

No. 45535-8-II
(CONSOLIDATED CASE)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ELIZABETH VICTORIA MULLIGAN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-01048-0
The Honorable Ronald Culpepper, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE	2
	A. PROCEDURAL HISTORY.....	2
	B. SUBSTANTIVE FACTS	3
IV.	ARGUMENT & AUTHORITIES	8
	A. ELIZABETH'S STATEMENTS TO OFFICER BUTTS SHOULD HAVE BEEN EXCLUDED BECAUSE HER UNEQUIVOCAL REQUEST FOR A LAWYER WAS IGNORED.....	8
	B. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ELIZABETH WAS NOT ACTING IN SELF- DEFENSE WHEN SHE SWUNG AT KENAN INSIDE THE FLYING BOOTS TAVERN.	15
V.	CONCLUSION	16

TABLE OF AUTHORITIES

CASES

WASHINGTON STATE

<u>State v. Allery</u> , 101 Wn.2d 591, 682 P.2d 312 (1984).....	15
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	10
<u>State v. Brown</u> , 113 Wn.2d 520, 782 P.2d 1013 (1989).....	13
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	10
<u>State v. Douglas</u> , 128 Wn. App. 555, 116 P.3d 1012 (2005)	15
<u>State v. Dunn</u> , 108 Wn. App. 490, 29 P.3d 789 (2001).....	11
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	13, 14
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	10
<u>State v. Hubbard</u> , 103 Wn.2d 570, 693 P.2d 718 (1985)	13
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	15
<u>State v. Nysta</u> , 168 Wn. App. 30, 275 P.3d 1162 (2012)	12
<u>State v. Radcliffe</u> , 164 Wn.2d 900, 194 P.3d 250 (2008).....	11, 12
<u>State v. Reuben</u> , 62 Wn. App. 620, 814 P.2d 1177 (1991).....	13
<u>State v. Rodriguez</u> , 121 Wn. App. 180, 87 P.3d 1201 (2004)	15
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	10

FEDERAL

<u>Arizona v. Roberson</u> , 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).....	12
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<u>Berghuis v. Thompkins,</u> 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).....	11
<u>Davis v. United States,</u> 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).....	11, 12, 13
<u>Miranda v. Arizona,</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	10, 11
<u>Smith v. Illinois,</u> 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984)	13

OTHER AUTHORITIES

U.S. Constitution, Amendment V	10
Washington State constitution article I, § 9	10
CrR 3.1	10

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found that Elizabeth Mulligan's request for an attorney was equivocal.
2. The trial court erred when it found that Elizabeth Mulligan's custodial statements were made after a knowing and voluntary waiver of her rights.
3. In convicting Elizabeth Mulligan of fourth degree assault, the State failed to present sufficient evidence to prove beyond a reasonable doubt that she was not acting in self-defense.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is repeating the word "lawyer" continuously for two minutes after being taken into custody by police an unequivocal request to be represented by a lawyer? (Assignment of Error 1)
2. Where Elizabeth Mulligan repeated the word "lawyer" continuously for two minutes, and where the officers present ignored her request and proceeded as if there was no request, did the trial court err when it found that Elizabeth's request for an attorney was equivocal and when it found that Elizabeth's custodial statements were made after a knowing and voluntary waiver of her rights? (Assignment of Error 1 & 2)

3. Where the alleged victim testified that she grabbed Elizabeth Mulligan from behind without warning and that she could understand how her actions might make Elizabeth think she was being choked, did the State fail to prove beyond a reasonable doubt that Elizabeth was not acting in self-defense when she struck the victim? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Elizabeth Victoria Mulligan with one count of third degree assault (RCW 9A.36.031(1)(g)); one count of fourth degree assault ((RCW 9A.36.041(1)(2)); one count of second degree robbery (RCW 9A.56.190, .210); one count of first degree theft (RCW 9A.56.020, .030); and one count of first degree burglary (RCW 9A.52.020), all in relation to an incident inside and outside the Flying Boots tavern in Tacoma, Washington. (CP 5-7) The State also charged Elizabeth's husband, Robert Mulligan, with several offenses in relation to the same incident.¹ (CP 114-15)

The trial court granted Elizabeth's Knapstad motion, and dismissed the robbery and theft charges before trial. (CP 9-12, 35-

¹ To avoid confusion, the parties who share a last name will be referred to by their first names throughout this brief.

36; 10/02/13 RP 161-62)² The trial court also ruled that statements Elizabeth made to law enforcement at the hospital after the incident were admissible under CrR 3.5. (CP 29-34; 10/02/13 RP 130-36)

The State proceeded to trial on a Second Amended Information, which charged Elizabeth with two counts of fourth degree assault (against the Flying Boots' bartender), and one count of third degree assault (against a responding police officer). (CP 37-38) The jury convicted Elizabeth as charged. (CP 82-84; 5RP 611) The trial court imposed a standard range sentence, but because Elizabeth had no prior criminal convictions, and because she and Robert had young children at home, the court converted all but five days of her sentence into community service hours. (11/01/13 RP 16-17; CP 97, 100, 107-11) This appeal timely follows. (CP 85)

B. SUBSTANTIVE FACTS

On March 11, 2013, Tami Kenan was working her shift as a bartender at the Flying Boots bar and restaurant in Tacoma. (1RP 37-38) Shortly before midnight, three couples dressed in formalwear entered the bar. (1RP 39, 41) Kenan recognized one of the couples, Robert and Elizabeth Mulligan, because they had eaten breakfast at

² The transcripts labeled volumes I through V will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding contained therein.

the restaurant within the past few weeks. (1RP 39, 40-41)

The entire group seemed in good spirits as they sat down at one of the booths and ordered drinks. (1RP 39, 57) One of the couples eventually left, and two couples, the Mulligans and Angela and David Anderson, stayed. (1RP 41, 3RP 336) However, Kenan later overheard David say to Angela, "Why do you have your foot in [Robert's] lap?" (1RP 41) Angela replied that she had not done that, but David stood up, forcefully grabbed Angela's arm and said, "come on." (1RP 43-44)

Kenan became concerned with how David was behaving, so she approached the booth and told David not to grab Angela in that manner. (1RP 44, 59) According to Kenan, Elizabeth also became angry with David and told him, "She's not going with you." (1RP 44) Kenan wanted to calm the situation down, so she asked David to come with her to another part of the bar. As they walked away, Elizabeth followed and told Kenan that David is abusive towards Angela. (1RP 44-45) Robert, Elizabeth and David exchanged words, then David and Robert began physically fighting. (1RP 45-46)

Kenan tried unsuccessfully to get them apart, but eventually David ran out of the bar with Angela following him. (1RP 46-47)

According to Kenan, Elizabeth began pounding on the window with her fists as she watched David and Angela talking outside. (1RP 47) Kenan told her to stop because she was concerned that Elizabeth might break the window and possibly hurt herself. (1RP 47)

Without warning, Kenan approached Elizabeth from behind, grabbed her, and pulled her away from the window. (1RP 48, 77-78) As Kenan let go, Elizabeth turned and swung with her fist at Kenan's face. (1RP 48, 50) Kenan tried to explain that she was just trying to get her away from the window, but Elizabeth was angry and screamed that Kenan had tried to choke her.

Because of the manner in which Kenan grabbed Elizabeth, Kenan "could see how [Elizabeth] thought I was trying to choke her." (1RP 48, 63) Kenan testified that Elizabeth did not hit her very hard and that she was not hurt. (1RP 50)

Robert and Elizabeth then left the bar. (1RP 49) Kenan looked out of the window and saw Robert and Elizabeth chasing David. (1RP 52) Kenan then noticed Elizabeth sprawled on the ground, so she went outside to make sure that she was not hurt. (1RP 52) She approached Elizabeth and tried to help her to her feet, but Elizabeth punched her again. (1RP 52, 83) Kenan then retreated to the bar, and the police arrived shortly thereafter. (1RP 54)

Responding officers arrived and found the Mulligans and Andersons gathered across the street from the Flying Boots. (2RP 164, 235, 266) Elizabeth was sitting on the curb yelling incoherently. (2RP 104, 166, 168, 208, 236; 4RP 480-81) She tried several times to stand up but kept falling back down. (2RP 171, 235) She was eventually able to stand, and began moving quickly towards Officer Steven Butts. (2RP 105-06, 168, 210, 270) According to Officer Butts, she made a growling noise, then swung her hand at his face, striking it and knocking his eyeglasses off. (2RP 169, 170) She then grabbed ahold of his shoulders and would not let go. (2RP 237, 270)

Officer Butts grabbed Elizabeth by the arm, spun her around, and attempted to take her to the ground. (2RP 170) As he did so, Robert grabbed Officer Butts from behind and tried to pull him away from Elizabeth. (2RP 110, 177, 271) As other officers attempted to restrain Robert, Officer Butts and another officer were able to restrain a struggling Elizabeth. (2RP 111-12, 117, 172, 179, 238, 273)

As Elizabeth lay handcuffed on the ground, she continued to yell and swear at the officers. (2RP 174, 238, 239) Elizabeth began yelling, "lawyer, lawyer" over and over again for nearly two minutes. (2RP 181, 239) She then banged her forehead against the cement two or three times, causing her forehead to bleed. (2RP 181, 238)

Medical responders treated Elizabeth at the scene, and transported her to the hospital. (2RP 182, 304)

The responding officers could see that Elizabeth was highly intoxicated. (2RP 190, 193, 212, 254, 282, 4RP 480-81) The medic who treated Elizabeth at the scene also testified that she exhibited a high level of intoxication, and that he classified her as having an “altered level of consciousness.” (3RP 306-07, 320-21) He testified that someone in that state cannot make sound decisions. (3RP 323)

Elizabeth and Robert testified in their defense. Elizabeth and Robert had gone to Seattle with the Andersons and a third couple, to attend an awards dinner being held for Robert’s classmates from Bates Technical College. (3RP 334-35, 336, 380, 381) They hired a babysitter to care for their children, and had rented a limousine to take them to and from the dinner. (3RP 334, 336) Elizabeth drank several vodka drinks in the limousine on the way to Seattle, a few more drinks at the dinner itself, and she continued to drink in the limousine on the way home from Seattle. (3RP 336, 338, 340) She ate only a little food at the dinner itself. (3RP 339)

The entire group had been drinking together and having a good time the entire night. (3RP 338, 344, 382, 383-84) The limousine driver dropped the couples off at the Mulligans’ home,

which is near the Flying Boots tavern. (3RP 342) The group walked to the Flying Boots, and were still in good spirits. (3RP 344)

At the Flying Boots, David became aggressive and accused Angela of flirting with Robert. (3RP 355, 389-90) Elizabeth did not like how David was talking to and treating Angela, so she tried to push him out of the bar and away from Angela. (3RP 345, 358, 359-60) Her memory of the evening is unclear after that point. (3RP 346-47) She does not remember interacting with Kenan, she does not remember how she got outside of the Flying Boots, and she does not remember scuffling with Officer Butts. (3RP 346-48)

IV. ARGUMENT & AUTHORITIES

- A. ELIZABETH'S STATEMENTS TO OFFICER BUTTS SHOULD HAVE BEEN EXCLUDED BECAUSE HER UNEQUIVOCAL REQUEST FOR A LAWYER WAS IGNORED.

At the CrR 3.5 hearing, Officer Butts testified that Elizabeth yelled "lawyer, lawyer" over and over for about two minutes after she had been taken to the ground and handcuffed. (10/02/13 RP 15) She was later transported to the hospital for treatment of the injury she sustained when she banged her head against the cement. (10/02/13 RP 16) About 45 to 60 minutes later, when Elizabeth was still intoxicated but calm, Officer Butts read Elizabeth the Miranda warnings. (10/02/13 RP 19-20, 29, 30-31) Officer Butts testified that

Elizabeth appeared to understand these rights, and agreed to answer questions. (10/02/13 RP 21, 22, 44)

According to Officer Butts, Elizabeth told him she was angry at Kenan for kicking them out of the bar, and that she had “gone after” Kenan but did not think she hit her. (CP 32; 10/02/13 RP 22-23) Elizabeth also acknowledged that she had been “belligerent” and “loud” outside of the bar, but that she did not remember trying to assault Officer Butts. (CP 32; 10/02/13 RP 23-24) She also said she hit her head against the cement because she was frustrated that everyone was fighting. (CP 32; 10/02/13 RP 24)

The court did not make a written finding about whether repeatedly yelling “lawyer” for two minutes was or was not a demand to be represented by counsel. But in its oral ruling, the court determined that Elizabeth did not unequivocally indicate that she wanted to speak to a lawyer before answering questions. (10/02/13 RP 131-32) The court also ruled that Elizabeth’s statements to Officer Butts about the incident were made “after she had been fully advised of her constitutional rights, and after she acknowledged an understanding of such rights. While she appeared to be intoxicated, she was appropriately responsive to questioning and appeared to understand. She made those statements intelligently and

knowingly.”³ (CP 33-34) The State introduced Elizabeth’s statements in its case-in-chief. (2RP 186-87)

A suspect’s right to remain silent is guaranteed by both the Fifth Amendment of the United States constitution and by article I, § 9 of the Washington State constitution.⁴ To protect this right, the U.S. Supreme Court held in Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that police officers must inform a suspect of his or her right to remain silent, as well as the right to counsel, prior to any custodial interrogation.

Washington’s Criminal Rule 3.1 also provides that “[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody[.]” CrR 3.1(b)(1). The rule further states that “[w]hen a person is taken into custody that person shall *immediately* be advised of the right to a lawyer[.]” CrR 3.1(c)(1) (emphasis added). The Washington State Supreme Court has interpreted this rule to apply whenever one’s “freedom of movement is restricted.” State v. Copeland, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996). The

³ The trial court’s conclusions of law following a CrR 3.5 hearing are reviewed *de novo*. State v. Broadway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

⁴ The Washington Supreme Court has compared and analyzed the Fifth Amendment and art. I, § 9 under the factors enunciated in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and has determined that the federal and state provisions provide the same level of protection. State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994).

court rule goes beyond the requirement of Miranda that rights be given before interrogation, and instead requires that a defendant be advised “immediately” of the right to counsel. State v. Dunn, 108 Wn. App. 490, 494, 29 P.3d 789 (2001).

A suspect may waive her right to an attorney, but there can be no questioning if she “indicates *in any manner or at any stage of the process* that he wishes to consult with an attorney before speaking.” Miranda, 384 U.S. at 444-45 (emphasis added). If the suspect unequivocally states that she wants an attorney, interrogation must cease until an attorney is present. Berghuis v. Thompkins, 560 U.S. 370, 388, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) (“a suspect may ask for an attorney at any time. If he requests an attorney, all questioning must stop until he has an attorney or starts talking again on his own.”).

The rule that questioning must cease if the suspect asks for a lawyer “provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information.” Davis, 512 U.S. at 461. The Supreme Court has “repeatedly emphasized the virtues of a

bright-line rule in cases following . . . Miranda.” Arizona v. Roberson, 486 U.S. 675, 681, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

To successfully invoke the right to counsel, a suspect must do so “unambiguously.” Davis, 512 U.S. at 459. That is, the suspect “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” Davis, 512 U.S. at 459.

For example, courts have held that the statement, “Maybe I should talk to a lawyer,” is not an unequivocal request for counsel. See Davis, 512 U.S. at 462; Radcliffe, 164 Wn.2d at 907-08 (defendant’s statement that “maybe I should contact an attorney” was equivocal). But the words, “I gotta talk to my lawyer” are a plain and unambiguous invocation of the right to counsel, requiring all interrogation to cease. State v. Nysta, 168 Wn. App. 30, 40-41, 275 P.3d 1162 (2012).

In this case, an intoxicated Elizabeth yelled “lawyer” over and over for two minutes. (10/02/13 RP 15) Although perhaps not as articulate as she could have been, she clearly, loudly, and repeatedly made her desire for an attorney known. Any police officer at the scene would have or should have understood her statement to be a

request for an attorney. Davis, 512 U.S. at 459.

But the officers blatantly ignored her request. They did not cease contact and did not provide an attorney. Instead, they waited until she calmed down then initiated contact and questioning as if nothing had happened. This was clearly improper. See e.g. Smith v. Illinois, 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984) (the interrogator may not proceed on his own terms as if the defendant had requested nothing).

Statements obtained in violation of Miranda and CrR 3.1 cannot be used by the State in its case-in-chief. State v. Brown, 113 Wn.2d 520, 556, 782 P.2d 1013 (1989); State v. Hubbard, 103 Wn.2d 570, 575-76, 693 P.2d 718 (1985). The trial court therefore erred when it allowed the State to present Elizabeth's statements as evidence against her.

The harmless error analysis applies to erroneous admissions of statements obtained in violation of Miranda. State v. Reuben, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any

reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425. Under the “overwhelming untainted evidence” test, the reviewing court looks only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d at 426. Under this test, a conviction will be reversed where there is any reasonable chance that the use of inadmissible evidence was necessary to reach a guilty verdict. Guloy, 104 Wn.2d at 426.

In this case, there was overwhelming evidence that Elizabeth was highly intoxicated. (2RP 190, 193, 212, 254, 282, 4RP 480-81) There was also testimony that someone with her level of intoxication is cognitively impaired and cannot make sound decisions. (3RP 306-07, 320-21, 323) Thus, the main issue in the case was whether Elizabeth, in that state, formed the intent to commit the assaults on Kenan and Officer Butts. Her statements to Officer Butts at the hospital indicated that she was aware of her behavior both at the time of the incident and afterwards. These statements were the only evidence from which a juror could conclude that Elizabeth may have intended her actions. Without it, there is no evidence that she was acting rationally or with any thought about her actions or their consequences. It cannot be said that the outcome of the case would

not have been different had her statements been excluded.

B. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT ELIZABETH WAS NOT ACTING IN SELF-DEFENSE WHEN SHE SWUNG AT KENAN INSIDE THE FLYING BOOTS TAVERN.

Where there is evidence that a defendant reasonably believed the victim was about to harm her or another person and she acted in self-defense, the State must prove the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983); State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004); State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005).

A claim of self-defense is judged by a subjective standard. McCullum, 98 Wn.2d at 488-89. The jury must “view the evidence from the defendant's point of view as conditions appeared to him or her at the time of the act.” McCullum, 98 Wn.2d at 488-89 (citing State v. Wanrow, 88 Wn.2d 221, 234-36, 559 P.2d 548 (1977)). Thus, the jury must view the claim of self-defense “from the defendant's perspective in light of all that [he] knew and experienced with the victim.” State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984) (citing Wanrow, 88 Wn.2d at 235-36).

In this case, the State did not present sufficient evidence to

establish that Elizabeth's act of swinging at Kenan inside the bar was not done in an effort to protect herself from a perceived threat. Although Kenan may have had the right to use reasonable force to pull Elizabeth away from the window to prevent damage to the window or harm to Elizabeth, Kenan exceeded that right by grabbing Elizabeth from behind in an apparent choke hold. Even Kenan acknowledged that she went too far, when she testified that she "could see how [Elizabeth] thought I was trying to choke her," and that Kenan "did it to myself and I could see what she was thinking[.]" (1RP 48, 63) And Elizabeth screamed that Kenan had tried to choke her, which shows that Elizabeth believed that was what Kenan tried to do. (1RP 48)

The State therefore failed to disprove, beyond a reasonable doubt, that Elizabeth was reacting to a perceived threat from Kenan when she turned and tried to strike Kenan in the face. The State therefore failed to prove that Elizabeth is guilty of this fourth degree assault offense, and this conviction should be reversed and dismissed.

V. CONCLUSION

Officer Butts ignored Elizabeth's repeated and unequivocal demand for a lawyer, and continued with his attempt to interview her

as if nothing had happened. This violated Elizabeth's constitutional right to have an attorney present during questioning, and Elizabeth's statements should not have been admitted at trial. Their admission was not harmless, and her convictions must therefore be reversed. In addition, the State failed to disprove that Elizabeth only struck Kenan inside the bar because Kenan had choked her, and that Elizabeth was acting in self-defense. Therefore, Elizabeth's fourth degree assault conviction based on this incident should be reversed and dismissed.

DATED: May 2, 2014



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CERTIFICATE OF MAILING

I certify that on 05/02/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Elizabeth Mulligan, 3711 Tacoma Ave. S, Tacoma, WA 98418.



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