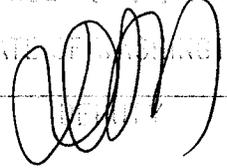


COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY 

No. 40629-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Thades Rich,**

Appellant.

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Clallam County Superior Court Cause No. 09-1-00347-4

The Honorable Judge S. Brooke Taylor

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. The trial court erred by using a nonstandard instruction to outline the burden of proof.
2. The trial court erred by failing to instruct jurors that Mr. Rich had “no burden of proving that a reasonable doubt exists.”
3. The trial court erred by giving Instruction No. 3.
4. Mr. Rich’s second trial violated his constitutional right not to be twice put in jeopardy for the same offense.
5. The trial court erred by discharging the jury without Mr. Rich’s explicit consent.
6. The trial court erred by discharging the jury without considering the length of the deliberations in light of the length of the trial and the complexity of the issues.
7. The trial court erred by discharging the jury without finding that discharge was necessary to the proper administration of public justice.
8. The trial court erred by discharging the jury without making a finding of manifest necessity.
9. The trial court erred by discharging the jury without finding that extraordinary and striking circumstances required discontinuation of the trial, in order to obtain substantial justice.
10. The trial judge’s decision to discharge the jury violated Mr. Rich’s constitutional right to a verdict from the jurors who began deliberations on his case.
11. The trial court erred by admitting Mr. Rich’s custodial statements.
12. The trial court erred by concluding that Mr. Rich’s custodial statements were voluntary.
13. The trial court erred by concluding that Mr. Rich’s *Miranda* waiver was voluntary.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Supreme Court has unequivocally decreed that courts must use WPIC 4.01 when instructing the jury on the burden of proof. Here, the trial court used a nonstandard instruction, omitting language that the accused person has no burden to establish that a reasonable doubt exists. Did the trial court violate the Supreme Court's directive and Mr. Rich's right to due process under the Fourteenth Amendment and Wash. Const. Article I, Section 3?
2. An accused person has a constitutional right to receive a verdict from the jury s/he selected for trial. Here, the trial judge discharged the jury before it had completed its task, without obtaining Mr. Rich's explicit personal consent and without making a finding of manifest necessity based on extraordinary and striking circumstances that substantial justice could not be obtained without discontinuing the trial. Did Mr. Rich's second trial and conviction violate his Fifth and Fourteenth Amendment right not to be twice put in jeopardy for the same offense?
3. An accused person's custodial statements are presumed to be coerced and may not be admitted at trial unless the prosecution establishes they were voluntary and preceded by a valid *Miranda* waiver. Mr. Rich was intoxicated at the time he waived his *Miranda* rights and provided statements to the police. Did the admission of Mr. Rich's statements violate his Fifth and Fourteenth Amendment privilege against self-incrimination?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Thades Rich lived in Port Angeles while working for the Coast Guard as a boarding officer. RP (3/22/10) 96; RP (3/23/10) 225. One evening in August of 2009, he and friends met up at bar, and then his girlfriend Briahn Ballas joined them. They shared some drinks, and then went to a different bar. RP (3/23/10) 217-218, 227.

Carmen Johnson and Ballas started kissing in the second bar. RP (3/22/10) 25, 28; RP (3/23/10) 230. Johnson had been drinking, at least 6 “strong” mixed drinks. RP (3/22/10) 110. Mr. Rich was upset by this and let them know. RP (3/22/10) 26. They continued to make out after Mr. Rich left, including outside on a bench. RP (3/22/10) 26; RP (3/23/10) 232. Mr. Rich came back to get his debit card from Ballas, and Johnson stood and grabbed his shirt. Mr. Rich pushed her back down. RP (3/22/10) 101; RP (3/23/10) 58. Mr. Rich made it clear that he was not happy and saw his relationship with Ballas as over. RP (3/22/10) 111; RP (3/23/10) 58, 232. At some point, Johnson called Mr. Rich a “violent hick.” RP (3/23/10) 59.

Mr. Rich walked away, and Johnson followed, even though she knew Mr. Rich was not happy with her and did not want to talk to her. RP (3/22/10) 102, 113-114, 120-122. She was trying to catch up and shouting

for Mr. Rich to stop as they went along the sidewalk. RP (3/22/10) 33. Mr. Rich told her that he wanted nothing to do with her and kept walking. RP (3/22/10) 39, 46. She passed Ben Eastman, recognized him, and told Eastman that he (Eastman) was her friend, and that Mr. Rich had raped her. RP (3/22/10) 34; RP (3/23/10) 18-20, 241; RP (3/24/10) 12. Eastman picked up his skateboard and walked with Johnson. RP (3/22/10) 67; RP (3/23/10) 29-32.

Johnson said that she swung on Mr. Rich from behind with a semi-closed fist. RP (3/22/10) 102, 117. Juliet Kindred said that Johnson ran up and hit Mr. Rich on his back and knocked his hat off, which he could not have seen coming. RP (3/22/10) 34, 40. Mr. Rich turned and took Johnson to the ground forcefully. RP (3/22/10) 34, 50-52, 68.

The state charged him with Assault in the Second Degree. CP 16. The case was tried (for the first time) in January of 2010.

The court held a CrR 3.5 hearing mid-trial. Detective Ensor described his meeting with Mr. Rich at the jail which resulted in two statements – one recorded and one not. RP (1/5/10) 48-61. Ensor did not review *Miranda* rights with Mr. Rich, but indicated that Officer Maynard told him that he had reviewed them twice. RP (1/5/10) 50-53. According to Ensor, Mr. Rich had been drinking “a considerable amount,” and at some point had taken a portable breath test which resulted in a .14 reading.

RP (1/5/10) 56-58. Ensor acknowledged he had never spoken with Mr. Rich before, but also opined that he was not confused. RP (1/5/10) 60-61. Officer Maynard testified that he gave the PBT when Mr. Rich was arrested because of a strong alcohol smell. RP (1/5/10) 70-72, 75.

Mr. Rich testified at the CrR 3.5 hearing, stating that he was intoxicated and his waiver of his rights was not knowing, intelligent, or voluntary. RP (1/5/10) 77-78, 81. While talking with Ensor, Mr. Rich expressed concern that he could lose his career in the Coast Guard because of the incident. Ensor responded that “coasties [sic] always say that but nothing ever happens to them.” RP (1/5/10) 80. This encouraged Mr. Rich to waive his rights. RP (1/5/10) 80. The court ruled that the statements were admissible. RP (1/5/10) 86-87.

During deliberations, the jury indicated that they were deadlocked between the Assault 2 and the Assault 4 charges, and requested another option. RP (1/6/10) 2. The court declined that request. RP (1/6/10) 2. The chairperson later indicated that the jury could not reach a verdict. After inquiring of the jurors, the court excused the panel, apparently declaring a mistrial. RP (1/6/10) 3-7. Mr. Rich moved for dismissal. Without comment, the court set the case for trial. RP (1/6/10) 8-10.

At the second trial, the court gave the following non-WPIC instruction, over defense objection:

The Defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A Defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been over come by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. It, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. Instruction No. 3, Supp. CP.

RP (3/24/10) 73. The jury convicted Mr. Rich. CP 5.

After sentencing, Mr. Rich timely appealed. CP 4.

### ARGUMENT

**I. MR. RICH’S CONVICTION VIOLATED HIS RIGHT TO DUE PROCESS BECAUSE THE TRIAL JUDGE’S NONSTANDARD INSTRUCTION ON THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF OMITTED MANDATORY LANGUAGE.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 864,

215 P.3d 177 (2009); *State v. Berg*, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

- B. The Washington Supreme Court has approved WPIC 4.01 as the only permissible instruction for defining the burden of proof in a criminal trial.

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. The state constitution provides similar protection. Wash. Const. Article I, Section 3. In a criminal prosecution, due process requires the government to prove each element of the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The accused person “has no burden to present evidence.” *State v. Montgomery* 163 Wash.2d 577, 598, 183 P.3d 267 (2008).

Failure to properly instruct on the burden of proof is “a grievous constitutional failure.” *State v. McHenry*, 88 Wash.2d 211, 214, 558 P.2d 188 (1977). Reversal is required if the accused person was denied a fair trial “in light of the totality of the circumstances-including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors...” *Kentucky v. Whorton*, 441 U.S. 786, 789, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979)

(citing *Taylor v. Kentucky*, 436 U.S. 478, 486, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); see also *Matter of Lile*, 100 Wash.2d 224, 228, 668 P.2d 581 (1983) (adopting the *Whorton* standard under Article I, Section 3).

Furthermore, the Washington Supreme Court has exercised its “inherent supervisory authority to instruct Washington trial courts to use *only* the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt.” *State v. Bennett*, 161 Wash.2d 303, 318, 165 P.3d 1241 (2007) (emphasis added). The Court noted that “every effort to improve or enhance the standard approved instruction necessarily... shifts, perhaps ever so slightly, the emphasis of the instruction.” *Id.*, at 317.

Failure to use WPIC 4.01 requires reversal, unless the instruction used in its place is an improvement upon WPIC 4.01. *State v. Castillo*, 150 Wash.App. 466, 472-473, 208 P.3d 1201 (2009).

C. The trial court’s failure to follow the Supreme Court’s directive in *Bennett* violated Mr. Rich’s right to due process under the Fourteenth Amendment and Wash. Const. Article I, Section 3.

WPIC 4.01, the instruction approved by the Supreme Court, reads (in relevant part) as follows:

The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

WPIC 4.01 (certain bracketed materials deleted). Omitting the last sentence of this paragraph does not improve WPIC 4.01; a conviction obtained through use of such an instruction must be reversed. *Castillo*, at 473-474.

Here, as in *Castillo*, the trial judge used an instruction that differed from WPIC 4.01 by omitting the last sentence of the first paragraph. Instruction No. 3, Supp. CP. The nonstandard instruction used by the trial court in this case is not the “simple, accepted, and uniform instruction” adopted by the Supreme Court. *Bennett*, at 318. Instead, by omitting required language, Instruction No. 3 accomplishes the “ever so slight[]” shift warned of in *Bennett*.

Because the trial judge used an instruction that differed from but did not improve WPIC 4.01, Mr. Rich’s conviction must be reversed. The case must be remanded for a new trial. *Castillo*, at 472-474.

**II. MR. RICH’S CONVICTION WAS ENTERED IN VIOLATION OF HIS RIGHT NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.**

**A. Standard of Review**

Constitutional violations are reviewed *de novo*. *Schaler*, at 282. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). A reviewing court “previews the merits

of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).<sup>1</sup> An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. The Fifth and Fourteenth Amendments protect an accused person’s valued right to a verdict from the jury s/he selected for trial.

The Fifth Amendment<sup>2</sup> provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. A similar prohibition is set forth in the Washington Constitution. Wash. Const. Article I, Section 9. These provisions protect an individual from being held to answer multiple times for the same offense:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby

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<sup>1</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

<sup>2</sup> The Fifth Amendment’s double jeopardy clause applies in state court trials through action of the Fourteenth Amendment’s due process clause. *Monge v. California*, 524 U.S. 721, 728, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998)

subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

*Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

The constitutional prohibition against double jeopardy “embraces the defendant’s ‘valued right to have his trial completed by a particular tribunal.’” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974 (1949)). A second prosecution may be grossly unfair, even if the first trial is not completed:

[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

*Arizona v. Washington*, at 504-05 (footnotes omitted).

Historically, English judges had the power to discharge juries “whenever it appeared that the Crown’s evidence would be insufficient to convict.” *Arizona v. Washington*, 507-08. The constitutional prohibition against double jeopardy in the U.S. “was plainly intended to condemn this ‘abhorrent’ practice.” *Id.*, at 507-08.

Since discharging the jury inevitably implicates the double jeopardy clause, a trial court's discretion to declare a mistrial is not unbridled. *Arizona v. Washington*, at 514; *State v. Juarez*, 115 Wash.App. 881, 889, 64 P.3d 83 (2003). Discharge of the jury without first obtaining the accused person's consent is equivalent to an acquittal, unless such discharge is necessary to the proper administration of public justice. *Id.*, at 889.

A mistrial frees the accused from further prosecution, unless prompted by "manifest necessity." *Juarez*, at 889. To justify a mistrial, "extraordinary and striking circumstances" must clearly indicate that substantial justice cannot be obtained without discontinuing the trial. *Id.*, at 889. The extraordinary and striking circumstances upon which the judge relies must have a factual basis in the record. *State v. Jones*, 97 Wash.2d 159, 641 P.2d 708 (1982).

If the jury "through its foreman and of its own accord, acknowledges that it is hopelessly deadlocked, there would be a factual basis for discharge *if the other jurors agree with the foreman.*" *Jones*, at 164 (emphasis added). Under such circumstances, the court must consider the length of the jury deliberations in light of the trial length and the

complexity of the issues.<sup>3</sup> *State v. Kirk*, 64 Wash.App. 788, 793, 828 P.2d 1128 (1992). A mechanical focus on any one factor does not justify a mistrial and discharge of the jury. *State ex rel. Charles v. Bellingham Mun. Court*, 26 Wash.App. 144, 148-149, 612 P.2d 427 (1980). Where the trial court discharges a hung jury too quickly, the accused person's right to a verdict from that jury is abridged. *Jones*, at 163.

- C. The trial judge should not have discharged the jury without finding a manifest necessity, based on extraordinary and striking circumstances, that substantial justice could not be obtained without discontinuing the trial.

In this case, Mr. Rich did not personally waive his right to have the jury complete its deliberations. RP (1/5/10) 3-10. Accordingly, the discharge functions as an acquittal unless it was supported by "extraordinary and striking circumstances" indicating that substantial justice could not be obtained without discontinuing the trial. *Juarez*, at 889. That test is not met here.

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<sup>3</sup> Although the court in *Kirk* used the word "should" ("a trial court should consider the length of the jury deliberations in light of the length of the trial and the complexity of the issues," *Kirk*, at 793, citing *Jones*, at 164), it is clear from the original context in *Jones* that the inquiry is mandatory. The Supreme Court in *Jones* also used the word "should," but went on to add the following: "After considering the length and difficulty of the deliberations, and making such limited inquiries of the jury as do not amount to impermissible coercion, the judge must then determine whether to exercise his discretion to discharge the jury. It is this determination, weighing the relevant considerations, which is subject to great deference from a reviewing court and which will not lightly be upset." *Jones*, at 165. This implies that a decision to discharge the jury without "weighing the relevant considerations" will not be entitled to deference.

First, there was no indication that the judge considered the length of deliberations, the length of the trial, or the complexity of the issues. Juliet Kindred said that Johnson ran up and hit Mr. Rich on his back and knocked his hat off, which he could not have seen coming. RP (3/22/10) 34, 40. Thus he did not weigh even the minimal “relevant considerations” prior to discharging the jury. *Jones, at 165.*

Second, the judge did not make the findings required for discharge of a jury short of verdict. He did not find that release of the jury was necessary to the proper administration of public justice, prompted by manifest necessity, or supported by extraordinary and striking circumstances that required discontinuation of the trial to obtain substantial justice. *Juarez at 889; RP (1/5/10) 3-10.*

For these reasons, the court’s decision to discharge the jury violated Mr. Rich’s constitutional right to receive a verdict from the jury he selected. Accordingly, his conviction must be reversed and the case dismissed with prejudice. *Jones, supra.*

**III. THE TRIAL COURT VIOLATED MR. RICH'S CONSTITUTIONAL PRIVILEGE AGAINST SELF INCRIMINATION BY ADMITTING HIS CUSTODIAL STATEMENTS.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler*, at \_\_\_\_\_. A *Miranda* claim is an issue of law requiring *de novo* review. *State v. Daniels*, 160 Wash.2d 256, 261, 156 P.3d 905 (2007). Whether or not a person is in custody is a mixed question of law and fact subject to *de novo* review. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

B. Custodial statements are presumed to have been obtained in violation of the Fifth and Fourteenth Amendment right to remain silent.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.<sup>4</sup> U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

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<sup>4</sup> Similarly, Article I, Section 9 of the Washington State Constitution, provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wash.2d 228, 235, 922 P.2d 1285 (1996).

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)); *State v. Nelson*, 108 Wash.App. 918, 924, 33 P.3d 419 (2001). Failure to obtain a valid *Miranda* waiver requires exclusion of any statements obtained. *Seibert*, at 608. It is “clearly established” that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. *Hart v. Attorney General of Florida*, 323 F.3d 884, 891-892 (C.A.11, 2003) (citing *Miranda*, at 475).

The government must also establish that custodial statements are admissible under the due process “voluntariness” test, which “takes into account the totality of the circumstances to examine ‘whether a defendant’s will was overborne by the circumstances surrounding the giving of a confession.’” *United States v. Gamez*, 301 F.3d 1138, 1144 (9<sup>th</sup> Cir. 2002) (quoting *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotations and citation omitted)). The privilege against self-incrimination absolutely

precludes use of any involuntary statement against an accused in a criminal trial, for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

These standards apply “whether a confession is the product of physical intimidation or psychological pressure *and, of course, are equally applicable to a drug-induced statement.*” *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (emphasis added), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). In *Townsend*, the defendant was interrogated while suffering withdrawal from heroin. He was treated with phenobarbital and scopolamine, to alleviate his withdrawal symptoms. On review of defendant’s *habeas corpus* petition, the Supreme Court noted that it was “generally recognized that the administration of sufficient doses of scopolamine will break down the will.” *Townsend*, at 309.

Accordingly, the Court remanded the case for a hearing to determine whether or not the defendant’s statements were admissible.

C. The state failed to prove that Mr. Rich’s *Miranda* waiver and his statements were the product of free will, in light of his alcohol consumption.

At the time he was interrogated, Mr. Rich smelled strongly of alcohol. Several witnesses commented on his intoxication, and a PBT administered by Officer Maynard produced a reading of .14. RP (3/23/10)

64-65. Mr. Rich testified that he had consumed seven to ten drinks. RP (3/23/10) 227-229. He also testified that he was familiar with *Miranda*, and would never have waived his rights if he had not been intoxicated. RP (1/5/10) 78-79.

In the absence of any proof that Mr. Rich's free will remained intact, the state failed to meet its heavy burden of proving that his waiver and statements were voluntarily made.<sup>5</sup> The fact that he gave coherent statements has no bearing on whether or not his decision to talk was voluntary. *See Townsend at 320* (rejecting the coherency standard).

The trial court did not make factual findings addressing the impact of alcohol on Mr. Rich's free will. Instead, the court's limited oral findings focused on Mr. Rich's intellectual functioning at the time of the interrogation. RP (1/5/10) 86-87. Although these findings might establish a knowing and intelligent waiver, they do not establish voluntariness. In fact, none of the court's factual findings address voluntariness.

Because the state did not show that Mr. Rich's waiver and his statements were the product of free will, rather than induced by the presence of alcohol in his blood, the trial court should not have concluded that his statements were voluntary. The statements must be suppressed,

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<sup>5</sup> Indeed, it is likely that Mr. Rich's decision to speak with officers was at least partly due to the influence of alcohol rather than his own free will.

the conviction reversed, and the case remanded for a new trial. *Townsend, supra.*

**CONCLUSION**

For the foregoing reasons, Mr. Rich's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial with directions to exclude his custodial statements and to provide the jury a proper instruction on the burden of proof.

Respectfully submitted on December 3, 2010.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

COURT OF APPEALS  
DIVISION II  
10 DEC -6 20 9:53  
STATE OF WASHINGTON  
BY 

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

Thades Rich  
4816 Holbrook Dr.  
Montgomery, AL 36108

and to:

Lewis County Prosecutor  
223 E. Fourth St.  
Pt. Angeles, WA 98362

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

All postage prepaid, on December 3, 2010.

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 December 3, 2010.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
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