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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN ESTAVILLO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00078-18

BRIEF OF RESPONDENT

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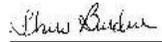
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| SERVICE | John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3equitycourt.com | This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 13, 2018, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us |
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the failure to recite the four particular *Miranda* rights in a CrR 3.5 hearing is fatal to admissibility where the testimony of both police and defendant is that the rights were read?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ryan Estavillo was charged by information filed in Kitsap County Superior Court with first degree robbery and first degree unlawful possession of a firearm. CP 1-2. Before trial, a first amended information charged first degree robbery, first degree unlawful possession of a firearm, first degree theft, and second degree promoting prostitution. CP 40-42.

Estavillo stipulated to the existence of a conviction for a serious offense, second degree murder, as the predicate offense for the charge of unlawful possession of a firearm. 1RP 14-15.

A CrR 3.5 hearing was convened. 2RP 88. Bremerton Police Officer Forbragd testified that he had contact with Estavillo on the incident date. 2RP 90. Having a report that Estavillo may be armed, the officer immediately detained him. 2RP 91. Five to ten minutes later he was arrested and placed in a patrol car. 2RP 95. There were two occasions when the officer and Estavillo spoke: once just after the initial detention and once around 20 minutes later. 2RP 92-93. Before the

second conversation, the officer advised Estavillo of his *Miranda*¹ rights. Id.

The rights were read word-for-word from a “department-issued” card. 2RP 92. Estavillo indicated that he understood his rights. Id. Estavillo agreed to speak to the officer. Id.

Estavillo testified that when he was initially detained, he was told that he was not under arrest. 2RP 99. Estavillo heard the officer questioning another person, but the officer did not ask him any questions. Id. But Estavillo recalled that the officer inquired as to where the handgun was. 2RP 100. Estavillo recalled that he sat in a patrol car for a long period of time before an officer gave the *Miranda* warnings. 2RP 101. But no officer asked him any questions during this time. Id. Estavillo testified that when his rights were read to him, he understood them. 2RP 103.

The trial court orally ruled that the initial contact and detention constituted an appropriate investigative detention under *Terry v. Ohio*.² 2RP 106. Hand restraints were warranted by the report of an assault with a gun and statements made were not coerced. Id. After arrest and placement in the patrol car, no further questioning occurred until after

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

² 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

rights were provided and waived. 2RP 107. The trial court ruled that both instances of statements by Estavillo were admissible. Id.

Findings of Fact and Conclusions of Law on CrR 3.5 were entered. CP 98. The written findings and conclusions reflected the oral ruling. An addition was that the trial court concluded that the initial *Terry* stop was based on reasonable suspicion that Estavillo had committed a first degree robbery. CP 99. The trial court specifically concluded that Estavillo was not coerced by the police. Id.

The jury convicted Estavillo of first degree robbery while armed with a firearm, first degree unlawful possession of a firearm, and first degree theft. CP 221. He was sentenced within the standard range to 190 months of confinement. CP 223. The present appeal was timely filed. CP 234.

B. FACTS

John Buckner had made a date by text message with a prostitute at the Motel 6 in Bremerton. 2RP 133; 2RP 221. He made contact by way of an ad on Backpage.com. 2RP 134. The prostitute was Abigail Baker. 2RP 151.

Motel employees had seen a man running from a room and yelling that he had been robbed and that there was a gun. 2RP 164; 2RP 179-80.

The man had wet himself. Id.

Mr. Buckner had agreed to pay \$100 dollars for sex. 2RP 223. He was directed to a Burger King and from there to the Motel 6 nearby. 2RP 224. He went to the room, knocked, and was let in. Id. Mr. Buckner gave the woman the \$100. Id. The woman, Ms. Baker, went to the bathroom, came out, and took a phone call. 2RP 224-25. The two hugged and Mr. Buckner began to undress. 2RP 225.

Estavillo walked into the room. 2RP 225. As Mr. Buckner tried to dress, Estavillo hit him in the face. 2RP 226. Mr. Buckner fell to the bed and as he got up Estavillo pulled a gun. Id. At gunpoint, Estavillo told Mr. Buckner to empty his pockets. Id. Ms. Baker told Mr. Buckner to comply because if he did not Estavillo would shoot him. Id. Ms. Baker wanted Mr. Buckner to delete the text message communication and Estavillo wanted him to remove his jewelry, but he grabbed his clothing and fled. 2RP 227. Estavillo followed him out and he began to yell about the gun. 2RP 228.

Mr. Buckner had given over a buck knife, a challenge coin, a multi-tool, and two bracelets. 2RP 228. Mr. Buckner identified the gun in court (exhibit 28). Id.

Another man, Griff Woodford, had previously contacted Ms. Baker through Backpage.com. 2RP 237-38. He too was directed to the Burger King. 2RP 239. There, Estavillo came to his car and asked if Mr.

Woodford was waiting for someone. Id. Mr. Woodford was then directed to the room in the Motel 6 and he went there. 2RP 240. He found Ms. Baker in the room. Id. Mr. Woodford began to undress and Ms. Baker went to the bathroom with her phone. 2RP 241.

Feeling uncomfortable, Mr. Woodford was about to cancel the tryst when there was loud knocking on the door. 2RP 241. Ms. Baker opened the door and Estavillo came into the room. 2RP 242. Estavillo was holding a stun gun and pointing it at Mr. Woodford. 2RP 243. Mr. Woodford was asked to leave and told that if he gave money, Estavillo would not call the police. 2RP 244. Mr. Woodford took his money from his wallet and left it on the television stand and left the room. Id.

Kayla Hunt and her boyfriend had been staying at the Motel 6 at the time of the incident. 3RP 264. On the occasion that Mr. Buckner was robbed, Estavillo had come to their room door, exclaimed that the police were coming, and tossed a gun to the boyfriend. 3RP 264. Ms. Hunt later called police and gave them the gun. 3RP 267.

Ms. Baker testified that the scheme included her getting money from her customers and Estavillo then coming in to scare them off. 3RP 352. She verified that Estavillo had pointed a gun at Mr. Buckner. 3RP 353. She verified that Estavillo had told Mr. Buckner to empty his pockets. 3RP 354. She also verified the plan to rob Mr. Woodford. 3RP 361.

1. Testimony regarding Estavillo's statements.

Officer Forbragd first asked (during investigative detention) Estavillo what was going on. 2RP 157. Estavillo said that he had walked in on a person, later identified as John Buckner, who was naked and having sex with his girlfriend. Id. Estavillo said he grabbed the man and detained him. Id³. During the post-*Miranda* interview, Estavillo said he pushed the man out of the room, denying that he grabbed and detained him. Id. Estavillo said that he knew Ms. Baker was prostituting by way of Backpage ads but he had asked her to stop. 2RP 158. He knew that she used the motel room for prostitution. Id. He paid for the room. Id.

³ Officer Forbragd testified in the CrR 3.5 that all he asked Estavillo during the initial detention was what was going on. 2RP 92.

III. ARGUMENT

A. ESTAVILLO'S ADMISSIONS WERE ADMISSIBLE BECAUSE THE OFFICER TESTIFIED THAT HE WAS READ HIS RIGHTS, HE TESTIFIED THAT THAT WAS TRUE, INVITING ERROR, THE TRIAL COURT REASONABLY INFERRED THAT PROPER WARNINGS WERE GIVEN, AND NO INFORMATION IN THE RECORD ESTABLISHES THAT ESTAVILLO'S STATEMENTS WERE INVOLUNTARILY MADE.

Estavillo argues that his post-arrest statements are inadmissible because the state did not establish that the police officer specifically read to him each of the four *Miranda* rights. This claim is without merit because substantial evidence in the form of sworn police testimony supported each of the trial court's findings, because Estavillo agreed on the record that rights were read to him, because on this record the trial court can properly infer that the correct warnings were given, and because there is no evidence that the statements made were involuntary. If the trial court was in error, that error was harmless.

Questions on the admissibility of confessions are reviewed to determine whether or not the trial court's findings of fact are supported by substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational

person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Findings that are unchallenged or are supported by substantial evidence are varities on appeal. *Broadaway*, 133 Wn.2d at 131. The test for voluntariness of a confession asks whether under the totality of the circumstances the confession was coerced. *Broadaway*, 133 Wn.2d at 132. The trial court assesses the credibility of the witnesses. *See State v. Miller*, 92 Wn. App. 693, 704, 964 P.2d 1196 (1998) *review denied* 137 Wn.2d 1023 (1999).

The state first takes note of the scope of Estavillo’s argument. He does not advance any argument that question asked during the time period of the *Terry* detention were improper. His answers to those questions are admissible. It appears that the only statement made by Estavillo at the initial time was that he had gone to his room and found another man having sex with his girlfriend. 2RP 157. Moreover, contrary to Estavillo’s argument here, below he argued against the admissibility of the investigative detention statements and conceded the admissibility of the second set of statements as happening after the advisement of rights. 2RP 105 (“I think the statements prior to Miranda rights being read were not voluntary. . .”).

1. Substantial evidence supported the trial court’s findings of fact.

Estavillo claims that the trial court’s findings ##8 and 9 were not

supported by substantial evidence. Brief at 12. Finding 8 says “that Forbragd read *Miranda* warnings to the defendant verbatim from his department issued *Miranda* warning card.” CP 99. This finding is nearly a direct quote of Officer Forbragd’s testimony at the CrR 3.5 hearing. 2RP 92. Finding #9 says “that defendant understood the *Miranda* warnings and agreed to speak to Forbragd.” CP 99. Again, that is precisely the testimony given in the CrR 3.5 hearing. 2RP 92.

In addition, Estavillo testified that an officer came to the vehicle where he was detained and “read me my Miranda right.” 2RP 101. Estavillo’s attorney asked “Do you feel like you understood the rights?” and he responded “Yeah. Yeah.” 2RP 103.

There was substantial evidence. A police officer’s direct testimony on an issue is substantial evidence even when the defendant gives directly conflicting testimony. *State v. Miller*, 92 Wn. App. 693, 704-05, 964 P.2d 1196 (1998) *review denied* 137 Wn.2d 1023 (1999). Moreover since the trial court assesses credibility, there is no error in finding the officer more credible than the defendant. *Id.* Officer Forbragd’s testimony provides substantial evidence that the rights were read, understood, and waived. And, significantly, Estavillo has no evidence contradicting that testimony because he testified that he was read his rights and understood them.

2. *Estavillo below made no argument that he was not*

properly advised or that he exercised his rights and thereby invited any error occasioned by omission from Officer Forbragd's testimony.

Estavillo's statements during the investigative detention are not challenged here and the trial court's findings are supported by the direct testimony of Officer Forbragd and the under oath agreement of Estavillo. The present issue collapses into the question of whether or not the record is insufficient (not substantial) when the officer says he read the arrestee his *Miranda*, the arrestee agrees with that statement, but the record does not contain the precise language used.

What is clear is that neither by cross-examination of the officer nor by argument did Estavillo challenge the nature of the right provided nor the validity of his waiver. In this pretrial hearing, an objection or argument challenging the nature of the warnings would have occasioned the state to provide the trial court with additional information—the words on the preprinted Bremerton Police Department *Miranda* card. The present issue is invited error.

The doctrine directs that “a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial.” *Matter of Salinas*, 189 Wn.2d 747, 755, 408 P.3d 344 (2018). A reviewing court considers “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” 189 Wn.2d

at 755. Here, Estavillo assented to the now alleged error by testifying in agreement with Officer Forbragd, saying that he was read his rights and that he understood them. In the same way, Estavillo contributed to the now alleged error by his testimony and his failure to raise the issue below under circumstances where the allegedly offending omission could have been easily remedied. And, Estavillo now seeks to benefit from the error below.

3. *The trial court could reasonably infer that the proper warnings were given.*

Estavillo never alleged, by sworn testimony or legal argument, that he exercised his right to remain silent or requested an attorney. Under all the circumstances of this case, it is clear that Estavillo's failure to contest the advisement of his rights or his waiver thereof provide a reasonable inference, coupled with the officer's direct testimony, that the same was done and supports the findings made by the trial court. The trial court's findings should be regarded as verities.

But it remains that Estavillo argues that the trial court's findings, verities or not, are incomplete because they do not specifically recite the four *Miranda* warnings. It may be reasonably inferred from the circumstances of this case that when the officer read "*Miranda* rights" he was reading the four warnings required by the case. *See Jackson v. Denno*, 378 U.S. 368, 390, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)

(inferences from established facts, along with credibility determination, may be determinative of the issue of voluntariness).

Trial judges may make reasonable inferences from evidence presented: in the context of search warrants, the task of a neutral magistrate is to decide whether the facts and circumstances presented allow a “reasonable inference” that there is a crime and that evidence of it may be found in the place to be searched. *State v. Scherf*, Washington Supreme Court slip. op. No. 88906-6 at ¶10 (November, 2018). Other examples include considering “all reasonable, factual inferences” on review of a trial court’s granting of a summary judgment motion, *See Wrigley v. State*, Washington Court of Appeals, Division II, slip. op. No. 49612-7-II (October 30, 2018); or, the well-established rule that all reasonable inferences from the evidence will be construed in a light most favorable to the non-challenging party on a claim of insufficient evidence. *See State v. Ramirez*, __Wn. App.__, 425 P.3d 534 (August 30, 2018). Judges are often called upon to make reasonable inferences from the evidence adduced and the trial court here did no more than that.

The cases do not require an exact formulaic recitation of the four rights. *See Florida v. Powell*, 559 U.S. 50, 60, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) (“this Court has not dictated the words in which the essential information must be conveyed.”). The question is whether or not

the words used reasonably conveyed the rights to the suspect. *Id.* Nothing in this record, in particular no argument advanced below by the defense, establishes that Estavillo did not receive the essential information required. In fact, he said that he did receive his rights.

4. *Nothing in the record allows a finding that any statements made by Estavillo were not voluntary.*

The ultimate question is whether or not Estavillo's admissions were voluntarily given. Viewing all the circumstances of the statements, courts ask whether a suspect's "will was overborne by the circumstances surrounding the giving of the confession." *Doody v. Ryan*, 649 F.3d 986, 1008 (9th Cir, 2011) *quoting Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The reading of *Miranda* rights is one factor in the all the circumstances analysis. *Id.* In the present case, there is no evidence, and no argument asserted, that Estavillo's will was overborne. His own testimony provides good evidence of the contrary. Moreover, Estavillo was no neophyte: he had previously been arrested and convicted of murder among other convictions. CP 209. The record shows no deficit in his responsiveness to Officer Forbragd. *See Doody*, 649 F.3d at 1012-13 (considering juvenile suspect's lack of responsiveness as evidence that he was overborne).

The trial court specifically found that there is no evidence that Estavillo was coerced. CP 100. This finding has not been challenged

here. This verity, then, is a reflection of the fact that the defense below did not question Estavillo's receipt of the proper warnings or that his admissions were otherwise voluntary.

The record here establishes that Estavillo invited the error, if any. He agreed with Officer Forbragd that he was read his rights and chose to speak to the officer. On this record, it can be reasonably inferred that there was no defect in the advisement of rights. This issue fails.

5. *Any error in admitting the statements was harmless.*

The statements by Estavillo that were admitted are recited above. If those statements are omitted from the evidence presented to the jury, the evidence of guilt in the case remains overwhelming. Those statements had no discernable effect on the verdicts, except perhaps an effect to the advantage of Estavillo.

On this constitutional issue, the test for harmless error requires the state to show that an error is harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (En banc) (2013).

In the second amended information, Estavillo was charge with, in count IV, with second degree promoting prostitution. CP 42. With regard to prostitution, Estavillo made exculpatory statements to the police. He knew she was doing it but wanted her to stop. Estavillo was acquitted on count IV. CP 134. Thus, any error in the admission of his statements with

regard to Ms. Baker's prostitution activities clearly were harmless to his defense.

Further, Estavillo testified at trial. About the incident in the hotel room with Mr. Buckner, Estavillo said almost exactly what Officer Forbragd testified that Estavillo had said to him. 3RP 378. However, Estavillo's story was overwhelmed. Mr. Buckner gave testimony of being robbed at gun point. Other witnesses testified that they heard his excited utterances as he fled. The gun used was found and identified. Property belonging to Mr. Buckner was found in Estavillo's possession and in the possession of his confederate Ms. Baker. Text messages provided a step by step narrative of what occurred. Further, Mr. Woodford established Estavillo's modus operandi with his testimony of nearly exactly the same set-up a short time before Mr. Buckner was robbed.

In the end, the testimony of Ms. Baker devastated the defense. She told the jury that the two incidents happened just as the two victims said they had happened. If it was error to admit Estavillo's admissions, that error was harmless beyond a reasonable doubt.

IV. CONCLUSION

For the foregoing reasons, Estavillo's conviction and sentence should be affirmed.

DATED November 13, 2018.

Respectfully submitted,

TINA R. ROBINSON
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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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