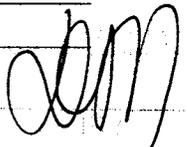


FILED  
COURT OF APPEALS

NO. 40049-9-II

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STATE OF WASHINGTON  
BY: 

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOCEPHUS OSBORN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas P. Larkin, Judge

No. 08-1-03404-8

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court correctly allow defendant's custodial confession to be admitted in the state's case-in-chief?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Jocephus Osborn (defendant) on July 23, 2008 with residential burglary (count I), trafficking in stolen property in the first degree (count II), and theft in the first degree (count III). CP 1-2. On March 5, 2009, the State amended the charges, adding 30 additional counts including residential burglary, burglary in the first degree, theft in the first degree, theft of a motor vehicle, and trafficking in stolen property in the first degree. CP 5-16.

The court held a CrR 3.5 hearing on August 20, 2009 to determine the admissibility of statements made by the defendant. PTRP<sup>1</sup> 19. After hearing testimony from Deputy Fries, Detective Heishman, and defendant, the court held that the defendant knowingly waived his right against self-incrimination and that the confession provided by defendant to police

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<sup>1</sup> Consistent with defendant's brief, PTRP denotes the single volume containing the transcribed pretrial proceedings on August 19, 20, and 24, 2009.

investigators had not been coerced or cajoled. PTRP 116<sup>2</sup>. The court allowed for admission of defendant's confession in the State's case in chief. *Id.*

During trial, the State voluntarily dismissed count XIX (theft in the first degree). RP 1443.

A jury found defendant guilty of fourteen counts of residential burglary, five counts of trafficking in stolen property in the first degree, five counts of theft in the first degree, one count of theft of a motor vehicle, one count of burglary in the first degree, and two counts of theft in the second degree. CP 103-134. The jury found him guilty of all counts with the exception of counts IX (residential burglary), XXIII (residential burglary), XXVI (residential burglary), and XXVII (trafficking in stolen property in the first degree). *Id.*

At the sentencing hearing on November 6, 2009, the State sought an exceptional sentence due to the number of counts involved. The State recommended the court impose low end standard range sentences on counts I, IV, VII, XII (residential burglary), and XX (burglary in the first degree) to run consecutively, for a total of 339 months confinement. RP 1608-9. The court rejected the state's recommendation of a 339 month exceptional sentence and imposed standard range sentences totaling 116

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<sup>2</sup> At the time of filing of the Brief of Appellant, the trial court had yet to submit findings of fact from the CrR 3.5 hearing. The Pre-Trial Report of Proceedings has been cited to determine the trial court's finding of fact and conclusions of law for the CrR 3.5 hearing.

months of confinement and 18 to 36 months of community custody on count XX, burglary in the first degree. CP 141-159. RP 1621.

Defendant filed timely notice of appeal on December 1, 2009.

## 2. Facts

In June and July of 2008, defendant broke into a number of homes in the Parkland and Spanaway areas and stole property. RP 1240-1241; RP 1190. A Tacoma Power work crew witnessed perpetrators at the scene of a burglary near 121st Street and informed law enforcement. RP 1242. Deputy Fries testified that a correlation between suspects from the burglary and recent pawn activity led him to find and question defendant. RP 1243-44. He testified that he showed the line crew witnesses photo montages with the suspects in them; they identified defendant and his companions from the montage. RP 1259-1260.

Deputy Fries testified that on July 21, 2008, he arrested defendant for the burglary witnessed by the line crew. RP 1246-47. He took defendant to the South Hill precinct for questioning where Detective Heishman joined him for the interrogation. *Id.*

Detective Heishman stated at trial that she received a phone call requesting assistance with the interview of defendant on July 21, 2008. RP 1061. She testified that she arrived at the South Hill precinct in Puyallup at approximately 9:53 p.m. *Id.* Prior to questioning defendant, Detective Heishman advised him of his constitutional rights, read from a

standard advisement of rights form. RP 1063. During direct examination, Detective Heishman described the interrogation room used to question defendant as a large conference room at the precinct. RP 1061. During this interview, defendant wrote down a list of ten distinct locations that he had burglarized, signed his statement, and submitted it to the police. RP 1064.

Deputy Fries testified that the initial interview concluded at 10:40 p.m. RP 1278. Both police investigators testified that after the initial interview, defendant provided a tape-recorded testimony of the confession. RP 1076; RP 1277-78. Prior to this recording, Detective Heishman advised defendant of his rights again. RP 1076. At trial, Detective Heishman went through a detailed narrative of defendant's recorded confession, giving detailed descriptions of a number of the residential burglaries in question. RP 1077-1099. Deputy Fries clarified at trial that the interview focused on the Parkland burglaries. RP 1277. He explained that they completed the audio recording at 11:22 p.m. RP 1269.

Deputy Fries testified that due to the confusion regarding the location of the residences, he asked defendant to take him on a "show and tell" of the locations. RP 1300. Deputy Fries testified that after he concluded the recorded interview at 11:22 p.m., he and Sergeant Tom Seymour drove defendant to the different locations so he could properly identify them. RP 1301-2.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE  
DEFENDANT’S FIFTH AMENDMENT  
PROTECTION AGAINST SELF-  
INCRIMINATION WHEN IT ADMITTED  
DEFENDANT’S CONFESSION TO POLICE  
OFFICERS INTO EVIDENCE.

The federal constitution provides an explicit protection against self-incrimination. “No person shall be ... compelled in any criminal case to be a witness against himself ...” U.S. Const. amend. V. The Supreme Court has held this protection to extend to custodial interrogation, requiring that law enforcement inform individuals of their rights prior to any questioning when in custody. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). More specifically, they must ensure that a person in custody understands those rights before the questioning begins. Any waiver of those rights must be “made voluntarily, knowingly, and intelligently.” *Id.* at 444. If the individual chooses to exert the right to silence, law enforcement must honor the choice and discontinue their questioning. *Id.*

The Washington state constitution, using different language than the federal constitution, provides the same protection. “No person shall be compelled in any criminal case to give evidence against himself ...” Const. art. I, §9. The Washington Supreme Court held that the protection provided by the Washington state constitution “is co-extensive with, not

broader than, the protection of the Fifth Amendment.” *State v. Earls*, 116 Wn.2d 364, 374, 805 P.2d 211 (1991)(citation omitted).

The court requires *Miranda* warnings when the interview is a custodial interrogation by a state agent. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004)(citing *State v. Post*, 118 Wash.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992)). “In order for there to be custody, [a suspect] would have to believe that he or she was in police custody with the loss of freedom associated with a formal arrest.” *Id.* at 37. The court must consider whether the circumstances required that police investigators give *Miranda* warnings.

When a custodial interview proceeds without counsel, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination...” *Miranda*, 384 U.S. at 475. The State must show by a preponderance of the evidence that defendant gave any incriminating statements voluntarily. *Earls*, 116 Wn.2d at 379. When determining the validity of the waiver of rights, including the right against self-incrimination, the court must consider “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Id.* at 379 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Additionally, “both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant’s ability to resist

the pressure are important.” *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). Thus, the court must examine the totality of the circumstance to determine whether a defendant waived any associated rights.

Examining the totality of the circumstances includes whether or not behavior of police investigators, including express or implied promises during custodial interrogation, overbore defendant’s will and coerced a confession. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Although promises made by law enforcement represent a possible factor in the totality of the circumstances, “[a] promise made by law enforcement does not render a confession involuntary per se.” *Unga*, 165 Wn.2d at 101. The court must consider whether law enforcement made any promise and determine if a direct causal relationship exists between the promise and the confession. *Broadaway*, 133 Wn.2d at 132.

Regarding the appropriate standard of review, the Washington Supreme Court held that “the rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.” *Broadaway*, 133 Wn.2d at 131. In the this case, defendant challenges the trial court’s findings in the CrR 3.5 hearing that “[the court] [is] not talking about a situation of coercion with respect to ... [defendant]” and “[his] statements were freely and

voluntarily made and would be admissible into evidence.”<sup>3</sup> PTRP 116. In considering credibility of witnesses, the Washington Supreme Court upheld that the trier of fact decides these issues; appellate courts do not review such determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335 (1987)).

The court found that when Deputy Fries took defendant into custody, Detective Heishman advised defendant of his *Miranda* rights and made him sign and initial the advisement of rights form prior to any questioning; defendant knew and understood his rights regarding the interrogation. PTRP 116. The record supports this finding as evidence was adduced that Deputy Fries took defendant to the South Hill precinct where Detective Heishman read him his *Miranda* rights. PTRP 52-53. After Deputy Fries informed defendant of the work crew that saw him at the scene of one of the burglaries, defendant confessed, told the police about the other crimes, and allowed the police to record his statements. PTRP 48-49. Neither Deputy Fries nor Detective Heishman made promises regarding leniency in sentencing when defendant confessed to the crimes. He knew his rights, having heard and understood them at the

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<sup>3</sup> At the time of filing of the Brief of Appellant, the trial court had yet to submit findings of fact regarding the CrR 3.5 hearing. The Assignments of Error given in the Brief of Appellant have been interpreted to challenge the trial court’s admission of defendant’s confession to police investigators.

beginning of the questioning. PTRP 24-25. He chose to waive his right to silence intelligently, knowingly, and voluntarily.

In coming to its ruling, the court emphasized that “Deputy Fries is adamant that [defendant] was not promised that he could roll all charges into one, only that he would indicate that Mr. Osborn was being cooperative.” PTRP 116. Again the record supports this finding. Deputy Fries testified that he did not make any promises to defendant regarding possible sentencing. PRTP 75-76, 84. Detective Heishman, while suggesting that honesty would improve his position, also did not promise any manner of leniency to defendant. PRTP 31. The trial court accepted the testimony of Deputy Fries and Detective Heishman as credible, finding that no coercion of defendant occurred. Appellate courts do not disturb assessments of credibility on appeal. *Camarillo*, 115 Wn.2d at 71.

Defendant claims that Deputy Fries coerced his confession by promising leniency in sentencing, promising that “if [defendant] were to *point out all the houses*, it’s going to be wrapped up into one charge.” PTRP 95 (emphasis added). Defendant himself asserts that the promise made corresponded to pointing out the houses rather than any aspect of his confession. *Id.* Furthermore, as stated by defendant, this promise came “after the interview before [Deputy Fries] put [defendant] in the car and shut the door.” PRTP 94. By this time, defendant had already confessed to the series of crimes, written out a list of all the locations that he had burgled, and made a recording of his statements. Even if the police

investigators had promised defendant lenient or reduced charges as he claims they did, it would have occurred after the actual confession, severing any causal connection between the two. With no causal relationship between the hypothetical promise and the actual confession, the police investigators' purported actions cannot have influenced defendant's choice to confess. *Broadaway*, 133 Wn.2d at 132.

Defendant made his confession after Detective Heishman informed him of his *Miranda* rights. He had not been cajoled, coerced, or forced into making the confession; he gave the confession intelligently, knowingly, and voluntarily. The police investigators made no implied or explicit promises of leniency in sentencing that would have motivated him to confess. Therefore, the trial court correctly found that his confession could be admitted in the states case-in-chief.

D. CONCLUSION.

Once police investigators arrested defendant for the crime of burglary, defendant took it upon himself to confess to the entire series of crimes. He made these confessions with full knowledge of his rights and without compulsion or coercion from law enforcement personnel. The actions of police personnel did not violate his *Miranda* protections. For

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the reasons argued, the State respectfully requests that defendant's sentence be affirmed.

DATED: AUGUST 16, 2010.

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Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/26/10 Johnson  
Date Signature