

No. 35042-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Covarrubias,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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Clallam County Superior Court

Cause No. 05-1-00079-1

The Honorable Judge George L. Wood

Appellant's Supplemental Brief

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SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred by entering Finding of Fact No. 3, which reads as follows:

Before questioning Robert Covarrubias, Detective Ensor advised him/her of his constitutional rights pursuant to the Miranda decision. Detective Ensor used a rights advisal form to assist in giving those rights to Mr. Covarrubias (admitted into evidence as State's Exhibit No. 1).

2. The trial court erred by entering Finding of Fact No. 5, which reads as follows:

After being advised of the above rights, Mr. Covarrubias acknowledged that he understood those rights and agreed to talk to the detectives. Mr. Covarrubias never invoked his right to remain silent, either initially or during questioning. No promises were made to Mr. Covarrubias in return for his making the statement. Detectives Kovatch and Ensor did not coerce Mr. Covarrubias into making a statement with threats or threatening actions.

3. The trial court erred by concluding that "the Defendant herein, Robert Covarrubias, knowingly, intelligently and voluntarily waived his right to counsel and, as a result of rational intellect and free will, spoke with Detectives Kovatch and Ensor of the Port Angeles Police Department. The statements made by Robert Covarrubias to the officers on December 28, 2004, were admissible at trial."

ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

A CrR 3.5 hearing was held prior to Robert Covarrubias' murder trial. Detective Ensor testified that he brought Mr. Covarrubias into an interview room at 1638, that Mr. Covarrubias was in the interview room for 3 to 4 minutes before the interview began, that he read Mr. Covarrubias his rights at 1708, and that the interview ended at 1948. Detective Kovatch testified that he walked into the interview room at 5:05 pm, that he was present when *Miranda* rights were administered, and that Mr. Covarrubias requested an attorney at 7:48 pm and the interview stopped. The trial court found that *Miranda* warnings were administered prior to the interview.

1. Are the trial court's findings and conclusions contrary to the undisputed evidence introduced at the CrR 3.5 hearing?
Assignments of Error Nos. 1-3.

2. Must the trial court's findings and conclusions be vacated because they are not supported by substantial evidence?
Assignments of Error Nos. 1-3.

SUPPLEMENTAL STATEMENT OF FACTS

The trial court's Findings of Fact and Conclusions of Law relating to the CrR 3.5 hearing were entered on April 5, 2007. Findings of Fact, Conclusions of Law, and Ruling, Supp. CP. Finding No. 3 reads as follows:

Before questioning Robert Covarrubias, Detective Ensor advised him/her of his constitutional rights pursuant to the Miranda decision. Detective Ensor used a rights advisal form to assist in giving those rights to Mr. Covarrubias (admitted into evidence as State's Exhibit No. 1).
Supp. CP.

Finding No. 5 reads as follows:

After being advised of the above rights, Mr. Covarrubias acknowledged that he understood those rights and agreed to talk to the detectives. Mr. Covarrubias never invoked his right to remain silent, either initially or during questioning. No promises were made to Mr. Covarrubias in return for his making the statement. Detectives Kovatch and Ensor did not coerce Mr. Covarrubias into making a statement with threats or threatening actions.
Supp. CP.

The trial court concluded that "the Defendant herein, Robert Covarrubias, knowingly, intelligently and voluntarily waived his right to counsel and, as a result of rational intellect and free will, spoke with Detectives Kovatch and Ensor of the Port Angeles Police Department. The statements made by Robert Covarrubias to the officers on December 28, 2004, were admissible at trial." Supp. CP.

SUPPLEMENTAL ARGUMENT

A trial court's findings entered following a suppression hearing must be reversed unless supported by substantial evidence. *State v. Broadaway*, 133 Wn.2d 118 at 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005). It is more than "a mere scintilla" of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003).

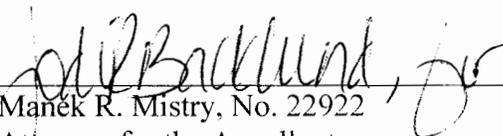
In this case, the undisputed evidence established that Mr. Covarrubias was taken to an interview room at 1638, that the interview began within 3 to 4 minutes, and that he was not read his rights until 1708. RP (3/27/06) 28, 29, 32-34, 36, 54, 55. The trial court's findings are therefore contrary to the evidence, and must be vacated. *Broadaway*.

Respectfully submitted on June 9, 2007.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Supplemental Brief to:

Robert Covarrubias, DOC #810822
New Hampshire State Prison
PO Box 14
Concord, NH 03302

and to:

Clallam County Prosecuting Attorney
Deborah Snyder Kelly
223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 9, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on June 9, 2007.



Jodi R. Backlund, No. 22917
Attorney for the Appellant

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DIVISION II
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BY DEBORAH SNYDER KELLY