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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

ZACHARY PARKER

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BRIEF OF APPELLANT

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## A. Assignments of Error

### Assignments of Error

The trial court erred by admitting Mr. Parker's post-arrest statements to law enforcement.

### Issues Pertaining to Assignments of Error

Mr. Parker promptly invoked his right to remain silent after being arrested. Later, after he expressed an interest in making a statement, he was read *Miranda* warnings that contained material defects and omissions.

1. The trial court failed to enter written findings of fact and conclusions of law following the CrR 3.5 hearing. Has Mr. Parker been substantially prejudiced such that reversal is required given the confusing nature of the hearing testimony and the trial court's ambiguous oral findings?
2. Did Mr. Parker knowingly and voluntarily waive his right to remain silent given the defective *Miranda* warning?

## B. Statement of Facts

### Substantive Facts

Zachary Parker was charged by Amended Information with two counts of Second Degree Rape of a Child and one count of Commercial Sex Abuse of a Minor, CP, 85. The jury convicted him of both counts of

Rape of a Child and acquitted him of the Commercial Sex Abuse. CP, 135-37.

This case was essentially a he-said-he-said between J.D.Z. and Mr. Parker. J.D.Z., whose birthday is April 14, 2004, was fourteen at the time of trial, but twelve at the time of the incident. RP, 74. Mr. Parker was a family friend with whom J.D.Z. did activities, such as fishing trips and playing video games. RP, 98, 105. Mr. Parker lived with his sister, Jessica Parker. RP, 174. Mr. Parker had a boyfriend named Landon.

On an unknown date in December of 2016 (Mr. Parker testified it was most likely December 9), J.D.Z. spent the night at the Parker residence. RP, 118, 192. According to J.D.Z., as they were getting ready to go to bed, Mr. Parker initiated mutual acts of oral sex. RP, 89-90. Mr. Parker offered \$25 and an Xbox in exchange for oral sex. RP, 86-87. According to J.D.Z., Landon was not present at the house. RP, 106.

On December 31, 2016, Clark County Detective Andrew Kennison went to Mr. Parker's residence with the intent of arresting him. Detective Kennison observed Mr. Parker exiting his house by the back door and contacted him. RP, 145. According to his trial testimony, Detective Kennison detained Mr. Parker and questioned him. RP, 146. Mr. Parker acknowledged knowing J.D.Z. RP, 146. Mr. Parker said J.D.Z. had stayed at his house several times, most recently about a week or two earlier. RP,

147. He said J.D.Z. had been in his room on other occasions to play with his pet lizard, but had not been in his room that night because he and his boyfriend, Landon, had been in the room. RP, 147-48. Around one o'clock in the morning, he drove Landon home. RP, 149. Mr. Parker owned two video game consoles, one of which he was trying to sell. RP, 148.

Mr. Parker testified no sexual contact occurred between them. RP, 194-95. On the night of the alleged incident, he was with his boyfriend, Landon, all night. RP, 193. After a quick trip to the store, the three of them sat around playing video games. RP, 193-94. At some point, Mr. Parker and Landon retreated to his bedroom to watch a movie, leaving J.D.Z. to sleep on the couch in the living room. RP, 194. Mr. Parker drove Landon home and returned to the house at six in the morning. RP, 194.

Landon did not testify at the trial, although he was on Mr. Parker's witness list. CP, 87. Jessica Parker testified at trial when she got home she only J.D.Z. was in the house, playing video games. RP, 180-81. She asked where Mr. Parker and Landon were and he said they went to the store. RP, 181. She went to her room to study for finals. RP, 181. When she woke up in the morning, Mr. Parker was in his bedroom and J.D.Z. was asleep on the couch. RP, 182-83.

### CrR 3.5 Hearing

The Court conducted a CrR 3.5 hearing where more details of the December 31, 2016 arrest were given. On that date, Detective Kennison detained Mr. Parker, handcuffed him, and placed him in the back of the patrol car. RP, 11. Mr. Parker said he did not want to talk to him. RP, 11. Detective Kennison then returned to the house to ask Jessica Parker some questions. RP, 12. When he returned to the car, Mr. Parker apologized for the way he had acted earlier and wished to talk at that point. RP, 12. Detective Kennison then read him his *Miranda* rights from a Clark County form. RP, 12. Detective Kennison could not remember what form he used, explaining there are several forms he uses and “the verbiage can change from card to form to notebook.” RP, 13. In response to leading questions from the prosecutor, he testified he advised him of his right to remain silent, that he had the right to an attorney, that if he could not afford an attorney one could be made available to him, and anything he said could be used against him in court. RP, 13. Mr. Parker said he understood his rights and wished to speak with the detective. RP, 14. No *Miranda* form was introduced into evidence at the CrR 3.5 hearing.

The State also called Deputy Zack Nielsen at the CrR 3.5 hearing. According to Deputy Nielsen, Mr. Parker was read his *Miranda* rights twice, the first time when he was placed into the patrol car and the second

time after they had spoken to Jessica Parker. RP, 20. The first time *Miranda* was read, Mr. Parker said he did not wish to speak. RP, 21. After the officers spoke to Jessica Parker, Mr. Parker wished to speak with them and *Miranda* was read a second time. RP, 22. Deputy Nielsen could not remember exactly how he expressed his desire to talk. RP, 23-24. Deputy Nielsen testified Mr. Parker was advised he had the right to remain silent, that he had the right to counsel, that if he could not afford counsel counsel would be provided to him, and anything statements he made could be used against him in court. RP, 22-23.

Mr. Parker argued at the CrR 3.5 hearing that there was insufficient evidence of what rights were read to Mr. Parker. RP, 27. The Court initially commented the testimony was not “the clearest type of testimony that I’ve ever heard.” RP, 27. In resolving the dispute whether Mr. Parker was read his *Miranda* rights once or twice, the Court concluded they were only read once. Regardless of whether the original detention was characterized as a detention of custodial arrest, once Mr. Parker was handcuffed and placed into the patrol car, *Miranda* rights were required. RP, 28. Although no *Miranda* rights were given at that time, Mr. Parker invoked his right to remain silent. After speaking with Jessica Parker, Mr. Parker initiated contact without any prompting by the officers. RP, 28. Although he could not testify which form he used, Detective

Kennison then read him “the rights that were addressed.” The Court commented it was “certainly not the best way to present evidence,” but the court was satisfied that “the essential Constitutional Rights that are required were given to Mr. Parker.” RP, 29.

### Sentencing

At sentencing, the Court concluded Mr. Parker has four prior felonies, all sentenced on the same date. CP, 227. The offenses were Identity Theft in the First Degree, Identity Theft in the Second Degree, Theft in the Second Degree, and Factoring Credit Card Transactions. CP, 227. The Court concluded the Factoring Credit Card Transactions and Identity Theft in the First Degree convictions were the same criminal conduct. RP, 247; CP, 227. The Court overruled defense arguments that additional counts were same criminal conduct. CP, 148; RP, 247-48.

The Court concluded the two counts of Second Degree Rape of Child were same criminal conduct. RP, 251. His offender score was, therefore, a “3” and his standard range 108-136 months. CP, 215. The Court sentenced him to 120 months plus community custody for life. CP, 217.

### C. Argument

1. The failure to enter written findings of fact and conclusions of law requires reversal.

Following a CrR 3.5 hearing, the trial court is required to enter written findings of fact and conclusions of law. CrR 3.5(c); *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). In *Head*, the Court stated, “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.

Normally, the remedy for failure to enter written findings is remand for entry of the findings. The Court in *Head* did note, however, that there may be situations where reversal is required, saying “reversal might be an appropriate remedy if the appellant could show actual prejudice from the failure to enter the written findings of fact.” *Head* at 624-25. But the court stated that the appellant had the burden to establish prejudice and that the court would not infer prejudice based on the delay in entering the written findings of fact and conclusions of law. *Head* at 624-25.

No findings of fact and conclusions of law were entered in this case. The question is whether remand or reversal is required. In this case, the trial court twice commented that the testimony was not “the clearest type of testimony that I’ve ever heard” and “certainly not the best way to present evidence.” RP, 27, 29. Additionally, as argued further below,

there is no way to cure the defects in determining what rights were read to Mr. Parker and under what circumstances. Mr. Parker is actually prejudiced by the absence of written findings of fact and conclusions of law and reversal is required. In the alternative, remand is required.

2. Mr. Parker's statement was not knowing and voluntary.

Both Detective Kennison and Deputy Nielsen testified Mr. Parker was read his *Miranda* rights and their recitation of those rights was identical. That recitation contained two material errors, however. There are five *Miranda* rights and Detective Kennison's recitation of one of those rights was defective and one of the rights was omitted in its entirety. This was after Mr. Parker had previously invoked his right to remain silent. The error in the recitation was prejudicial and requires reversal.

In the seminal case of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that prior to custodial interrogation, a suspect must be advised of his or her rights. Although this rule has been frequently referred to as "prophylactic," the basic rule has nevertheless been repeatedly upheld and has taken on a constitutional dimension. See *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Police may not engage in custodial interrogation unless he has made a knowing and voluntary waiver of his constitutional rights.

The primary federal case discussing whether the *Miranda* warning needs to be worded exactly in one form or another is *Duckworth v. Eagan*, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). In *Duckworth*, the Court noted a variety of situations might necessitate a police officer improvising the warning, including, significant to Ms. Dawson's case, the possibility "the officer in the field may not always have access to printed *Miranda* warnings." *Duckworth* at 203. Because of these situations, the Court upheld a conviction where the warning given contained some language arguably inconsistent with the *Miranda* decision. See *Duckworth* at 215 (Justice Marshall, dissenting).

Although the Supreme Court does not require a word-for-word recitation of the *Miranda* warning, the warning given must still convey the "all of the bases required by *Miranda*." *Duckworth* at 203. As set out by the *Duckworth* Court, the five bases required by *Miranda* are (1) the right to remain silent; (2) that anything he said could be used against him in court; (3) that he had the right to speak to an attorney before and during questioning; (4) that he had the right to the advice and presence of a lawyer even if he could not afford to hire one; and (5) that he had the right to stop answering at any time until he talked to a lawyer. *Id* at 203.

The Washington Supreme Court cited the *Duckworth* decision while reviewing the officer's "confusing and contradictory" warnings.

*State v. Mayer*, 184 Wn.2d 548, 362 P.3d 745 (2015). The Court stressed “that the rights set forth in what became known as the ‘*Miranda* warnings’ must be explained fully prior to questioning. This explanation of rights must convey to the suspect that his right to silence—and his opportunity to exercise that right—applies continuously throughout the interrogation process.” *Mayer* at 557. In analyzing the suspect’s confusion so, the Washington Supreme Court placed in italics the requirement that a suspect be advised of his or her “*right to stop answering at any time until you’ve talked to a lawyer.*” *Mayer* at 563, quoting *Duckworth* at 198 (Emphasis added by Washington Supreme Court). Because the recitation of *Miranda* rights in *Mayer* did not make this clear, the trial court erred by not suppressing the statement. *Cf. In re the Personal Restraint of Woods*, 154 Wn.2d 400, 434, 114 P.3d 607 (2005) (Applying the standard of review in personal restraint petition, defendant had not shown “actual and substantial prejudice” in defective *Miranda* warning.)

In this case, the warnings given to Mr. Parker were inadequate for two reasons. First, Detective Kennison did not advise Mr. Parker that he had the right to speak to an attorney “before and during questioning.” Second, Detective Kennison did not advise Mr. Parker that he had the right to right to “stop answering at any time.” Two police officers testified at the CrR 3.5 hearing and they were consistent on the fact that the third

*Miranda* warning was defective and the fifth *Miranda* warning was omitted in its entirety. Either of these defects would require reversal. The fact that there are two defects compounds the prejudice.

The trial court's oral finding is not helpful, either. The trial court concluded "the essential Constitutional Rights that are required were given to Mr. Parker." RP, 29. This conclusion is tautological. The trial court cannot conclude the officers advised Mr. Parker of his "essential Constitutional Rights that are required" without first determining what essential Constitutional Rights are required. The rebuttal to the trial court's conclusion is that there are five "essential Constitutional Rights that are required" and the undisputed evidence presented at the hearing, as testified to by both Detective Kennison and Deputy Nielsen, is that one of those essential Constitutional Rights was defective and one was omitted entirely. The trial court erred by concluding otherwise.

The prejudice to Mr. Parker is compounded by the fact that the interrogation was conducted after Mr. Parker had invoked his right to remain silent. When a suspect invokes his right to remain silent, the Fifth Amendment of the United States Constitution requires that the police "scrupulously honor" the request and cease questioning. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Normally, this requires police "immediately cease[] the interrogation,

resume[] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[] the second interrogation to a crime that had not been a subject of the earlier interrogation.” *Mosley* at 106. Washington Courts have interpreted the *Mosely* case as setting forth a four-pronged analysis. Whether a defendant validly waives his previously asserted right to remain silent depends on: (1) whether the police scrupulously honored the defendant's right to cut off questioning, (2) whether the police continued interrogating the defendant before obtaining a waiver, (3) whether the police coerced the defendant to change his mind, and (4) whether the subsequent waiver was knowing and voluntary. *State v. Brown*, 158 Wn.App. 49, 240 P.3d 1175 (2010), citing *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). In *Brown*, the Court concluded that officers had scrupulously honored[] the defendants expressed desire to remain silent when they contacted him two hours later, re-advised him of his *Miranda* warnings, and obtained a written waiver of his *Miranda* rights. In this case, Detective Kennison interrogation of Mr. Parker after he invoked his right to remain silent was accompanied by defective *Miranda* warnings. The statement should have been suppressed.

Having concluded the trial court erred by not suppressing Mr. Parker's post-arrest statement, the next issue is whether the err was harmless beyond a reasonable doubt. The State cannot meet its steep

burden. This was at its core a he-said-he-said case and the credibility of the two primary witnesses was critical.

In Mr. Parker's statement, he admits several facts that corroborated J.D.Z.'s testimony. Mr. Parker told Detective Kennison that J.D.Z. had spent the night at his house "one or two weeks" prior. Mr. Parker said he had two video game consoles, one of which he wished to sell, corroborating J.D.Z.'s testimony that he had an extra video game console.

Mr. Parker's post-arrest statement also committed to a chronology of December 9 that prejudiced his ability to get a fair trial. Mr. Parker told Detective Kennison that on the night J.D.Z. spent the night, his boyfriend Landon was present all night as well. J.D.Z. denied Landon was there. When Mr. Parker reiterated this fact in his trial testimony, the following occurred:

Q: And Landon was there but he was no there all night?

A: Landon was with me all night until I came home at 6:00 a.m.

Q: Umm. That's convenient don't you agree?

JS: Objection. Argumentative.

Judge: Sorry. I couldn't hear the –

Q: The question was that's convenient, don't you agree.

JS: And I –

Judge: I sustain the objection. It's argumentative.

Q: And your sister was there most of that night?

A: Correct. She was there.

Q: But in her room?

A: I don't know exactly where she was. As I ended up 8 leaving for part of the night.

Q: Um-hum. So you – you had access to Jamie?

A: I'm not sure what you mean by that question.

Q: I mean you could get access to Jamie. You could get Jamie's parents to let him drive off in a car with you?

A: Yes. Jamie did come with me.

RP, 197-98. Although the trial court properly sustained the objection, the point was still made: Mr. Parker was claiming he was not alone with J.D.Z. that night but he could not corroborate that claim. The State next emphasized this point in its closing argument, "The Defendant's version is very self-serving. It was very tailored. It was a way to explain anything that cast him in a negative way. And it was a self-created, uncorroborated alibi." RP, 220.

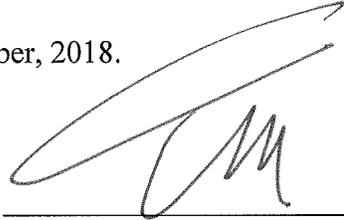
For reasons that are unclear in the record, Mr. Parker did not call Landon to testify. His sister, Jessica Parker, testified when she got home, J.D.Z. was alone playing video games and Mr. Parker and Landon had just left to go to the store. The next time she saw Mr. Parker was in his bedroom asleep in the morning. She did not see Landon at the house all night.

Because Mr. Parker committed to a specific chronology, a chronology he could not corroborate at trial, he was prejudiced by his post-arrest statements. The error was not harmless and reversal is required.

D. Conclusion

This Court should reverse and remand for a new trial. At that trial, Mr. Parker's post-arrest statement should be suppressed.

DATED this 31<sup>st</sup> day of October, 2018.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

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Attorney for Defendant/Appellant

**THE LAW OFFICE OF THOMAS E. WEAVER**

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