

FILED
Court of Appeals
Division II
State of Washington
1/3/2018 3:17 PM
No. 50231-3-II

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

STATE OF WASHINGTON, RESPONDENT

V.

MARK D. WILMER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 16-1-00430-0

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

	Page
A. <u>STATE’S COUNTERSTATEMENTS OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
B. <u>FACTS AND STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
1. Wilmer contends that because he was an inmate in state institution when he made an incriminating statement in response to interrogation by a state agent, he was in custody for <i>Miranda</i> purposes when he made the statement and that the trial court, therefore, erred when it declined to suppress the statement at issue. In response, the State contends that under the facts of this case and legal analysis supplied by <i>Howes v. Fields</i> , 565 U.S. 499, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012), Wilmer was not in custody for <i>Miranda</i> purposes when he made the statement at issue.....	5
2. Although the State contends that the trial court did not err when it ruled that Wilmer was not in custody when he made the statement at issue in this case, even if the trial court’s ruling was erroneous, which it wasn’t, the error would nevertheless be harmless on the facts of the instant case.....	9
D. <u>CONCLUSION</u>	11

State’s Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Table of Cases

	Page
<u>State Cases</u>	
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	10, 11
<i>State v. Reuben</i> , 62 Wn. App. 620, 814 P.2d 1177 (1991).....	10

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Wilmer contends that because he was an inmate in state institution when he made an incriminating statement in response to interrogation by a state agent, he was in custody for *Miranda* purposes when he made the statement and that the trial court, therefore, erred when it declined to suppress the statement at issue. In response, the State contends that under the facts of this case and legal analysis supplied by *Howes v. Fields*, 565 U.S. 499, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012), Wilmer was not in custody for *Miranda* purposes when he made the statement at issue.
2. Although the State contends that the trial court did not err when it ruled that Wilmer was not in custody when he made the statement at issue in this case, even if the trial court's ruling was erroneous, which it wasn't, the error would nevertheless be harmless on the facts of the instant case.

B. FACTS AND STATEMENT OF THE CASE

Throughout the timeframe that is relevant to the instant case, the defendant-appellant, Mark Wilmer, was an inmate at the Washington Corrections Center (WCC) in Mason County, Washington. RP 56-58, 72-75, 87-90, 99-101, 118-22.

On January 27, 2015, Corrections Officer Kenneth Nonamaker was making routine rounds at WCC when he went to Wilmer's cell to explain to him that he was going to give him clean clothes and a towel but that Wilmer would be unable to go to the yard or to get a shower that day. RP

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

57-58. When Officer Nonamaker contacted Wilmer at his cell, Wilmer remained enclosed in his cell behind a door. RP 70. As Officer Nonamaker spoke with Wilmer from outside the cell, Wilmer threw a liquid substance out through a crack in the door and splashed it on Officer Nonamaker's right foot and left leg. RP 58, 70.

On January 31, 2015, Corrections Officer Shannon Shinn made routine rounds at WCC while escorting a nurse who was distributing medicines to the inmates. RP 72-74, 88. As Officer Shinn passed in front of Wilmer's cell, Wilmer threw a yellow liquid onto Officer Shinn. RP 74-75. The yellow liquid smelled like urine, and when it splashed onto Officer Shinn, it went into her eyes, mouth, nose, ears and hair and onto her arms, torso, and upper legs. RP 75, 89. Another officer, Officer Wulf, heard Wilmer say that he had thrown urine on Officer Shinn and that he was going to continue to assault staff. RP 90.

On February 1, 2015, Corrections Officer Joshua Underberg was performing routine checks at WCC and passed in front of Wilmer's cell. RP 99-101. Officer Underberg saw Wilmer at the front of his cell, and he saw an orange Sunkist bag protruding from the cuff port of Wilmer's cell door. RP 101-02. A cuff port is a belt-high access that the staff can use to provide food and medicine to the inmate in the cell without having to open

the door. RP 101-02. Once every half hour, the officers are required to look into the cell and put eyes on the inmates in order to verify that inmate is not in danger of self-harm or other harm. RP 102.

When Officer Underberg approached Wilmer's cell, Wilmer told Officer Underberg that he was going to rape his wife and children while making Officer Underberg watch and that he was then going to kill Officer Underberg. RP 105. Wilmer then somehow applied pressure to the orange bag and caused it to splash a yellow liquid onto Officer Underberg's left arm, thigh, ear and back. RP 102, 104. The yellow liquid had the strong, pungent smell of urine. RP 104-06.

On February 4, 2015, Joshua Adams, who is an investigator at WCC and was investigating the urine-throwing incidents for administrative purposes, went to the cell-front of Wilmer's cell to speak with him. RP 118, 121-23. Officer Adams asked Wilmer why he was assaulting the staff, to which Wilmer responded that he felt that his rights were being violated because he was not getting yard time or a shower. RP 122.

Based on these three urine-throwing incidents, the State charged Wilmer with three counts of custodial assault. CP 47-48. The trial court held a CrR 3.5 hearing to determine the admissibility of Wilmer's pretrial

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

statements, which included: 1) Wilmer's threats to Officer Underberg on February 1, 2015; 2) Wilmer's January 31, 2015, admission that he had thrown urine on Officer Shinn and that he was going to continue to assault staff; and, 3) Wilmer's February 4, 2015, statement to Investigator Adams, where Wilmer said that he was assaulting staff because he was not getting a shower and was not getting to go to the yard. RP 7-35.

At the conclusion of the CrR 3.5 hearing, the trial court ruled that Wilmer's January 31 and February 1 statements were admissible under CrR 3.5 because they were unsolicited or spontaneous and were not in response to interrogation. RP 33-34. The trial court also ruled that Wilmer's February 4 statement to Investigator Adams was also admissible. RP 34-35. The trial court found that Investigator Adams was a state agent and that his question to Wilmer, where he asked Wilmer why he was assaulting staff, was interrogation. RP 34-35. But the trial court found that Wilmer was not in custody for *Miranda* purposes when the question and answer occurred and that, therefore, Wilmer's answer was admissible. RP 34-35.

After receiving the evidence, which included Wilmer's pretrial statements described above, the jury returned guilty verdicts on all counts. RP 199.

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

C. ARGUMENT

1. Wilmer contends that because he was an inmate in state institution when he made an incriminating statement in response to interrogation by a state agent, he was in custody for *Miranda* purposes when he made the statement and that the trial court, therefore, erred when it declined to suppress the statement at issue. In response, the State contends that under the facts of this case and legal analysis supplied by *Howes v. Fields*, 565 U.S. 499, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012), Wilmer was not in custody for *Miranda* purposes when he made the statement at issue.

As his sole issue on appeal, Wilmer contends that the trial court violated his rights under the 5th Amendment of the United States Constitution by admitting into evidence the statement that he made to Department of Corrections investigator Joshua Adams on February 4, 2015, without first being informed of his *Miranda* rights. Br. of Appellant at 3-10. Wilmer summarizes the issue as follows:

The issue here is over the trial court's ruling that Wilmer was not in custody for purposes of *Miranda* because he was an incarcerated person, interviewed in his prison cell, and not placed under additional restriction during questioning.

Br. of Appellant at 3.

The record shows that Department of Corrections administrative leaders were asking questions about whether anything was going on at WCC that would explain why staff were being assaulted. RP 14.

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Investigator Adams went to speak with Wilmer at his cell and attempted to move him to an interview room, but Wilmer did not want to come out of his cell; so, Investigator Adams stood outside Wilmer's cell, where Investigator Adams and Wilmer were separated by a cell door, and spoke to him from outside the cell. RP 10. Wilmer was in his cell, where he would normally be. RP 11. Neither Investigator Adams nor anyone else did anything to further restrict Wilmer's movements more than would usually be the circumstances for an incarcerated inmate. RP 11. Investigator Adams did not ask Wilmer about any individual assault. RP 11. The conversation was very brief, and Investigator Adams only casually asked Wilmer why he was assaulting staff, to which Wilmer responded that it was because he was not getting shower or yard privileges. RP 14-15.

At the conclusion of the CrR 3.5 hearing, the trial court found that because there were no further restrictions were place upon Wilmer beyond what were normally in place for him as an incarcerated inmate at WCC, he was not in custody for *Miranda* purposes when Investigator Adams asked him why he was assaulting staff, and on this basis the trial court declined to suppress Wilmer's answer to the question. RP 35.

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

In 2012, our United States Supreme Court clarified that its prior precedents did “not clearly establish that a prisoner is always in custody for purposes of Miranda whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison” and that any assertion that Miranda is required in such cases “is simply wrong.” *Howes v. Fields*, 565 U.S. 499, 508, 132 S. Ct. 1181, 1188-89, 182 L. Ed. 2d 17 (2012). Although *Fields* involved questioning about an incident outside the prison, rather than inside the prison, the Court was clarifying that the rule applicable to investigation inside the prison was also applicable to investigation of incidents outside the prison. *Id.* at 513-14. On this topic, the Court declared as follows:

Finally, we fail to see why questioning about criminal activity outside the prison should be regarded as having a significantly greater potential for coercion than questioning under otherwise identical circumstances about criminal activity within the prison walls. In both instances, there is the potential for additional criminal liability and punishment. If anything, the distinction would seem to cut the other way, as an inmate who confesses to misconduct that occurred within the prison may also incur administrative penalties, but even this is not enough to tip the scale in the direction of custody. “The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize” is neither mitigated nor magnified by the location of the conduct about which questions are asked.

State’s Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Id., quoting *Berkemer v. McCarty*, 468 U.S. 420, 435, n. 22, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

In *Fields* the Court clarified that restraint on freedom of movement alone is not determinative of custody and that in order to constitute custody for purposes of *Miranda*, the environment must “present[] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.” *Fields* at 509. The Court cited three reasons for concluding that imprisonment is not inherently custodial under *Miranda*. *Id.* at 511-12. First, a prisoner is already incarcerated, so there is no “shock” from the possibility of arrest that generally arises during police station interrogations. *Id.* at 511. Second, a person who is already incarcerated is unlikely to be “lured into speaking by a longing for prompt release.” *Id.* Finally, “a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence.” *Id.* at 512. Instead, a court should focus on all of the circumstances of the interrogation. *Id.* at 514.

In *Fields*, despite the defendant repeatedly stating that he did not want to talk to them, armed police officers used a “sharp tone” and “profanity” while interrogating him for five to seven hours, to a time that

State’s Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

was well past his normal bedtime, while trying to extract a confession from him. *Id.* at 502-03. However, the Court weighed these factors against others and found these factors insufficient to trigger the requirements of *Miranda*. *Id.* at 515-17. In the instant case, Wilmer was permitted to remain in his cell when he didn't want to be moved to an interview room, he was under no restraint beyond those that were normally attendant to his preexisting status as an inmate at WCC, he had nothing to gain or lose by answering or refusing to answer the question that Investigator Adams casually asked him in an effort to identify the problem that was instigating the assaults. RP 10-15. Thus, the State contends that under *Howes v. Fields*, 565 U.S. 499, 508, 132 S. Ct. 1181, 1188-89, 182 L. Ed. 2d 17 (2012), Wilmer was not in custody for *Miranda* purposes, and the trial court did not err when it declined to suppress Wilmer's answer to Investigator Adams's question.

2. Although the State contends that the trial court did not err when it ruled that Wilmer was not in custody when he made the statement at issue in this case, even if the trial court's ruling was erroneous, which it wasn't, the error would nevertheless be harmless on the facts of the instant case.

Although the State contends that the trial court did not err by declining to suppress Wilmer's statement that is at issue in this appeal,

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

which was his answer to Investigator Adams's question to him without having first been advised of *Miranda* rights, the State nevertheless also contends that even if the trial court ruling was error, it would be harmless on the facts of the instant case. Erroneous admission of statements obtained in violation of *Miranda* is subject to a harmless error analysis. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991). The applicable harmless error test in these circumstances is the "overwhelming untainted evidence" standard wherein the reviewing court "look[s] only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty." *Id.* at 627 (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

In the instant case, eyewitnesses testified that Wilmer committed each of the crimes of conviction. RP 56-70, 72-80, 87-94, 99-107. All three of these crimes were captured on a video recording that was presented as evidence. RP 58, 61-62, 63, 67-68, 78-79, 84, 94-96, 98, 106-08. And another of Wilmer's statements, which he uttered at the scene of the crime when he threw urine on Officer Shinn and later said that the substance was indeed urine and that he intended to continue to assault staff, was admitted as evidence at trial and is not issue on appeal. RP 89-90. Thus, the State contends that based on the totality of the

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

untainted evidence, when applied to the standard established by *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), is so overwhelming that, even in the absence of the statement at issue, it necessarily leads to a finding of guilt for each of the crimes of conviction.

D. CONCLUSION

Under the analysis provided by *Howes v. Fields*, 565 U.S. 499, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012), Wilmer was not in custody for *Miranda* purposes when he made the statement at issue in the instant case, but even if the court's admission the statement into evidence were error, the error would be harmless beyond a reasonable doubt. Accordingly, the State asks this court to deny Wilmer's appeal and sustain his convictions.

DATED: January 3, 2018.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

State's Response Brief
Case No. 50231-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

MASON CO PROS ATY OFFICE

January 03, 2018 - 3:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50231-3
Appellate Court Case Title: State of Washington, Respondent v Mark D. Wilmer, Appellant
Superior Court Case Number: 16-1-00430-0

The following documents have been uploaded:

- 502313_Briefs_20180103151602D2140414_8869.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 50231-3-II --- State v. Wilmer --- Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- jennifer@stutzerlaw.com
- jenstutzer@yahoo.com
- timw@co.mason.wa.us

Comments:

Sender Name: Timothy Higgs - Email: timh@co.mason.wa.us
Address:
PO BOX 639
SHELTON, WA, 98584-0639
Phone: 360-427-9670 - Extension 417

Note: The Filing Id is 20180103151602D2140414