

No. 47318-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES MAJORS,

Appellant.

---

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

The Honorable Carol Murphy, Judge  
Cause No. 14-1-01718-2

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	1
1. <u>Defense counsel's failure to seek suppression of gestures made by Majors before <i>Miranda</i> warnings were given did not prejudice Majors, and therefore did not constitute ineffective assistance of counsel</u> .....	1
2. <u>The court did not err by precluding Majors from eliciting his own hearsay statements from a State witness. Even if it were error, Majors was allowed to testify to those statements himself and he suffered no prejudice</u> .....	9
D. <u>CONCLUSION</u> .....	19

## TABLE OF AUTHORITIES

### Washington Supreme Court Decisions

<u>State v. Atsbeha</u> , 142 Wn.2d 904, 16 P.3d 626 (2001) .....	10
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997) .....	18
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990) .....	9
<u>State v. Crawford</u> , 159 Wn.2d 86, 147 P.3d 1288 (2006) .....	6-7
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).....	10
<u>State v. Harris</u> , 106 Wn.2d 784, 725 P.2d 975 (1986) .....	2
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996) .....	6
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007) .....	5
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	6
<u>State v. Ruzicka</u> , 89 Wn.2d 217, 570 P.2d 1208 (1977) .....	14
<u>State v. Sargent</u> , 111 Wn.2d 641, 782 P.2d 1127 (1988) .....	2
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981) .....	18

<u>State v. West</u> , 70 Wn.2d 751, 424 P.2d 1014 (1967) .....	13
--	----

### Decisions Of The Court Of Appeals

<u>In re Pers. Restraint of Riofta</u> , 134 Wn. App. 669, 142 P.3d 193 (2006).....	6
--	---

<u>State v. Anderson</u> , 112 Wn. App. 828, 51 P.3d 179 (2002).....	11
---	----

<u>State v. Borsheim</u> , 140 Wn. App. 357, 165 P.3d 417 (2007).....	15
--	----

<u>State v. Knapp</u> , 14 Wn. App. 101, 540 P.2d 898 (1975).....	12
--	----

<u>State v. Lozano</u> , 76 Wn. App. 116, 882 P.2d 1191 (1994).....	3
--	---

<u>State v. Perez</u> , 139 Wn. App. 522, 161 P.3d 461 (2007).....	13
---	----

<u>State v. Sanchez-Guillen</u> , 135 Wn. App. 636, 145 P.3d 406 (2006).....	10
---	----

<u>State v. Spotted Elk</u> , 109 Wn. App. 253, 34 P.3d 906 (2001).....	2-3
--	-----

<u>State v. Stubsjoen</u> , 48 Wn. App. 139, 738 P.2d 306, <i>review denied</i> , 108 Wn.2d 1033 (1987) .....	17
---	----

### U.S. Supreme Court Decisions

<u>Doe v. United States</u> , 487 U.S. 201, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).....	3
---	---

<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)....	1-3, 14, 16
--	-------------

<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).....	2
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	6

**Federal Court Decisions**

<u>United States v. Walker</u> , 652 F.2d 708 (7 <sup>th</sup> Cir. 1981) .....	15-16
--	-------

**Statutes and Rules**

CrR 3.5(b) .....	15
ER 106 .....	12-13, 15
ER 609 .....	15
ER 801 .....	13
ER 801(c).....	11
ER 810(d)(2) .....	13
Federal Evidence Rule 106.....	15
Fifth Amendment to the United States Constitution.....	16
RAP 2.5(a)(3).....	5
Sixth Amendment to the United States Constitution.....	14
Washington State Constitution Article 1, § 22 .....	14

**Other Authorities**

1 Weinstein’s Evidence (1979) P 106(01) at 106-9).....	15-16
--	-------

5 KARL B. TEGLUND, WASHINGTON PRACTICE: EVIDENCE § 106.4 at 150-51 (5 <sup>th</sup> ed. 2007).....	13
29 A Am. Jur. 2d Evidence § 772.....	13

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether defense counsel's failure to seek suppression of gestures made by Majors before he was given the *Miranda* warnings constituted ineffective assistance of counsel.

2. Whether the court erred in refusing to allow Majors to introduce hearsay statements he made to a police officer through cross-examination of the officer.

B. STATEMENT OF THE CASE.

The State accepts the appellant's Statement of the Case.

C. ARGUMENT.

1. Defense counsel's failure to seek suppression of gestures made by Majors before *Miranda* warnings were given did not prejudice Majors, and therefore did not constitute ineffective assistance of counsel.

Majors argues that because his attorney did not seek to suppress the fact that, when shown the methamphetamine, he shrugged his shoulders and sighed heavily, his counsel's performance was deficient and he was prejudiced by it. The State agrees that counsel had grounds to seek suppression of those gestures, but under the circumstances of this case Majors does not show that he was prejudiced.

A person who is in custody must be warned that he has the right to remain silent, that any statement he makes may be used against him, and that he has the right to have an attorney present

during questioning. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Interrogation can be “either express questioning or its functional equivalent.” Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The “functional equivalent” can be “words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Id. at 301. The intent of the police is irrelevant; the question is how the suspect is likely to perceive the words or actions. If there is no reasonable likelihood of an incriminating response, the action is not an interrogation even if the suspect makes such a response. Id. at 301-02.

*Miranda* warnings are designed to protect a suspect's right not to make incriminating confessions or admissions to police while in the coercive environment of custodial police interrogation. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986). In the absence of *Miranda* warnings, a suspect's statements during custodial interrogation are presumed involuntary and may be inadmissible at trial. State v. Sargent, 111 Wn.2d 641, 647-48, 782 P.2d 1127 (1988). Nonverbal acts may be testimonial. State v. Spotted Elk, 109 Wn. App. 253, 34 P.3d 906 (2001); State v.

Lozano, 76 Wn. App. 116, 882 P.2d 1191 (1994). In each of those cases, a defendant produced heroin when asked by officers if she had "anything on her person." The court in each case found the production of heroin to be a nonverbal testimonial act, inadmissible without prior *Miranda* warnings. Spotted Elk, 109 Wn. App. at 259; Lozano, 76 Wn. App. at 118-19. "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate to a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." Doe v. United States, 487 U.S. 201, 210, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988). There is, then, a distinction between acts that are incriminating and acts that are simply acts.

The State does not dispute that Majors was in custody and that at the time the officer showed him the baggie of methamphetamine, he had not been advised of the *Miranda* warnings. RP 22-24.<sup>1</sup>

Q: . . . [W]ell, did you take the suspected methamphetamine out of the box?

A: I did.

Q: And what did you do with it? Or what happened with it next?

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<sup>1</sup> Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the single-volume trial transcript dated February 24-16, 2015.

A: I showed it to Mr. Majors.

Q: And what was his physical response when you showed it to him?

A: At that point he shrugged his shoulders and kind of let out a sigh.

....

Q: And at any point did you read him his *Miranda* warnings?

A: I did.

Q: And when did that happen?

A: That happened immediately after I had showed him the substance that I believed to be meth.

RP 23-24.

The first question, then, is whether the officer should have known that holding up the methamphetamine and displaying it to Majors was likely to elicit an incriminating response. The State concedes that such a response would be foreseeable. It is a closer question, however, whether the shrug and the sigh were testimonial or, if so, whether the communication was incriminating. At trial, the State argued that those acts were evidence of guilt. RP 139, 157-58. On the other hand, Majors' counsel argued that they were not.

Well, he sighed and shrugged. And he interpreted that to mean, "Huh. You got me." Isn't it just as plausible that a sigh and a shrug is "Oh, shoot. I

recognize that that's methamphetamine. I had no idea that was on me. Now I'm going to get in even more trouble." Isn't it also possible that a sigh and a shrug is "What's that? What's he talking about? He arrested me for trespass."

RP 149.

Majors did not seek to suppress the evidence of his gestures, nor did he object at trial to the officer's testimony about them. Generally, a reviewing court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A narrow exception, however, exists for "manifest error[s] affecting a constitutional right." RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 936. Majors is, therefore, raising his claim as ineffective assistance of counsel, which is a constitutional right. The defendant must show the constitutional error actually affected his rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review. Id. at 926-27. "If a court determines the claim raises a manifest constitutional error, it may still be subject to the harmless error analysis." Id. at 927.

To demonstrate ineffective assistance of counsel, the defendant must show that his attorney's performance fell below an

objective standard of reasonableness and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He must affirmatively prove prejudice, showing a reasonable probability that the outcome would have been different, not just that there could have been some "conceivable effect" on the proceedings. State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006)

In reviewing a claim of ineffective assistance, the court engages in a strong presumption that counsel was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics and strategy form no basis for an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A reviewing court will evaluate the reasonableness of counsel's performance from counsel's perspective at the time of the alleged error and in light of all the circumstances. In re Pers. Restraint of Riofta, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

Majors' acts of shrugging and sighing were sufficiently ambiguous that it is difficult to say that they were incriminating communications. Defense counsel apparently did not find them so prejudicial that he sought suppression. The State argued its theory

of the gestures and Majors argued his. The fact that there are conflicting interpretations of the shrug and sigh gives rise to substantial doubt that, had Majors sought to suppress them, the trial court would have done so. Majors bears the burden of showing that, had his attorney done as he now argues he should have, the outcome of the trial would have been different. Crawford, 159 Wn.2d at 99.

Majors argues that the shrug and the sigh were particularly prejudicial because “none of [his] other statements to police suggested he knew there was methamphetamine inside the cigarette case.” Appellant’s Opening Brief at 20. The State disagrees. Officer Peters testified that after he read Majors the *Miranda* warnings, he asked him, regarding the suspected methamphetamine, “What is this?” Majors responded, “I don’t know. Maybe meth.” RP 24. He admitted that the cigarette box was his, and indeed, it was found in an inside pocket of the coat he was wearing. RP 22, 25. He never claimed the meth was his but he also never denied ownership of it. He never claimed ignorance about the nature of the substance. RP 38-39. He did tell the officer he didn’t know it was there. RP 112.

Majors testified in his own defense. He said that he had picked up the cigarette box on the street the night before but had not looked inside of it because when he kicked it the box made an "empty sound." RP 99, 101-02. Even though he is a smoker who cannot afford cigarettes and obtains them by picking up discarded cigarette butts wherever he can find them, salvaging any remaining tobacco and rolling it in new papers, he simply put this box in his inside pocket and forgot about it. RP 99. He said when the officer held up the baggie he could not see it clearly and was unsure what it was. RP 101-02, 106. He testified that when asked what it was he replied, "I don't know. It could be sugar." "No, I don't know what it is. I didn't know it was in there." Majors said he never mentioned anything about methamphetamine, but rather the officer had suggested that it might be meth. In response, Majors testified that he said, "It's not mine. I didn't know it was in there." RP 100-01, 106-07.

Officer Peters testified on rebuttal that at the time of the arrest Majors never said he had found the cigarette box, never suggested that the substance was sugar, but did suggest that it was meth. RP 111.

The State and the defendant offered differing interpretations of the shrug and sigh. Those gestures are difficult to convey in a written record. The jury had the opportunity to see the officer's re-enactment. RP 24. It had the opportunity to observe Majors on the witness stand. It made its own determination of the facts. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It cannot be said that on this record the trial court would have excluded the evidence about the gestures. Majors is not prejudiced if his attorney's failure to move for suppression would have made no difference. Similarly, viewing the evidence in its entirety, it cannot be said that the outcome of the trial would have been different had the evidence been suppressed. The evidence apart from the gestures supports a verdict of guilty of possession of methamphetamine.

2. The court did not err by precluding Majors from eliciting his own hearsay statements from a State witness. Even if it were error, Majors was allowed to testify to those statements himself and he suffered no prejudice.

Majors argues that the trial court erred by refusing to allow him, on cross-examination of the arresting officer, to elicit an exculpatory statement that he had made to the officer, specifically

that he did not know the meth was in the cigarette box. Appellant's Opening Brief at 22. He maintains that this statement was not hearsay because it was not offered to prove its truth, it was necessary to show bias on the part of the officer, and it was necessary to satisfy the rule of completeness. Appellant's Opening Brief at 22-23. While the court did not allow those statements in on cross-examination of the officer, Majors testified to them in his case without objection. RP 101, 106. In rebuttal, the officer testified that Majors had said to him that he (Majors) didn't know the meth was there. RP 112.

An appellate court reviews the trial court's interpretation of the rules of evidence de novo and the application of the rules for abuse of discretion. State v. Sanchez-Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed unless no reasonable person would adopt the trial court's view. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). An evidentiary error may be harmless. "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." State v. Guloy, 104 Wn.2d 412, 425,

705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). Nonconstitutional error is harmless if "within reasonable probabilities," the outcome of the trial would not have been materially affected absent the error. State v. Anderson, 112 Wn. App. 828, 837, 51 P.3d 179 (2002).

a. Impeachment.

Majors argues that it was necessary to cross-examine the officer about his statement that he did not know the meth was in the cigarette box in order to demonstrate that the officer was biased and willing to mislead the jury in an attempt to convict him. Appellant's Opening Brief at 22. There is nothing in the record that even suggests the officer was biased. He answered the questions that the prosecutor asked him. If he was not asked about exculpatory statements, he could not very well volunteer that information. The prosecutor objected to cross-examination on the grounds that the answers would be hearsay because they were exculpatory, allowing the defendant to get his version of the evidence before the jury without being subject to cross-examination himself. RP 40-41. Majors argues that his statement was not offered to prove the truth of the matter asserted, and therefore not hearsay under ER 801(c). That is not particularly persuasive, since

he obviously did want the jury to believe it was true. Merely demonstrating that the officer was not relaying every statement he made would be of dubious benefit to him.

This is not a situation where the witness was showing bias or prejudice against the defendant. The State does not dispute that a defendant has great latitude to show bias. State v. Knapp, 14 Wn. App. 101, 107, 540 P.2d 898 (1975). However, the context of the testimony does not indicate that impeachment was the goal of the cross-examination.

b. Rule of Completeness.

Majors' argument that he was entitled to elicit the entire conversation he had with the police officer in order to show context and avoid a misleading impression is more on point. ER 106 codifies the rule of completeness, but it does not apply in this situation.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106.

The statement at issue in this case was neither a writing nor a recorded statement. The Court of Appeals has said, in a similar situation, the following:

The State is correct that ER 106 is limited to a writing or recorded statement and does not apply to Perez. The rule of completeness did not require that Perez's statement to Officer Brand be admitted to the jury. Instead, ER 801 provides the proper framework.

State v. Perez, 139 Wn. App. 522, 531, 161 P.3d 461 (2007). ER 801 is the hearsay rule that makes statements favorable to a party opponent hearsay while statements against interest are not. ER 810(d)(2).

Majors is correct that there exists an uncodified rule of completeness allowing, when one party has offered part of a conversation, the opposing party to introduce the remainder to "explain, modify, or rebut" the portions admitted. State v. West, 70 Wn.2d 751, 754, 424 P.2d 1014 (1967). The evidence need not be otherwise admissible. 5 KARL B. TEGLUND, WASHINGTON PRACTICE: EVIDENCE § 106.4 at 150-51 (5<sup>th</sup> ed. 2007).

The State has been unable to find any authority for the proposition that the "completion" evidence must be introduced through the same witness who testified to only portions of a conversation. Majors quotes 29 A Am. Jur. 2d Evidence § 772 for

the principle that a criminal defendant must be allowed to introduce everything that he or she said “*either in cross-examination of the witness who testified to the admissions or through witnesses produced by the accused . . .*” Appellant’s Opening Brief at 23-24, emphasis added. Here, Majors took the stand and testified that he told the officer that he did not know the meth was in the cigarette box. RP 101, 106. The State did not object to that testimony. The jury did hear the evidence; the rule of completeness was satisfied.

c. Choice to testify.

Majors argues that his only option for getting his exculpatory statement before the jury was to take the witness stand, and this somehow violated his right to remain silent. Appellant’s Opening Brief at 25-26. A defendant has the constitutional right to testify in his own behalf. Wash. Const. art. I, sec. 22; Sixth Amendment. Having to balance competing rights does not infringe on the exercise of constitutional rights. For example, a statement obtained from a defendant in violation of his *Miranda* rights may be used for impeachment purposes if he testifies at trial. “In deciding whether to testify, the defendant must weigh the pros and cons of perhaps having his previously inadmissible statement heard by the jury.” State v. Ruzicka, 89 Wn.2d 217, 233-34, 570 P.2d 1208 (1977);

see also State v. Borsheim, 140 Wn. App. 357, 371, 165 P.3d 417 (2007). If a defendant testifies at a pretrial suppression hearing, that testimony is not admissible at trial unless he takes the stand. CrR 3.5(b). A defendant with prior convictions faces the possibility that he will be impeached with those convictions if he testifies at trial. ER 609. Majors choice to testify to get in his statement to the officer that he did not know the meth was in the cigarette box is the kind of choice defendants must routinely make. It did not violate his right to remain silent.

In United States v. Walker, 652 F.2d 708 (7<sup>th</sup> Cir. 1981), the court made reference to a situation where a defendant, forced to take the stand to introduce exculpatory parts of a confession, could be denied the protection against self-incrimination. Id. at 713 (citing to 1 Weinstein's Evidence (1979) P 106(01) at 106-9). In Walker, the defendant was charged with extortion under color of official right. His first trial resulted in a hung jury and he was convicted after a second trial. Id. at 709. Walker testified in the first trial but not the second. Id. at 710. Parts of his testimony from the first trial were admitted into evidence at the second trial; other parts were excluded. Id. In that case, Federal Evidence Rule 106, which is similar to Washington's ER 106, squarely applied because it was a

recorded statement. The court in Walker reversed the conviction, finding that the incomplete presentation of Walker's testimony "may have painted a distorted picture of Walker's prior testimony which he was powerless to remedy without taking the stand." Id. at 713. The court also found, however, that this was less egregious than the situation discussed by Weinstein, and that Walker's testimony could not be properly characterized as a confession. Id. It went on to weigh the potential unfairness to Walker against the inconvenience to the court and the additional burden on the State. Id. at 714. "In view of the weighty factors favoring admissibility which are not counterbalanced by any plausible reasons for exclusion, we find that the trial judge committed error in excluding the relevant and explanatory portions of Walker's prior testimony." Id.

The mere fact that the court engaged in a weighing analysis illustrates that placing the defendant in a position where he must choose between testifying or not is not per se a violation of his right against self-incrimination. Like Walker, this case does not involve a confession. And while the *Miranda* warnings use the language "you have the right to remain silent," the actual right being protected is the Fifth Amendment right against self-incrimination. Miranda, 384

U.S. at 439. Majors was in no way required to incriminate himself by testifying.

The record shows that Majors had a lot more to say than just that he told the officer he didn't know the meth was in the cigarette box. He explained his homeless condition, how he picks up discarded cigarette butts and recycles the remaining tobacco, how he thought the box was empty because of the hollow sound it made when he kicked it, that he couldn't see what was in the baggie when the officer held it up, that he suggested it might be sugar but not that it might be meth, and that it not only wasn't his but he told the officer it wasn't his. RP 96-108. Testifying gave Majors the opportunity to explain himself beyond the mere statement that he didn't know there was meth in the cigarette box.

d. Abuse of discretion and prejudice.

Admission of evidence is within the trial court's "sound discretion" and will not be disturbed on review absent an abuse of that discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). Majors sought to admit hearsay evidence to get his exculpatory statement before the jury. It cannot be said that the court abused its discretion by excluding the statement "I didn't know it was there," particularly

where it allowed that statement into evidence, just not through the State's witness.

Even if the court erred, an error in admitting evidence is harmless unless the defendant was prejudiced. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Majors argues violation of a rule of evidence, not a constitutional requirement. For nonconstitutional errors, the standard is whether, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Id. (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). The statement Majors wanted into evidence was admitted into evidence, he was not forced to incriminate himself, and the outcome of the trial would have been the same had the court permitted the officer to testify to the statement. There was no error, no prejudice, and Majors conviction should stand.

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D. CONCLUSION.

Majors has not established a reversible error at his trial. Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm his conviction.

Respectfully submitted this 30<sup>th</sup> day of October, 2015.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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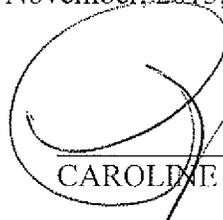
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 2 day of November, 2015, at Olympia, Washington.

  
CAROL M. JONES

# THURSTON COUNTY PROSECUTOR

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