ask any questions and did not take any notes. 2RP 121. He testified that Conroy advised Haffner of his rights and asked Haffner if he would agree to talk. Haffner agreed and made a statement. 2RP 117.

Conroy testified that he did not bring a tape recorder to the interrogation, even though he had a portable tape recorder available to

interrogation or securing the presence of an independent witness. Because they did not, the court was left to decide a swearing contest, and the state did not meet its burden of proof. 2RP 132-35.

The Court ruled that, since the state presented testimony from both officers who were present during the interrogation, the state met its burden of proof under Miranda. 2RP 140. It declined to suppress the alleged statements simply because the officers did not take available corroborative steps. Id. The court concluded that it was the appellate court's function to create a policy requiring further corroboration on a waiver of constitutional rights, such as electronic recording, written waiver statements, or independent witnesses. Id.

The court found that the officers were more credible than Haffner and believed their testimony that Haffner was given the Miranda warnings. The court found that Haffner understood his rights, was cooperative, and voluntarily waived his rights by choosing to answer questions. It ruled the statements attributed to Haffner were admissible. 2RP 144; Supp. CP 316. The court then reemphasized that the evidence showed that tape recorders were available, and Haffner could raise the policy issue on appeal. 2RP 144.

b. Trial Testimony

Tim Cossel testified that he shares a house with Brent Jones in Vancouver, Washington. 1RP 40. Cossel was asleep in his bedroom on January 27, 2006, when he heard a loud noise, followed by voices shouting “Cops.” 1RP 41-42. Two men then pushed open the door to his room, entered the room, and yelled at him to get out of bed. One man held a gun in his face and asked if there was anyone else in the house. Cossel told them that his roommate was across the hall. 2RP 42. The man with the gun stayed in the room while the other left. 2RP 46.

Jones was asleep when he heard someone yelling, “Police, get down.” 1RP 72. He jumped out of bed, pulled on some sweatpants, and went to his door. He could hear some commotion in Cossel’s room. 1RP 72. A couple of seconds later, a man wearing a bandana over his nose and mouth came into Jones’s room, turned on the light, and yelled at Jones to get down. 1RP 73. When the man was distracted by a noise, Jones pulled the bandana off his face, then grabbed the man and pushed him into the hall. 1RP 74-75. They wrestled in the hallway for a few seconds before Jones broke free and headed toward the front door. The man chased Jones and tackled him. 1RP 74.

Cossel was getting out of bed and to the floor when he heard struggling across the hall. 1RP 46. Cossel then lunged for the gun, discovering once he grabbed it that it was made of plastic. 1RP 47. The

man holding the gun hit Cossel in the face with it, and they began to struggle. 1RP 48. When the man tried to hit Cossel with a barbell, Cossel grabbed hold of it and dragged the man into the hall. 1RP 48. When they reached the top of the stairs, Cossel saw that the second man had Jones in a headlock by the front door. 1RP 49.

Cossel used the barbell he was still holding to throw his attacker over his back and down the stairs. Cossel fell down the stairs as well and managed to break Jones free. 1RP 50. Both intruders then ran back up the stairs and out the back door. 1RP 51, 79-80. Cossel and Jones ran to a neighbor's house and called 911. 1RP 51, 81.

Cossel testified that the intruders had not taken anything. 1RP 58. Police found a piece of plastic from the toy gun in Cossel's room and a backpack containing duct tape and zip ties in Jones's doorway. 1RP 53, 82.

Detective Conroy interviewed Cossel and Jones on February 23, 2006. He showed them a photo laydown containing several photographs, including Haffner's. Neither Cossel nor Jones could identify anyone from the laydown. Both told Conroy that they were unsure from the start whether they would be able to make an identification. They explained that it had been too dark in the house and they were much too involved in the struggle to identify anyone. 2RP 162.

Cossel made no identification at trial. Jones, on the other hand, pointed to Haffner and said he was about 75 percent sure Haffner was the man in his room that night. 1RP 83. Jones testified that although he got a good look at the man when he pulled the bandana off his face, it did not really stick in his head, and as a result, he was unable to identify the man from pictures when he talked to the police. 1RP 75-76. While he was fairly certain of his identification at trial, Jones admitted he was not positive. 1RP 88.

Conroy testified that he interviewed Haffner on February 23, 2006. Conroy told Haffner that he was investigating a robbery and that he had taken statements from Crystal French and Shawn Wills. 2RP 153. According to Conroy, Haffner said that he, French, and Wills went to the house to steal some marijuana. 2RP 154, 156. Haffner said Wills kicked in the back door, and he and Wills went inside while French waited in the car. A fight broke out between Wills and one of the residents. Another resident then came up behind Haffner, and they fought and wrestled, ending up by the front door. When Conroy told Haffner the police had found a backpack with zip ties and duct tape, Haffner said they were planning to tie the residents up while they looked for the marijuana. 2RP 155-56. Sample's description of the interrogation was consistent with Conroy's. 2RP 173-77.

Haffner presented evidence that he was not involved in the burglary and attempted robbery. First, Cheryl Kelley testified that she rented a room in her house to Haffner in January 2006. 2RP 212. She was familiar with his schedule and knew he was regularly attending meetings and classes required for his probation during that time. 2RP 214-15. She also testified that Haffner did not have a key to her house and therefore did not leave or enter the house late at night after she was in bed. 2RP 216-17. Kelley testified that Haffner was in his room on January 27, 2006. 2RP 217, 222. Haffner's parole officer confirmed that Haffner was reporting in daily during January 2006, in addition to attending required classes and meetings. 2RP 226.

Haffner then testified that he was on very strict probation in January 2006. 2RP 233. He was reporting to his parole officer daily and attending classes six days a week. 2RP 233-34. He was renting a room from Kelley while he waited for an opening in an inpatient drug treatment program. 2RP 235. She expected him to follow her rules, and he knew that if he left the house at night, she would not let him back in. 2RP 237. Haffner testified that he did not go to Vancouver on the night of January 27, because he was not allowed to leave the state of Oregon. 2RP 236. He testified that he never confessed to the crime because he was not involved in it. 2RP 245.

c. Sentencing

The jury found Haffner guilty of first degree burglary and attempted robbery. CP 37-38. At the sentencing hearing, the court calculated the standard range for the burglary conviction as 87 to 116 months. The standard range for the attempted robbery conviction was 96.75 to 128.25 months, although the statutory maximum term was ten years. 3RP 328; CP 292. The court imposed 116 months on the burglary and 128 months on the attempted robbery and ordered 18 to 36 months community custody on both counts. 3RP 333; CP 295.

C. ARGUMENT

1. THE DUE PROCESS CLAUSE OF THE WASHINGTON CONSTITUTION REQUIRES ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS.

Allowing an unreliable confession to be admitted as evidence of guilt, when a reasonable safeguard such as an electronic recording requirement would mitigate the danger of a wrongful conviction, is offensive to the due process principles protected by Article I, § 3 of the Washington Constitution. The danger of a wrongful conviction based on a false confession is precisely the kind of injustice that warrants the additional protections of the state constitution, and this Court should hold that the failure of the police to electronically record Haffner's interrogation violated his state constitutional right to due process of law.

- a. Article I, § 3 of the Washington Constitution affords greater protection than the Fifth and Fourteenth amendments to the United States constitution.

In State v. Gunwall, the Court set forth six non-exclusive criteria for determining whether a provision of the Washington State Constitution should be construed to extend broader rights than comparable provisions in the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. 106 Wn.2d 54, 58, 720 P.2d 808 (1986). A review of these six factors favors a holding that, with regard to the issues presented by this case, the state constitution affords greater protection for the right to due process than the United States Constitution.

- i. **Textual Language, Differences in the Texts, and Constitutional History**

The language of Article I, § 3 is identical to that of the Fifth Amendment to the United States Constitution, and very similar to that of the Fourteenth Amendment. Article I, § 3 of the Washington Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The

"repeatedly noted that the [United States] Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause." State v. Bartholomew, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (citations omitted). Washington courts, moreover, have already interpreted the federal and state due process clauses independently where there were "compelling rationales" for doing so. Seattle v. Duncan, 44 Wn. App. 735, 743, 723 P.2d 1156 (1986); Bartholomew, 101 Wn.2d at 641-42; State v. Davis, 38 Wn. App. 600, 686 P.2d 1143 (1984). The Davis Court, for instance, held that under Article I, § 3 the state may not comment on a defendant's post-arrest silence even if the defendant has not received Miranda warnings. State v. Davis, 38 Wn. App. at 604-05.

Declining to follow Fletcher v. Weir, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), which held that the Fifth and Fourteenth Amendments would permit such comment, the court reasoned that "a constitutional guaranty designed to protect society from improper police conduct becomes meaningless when it may be obviated by law enforcement officials improperly withholding the *Miranda* warnings." Davis, 38 Wn. App. at 605. This case likewise presents a compelling rationale for interpreting the state due process clause as affording greater protection than its federal counterparts. The Court in Bartholomew

articulated the principle which should guide this Court when it stated: "We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." 101 Wn.2d at 640. An electronic recording requirement will ensure that only reliable and trustworthy statements are admitted at trial and considered as evidence of guilt.

iii. Differences in Structure Between the Federal and State Constitutions

As the Washington Supreme Court has explained, "The fifth *Gunwall* factor . . . will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power." State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (citing State v. Smith, 117 Wn.2d 263, 286, 814 P.2d 652 (1991) (Utter, J., concurring)); see also Gunwall at 62, 66. In this case, the limitations imposed on the state by Article I, § 3 should be construed to prohibit police from attempting to elicit incriminating statements by means of unrecorded interrogations, and to require that the evidence used to convict criminal defendants be reliable.

iv. Matters of Particular State Interest or Local Concern

Because it involves state law enforcement measures, electronic recording of custodial interrogations is a matter of particular state interest. See Young, 123 Wn.2d at 180 ("State law enforcement measures are a matter of local concern.") (citing Ortiz, 119 Wn.2d at 320 (Johnson, J., dissenting)); see also State v. Silva, 107 Wn. App. 605, 621, 27 P.3d 663 (2001) (citing State v. Richmond, 130 Wn.2d 368, 382-83, 922 P.2d 1343 (1996)). More specifically, the Washington Supreme Court has "long been concerned with the compulsion inherent in custodial questioning." State v. Hensler, 109 Wn.2d 357, 362, 745 P.2d 34 (1987) (citing State v. Creach, 77 Wn.2d 194, 197, 461 P.2d 329 (1969)); see also Heinemann v. Whitman County, 105 Wn.2d 796, 806, 718 P.2d 789 (1986). The State of Washington has an implicit interest in the fairness and integrity of its criminal justice system, and the Washington Supreme Court has made clear that the admission of unreliable evidence offends the principle of fairness which is embodied in the right to due process. See Bartholomew, 101 Wn.2d at 640.

- b. Electronic recording of custodial interrogations is necessary to ensure that criminal defendants receive due process.

In 1991, Division One of the Court of Appeals held that the state constitution does not require electronic recordings of police interrogations. State v. Spurgeon, 63 Wn. App. 503, 506, 820 P.2d 960 (1991), review

denied, 118 Wn.2d 1024 (1992). Since that decision was issued, there has been increasing recognition of the important safeguards afforded by electronically recording custodial interrogations. In addition to the Alaska Supreme Court's earlier decision in Stephan v. State, 711 P.2d 1156 (Alas. 1985), both Minnesota and Wisconsin have judicially required electronic recording of custodial interrogations. State v. Scales, 518 N.W.2d 587 (Minn. 1994); State v. Jerrell, 699 N.W.2d 110 (Wisc. 2005).³ These rulings, which recognize the importance and value of recording custodial interrogations, in part reflect a resurgence of interest in wrongful convictions during the 1990's. See Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 903-04 (2004). Confronting the problem of wrongful convictions resulting from false confessions, the American Bar Association has unanimously adopted a resolution urging mandatory videotaping of custodial interrogations. See ABA House of Delegates Report (February 2004) ("ABA Report").⁴ The same considerations that have led other jurisdictions to require electronic recording should lead this Court to do so as well.

³ In addition, the legislatures of Maine, Illinois and New Mexico have implemented statutes requiring electronic recording of custodial interrogations. 25 M.R.S.A. § 2803-B (2005); 725 ILCS 5/103-2.1 (2003); N.M. Stat. Ann. § 29-1-16 (2006). In Texas, electronic recording is required under the state rules of evidence. Tex. Code Crim. Proc. Art. 38.22 (2001).

⁴ The report is available at <http://www.abanet.org/leadership/2004/-recommendations/8a.pdf> last accessed 10/17/06.

It is squarely within the province of this Court to require the electronic recording of custodial interrogations as a matter of due process. More than half a century ago, in language which the Washington Supreme Court has quoted with approval, Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wn.2d 418, 423, 511 P.2d 1002 (1973), Justice Frankfurter stated:

"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise by those whom the Constitution entrusted with the unfolding of the process. Fully aware of the enormous powers thus given the judiciary and especially its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent -- in judges not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring). The denial of due process violates not only the rights of the accused, but the integrity of the judicial system. It is the ongoing duty of the courts, therefore, to tailor

the requirements of due process to changing times, new information, and a more enlightened understanding of the demands of justice.

- i. **Research on false confessions shows that an electronic recording requirement is essential to the accurate and efficient functioning of the courts and the criminal justice system.**

Contrary to past assumptions that false confessions were rare and due to physical coercion, recent empirical studies show that even standard interrogation techniques produce false confessions.⁵ Because interrogations proceed from a presumption of guilt, the purpose of an interrogation is not to elicit information, but to elicit a confession. Findley & Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 334 (2006). Consequently, in order to move a subject from denial to admission, interrogators use a number of tactics which also increase the risk of a false confession:

Interrogators try to break down a suspect's anticipated resistance by: repeatedly accusing the suspect of committing the crime and lying about it; cutting off and interrupting denials; attacking alibis or assertions of innocence as illogical, implausible, or untrue; insisting that no one will believe the suspect's

⁵ See Drizin & Reich, Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions, 52 Drake Law Rev 619, 634 (2004); White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.-C.L. L. Rev. 105, 108-09 (1997); Leo & Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations, 88 J.Crim.L. & Criminology 429, 472-96 (1998).

protestations of innocence; and, most importantly, accumulating real or fabricated evidence said to prove the suspect's guilt incontrovertibly.

Drizin & Leo, et. al., Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century, 2006 Wis. L. Rev. 479, 516 (2006); see also ABA Report at 3 ("Certain interrogation techniques, designed to elicit a true confession from a suspect who denies culpability, can have the effect of inducing a false confession.") (citing Leo & Ofshe, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U.L. Rev. 979 (1997)). One study suggests that a false confessor whose case goes to trial faces nearly a 75% chance of conviction. Leo & Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations, 88 J.Crim.L. & Criminology 429, 483-84 (1998).

Improvements in DNA testing and its increased accessibility have also underscored the relationship between false confessions and wrongful convictions. DNA exonerations demonstrate that innocent people do falsely confess. Out of its first 130 DNA exonerations, the Innocence Project identified 35 cases (more than 25%) involving false confessions. Innocence Project, Causes and Remedies of Wrongful Convictions, at <http://www.innocenceproject.org/causes/> (last visited November 6, 2006). Other comprehensive studies indicate that false confessions contribute to

between 14% and 25% of erroneous convictions. Drizin & Leo, 82 N.C. L. Rev. at 906-07. Altogether, Drizin and Leo documented 125 proven false confessions between 1971 and 2002, with 31% taking place between 1998 and 2003. *Id.* at 932. Against this backdrop of wrongful convictions based on false confessions, this Court should require Washington police officers to videotape interrogations in their entirety.⁶ It is incumbent upon the courts to ensure that the criminal justice system is accurate, fair and just in its evaluation of confession evidence. This Court should find, therefore, that the due process clause of the Washington Constitution requires that police officers electronically record all custodial interrogations of suspects.

By preserving an accurate record of what happened during the interrogation, electronic recording allows a court to make a more informed determination regarding not only whether a confession was voluntary, but whether it is reliable. Electronic recording deters the police from using methods likely to produce an unreliable confession, reduces disputes over Miranda, and therefore saves time and money currently spent litigating the issue, protects individual officers accused of using improper tactics, and

⁶ Haffner argues the entire interrogation should be videotaped to preserve visual aspects -- including demeanor, body language, and physical interaction -- that are highly relevant to presenting an accurate record of the interrogation. In the alternative, any electronic recording (whether audio or video) of the entire interrogation should be required.

improves interrogations by allowing officers to focus on the interrogation itself rather than taking notes. See Jerrell, 699 N.W.2d at 122; White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.-C.L. L. Rev. 105, 153-54 (1997). Electronic recording is especially crucial because "even honest testimony relating to police questioning will not adequately capture the interactions that transpire in the interrogation room." White, 32 Harv. C.R.-C.L. L. Rev. at 154. In short, an electronic recording requirement will promote fundamental fairness by ensuring that only reliable confessions are admitted into evidence. Conversely, reducing the number of unreliable confessions admitted into evidence will further the search for truth and bolster faith in the criminal justice system.

- ii. **As other courts have recognized, a judicial requirement that custodial interrogations be recorded is appropriate because recording is necessary to safeguard both the rights of the accused and the integrity of the judicial system.**

Three American courts have judicially required electronic recording of custodial interrogations. In holding that the due process clause of the Alaska Constitution requires such recording, the Supreme Court of Alaska observed:

The integrity of our judicial system is subject to question whenever a court rules on the admissibility of a questionable

confession, based solely upon the court's acceptance of the testimony of an interested party, whether it be the interrogating officer or the defendant. This is especially true when objective evidence of the circumstances surrounding the confession could have been preserved by the mere flip of a switch.

Stephan, 711 P.2d at 1164. A similar concern for the demands of fairness and the integrity of the criminal justice system has since prompted the Minnesota and Wisconsin courts to require electronic recording. Scales, 518 N.W.2d 587; Jerrell, 699 N.W.2d 110. Because an accurate and objective record of what happened in the interrogation room is an essential component of fundamental fairness, this Court should follow their example.

The Minnesota Supreme Court, while it declined to address whether the Minnesota Constitution mandates electronic recording of interrogations, imposed a recording requirement for custodial interrogations under its supervisory power to insure the fair administration of justice. Scales, 518 N.W.2d at 592. In Scales, the police were investigating the defendant for two counts of first degree murder and one count of second degree murder. Id. at 589. Although the final questioning of Scales was recorded, the prior three-hour interrogation was not. Id. at 590. During his motion to suppress the formal questioning, Scales disputed much of the officers' testimony regarding the timing and content of the Miranda warnings as well as the substance of the interrogation. Id.

at 590. The Scales court agreed with Stephan that the recording of custodial interrogations "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial." Id. at 592 (quoting Stephan, 711 P.2d at 1150-60).

Last year, the Wisconsin Supreme Court followed Minnesota's lead and required that all custodial interrogations of juveniles be recorded where feasible, and without exception if the interrogation is conducted at a place of detention. Jerrell, 699 N.W.2d at 110. After five and a half hours of interrogation, Jerrell signed a written statement, prepared by a detective, in which he admitted his involvement in an armed robbery. Id. at 113. At trial, Jerrell moved to suppress his written statement on the basis that it was involuntary, unreliable and coerced. Id. at 114. The court not only found that Jerrell's confession was involuntary, but also acknowledged that electronic recording is "an efficient and powerful tool in the administration of justice." Id. at 119, 121. Consequently, the court exercised its supervisory power to mandate recordings of custodial interrogations of juveniles. Id. at 121.

- c. The failure to record Haffner's interrogation violated his right to due process under the Washington constitution.

At the CrR 3.5 hearing, detectives Conroy and Sample testified that Conroy informed Haffner of his rights, Haffner indicated he understood them, and Haffner proceeded to make incriminating statements in response to Conroy's questions about the burglary. Haffner disputed this testimony, however. He testified that he was never informed of his rights, he requested an attorney several times, and he never answered any questions or made any incriminating statements. Without an electronic recording of that interrogation, it is impossible to gauge the validity of Haffner's alleged waiver of his constitutional rights or the reliability of his alleged statements. Admission of those statements was fundamentally unfair.

As a result of Conroy's failure to record the interrogation, in fact, it is impossible to know exactly what Haffner said to the detectives. Conroy testified that he had the equipment necessary to record the interrogation and that he often records witness interviews. Moreover, he went to the Portland DOC office with the intent of interviewing Haffner and could have brought with him a portable tape recorder. Sample too indicated that he has tape recorded interviews in the past. Neither offered any reason for failing to do so in this case. Consequently, there is no record of what Haffner actually said or even the specific questions that he was asked. Haffner's unrecorded statements remain uncertain and unreliable, and

their admission as evidence against him violated his right to due process under the Washington Constitution.

- d. The admission into evidence of Haffner's alleged statements was prejudicial error.

The admission of Haffner's alleged statements to detective Conroy was not harmless error. To prove that a constitutional error is harmless, the state must prove beyond a reasonable doubt "that any reasonable finder of fact would have reached the same result in the absence of the error." State v. Wethered, 110 Wn.2d 466, 474-75, 755 P.2d 797 (1988) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). Even under the non-constitutional harmless error standard, reversal is required where there is a reasonable probability that the error materially affected the verdict. State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002) (citing State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993)).

In this case, the prosecutor admitted to the court that the alleged confession was its whole case. If that were excluded, it would have to dismiss the charges against Haffner. 1RP 11. This was before the state realized that Jones was suddenly willing to make a tentative identification of Haffner in court, even though he had previously been unable to identify him from a photo montage. 1RP 19, 31, 67. Jones testified that he was 75 percent sure Haffner was the man who had been in his room on the night

of the burglary. But that identification was strongly impeached. Conroy testified that he had shown Jones a collection of photographs, including Haffner's, just three weeks after the burglary, and Jones had been unable to identify anyone. Moreover, he told Conroy that it had been too dark at the time of the burglary, he was too involved in the struggle to notice identifying features, and he had been unsure from the beginning whether he would be capable of making an identification. 2RP 162.

Under the circumstances, the state cannot establish that the erroneous admission of the statements did not affect the jury's verdict.

2. **FAILING TO FIND THAT ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IS REQUIRED AS A MATTER OF DUE PROCESS, THIS COURT SHOULD NONETHELESS EXERCISE ITS SUPERVISORY AUTHORITY TO FASHION AN EXCLUSIONARY REMEDY.**

Even if this Court finds that the due process clause of the state constitution does not require electronic recording of interrogations, this Court should follow the example of Minnesota and Wisconsin and exercise its supervisory power over the administration of justice to mandate that police electronically record the entire interrogation procedure as a prerequisite to admissibility in court. See Scales, 518 N.W.2d at 592; Jerrell, 699 N.W.2d at 123. Washington courts possess both statutory and inherent authority to govern their own procedures. State v. Fields, 85

Wn.2d 126, 128-29, 530 P.2d 284 (1975) (citations omitted); RCW 2.04.190; Wash. Const. Art. IV, § 1.⁷ Because the "taking and obtaining of evidence," including the preservation of evidence, is a procedural matter, State v. Templeton, 148 Wn.2d 193, 217, 59 P.3d 632 (2002), this Court can properly exercise its inherent power to require electronic recording of custodial interrogations.

A judicial requirement that interrogations be electronically recorded is appropriate because courts play a central role in regulating and evaluating evidence. The Miranda rule itself is a judicial device and not a legislative mandate. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). As a rule governing the admissibility of confessions, an exclusionary rule would not violate the separation of powers. See Jerrell, 699 N.W.2d at 121; Templeton, 148 Wn.2d at 212-13 (finding that a rule which governs practices and procedures of police rather than court actors does not necessarily constitute a violation of the separation of powers doctrine). In fact, the Washington Supreme Court

⁷ RCW 2.04.190 provides, in relevant part, that "[t]he supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process . . . of taking and obtaining evidence . . . and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading practice and procedure. . . ." Article 4, § 1 of the Washington Constitution provides that "[t]he judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." Article 4, § 30 further provides that "[i]n addition to the courts authorized in Section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute."

has recognized its supervisory power to exclude confessions in the context of irregularities in a defendant's arrest. State v. Bonds, 98 Wn.2d 1, 15, 653 P.2d 1024 (1982). Washington courts have long exercised the authority to exclude evidence that is unreliable or unconstitutionally seized and presented. Accordingly, this Court should hold that the trial court erred in admitting Haffner's alleged statements to the police.

3. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A SENTENCE BEYOND THE STATUTORY MAXIMUM TERM.

Under RCW 9.94A.505(5), "Except as [otherwise] provided . . . a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5); State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003). The total punishment imposed, including confinement and community custody, may not exceed the statutory maximum. Id.

Haffner was convicted of attempted first degree robbery. First degree robbery is a class A felony, with a maximum term of life imprisonment. RCW 9A.56.200(2); RCW 9A.20.021(1)(a). An attempt to commit first degree robbery, however, is a class B felony. RCW

9A.28.020(3)(a) and (b). The maximum sentence for a class B felony is ten years. RCW 9A.20.021(1)(b).

Here, the court imposed 128 months confinement and 18 to 36 months of community custody on Haffner's conviction for attempted robbery. This sentence exceeded the maximum term allowed by law, and the sentence is invalid. See Zavala-Reynoso, 127 Wn. App. at 124.

D. CONCLUSION

For the reasons stated above, this Court should find that interrogations which are not electronically recorded in their entirety are subject to the exclusionary rule, reverse Haffner's convictions, and remand his case for a new trial. In addition, the court exceeded its authority in imposing a sentence beyond the statutory maximum term. The attempted robbery sentence must be vacated and the case remanded for resentencing.

DATED this 9th day of November, 2006.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

APPENDIX

FILED

AUG 10 2006

JoAnn McBride, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,)	No. 06-1-00397-7
Plaintiff,)	
v.)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW ON CrR 3.5
VERNON LEE HAFFNER,)	HEARING
Defendant.)	

The parties appeared before the Honorable Judge Roger A. Bennett, Department One, Clark County Superior Court on June 13, 2006, for a hearing pursuant to CrR 3.5.

Defendant appeared personally and by and through his attorney, James J. Sowder. The State was represented by Deputy Prosecuting Attorney Anthony F. Golik.

UNDISPUTED FACTS

- 1 Detectives Sample and Conroy of the Clark County Sheriff's Office had probable cause to arrest the defendant for the crime of Burglary in the First Degree in this matter based on witness and co defendant statements.
- 2 The detectives contacted the defendant at an Oregon probation department office to interview the defendant on February 23, 2006.
- 3 The defendant was in custody when the detectives contacted him.
- 4 No other persons were present other than Detective Conroy and Detective Sample when the detectives interviewed the defendant.
- 5 The detectives did not tape record the interview.
- 6 The detectives did not attempt to get a written statement from the defendant.

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7 The defendant did not sign a written waiver of his Constitutional Rights.

DISPUTED FACTS:

1 Detective Conroy testified he advised the defendant of his Constitutional Rights at the beginning of the interview by reading the defendant his rights verbatim off his standard department issue Miranda Warnings card..

2 Detective Conroy testified at the conclusion of the reading of Constitutional Rights, he asked the defendant if he understood his rights. Detective Conroy testified the defendant stated he did understand the rights.

3 Detective Conroy testified that after the defendant stated he understood his rights, Detective Conroy began to ask him questions. Detective Conroy testified the defendant was cooperative, never stated he wanted an attorney, and the defendant made a statement in which he confessed.

4 Detective Conroy testified he could not recall whether or not he asked the defendant if he wished to waive his rights before he began to question the defendant.

5 Detective Sample testified he was present when Detective Conroy read the defendant his Constitutional Rights.

6 Detective Sample testified he recalled that Detective Conroy did ask the defendant if he wished to waive his rights, and that the defendant stated he would waive his rights, before the detectives began to question the defendant.

7 The defendant testified the detectives did not read him his Constitutional Rights before they began to question him and the defendant testified he requested an attorney.

CONCLUSIONS AS TO DISPUTED FACTS

1 Weighing the credibility of the defendant against the detectives, the detectives are more credible. Defendant has approximately fourteen prior convictions, including five felony crimes of dishonesty. The defendant has a motive to lie to better his position and not be convicted.

2 There is no evidence in this matter that the detectives would have a motive to lie about whether they advised the defendant of his rights and whether the defendant

confessed. All parties testified the defendant and the Detectives had never met each other prior to the contact in this matter.

3 The Court finds pursuant to CrR 3.5 the defendant, knowingly and voluntarily and intelligently waived his rights to remain silent.

CONCLUSIONS OF LAW

1 The Court has jurisdiction of the parties in the subject matter. There is no requirement when police interview a suspect, that the police record the interview or that the police attempt to secure a written statement from a suspect.

2 There is no requirement that after reading a suspect his Constitutional Rights, the police secure a signed waiver of Constitutional Rights from a suspect prior to questioning the suspect.

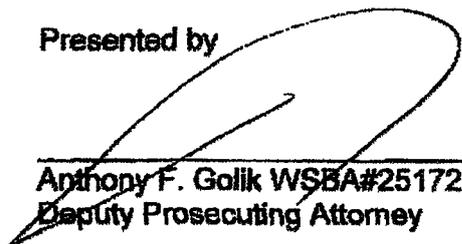
3 Because the defendant made a knowing, intelligent and voluntary waiver of his Constitutional Rights, the defendant's statements to Detective Sample and Detective Conroy are admissible.

DATED this 10th day of August, 2006

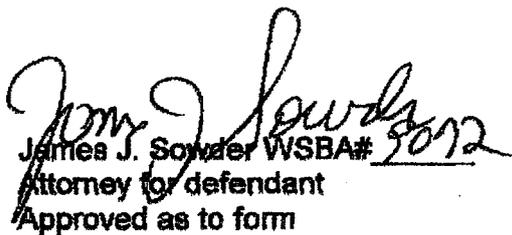


Honorable Roger A. Bennett

Presented by



Anthony F. Golik WSBA#25172
Deputy Prosecuting Attorney



James J. Sowder WSBA# 5012
Attorney for defendant
Approved as to form

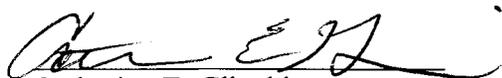
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Designation of Clerk's Papers and Appellant's Brief in *State v. Vernon L. Haffner*, Cause No. 35030-1-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
November 9, 2006

FILED
COURT CLERK
06 NOV 9 AM 10:05
STATE OF WASHINGTON
BY [Signature]
IDENTITY