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COA NO. 51016-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RAYLYN K. NELSON,

Appellant.

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

The Honorable Gregory N. Gonzales, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence is insufficient to convict appellant of first degree escape.

2. The trial court erred in failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.

3. The trial court violated the Fifth Amendment of the United States Constitution in failing to suppress appellant's incriminating statement to police.

4. The \$250 jury demand fee in the judgment and sentence is a scrivener's error.

5. The court violated RCW 9.94A.760(1) in not designating the total amount of legal financial obligations imposed.

**Issues Pertaining to Assignments of Error**

1. Whether the evidence is insufficient to convict for first degree escape because the State failed to prove the accused was the person named in the documents pertaining to a prior conviction?

2. Whether the court erred in failing to enter written findings of fact and conclusions law following the CrR 3.5 hearing on the admissibility of appellant's statement to police?

3. Whether appellant's statement to police should have been suppressed because he was subject to custodial interrogation without Miranda<sup>1</sup> warnings?

4. Where the court expressed its intent to waive all discretionary legal financial obligations, whether the inclusion of a \$250 jury demand fee in the judgment and sentence is a scrivener's error in need of removal?

5. Whether the judgment and sentence should be corrected to reflect the total legal financial obligations owed, thereby complying with statutory mandate?

**B. STATEMENT OF THE CASE**

The State charged Raylyn Nelson with first degree escape. CP 3.

**1. CrR 3.5 Hearing**

A CrR 3.5 hearing was held to determine the admissibility of Nelson's statement to police. 1RP<sup>2</sup> 4-23. Detective Kennison, a detective with the Clark County Sheriff's Office, was the sole witness to testify at the hearing. 1RP 5. His job was to find Nelson after he escaped from a work center. 1RP 6. Kennison tracked Nelson to his parent's residence,

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

<sup>2</sup> This brief cites to the verbatim report of proceedings as follows: 1RP – 8/16/17; 2RP - one volume consisting of 8/21/17, 8/22/17, 9/27/17.

where he saw Nelson walking nearby. 1RP 6-7. Kennison followed in his vehicle and jumped out. 1RP 7. Nelson turned into an open field. 1RP 7. Kennison shined a light on him and told him to stop, but Nelson kept walking. 1RP 7, 13. Kennison placed him under arrest upon contact. 1RP 7.

Kennison announced "I know who you are," "You're Raylyn Nelson. You need to stop. You're under arrest." 1RP 17-18. Nelson said "I'm not the guy you're looking for." 1RP 17-18. Kennison said he'd been looking at his photo all day, he knew it was him, and "You need to stop." 1RP 17. Kennison shouted at him during this interaction because he wanted Nelson to feel that Kennison "was in charge." 1RP 18. He "ordered" Nelson to stop multiple times. 1RP 17. After Nelson stopped, Kennison had Nelson lie down and handcuffed. 1RP 8, 17. Kennison read Nelson Miranda warnings after they got back to the patrol vehicle. 1RP 8. Nelson did not say anything after receiving the warnings. 1RP 9.

The State conceded Nelson was not free to leave but argued Nelson's statement was admissible because he was not interrogated. 1RP 20-23. Defense counsel argued Nelson was interrogated because he responded to the detective's assertion. 1RP 21-22. The court ruled the statement was admissible because Nelson's statement was not made in response to interrogation. 1RP 23.

## **2. Trial**

Paul Flores is a sergeant for the Clark County Sheriff's Correction Department. 2RP 27. He oversees operations at the Jail Worker Center. 2RP 27. The Jail Work Center operates a work release program. 2RP 28-29. In addition, jail inmates do kitchen and laundry work at the facility. 2RP 28-29. Flores identified Nelson in court as being a laundry worker at the facility. 2RP 28-30. Nelson was not on work release. 2RP 30.

Jail inmates wear wristbands for identification, which includes a photo, a central file number, height, and weight. 2RP 30. These wristbands are removed only upon release. 2RP 30-31. Flores testified that inmates are instructed during orientation that they are not supposed to be anywhere but at work. 2RP 40. Nelson was moved from the jail to the Jail Work Center two days prior to leaving. 2RP 40. Flores answered "Yes" to the prosecutor's question "So would he have received those instructions when he came over?" 2RP 40-41.

On April 8, 2017, it was discovered that Nelson was missing from the Jail Work Center. 2RP 38-39. He was last seen in the building at 3 p.m. that day. 2RP 39. Nelson did not have permission to leave. 2RP 40-41.

When asked if he was still serving a sentence at that time, Flores answered "Yes, he was." 2RP 40. Flores identified Exhibit 2 as a felony

judgment and sentence, naming the conviction as "Conspiracy With Possession of a Controlled Substance With Intent to Deliver Heroin." 2RP 31, 35. Flores identified Exhibit 3 as an order modifying sentence, dated March 21, 2017, reflecting 362 days confinement in jail. 2RP 35-37.

With respect to the charging document admitted as Exhibit 1, the prosecutor asked, "Is this document specific to Mr. Nelson?" 2RP 38. Flores answered "Yes, it is." 2RP 38. The prosecutor asked if the document provided the date of birth. 2RP 38. The trial court sustained the defense objection based on foundation and relevancy, and the prosecutor moved on. 2RP 38.

Detective Kennison's testimony was consistent with what he testified to at the CrR 3.5 hearing. He was given the name and date of birth of the person he was looking for. 2RP 46. He also received "a report" and "confirmed the name and date of birth with that report." 2RP 47. He then ran the name through the "JMS system," which provides a booking photo of the person and physical identifiers (weight, hair, eye color). 2RP 47. Kennison looked for Nelson, identified as the defendant in court. 2RP 47. At 11:50 p.m. on April 9, he drove over to Nelson's parent's residence in Vancouver. 2RP 47-48. As he waited for an additional unit to arrive, Kennison noticed a man walking by that matched the description of the person he was looking for. 2RP 49. As the person

walked along the road, Kennison pulled up in his unmarked vehicle and got out. 2RP 49. The person left the sidewalk and walked into an adjoining empty field. 2RP 50.

Kennison entered the field and drew his pistol, which had a weapon light on it. 2RP 50. Kennison began giving commands to the person, who was walking quickly away. 2RP 50. Kennison said "I'm a deputy with the Clark County Sheriff's office. You need to stop. You're under arrest." 2RP 50. The person did not initially respond. 2RP 50. Kennison followed, saying "You're under arrest. Raylyn, I know it's you. You need to stop." 2RP 51. At this point, Nelson said "he was not the guy that I was looking for" and continued walking. 2RP 51. Kennison said he knew that he was the guy he was looking for, as Kennison had been staring at his photo all day and he wore a jail bracelet. 2RP 51. Kennison took Nelson into custody. 2RP 51-52. Kennison looked at the bracelet, which had Nelson's name and photo on it. 2RP 52. This, in conjunction with a photo comparison, made Kennison certain that he found the man he was looking for. 2RP 52.

The jury found Nelson guilty as charged. CP 26. The court sentenced Nelson to 366 days in confinement. CP 33. Nelson appeals. CP 44.

C. **ARGUMENT**

1. **THE EVIDENCE IS INSUFFICIENT TO CONVICT NELSON OF FIRST DEGREE ESCAPE BECAUSE THE STATE FAILED TO PROVE NELSON WAS THE PERSON NAMED IN THE PRIOR JUDGMENT AND SENTENCE.**

Nelson's conviction for first degree escape should be reversed under an "identity of names" theory. The State failed to prove the element that Nelson was "detained pursuant to a felony conviction" because the evidence does not establish Nelson was the person named in the court documents for the felony conviction.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

In criminal trials, it is axiomatic that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. State v. Huber, 129 Wn. App. 499, 501, 119 P.3d 388 (2005). A person commits first degree escape if he "knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony." RCW 9A.76.110(1). When criminal liability depends on the accused's being the person to whom a document pertains, such as for first degree escape, the State must do more than authenticate and admit the document. Huber, 129 Wn. App. at 502. It must show beyond a reasonable doubt that the accused is the person named in the document. Id. Identity of names is insufficient. Id.

The State does not meet its burden merely because the defense presents no evidence refuting the claim of identity. Id. at 503. The State must present affirmative evidence that the person named in the document is the defendant in the present action by evidence independent of that record. Id. at 502. Independent evidence can include booking photographs or fingerprints, eyewitness identification, or distinctive personal information. State v. Santos, 163 Wn. App. 780, 784, 260 P.3d 982 (2011); Huber, 129 Wn. App. at 502-03.

In Huber, a bail jumping case, the State presented documents referencing "Wayne Huber," but no evidence the Wayne Huber on trial

was the same person named in those documents. On appeal, the court reversed Huber's conviction, concluding the documentary evidence was insufficient to show Huber was the person named in the documents. Huber, 129 Wn. App at 504. One of the warrants contained a general physical description, but the Huber court found this insufficient, not because the description was vague, but because the record did not reflect any comparison between that description and the person before the court. Id. at 503. n. 18.

In Santos, a felony driving under the influence case, the State was required to prove convictions for four or more prior offenses. Attempting to meet its burden, the State presented judgments that identified the defendant named therein as Santos. Santos, 163 Wn. App. at 782-783. The court found the State did not produce sufficient evidence showing Santos was the same person named in the judgments. "None of the information in the State's exhibits can be compared to Mr. Santos, the defendant in this case, by simple observation to determine whether he is the person named in the judgments." Id. at 785. "The State produced no evidence of Mr. Santos's address, birth date or criminal history," nor did it produce "photographs of 'Santos, Heraquio ' or 'Heraquio Santos' to compare to Mr. Santos, who appeared in person at trial." Id.

Here, there is likewise no record of comparison between any description of the Nelson named in the court documents pertaining to the prior conviction and the Nelson on trial. Independent evidence includes booking photographs or fingerprints, eyewitness identification, or distinctive personal information. Santos, 163 Wn. App. at 784; Huber, 129 Wn. App. at 502-03. None of that kind of evidence was presented.

The charging document and judgment and sentence admitted into evidence reflect the date of birth for the person named in those documents. Ex. 1, 2. In questioning witnesses, the prosecutor never established the accused's date of birth was the date of birth listed in those documents. 2RP 38, 43. There is no comparison between fingerprints, booking or other photographs, or addresses. Nor is there any witness testimony based on personal knowledge that the Nelson named in the court documents pertaining to the prior conviction is the same Nelson that was at trial. The State failed to make the requisite connection.

State v. Hunter, 29 Wn. App. 218, 627 P.2d 1339 (1981) is distinguishable. In that case, the defendant was convicted of attempted first degree escape. Id. at 219. On appeal, Mr. Hunter argued that insufficient evidence supported his conviction because the State failed to demonstrate he was detained in the county jail pursuant to a felony conviction at the time of the incident. Id. at 221. At trial, the State

produced certified copies of two judgments and sentences, both of which showed the felony convictions of a person named Dallas E. Hunter. Id. The State also adduced the testimony of a probation officer who "identified defendant as a former resident of the work release facility who had been transferred there from a state correctional institution following his Lewis County felony convictions." Id. He also testified that the defendant was temporarily incarcerated while awaiting transfer to a state institution on the date he attempted his escape. Id. The Court of Appeals held the testimony was sufficient independent evidence to establish that the defendant was the same Dallas E. Hunter named in the certified judgments. Id. at 222.

Nelson questions whether Hunter was correctly decided. The facts in that case are tersely stated, so perhaps there was more going on there than meets the eye. The described facts, such as they are, provide a tenuous basis for the Hunter court's conclusion that more than identity of names was established. The only fact tying the defendant Hunter to the Hunter named in the judgment and sentences was the probation officer's testimony that the defendant Hunter was at a work release facility following his felony convictions. Id. at 221. That is thin stuff.

In any event, Hunter is distinguishable on its facts. Unlike Hunter, the State here produced no independent evidence that the accused was in

custody *pursuant to a felony conviction*. The felony conviction at issue is that which is described in the court documents admitted into evidence — the information, the judgment and sentence, and the modification order. Flores identified the defendant Nelson as the person who worked at the facility. 2RP 28-30. The evidence is sufficient to show Nelson was in custody and that he escaped from custody. But the State needed to prove more. It needed to prove Nelson was detained pursuant to a felony conviction. RCW 9A.76.110(1). Flores did not identify the defendant Nelson as the same person who was named in the court documents for the prior conviction based on any personal knowledge. Flores merely read information reflected in the documents, which was redundant since the documents were admitted into evidence as exhibits and spoke for themselves. 2RP 31, 35-38. Flores did not testify the defendant Nelson was being detained pursuant to that felony conviction. Flores offered no independent information confirming the person named in the documents was the defendant on trial.

Where insufficient evidence supports conviction, the charge must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Nelson's conviction for first degree escape must therefore be reversed and that charge dismissed with prejudice.

**2. THE COURT ERRED IN FAILING TO ENTER CrR 3.5 WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

After the CrR 3.5 hearing, the court must set forth in writing "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5(c). The court's failure to do so in Nelson's case is error.

Written findings are essential to permit meaningful and accurate appellate review. State v. Mewes, 84 Wn. App. 620, 621-22, 929 P.2d 505 (1997). "A court's oral opinion is not a finding of fact." State v. Hescoek, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). "An appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Head, 136 Wn.2d at 624. Written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201,

209, 842 P.2d 494 (1992). The State, as the prevailing party, has the responsibility to present written findings to the trial court. State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995).

Remand for entry of written findings of fact and conclusions of law is the ordinary remedy. Head, 136 Wn.2d at 623. Reversal is appropriate if a defendant is able to show "prejudice resulting from the lack of written findings and conclusions," such as when there is a "strong indication that findings ultimately entered have been 'tailored' to meet issues raised on appeal." Id. at 624-25. Late findings and conclusions may be submitted and entered while an appeal is pending "if the defendant is not prejudiced by the belated entry of findings." State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). In the event belated findings are entered while this appeal is pending, Nelson will file an amended or supplemental brief addressing them.

**3. THE INCRIMINATING STATEMENT MADE BY NELSON IN RESPONSE TO CUSTODIAL INTERROGATION WAS IMPROPERLY ADMITTED INTO EVIDENCE, REQUIRING REVERSAL OF THE CONVICTION.**

Nelson's statement, admitted as evidence of guilt at trial, should have been suppressed because he was subject to custodial interrogation without being read his Miranda rights. Reversal is required because this constitutional error was not harmless beyond a reasonable doubt.

**a. The court's legal conclusions are reviewed de novo.**

A trial court's findings of fact on a CrR 3.5 motion to suppress statements must be supported by substantial evidence. State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). A trial court's determination of whether a person is in custody or subject to interrogation for Miranda purposes is reviewed de novo. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133, 140 (2004) (custody); In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014) (interrogation).

**b. Contrary to the trial court's conclusion, Nelson's statement made after the detective told him that he was under arrest was the product of interrogation and therefore inadmissible in the absence of Miranda warnings.**

The Fifth Amendment to the United States Constitution commands "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Suspects "must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the

interrogation." Thompson v. Keohane, 516 U.S. 99, 107, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

"[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings." State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). "Failure to administrate Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda." State v. Lozano, 76 Wn. App. 116, 119, 882 P.2d 1191 (1994) (quoting Oregon v. Elstad, 470 U.S. 298, 307, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985)).

The incriminating statement at issue here is "I'm not the guy you're looking for," stated after the detective told Nelson that he knew it was him. 1RP 17-18. The trial court ruled "Based upon the officer's testimony and the circumstances surrounding the same, it appears that the answer, 'I'm not the guy you're looking for,' or something along that line was not made directly in response to a question. The defendant, Mr. Nelson, was not in custody, but he was not free to leave. That statement was freely and

voluntarily made. It was not in response to an interrogation or any type of interrogation made by this particular officer. Therefore, I will allow the statement to come in." 1RP 23.

Nelson interprets this oral opinion to mean there was no Miranda violation because the detective did not interrogate Nelson. Nelson gave an answer that was not in response to a question. Nelson further interprets this oral ruling to mean, although he was not in physical custody in the sense that he was not yet in handcuffs or otherwise physically restrained, he was in custody for Miranda purposes because he was not free to leave. This would be consistent with the State's argument at the CrR 3.5 hearing, where the State acknowledged Nelson clearly was not free to leave but argued the statement was admissible because no interrogation took place. 2RP 20-23.

For Miranda purposes, custody means "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977)). Here, Nelson was under formal arrest when the detective told him he knew who he was. The detective had already announced Nelson was under arrest before Nelson opened his mouth. 1RP 17. Nelson was therefore in custody for Miranda purposes.

The question is whether Nelson gave an answer in response to interrogation. Nelson challenges the court's determination that he didn't. "Miranda safeguards come into play whenever a person in custody is subjected to 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). "[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any 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 standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts." Sargent, 111 Wn.2d at 651. All of the circumstances are considered. State v. Bradley, 105 Wn.2d 898, 903-04, 719 P.2d 546 (1986).

Under the totality of circumstances, it was reasonably likely that the detective's statement that he knew who Nelson was, though not in the form of a question, would elicit an incriminating response from Nelson. "Incriminating response" encompasses "any response — whether inculpatory or exculpatory — that the prosecution may seek to introduce at trial." Innis, 446 U.S. at 301 n. 5. The detective's statement invited a response: either agreement or disagreement. Agreement that he was the

man sought would be used at trial to show he knew he was guilty. Disagreement that he was the man sought was used at trial to show he knew he was guilty. Nelson's response showed consciousness of guilt, i.e., he knew he had escaped. See United States v. Brown, 720 F.2d 1059, 1068 (9th Cir. 1983) ("It is almost axiomatic in criminal investigation that if a suspect is induced to talk at all, he is likely to hurt his case."). Under these circumstances, it was reasonably likely that Nelson would respond to the detective's challenge. The detective acted in a manner that provoked Nelson into speaking. From an objective standpoint, it was foreseeable that Nelson would respond to the detective telling him that he knew it was him.

The psychological ploy of "posit[ing] the guilt" of the subject is a technique for eliciting statements from the suspect and amounts to interrogation in a custodial setting. Innis, 446 U.S. at 299; see United States v. Alexander, 428 A.2d 42, 51 (D.C. 1981) (informing suspect "we know what happened" or "we know you are responsible for the stabbing" was a form of interrogation); United States v. Poole, 794 F.2d 462, 466 (9th Cir. 1986) (showing a suspected bank robber surveillance photos was interrogation); Combs v. Wingo, 465 F.2d 96, 99 (6th Cir. 1972) ("The only possible object of showing the ballistics report to the appellant in this case was to break him down and elicit a confession from him. The

question was implied if not spoken. Everything was there but a question mark. It was a form of question and got the desired result."). Nelson responded to the detective's positing of guilt by claiming he was not the man being sought, which only served to implicate Nelson in the crime.

The standard is not whether an officer intended to elicit an incriminating response. State v. Wilson, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). The standard is foreseeability. The definition of interrogation extends "only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Innis, 446 U.S. at 301-02. This is an objective standard. Sargent, 111 Wn.2d at 651. What was actually going through the detective's mind — whether he subjectively intended to elicit an incriminating response — is not the test for whether interrogation took place.

That the detective's statement was not in the form of a question is of little moment. Interrogation includes not only express questioning but its functional equivalent, which can include any words or actions. Innis, 446 U.S. at 301. Innis gave a broad and practical definition to the term "interrogation," recognizing "[t]o limit the ambit of Miranda to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the

plain mandate of Miranda." Id. at 299 n.3 (quoting Commonwealth v. Hamilton, 445 Pa. 292, 297, 285 A.2d 172 (Pa. 1971)). In Wilson, for example, an officer reentered the interrogation room after Ms. Wilson invoked her right to counsel and gave her a "death notification" that her husband had died. Id. at 182-83. Ms. Wilson said "I didn't mean to kill him. I didn't mean to stab him." Id. at 183. This was interrogation because "the officer should have known that the death notification was reasonably likely to elicit an incriminating response." Id. at 184-85. This was so, even though no question was asked.

The trial court ruled Nelson's statement was not made in response to interrogation. 1RP 23. "Volunteered statements of any kind are not barred by the Fifth Amendment." Miranda, 384 U.S. at 478. A defendant's incriminating statement "that is not a response to an officer's question" is therefore admissible. Bradley, 105 Wn.2d at 904. But that is not what happened here and comparison with precedent shows it. Nelson's response is categorically different from those cases where an incriminating statement was truly non-responsive and therefore admissible.

A defendant's statement is properly categorized as volunteered and spontaneous where the context showed the defendant gave a statement unrelated to the crime being investigated. See id. at 904 (the statement "You sure are making a big deal about a little bit of coke" while being

questioned about personal history was admissible because it not made in response to interrogation); State v. McWatters, 63 Wn. App. 911, 915-16, 822 P.2d 787, review denied, 119 Wn.2d 1012, 833 P.2d 386 (1992) (suspect's statement that "not all of the money was drug money" was admissible because it was spontaneous and unrelated to the reason why the officer was there: to issue a citation for a traffic offense); United States v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir. 1985) (incriminating statement admissible because "the questions asked by the probation officer - whether appellant ever used any other names and whether she had a prior criminal record - were not directly related to the facts of the crime with which appellant was then charged.").

In contrast, Nelson's response was directly related to the detective's statement that he knew it was Nelson. Nelson did not say "I'm not the guy you're looking for" out of the blue. 1RP 17. Nelson's response was prompted by the detective's statement that he knew it was him. Even the detective described Nelson's statement as "a response to a statement" at the CrR 3.5 hearing. 1RP 18-19. The detective's statement invited Nelson to respond with a denial, which only served to ensnare him.

**c. The error was not harmless beyond a reasonable doubt.**

When statements obtained in violation of the Fifth Amendment are erroneously admitted, reversal is required unless the error was harmless

beyond a reasonable doubt. Cross, 180 Wn.2d at 681. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is therefore harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Nelson's inculpatory statement figured into the State's theory of guilt. It was used to support the knowledge element of the offense. The State needed to prove Nelson "knowingly" escaped. RCW 9A.76.110(1). The prosecutor naturally pointed to Nelson's statement in closing argument in convincing the jury to convict. 2RP 109. It showed consciousness of guilt — he knew he had escaped.

Aside from the improperly admitted statement, evidence pertaining to the knowledge element was fairly thin. Flores testified inmates working at the facility are told to not be anywhere but work and that Nelson would have received such warning. 2RP 40-41. Flores offered no specific recollection regarding Nelson's presence at the orientation or whether he was paying attention. "[A] jury, in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and everyday life

experience into deliberations." State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989). Common sense tells us that many find orientations of any sort boring and will tune the speaker out. That Nelson was subject to such an orientation does not necessarily show he knowingly escaped. This is why the prosecutor, in arguing guilt to the jury, pointed to Nelson's response to the detective as evidence of guilt.

The State needed to prove that Nelson "knew that his actions would result in leaving confinement without permission." CP 20 (Instruction 10). The knowledge requirement in a criminal offense does not simply mean a person should have known. Rather, the jury must find actual, subjective knowledge. State v. Shipp, 93 Wn.2d 510, 514-17, 610 P.2d 1322 (1980). The improperly admitted statement to the detective showed actual knowledge by inference. Nelson would not have said he was not the man being looked for unless he knew why the detective was looking for someone, i.e., he knew the detective was looking for an escapee. He could not have known that unless he was the escapee. The improperly admitted statement bolstered the State's argument on the knowledge element of the offense. Reversal and remand for a new trial is required because the State cannot show beyond a reasonable doubt that error in admitting Nelson's statement could not have possibly influenced the jury and contributed to the guilty verdict.

**3. THE \$250 JURY DEMAND FEE IS A CLERICAL MISTAKE IN NEED OF CORRECTION.**

The judgment and sentence lists a \$500 victim penalty assessment, a \$200 filing fee, and a \$100 DNA fee as legal financial obligations (LFOs). CP 35-36. These costs are considered mandatory. The judgment and sentence, however, also includes a pre-printed \$250 jury demand fee. CP 35. This fee is discretionary. State v. Lundy, 176 Wn. App. 96, 107, 308 P.3d 755 (2013).

At sentencing, the court said it would waive discretionary fines and costs because Nelson would not be working for a couple of years.<sup>3</sup> 2RP 151. The court accordingly checked the box in the judgment and sentence for the finding "that the defendant is indigent and is not anticipated to pay legal financial obligations in the future." CP 33.

From this, it is apparent that inclusion of the \$250 jury demand fee is a scrivener's error. The record shows the court's intent to waive discretionary LFOs. A scrivener's error is a clerical mistake that, when amended, would correctly convey the trial court's intention, as expressed in the record at trial. State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121

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<sup>3</sup> The verbatim report of proceedings, made from a recording, reads "I'll waive discretion and fines and costs at this point in time since you won't be working for a couple of years." 2RP 151. In context, it is apparent that the judge said "waive discretionary fines and costs," not "waive discretion and fines and costs."

(2011). "[T]he amended judgment should either correct the language to reflect the [trial] court's intention or add the language that the [trial] court inadvertently omitted." State v. Snapp, 119 Wn. App. 614, 627, 82 P.3d 252, review denied, 152 Wn.2d 1028, 101 P.3d 110 (2004). A court may correct a scrivener's error at any time. In re Pers. Restraint Petition of Mayer, 128 Wn. App. 694, 702, 117 P.3d 353 (2005) (citing CrR 7.8(a)). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. Id. Nelson therefore requests remand to remove the mistakenly-included \$250 jury demand fee from the judgment and sentence.

**4. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO REFLECT THE TOTAL AMOUNT OF LEGAL FINANCIAL OBLIGATIONS IMPOSED.**

The court failed to follow the statutory requirement that it list the total legal financial obligation in the judgment and sentence. RCW 9.94A.760(1) provides that "[t]he court *must* on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law." (emphasis added).

Statutory interpretation is a question of law reviewed de novo. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). In interpreting

a statute, the reviewing court looks first to its plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The inquiry ends if the plain language is unambiguous. Id. Of importance here, the legislature used the word "must" in RCW 9.94A.760(1). The trial court is given no choice in the matter. The court is required to designate the total amount of legal financial obligations to comply with the statute.

The judgment and sentence lists the following LFOs: (1) \$500.00 victim assessment; (2) \$200.00 criminal filing fee; (3) \$250 jury demand fee; and (4) \$100.00 DNA collection fee. CP 35-36. The amount for "fees for court appointed attorney" is crossed out by hand. CP 35. The phrase "to be set" appears next to "court appointed defense expert and other defense costs." CP 35. The total legal financial obligation line on page seven of the judgment and sentence is empty. There is no "subsequent order to pay" in the record. The court therefore violated its duty under RCW 9.94A.760(1). This Court should therefore remand so that the judgment and sentence will comply with RCW 9.94A.760(1) by designating the total amount of legal financial obligations owed. The remedy is especially appropriate because of the clerical error involving the jury demand fee. See section C.3., supra.

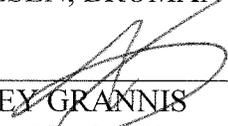
**D. CONCLUSION**

For the reasons stated, Nelson requests reversal of the conviction and correction of the judgment and sentence.

DATED this 30<sup>th</sup> day of April 2018

Respectfully Submitted,

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