

No. 38704-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN HENRY MULLINS
Appellant.

09 NOV -3 AM 11:43
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Anne Hirsch, Judge
Cause No.
07-1-01359-1

BRIEF OF RESPONDENT

David H. Bruneau
Senior Deputy Prosecuting Attorney,
Thurston County, Washington

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

Comps 11-2-09

TABLE OF CONTENTS

I. <u>STATEMENT OF THE CASE AND PROCEEDINGS</u>	1
1. <u>The Crime</u>	1
2. <u>The Motive</u>	2
A. <u>Background</u>	2
B. <u>Friday Evening, July 20th</u>	3
C. <u>Saturday, July 21st</u>	5
3. <u>The Investigation</u>	6
A. <u>Law Enforcement</u>	6
B. <u>Searches by the family</u>	7
C. <u>The Defendant's Peculiar Odyssey</u>	8
II. <u>RESPONSE TO ASSIGNMENTS OF ERROR</u>	12
1. <u>The defendant received effective assistance of counsel. The claimed ineffectiveness was actually objectively reasonable trial strategy.</u>	12
2. <u>The Trial Court properly declined to suppress statements made to Detectives Dehan and Duprey</u>	18
A. <u>The statements made by the defendant were admissible consistent with constitutional authorities.</u>	19
B. <u>The defendant waived his rights under CrR 3.1</u>	21
III. <u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>Davis v. U.S.</u> , 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d. 362 (1994)	20
<u>Edwards v. Arizona</u> , 451 U.S. 486, 68 L.Ed. 2d 378, 101 S.Ct. 1880, 1884-1885 (1981).....	19-20, 24
<u>Miranda v. Arizona</u> , 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct 1602 (1966).....	19, 23-24
<u>Strickland v. Washington</u> , 499 U.S. 668, 687-104 S.Ct. 2052, 806 L.Ed. 2d 674	13

Washington Supreme Court Decisions

<u>State v. Agee</u> , 89 Wn.2d 416, 419, 573 P.2d 355 (1977)	26
<u>State v. Aten</u> , 130 Wn.2d 640, 927 P.2d 210 (1996)	20
<u>State v. Birnel</u> , 89 Wn. App. 459, 949 P.2d 433 (1998).....	24
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)	13
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	14, 16
<u>State v. Harris</u> , 106 Wn.2d 784, 725 P.2d 975 (1995)	24
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994)	26

<u>State v. Hoffman,</u> 116 Wn.2d 51, 804 P.2d 577 (1991)	15, 17
<u>State v. Maxfield,</u> 125 Wn.2d 378, 886 P.2d 123 (1994)	26
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.1251 (1995)	13
<u>State v. Pirtle,</u> 127 Wn.2d 628, 904 P.2d 245 (1995)	15
<u>State v. Radcliffe,</u> 164 Wn.2d 900, 194 P.3d 250 (2008)	20
<u>State v. Robtoy,</u> 98 Wn.2d 30, 653 P.2d 284 (1982)	20
<u>State v. Russell,</u> 125 Wn.2d 24, 882 P.2d 747 (1994)	19

Decisions Of The Court Of Appeals

<u>State v. Hassan,</u> 151 Wn.App. 209, 217, _____ P. 3d _____ (2009).....	13
<u>State v. King,</u> 24 Wn.App. 495, 601 P.2d 982 (1979).....	15
<u>State v. Kirkpatrick.</u> 89 Wn.App. 407, 948 P.2d 882 (1997).....	23
<u>State v. Miner,</u> 22 Wn.App. 480, 591 P.2d 812 (1979).....	19
<u>State v. Valdez,</u> 82 Wn.App. 294, 917 P.2d 1098 (1996).....	24
<u>State v. Wade,</u> 44 Wn.App. 154, 721 P.2d 977 (1986).....	22-24

State v. Ward,
125 Wn.App. 243, 104 P.3d 670 (2004)..... 15, 16

Statutes and Rules

RCW 9.94A.525(9)..... 16
CrR 3.1..... 21, 26

Other Authorities

The Washington State Constitution Art. I § 9 19

I. Statement of the Case and Proceedings.

1. The Crime

On the afternoon of Monday, July 23, 2007, the body of Amy Mullins, 38--reported missing two days prior--was discovered stuffed inside an abandoned refrigerator a few hundred feet from the residence she once shared with her husband, the defendant. RP 159, 314-316, Ex. 72.

The victim was dressed in bra, jeans, and boots. A shirt was found in the refrigerator underneath the body. RP 343-344. Vegetation, grass, and dirt about the clothing and corpse suggested the body had been dragged to the location and hidden in the refrigerator. RP 72, 341-342, 343, 394.

Post-mortem examination revealed that Ms. Mullins died violently after an attack and beating that culminated in manual strangulation. RP 389, 399. The "multiplicity of bruising" indicated that the victim futilely struggled to get away from her assailant. RP 423. However, she was struck from behind by a "heavy blunt object," with "very strong force" that would "knock her off her feet." RP 396, 408, 417-418, 441. This blow left "a huge bruise--extending deep into the soft tissue--on the back of Amy's left shoulder. RP 395-396.

She also endured a blow to the chest--again with "strong force"--probably a kick or a "stomping," that fractured three ribs. RP 408-409, 419.

Bruises were also noted on the Amy's arms, nose, and neck. Scratches on the nose and nostrils indicated "someone trying to cut-off the air way." RP 394, 396. Her killer succeeded; for the bruises to the neck, bleeding of the eyes, bruising of the tongue, bleeding from the vocal cords, and fracture of the hyoid bone all demonstrated that death was due to manual strangulation - by means of "considerable force." RP 397-399, 406-407, 422. Death by such means requires continuous uninterrupted pressure for three to five minutes in order to effect death. RP 399, 406-407.

In sum, Amy Mullins was attacked with some weapon, knocked to the ground, stomped, strangled, and dragged off to avoid discovery. The evidence revealed, and the jury so found, that the defendant was his wife's brutal killer. RP 1077.

2. The Motive.

A. Background.

Amy Mullins had lived with the defendant, her 15-year old daughter, Kailyce, and a crowd of the defendant's relatives at a residence on the Carper Road in south Thurston County until July

10, 2007, when she moved out. RP 55-56, 168. She was employed outside the home, and was the sole support for the household. RP 57, 168. "Financial issues" and ensuing arguments were the problem, and so Amy and Kailyce took up residence in a rental home on the James Road a mile and a half away. RP 59, 559. For Amy Mullins, the only tie to the Carper Road residence remaining was her horse, "Ashley." The animal was pregnant, due to foal, and Amy went to the Carper property daily to check on the horse. RP 60, 176.

The defendant could not abide the separation. He spoke incessantly about "getting Amy back." RP 61-62. Accordingly, he viewed the evening of July 20, 2007, as his opportunity to make inroads with his estranged wife. RP 248-249.

B. Friday Evening, July 20th.

The defendant and victim had no children of their own marriage, yet Amy was close with the defendant's daughter, Alicia, and her two boys, aged four and two. RP 66, 188. Every Friday evening these children would visit the Mullins' residence on Carper Road for "grandparents night." RP 188. Thus, on Friday, July 20, the defendant brought these children to Amy's home on the James Road. According to the defendant's brother, Mullins was going to

“...get back in the graces of his wife in any way possible.” RP 248-249. Thus, when Mullins arrived, he not only had the youngsters, but came equipped with flowers, a greeting card, and protestations of affection. RP 66-67. His handwritten note proclaimed, in part:

*“...my Amy, my Amy May, my Amy May
Mullins...I love you with all my heart,
body, and soul. I will never let you
go, eternally...”*

RP 615, Ex. 99.

Mullins demonstrated his amorous intentions but was rebuffed by Amy. RP 69, 71, 249-250. She told him the relationship “was over--“ there was no hope” (for him). RP 249-250.

Mullins became angry, and argued. RP 69-70. Kailyce described her stepfather as “mad,” “angry...really angry.” RP 71, 134-135. On the other hand, Army appeared “scared” as well as “nervous.” RP 73-137. Mullins ordered the boys packed up, pronouncing to the upset children: *“Nana doesn’t love Papa anymore!”*, and roared off in his truck. RP 71, 135-136. The circumstances appeared extreme, and a friend suggested to Amy that she call the police. RP 138. She did not, but only pulled the blinds, shutting and locking all the doors and windows. RP 73, 137.

Before his departure Mullins made some dire threat to Amy. Upon returning home he told his brother he had “made a few comments” that would “get him into trouble” if Amy called the police. RP 250. Mullins affirmed that he could “not allow her” to start a relationship with another man. RP 251.

C. Saturday, July 21st.

On Saturday morning Amy was supposed to drive to a friends' home to finish the laundry. RP 74, 169. She never arrived. RP 169. That morning, Amy came to the bedroom where Kailyce and her girlfriend slumbered and awakened them. She announced it was “eight o'clock... you need to get up.” RP 64. This was the last time Kailyce saw her mother alive. RP 64.

On this Saturday morning the defendant also was unaccounted for--albeit for a brief time. He was up at seven o'clock, showered, and left his home between 7:30 and 8:00. RP 258, 298. He was out of the house for forty-five minutes to an hour. RP 260. Later on in the morning he left again - this time with the grandchildren. RP 260.

Although Kailyce was awakened by her mother at eight o'clock, she did not get out of bed until about nine. RP 75. Shortly after that, Kailyce spotted the defendant outside the residence. He

was running from the side of the house, looking back towards the garage, heading in the direction of his truck which was parked in front of the porch. RP 76. Kailyce went out and greeted the boys who were inside the truck. RP 78. Mullins, who appeared to Kailyce to be “shaky, nervous, and strung out,” inquired about her mother. RP 78, 79. Kailyce noted that the defendant had a fresh cut on his forehead. RP 79. After the defendant left Kailyce went about her business in the house. When she went outside later, about 10 a.m., she noticed her mother’s Jeep Wrangler in front of the garage. RP 81. The driver’s door was open, Amy’s purse was on the console, the keys were in the ignition, and a coffee cup was in its holder. RP 82. After a brief search about the premises and a flurry of phone calls to relatives, 911 was called. RP 83.

3. The Investigation.

A. Law Enforcement.

A deputy sheriff, Brian Cassidy, responded to the call at the James Road residence shortly before eleven a.m. RP 546-547. The officer gathered information about the preceding hours from a distraught Kailyce and others gathered at the residence. RP 547-548. He then adjourned to the defendant’s residence on the Carper Road. RP 548-549.

When the officer came calling the defendant was just emerging from the shower, his second of the morning. RP 261, 551. Cassidy noted the fresh cut on the defendant's forehead, and was told the wound came from falling from a hammock. RP 551-552. When asked about where Amy might be the defendant said she might be with another man, and told the deputy he would be at his shop in Oakville. RP 554, 556. The "missing person" investigation was then turned over to detectives. RP 557.

B. Searches by the family.

On July 21, the Sheriff's Department arranged for searches utilizing bloodhounds. RP 511. Bloodhounds "trail" a scent, which may be "good" for several days. RP 506-507. In this instance, one of the bloodhound picked up a scent from the driver's seat of the Jeep Wrangler and headed out the driveway and down the James Road. RP 515. The dog followed the scent to the intersection of the James Road and Carper Road, travelled north, and entered the defendant's residence. RP 519-520. From there the dog went back outside and travelled to a fence line (running north and south, the eastern boundary of the defendant's property). RP 521, Ex. 3. The dog kept trying to get under the fence and continue east, but

this was not allowed.¹ RP 521-522. Ex. 3. The abandoned refrigerator in which Amy was found two days later was just a few hundred feet east of this fence line. RP 314-315, Ex. 3.

Besides the law enforcement search efforts, Amy Mullins' family and friends embarked on their own search parties. RP 154-155. Amy's parents arrived Saturday from California, and immediately organized searches of various locations. RP 154-155, 313-316. One of these, on July 23d, ended up discovering Amy's body. RP 159, 314-315.

C. The Defendant's Peculiar Odyssey.

While friends of Amy and her family were looking for her, the defendant was conspicuous by his absence. RP 155, 158, 316. He was not at his shop in Oakville, where he said he could be located. RP 598, 611. Rather, he embarked on a journey that could be described as an evasion if not an attempt to escape.

While stating he would be in Oakville, Mr. Mullins made his way to Rochester, where at night he linked up with his son Matt. RP 739. Matt spoke to his father on the phone Saturday evening, and with a companion, drove to a bank in Rochester. RP 1007-

¹ A search warrant had been obtained for the Carper Road property. The property east of the fence line--where the dog wanted to go--was beyond the scope of the warrant. RP 571-572.

1008. There they located the defendant lurking behind the (closed) bank. RP 1008.

The pair drove the defendant to Olympia and tried to check him into various hotels. RP 1008-1009. There was no room at the inns, and so Mullins spent the night with "friends" of Matt's. The following day (Sunday), the defendant travelled to his daughter, (Alicia's), house in Centralia. RP 199, 186, 1009. Once there, the defendant took her car and drove off. RP 199.²

The vehicle was returned to Alicia Monday morning at about 3 a.m. RP 188, 264. Alicia was suspicious of her father, and noted that he spoke of "needing to go to Canada," for he would be not be "extradited" from there. RP 209-210. Mullins then went off with his brother Jim. RP 263-264.

Centralia police had been alerted by Thurston County deputies that they were looking for Steve Mullins. RP 615-616. The vehicle occupied by the defendant and his brother was stopped by Centralia police and the pair were brought to the department. RP 616. There the defendant was interviewed by Detectives Steve Hamilton and Dave Haller. RP 617, 657-658. The interviewed last

² The defendant later claimed that he drove to various locations in Oregon because he "...thought Amy was hiding from me." RP 896-897. There was no substantiation for the defendant's whereabouts from Sunday mid-day to early Monday morning.

approximately forty minutes, and defendant was allowed to leave the police station. RP 667, 674.

During the interview the defendant rambled, saying he had no idea where Amy was and asserted that she was unfaithful. RP 658-659, 661. The focus of the detectives' inquiries was the location of Amy Mullins - where was she? RP 666. In response, in his own circumlocutory way, the defendant spoke of a "conspiracy" to hide Amy's affair, and concluded with: "...*they think I did it.*" RP 666. Mullins was asked, "What's 'it'?" He refused to clarify what he meant. RP 666.

After his release, Mullins made his way back to the Carper Road house on Monday mid-day. RP 906. There he arranged to meet his "business partner" Frank Johnson. RP 221-222. Together they drove towards Aberdeen when Johnson took a phone call and learned that Amy Mullins had been found--dead. RP 222, 223. Johnson decided to drive to Montesano--to the nearest police station (the Grays Harbor County Sheriff) and told Mullins: "they found Amy... turn yourself in because you're a prime suspect." RP 224.

When the defendant approached the Grays Harbor County Jail he was asked what his business was, and he explained: "My wife is dead, and I may be the cause of it." RP 238-239.

Later Mullins was transported to the Thurston County jail where he was contacted by Detectives Jeff Dehan and Eugene Duprey. RP 67-678. The detectives were present to execute a search warrant on the defendant's person - to photograph him, obtain hair samples, fingernail clippings, and DNA (saliva) samples. RP 678.

During this process Mullins insisted on talking about whatever seemingly came to mind. RP 682. He talked of dreams he had, of abuse he endured at the hands of his brother, and about having done something "bad." RP 681, 682, 687.

Finally, Mullins pronounced that he "needed to get something off his chest--a man needs to own up for what he did." RP 689. He "saw himself" dragging Amy across a field by her belt - she was wearing a pair of jeans, a red shirt, a belt, and a red bra, he said. RP 691.

Mullins also referred to an ostensible "prenuptial agreement" he had with his wife: that the only way one could leave the other was to "fuck the other to death." RP 692. He also said something

like: "I don't think I raped Amy." RP 690, 693. He then recalled lying on top of Amy and placing his hands around her neck. RP 693. He said she turned blue, he dragged her, and concluded by saying that he wanted to lay down. RP 694-695. Things were "coming back" in bits and pieces." RP 694-695.

The case proceeded to trial on October 27th, 2008. RP 8. The defendant testified at great length on November 4th and 5th. RP 804-987. he covered his marriage and separation from Amy Mullins (RP 805-814) as well as his his wandering ways of Friday through Monday, July 20 - 23rd. RP 871-913. Mullins denied every incriminating word spoken by him to detectives Dehan and Duprey ("I don't know where they got that idea") RP 921. He averred that he had never harmed nor did he kill his wife. RP 922, 987.

The jury thought otherwise. A "guilty" verdict was returned on November 6th. RP 1077.

II. Response to Assignments of Error.

1. The defendant received effective assistance of counsel. The claimed ineffectiveness was actually objectively reasonable trial strategy.

In order to demonstrate that counsel ineffectively represented him, Mullins must show (1) his attorney's performance was so deficient that it fell below an objective standard of

reasonableness and (2) the deficient performance prejudiced him. Strickland v. Washington, 499 U.S. 668, 687-104 S.Ct. 2052, 806 L.Ed. 2d 674; State v. Brockob, 159 Wn.2d 311, 344-345. 150 P.3d 59 (2006). A defendant must meet both prongs to satisfy the test. Brockob, supra, at 345.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategies or tactical reasons for the alleged conduct. State v. McFarland, 127 Wn.2d 322, 335-336, 899 P.1251 (1995); State v. Hassan, 151 Wn.App. 209, 217, _____ P. 3d _____ (2009).

This strong presumption in favor of effective assistance of counsel was explained in Strickland, supra, 466 U.S. at 689:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”

In the instant case, defense counsel’s decision not to request lesser included offense instructions clearly was a decision based on considered trial strategy.

First, in order to be entitled to an instruction on an inferior degree offense there must be evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). There was no such evidence in this case.³

The evidence of premeditated murder was strong, if not overwhelming. The defendant was a jealous and possessive man who could not accept estrangement or allow his wife a relationship with another man. The victim was lured away from her home to a killing ground where she was struck from behind by some weapon, and knocked to the ground, stomped, and then strangled. Such evidence demonstrates premeditated intent to kill and nothing less.

Four characteristics of a murder are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth,

³ Evidence that the defendant said “I just snapped” was evidence of nothing more than that he was angered. RP 635-637. Thus, it was part of the constellation of evidence of the defendant’s motive.

and the method of killing. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). This defendant had motive, he used stealth, he used a weapon to beat his wife to the ground, and then he strangled her. The evidence sustained the charge of premeditated murder and nothing less.

Secondly, the record demonstrates that the decision not to seek lesser included offense instructions was a calculated defense trial tactic and not in-effective representation.

The “all or nothing” tactic taken by the defense in this case has been approved by appellate courts as part of a legitimate trial strategy to obtain an acquittal. State v. King, 24 Wn.App. 495, 501, 601 P.2d 982 (1979); State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991).

The determination of whether an “all or nothing” strategy is objectively reasonable is a “highly fact specific inquiry.” State v. Ward, 125 Wn.App. 243, 249, 104 P.3d 670 (2004).

In Ward, this court used three factors to measure effectiveness of counsel (with respect to the decision regarding lesser offense instructions): (1) the significant disparity in the penalties for the two crimes; (2) the defendant’s theory of self-defense applied to both crimes; and (3) the risk posed by the

significant impeachment of the defendant. Ward, 125 Wn.App. at 249-250.

Applying the Ward criteria, the penalties for 1st and 2nd degree murder are both considerable, but the disparity between the two is not necessarily “significant.”⁴

The defendant testified and flatly denied killing his wife. Thus, a lesser degree instruction would have required defense counsel to argue (a) “My client said he didn’t do it, but if you think he did, he didn’t premeditate.” While a defendant may rely on inconsistent defenses,⁵ the lesser included offense instruction would weaken Mullins’ claim of outright innocence. Thus, as a measure of the effective of counsel, the second Ward element does not apply. The defense position was that the defendant did not kill his wife, with or without premeditation. Finally, Mullins’ testimony incurred (to him) no risk of impeachment. He testified that he did not kill his wife and denied ever making inculpatory remarks. Thus, the defendant himself pursued an “all-or-nothing” tactic. Moreover, the record reflects this overall defense strategy.

⁴ 123 - 220 months for Murder in the Second Degree. 240 - 320 months for Murder in the First Degree. RCW 9.94A.525(9).

⁵ State v. Fernandez-Medina, supra, at p. 460-461.

Near the conclusion of evidence, the trial judge made references to on-going discussions about proposed instructions with counsel, RP 1015:

“We have had a couple of continuing discussions. There were no lesser included instructions provided by you, Mr. Purtzer, on behalf of Mr. Mullins, and I just want to make sure again that you don’t have any additional instructions to propose.”

After a moment, counsel for the accused responded:

“...I have talked to Mr. Mullins several times, and we are not requesting any lesser charges.”

RP 1015-1016.

The trial judge then allowed: “That is a tactical decision on your part.” RP 1016.

The records make clear that the defendant himself did not want lesser offense instructions. Thus, this was a calculated defense trial tactic. The defendant denied the killing and his counsel argued that the State had failed to prove the charge. RP 1045, 1061. Had the jury agreed, then under the instructions given, the defendant would have been acquitted.

Thus, this case is akin to State v. Hoffman, supra, p. 112-113, where the Supreme Court allowed that:

The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot

on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense instructions given was clear a calculated defense trial tactic and, ... defendants knowingly waived any rights they had to included offense instructions...

Neither can Mr. Mullins have it both ways. His decision at trial was objectively reasonable under the circumstances, but it failed. He cannot now claim that his counsel was ineffective.

2. The Trial Court properly declined to suppress statements made to Detectives Dehan and Duprey. The defendant's remarks were voluntary in all respects.

Mr. Mullins was quite conscious of his rights. Before appearing at the Grays Harbor County Jail on July 23d he had been advised of his rights and had invoked them. RP (3.5 hearing) 106, 196, 200. Thereafter, he was advised of his rights twice more. RP (3.5 hearing) 13, 154. The last time at 5:27 p.m. RP (3.5 hearing) 154. Nonetheless, the defendant insisted on "getting something off his chest," and overrode the admonitions of Detectives Dehan and Duprey and kept on talking. RP (3.5 hearing) 162-164. As the trial judge noted in ruling on these statements' admissibility, "...when the defendant wants to talk he will talk." CP 9, line 1, 2.

A. The statements made by the defendant were admissible consistent with constitutional authorities.

In Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct 1602 (1966)⁶ the Supreme Court of the United States recognized that the advice of rights were not the sine qua non for the admissibility of a defendant's statements. In Miranda, at 384 U.S. 478, the Court said:

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

This holding was followed in State v. Miner, 22 Wn.App. 480, 483, 591 P.2d 812 (1979) in which the Court of Appeals approved the admissibility of voluntary, spontaneous, or unsolicited statements of an accused.

In this case the defendant "waived" his right to counsel, since he himself initiated the conversation. In Edwards v. Arizona,

⁶ The Washington State Constitution Art. I § 9 is co-extensive with the federal constitution. State v. Russell, 125 Wn.2d 24, 59-62, 882 P.2d 747 (1994).

451 U.S. 486, 68 L.Ed. 2d 378, 101 S.Ct. 1880, 1884-1885 (1981)

the court said:

...we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused...having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (emphasis added)

A subsequent Washington case followed Edwards and pointed out that: "Edwards makes it clear there can be no further questioning (of a subject) until an attorney is provided unless the suspect himself reestablishes a line of communication with the police." State v. Robtoy, 98 Wn.2d 30, 37, 653 P.2d 284 (1982), (emphasis added).⁷

Edwards also was followed in State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996). There, the defendant made reference to wishing to have an attorney present and the police terminated the

⁷ Robtoy held that the Fifth Amendment required police to clarify a suspect's equivocal request for counsel. This holding was abrogated by the United States Supreme Court in Davis v. U.S., 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d. 362 (1994), which held that once a defendant has waived the right to counsel, a later request for counsel must be explicit. State v. Radcliffe, 164 Wn.2d. 900, 194 P.3d. 250 (2008). However, the instant case does not invoke requests for counsel equivocal or otherwise. Mr. Mullins initiated communication with the police.

interview. However, the defendant then asked to have a tape-recorder turned off and asked questions of the interrogator. Thereafter, the accused asked the police to resume the interrogation without the presence of an attorney. The court in Aten, at p.666, ruled:

A suspect or an accused who invokes the right to counsel but then initiates further communication or conversation with law enforcement officers without a lawyer is subject to further interrogation.

In the instant case the defendant initially requested an attorney but kept talking with officers. The detectives put off questioning the defendant but Mr. Mullins insisted: "I want to get this off my chest." His initiative and insistence on talking amounted to a waiver of rights and should be admissible.

B. The defendant waived his rights under CrR 3.1.

Mullins also relies upon CrR 3.1(c) which is set out in full, below:

(c) Explaining the Availability of a Lawyer.

(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the

public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

This rule was addressed in State v. Wade, 44 Wn.App. 154, 721 P.2d 977 (1986). There, the defendant was arrested shortly after he committed a robbery. He was advised of his rights and requested an attorney. Questioning ceased, and the defendant was transported to the police station. There the defendant was asked if he would consent to a search of his vehicle. He said no, and again requested an attorney. After the booking process was completed the defendant waived his rights and confessed to the crime. The court pointed out that less than an hour transpired between the initial advice of rights and the defendant's waiver. This period of time was spent in the booking process. The Court of Appeals noted, at page 159:

The robbery occurred between 5:45 and 5:50 p.m. on December 3.... Less than 10 minutes later, at 5:57 p.m., Mr. Wade was first read his rights and then transported to the police station. At the station, he again requested an attorney. As the booking process was being completed, Mr. Wade initiated the conversation with Officer Jensen. At 6:45 p.m., less than an hour after he was initially stopped as a suspect, he was again advised of his rights and signed a waiver. In our view, Mr. Wade waived his right to counsel before the police had an opportunity to provide him with access to the phone and a list of

attorneys who could possibly defend him. (emphasis added)

Essentially, the Wade court ruled that a defendant has not been denied his right to counsel simply because no attorney was produced by the police between the time of arrest (when an attorney was requested), and the end of the booking process, when the defendant initiated a conversation and waived his rights.

In State v. Kirkpatrick 89 Wn.App. 407, 948 P.2d 882 (1997)-relied upon by the defendant--the Court of Appeals came to a different conclusion. Obviously, the Kirkpatrick court had geographic and time factors in mind.⁸ The distinguishing feature for the Kirkpatrick court was set forth on page 415 of the opinion:

Here, the police first contacted Kirkpatrick more than three hours before he confessed, and Kirkpatrick first asked for an attorney several hours before confessing.

The court in Kirkpatrick acknowledged that (just like a defendant may waive Miranda rights), a defendant may waive rights derived from court rules (at p.415). A waiver of these rights requires an accused's "knowing, intelligent, and voluntary" conduct. Kirkpatrick, at p. 415. Whether such (court rule) rights were waived

⁸ The defendant asked for a lawyer in Port Angeles, Washington. Over three hours later in Centralia the defendant--without counsel--confessed.

requires consideration of Miranda principles set out in various appellate decisions.

Miranda warnings protect a defendant's right to avoid making incriminating statements while in a custodial police interrogation. State v. Harris 106 Wn.2d 784, 789, 725 P.2d 975 (1995). An officer's questions or statements will not constitute an "interrogation" if they are not "reasonably likely to elicit an incriminating response "from the suspect." State v. Birnel, 89 Wn. App. 459, 467, 949 P.2d 433 (1998). Once a suspect has asserted his right to counsel, custodial interrogation must cease unless the suspect initiates further communication. State v. Birnel, supra, at p. 468; State v. Valdez 82 Wn.App. 294, 296, 917 P.2d 1098 (1996).

As summed up in State v. Wade, supra, at pages 158-159:

The focus is on the defendant's background and experience, his conduct and the conduct of the police, and his understanding of his right to counsel and the charge against him. Once the accused invokes the right to counsel, the police may not requestion him until counsel has been provided, "unless the accused himself initiates further communication, exchanges, or conversations with the police." (Italics ours.) *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981); ...(emphasis added) If the accused initiates the conversation, then the police may listen to the voluntary, volunteered statements and use them against him at trial. *Edward v. Arizona*, 451 U.S. at 485.

Obviously, where an accused initiates conversations with the police, he may be considered to have waived his Miranda rights. Likewise, an initiated conversation with the police constitutes a waiver of CrR 3.1 rights.

The trial court entered findings that concluded:

1. The question, "Do you know why you're here?" was made at the time the officers were executing a search warrant on the defendant's person. This is a somewhat intrusive procedure, and Det. Duprey testified that the question was made in an effort to make the defendant comfortable. The question was not designed to elicit an incriminating response. Under the circumstances of the case, the question cannot be reviewed as an "interrogation."

2. The statements made by the defendant to the detectives in the BAC room were voluntarily made by him. The defendant initiated the conversation, was reminded that he (Mullins) had invoked (his rights), but he insisted on talking to the police and did so for twenty minutes.

3. The evidence presented by the State concerning the defendant's contacts with Detectives Hamilton and Haller earlier on July 23rd, when taken in conjunction with the defendant's insistence on talking to Detectives Duprey and Dehan--persuade the court that when the defendant wants to talk he will talk. His statements to Duprey and Dehan were voluntarily made.

4. The defendant's rights under CrR 3.1 were not violated. The time spent processing the defendant (execution of the warrant and pre-booking) took about one and three quarters of an hour. This process was not even completed when the defendant

made the statements to Duprey and Dehan about his "dream."

5. Moreover, during this period, the defendant was not restrained in close custody. After the evidence collection the defendant was allowed to remain in the "waiting area" of the booking area (Exhibit 11) where he had access to telephones with signs posted as to their availability (Exhibits 7, 8, 9, and 10). It was from this area that the defendant moved to the BAC room to talk to the officers. CP 8-9.

Such findings (and conclusions) by a trial court are accorded great significance or great weight by appellate courts. State v. Agee, 89 Wn.2d 416, 419, 573 P.2d 355 (1977). This is so because the "trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. State v. Hill, 123 Wn.2d 641, 646, 870 P.2d 313 (1994); State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994).

The trial court ruled consistent with the cited authorities and the evidence presented.

III. CONCLUSION.

The defendant's statements to various law enforcement officer were properly admitted at trial. The defendant received

effective representation by counsel. His conviction should be affirmed.

Respectfully submitted this 30 day of October, 2009.

A handwritten signature in black ink, appearing to read 'D.H. Bruneau', written over a horizontal line.

David H. Bruneau
Senior Deputy Prosecuting Attorney,
Thurston County, Washington

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

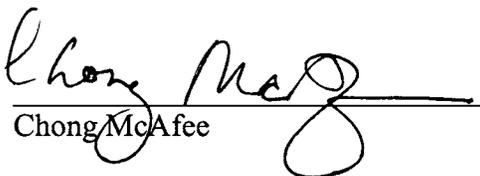
- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: ANNE CRUSER
ATTORNEY AT LAW
P.O. BOX 1670
KALAMA, WA 98625

FILED
COURT OF APPEALS
DIVISION II
09 NOV -3 AM 11:43
STATE OF WASHINGTON
BY _____
DEPUTY

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

Dated this 2d day of November, 2009, at Olympia, Washington.


Chong McAfee