

FILED

JUL 06, 2015

Court of Appeals
Division III
State of Washington

No. 32641-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MONTY RAY BOCKMAN, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by denying the CrR 3.5 motion to suppress statements made by Monty Ray Bockman.

2. The court erred by making finding of fact 2 in the CrR 3.5 findings and conclusions:

2. Officer Sullivan read the defendant his Miranda rights from Officer Sullivan's department issued card and the defendant agreed to answer questions.

3. The court erred by making its conclusion of law in the CrR 3.5 findings and conclusions:

The defendant's statements to Officer Sullivan are admissible because the defendant was advised of his Miranda rights prior to making any statements and his statements to Officer Sullivan were made knowingly, freely, and voluntarily.

Issue Pertaining to Assignments of Error

A. Did the court err by denying the CrR3.5 motion to suppress statements made by Mr. Bockman when the State failed to prove he waived his *Miranda* rights? (Assignments of Error 1, 2, 3).

II. STATEMENT OF THE CASE

Mr. Bockman was charged by amended information with

count 1: residential burglary, count 2: unlawful possession of a controlled substance, and count 3: bail jumping. (CP 67). The defense moved to suppress statements made to law enforcement. (CP 40). The court denied the motion. (CP 126-27). The case proceeded to jury trial.

On December 9, 2013, Ryan Boyce's home in Kennewick was burglarized. (6/30/14 RP 7). Mr. Boyce was a West Richland police officer, but he did not broadcast it to the neighborhood as he was undercover with the Metro Drug Task Force. (*Id.* at 6-7). He had left the house in the morning and, on his return, discovered his home had been burglarized. (*Id.* at 8).

Mr. Boyce went in the front door and saw the sliding door was open. (6/30/14 RP 11). Fence boards to the south had been kicked out and a bike tire, not his, was leaning up against the back fence. (*Id.* at 12). Mr. Bockman lived right across the street, but they had no relationship at all. (*Id.* at 13-14). Mr. Boyce's backyard gate was open as well. (*Id.* at 16). The hole in the fence was about three feet wide and there were footprints. (*Id.* at 16-17).

It was obvious to Mr. Boyce someone had been in his home and burglarized it. (6/30/14 RP 17). He armed himself before

checking the basement. (*Id.* at 17). His work laptop was missing. (*Id.* at 19). Mr. Boyce called police dispatch to report the burglary. (*Id.* at 22). Kennewick Police Officer Sullivan arrived in 10-15 minutes. (*Id.*). Officer Peterson arrived also. (*Id.* at 23). Mr. Boyce showed the officers what he had discovered. (*Id.*). He suspected Mr. Bockman, but was not sure. (*Id.* at 26). Mr. Boyce found it unusual that high-value items were left in the home and told Officer Sullivan about it. (*Id.*).

After the officers left, Mr. Boyce checked his neighbor's shed. (6/30/14 RP 43). He could not open the door because someone was holding it shut. He called police again. (*Id.*). Mr. Bockman, who was inside the shed, asked Mr. Boyce not to call the police and said we can work things out. (*Id.* at 44). The shed door opened and a struggle ensued. (*Id.*). They struggled on the ground and police arrived in a couple of minutes. (*Id.* at 45).

Officers Sullivan and Detective Runge arrived and detained Mr. Bockman after a little more struggling with him. (6/30/14 RP 47). Mr. Boyce's laptop was recovered in Mr. Bockman's residence. (*Id.* at 48). He had no permission to be on Mr. Boyce's property or in his home. (*Id.* at 50).

Mike Hennessey, Mr. Boyce's neighbor on whose property the shed was located, did not give permission to anyone to be in his backyard or in his shed. (6/30/14 RP 53, 55).

Officer Sullivan responded to the burglary call at Mr. Boyce's home around noon on December 9, 2013. (6/30/14 RP 56). He cleared the residence at 1:20 p.m. (*Id.* at 65). Officer Sullivan was called back soon thereafter as Mr. Boyce had located an individual at the neighboring residence. (*Id.* at 66). He got back to Mr. Boyce's in a couple of minutes. (*Id.* at 67). Mr. Boyce and Mr. Bockman were in a struggle on the ground in front of the Hennessey shed. (*Id.* at 68). Eventually, Mr. Bockman was handcuffed. (*Id.*). In the search incident to arrest, the officers found Mr. Boyce's digital camera, thumb drive, and flashlight. (*Id.* at 69). While Mr. Bockman was handcuffed and sitting in the yard, he was given his *Miranda* rights. (*Id.* at 71). He told the officers that Mike gave him permission to be in his yard and the bike tire had a flat so he was looking to either replace or fix it. (*Id.*). Officer Sullivan said Mr. Bockman became more and more incoherent so he stopped further questioning. (*Id.*). Mr. Bockman's boot bottoms were very similar to the prints found in the yard. (*Id.* at 71, 74).

Detective Runge responded to Mr. Boyce's home around 1:23 p.m. on December 9, 2013. (6/30/14 RP 78). He saw a homeowner struggling with a burglary suspect, Mr. Bockman. (*Id.*). It took Officer Sullivan, the detective, and Mr. Boyce to hold Mr. Bockman down and cuff him. (*Id.* at 80-81). A search warrant was then obtained for Mr. Bockman's home to look for Mr. Boyce's work laptop. (*Id.* at 82-83). The laptop was located in a bag by the front door. (*Id.*).

Detective Montebianco applied for the search warrant for Mr. Bockman's home to look for the laptop. (6/30/14 RP 90). Mr. Boyce's work laptop was found in a red bag by Detective Davis. (*Id.* at 96, 109). In a black bag in the hallway were a smoking pipe and a substance looking like methamphetamine. (*Id.* at 93-94).

WSP crime lab forensic scientist Jason Trigg tested the substance looking like methamphetamine and confirmed it was indeed methamphetamine. (7/1/14 RP 115, 125).

Benton County deputy clerk Lori Sakota testified that a bench warrant was issued for Mr. Bockman after his January 16, 2014 hearing where he failed to appear. (7/1/14 RP 125-26, 133).

Mr. Bockman was present at the January 9, 2014 court proceeding in which the hearing scheduled for that day was continued to January 16, 2014. (*Id.* at 135; 1/9/14 RP 2-3).

The defense called no witnesses. (7/1/14 RP 135). There were no exceptions taken to the court's instructions to the jury. (*Id.* at 149). The jury found Mr. Bockman guilty as charged on all counts. (*Id.* at 83; CP 102-04). This appeal follows.

III. ARGUMENT

A. The court erred by denying the CrR 3.5 motion to suppress statements made by Mr. Bockman when the State failed to prove he waived his *Miranda* rights.

After the CrR 3.5 hearing, the court entered findings of fact and conclusions of law.

1. Officer Joshua Sullivan testified that he detained the defendant on December 9, 2013, after responding back to the scene of a residential burglary he had just left. When Officer Sullivan arrived at the residence for the second time, the victim of that residential burglary was struggling with the defendant in an adjacent backyard.
2. Officer Sullivan read the defendant his *Miranda* rights from Officer Sullivan's department issued card and the defendant agreed to answer questions.
3. Officer Sullivan asked the defendant why he was in

the neighbor's back yard and the defendant stated that he had permission from the homeowner. Officer Sullivan also asked about a flat bike tire in the victim's yard and broken fence boards between the victim's and the neighbor's residences. The defendant stated that his bike tire was flat and that he was looking for a new one.

3. The defendant began mumbling and making incoherent statements so Officer Sullivan did not ask the defendant any further questions. (CP 126).

From these findings, the court made the following conclusion

of law:

The defendant's statements to Officer Sullivan are admissible because the defendant was advised of his Miranda rights prior to making any statements and his statements to Officer Sullivan were made knowingly, freely, and voluntarily. (CP 127).

Only Officer Sullivan testified at the CrR 3.5 hearing.

(6/19/14 RP 12). Before speaking with Mr. Bockman, the officer said he gave him his *Miranda* rights. (*Id.* at 13). Mr. Bockman advised him verbally "that he understood his rights." (*Id.*). Officer Sullivan then proceeded to ask him questions. (*Id.*). But there was no testimony whatsoever that Mr. Bockman waived his rights. (*Id.* at 12-15). Accordingly, finding of fact 2 is not supported by substantial evidence because the record is devoid of any testimony that Mr. Bockman agreed to answer questions. *State v.*

Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

The State cannot use statements obtained from custodial interrogation unless procedural safeguards guarantee that the accused has been informed of and freely waived the constitutional privileges of the Fifth and Sixth Amendments. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966). It also bears the burden of proving by a preponderance of the evidence that the person made a knowing, voluntary, and intelligent waiver of those rights. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1991). Mr. Bockman was in custody; he was given his *Miranda* rights; he understood them; and he was interrogated by Officer Sullivan. But the question is whether the State met its burden of proof to show he had validly waived those rights. The answer is no.

The State failed to prove by a preponderance that Mr. Bockman knowingly, freely, and voluntarily waived his *Miranda* rights. *Edwards*, 451 U.S. at 482. It is true that a waiver of *Miranda* need not be explicit, but may be inferred from the facts and circumstances. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.

Ct. 1755, 60 L. Ed.2d 286 (1979). On the other hand, a valid waiver cannot be implied merely because a defendant, makes a statement after receiving *Miranda* warnings:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. *Miranda*, 384 U.S. at 475.

The Washington rule also is that a *Miranda* waiver cannot be presumed simply from the fact the police obtained a statement from the defendant after he was warned of his rights. *State v. Adams*, 76 Wn.2d 650, 671, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed.2d 855 (1971).

Here, the court simply presumed that the fact Mr. Bockman made statements to the officer indicated he had waived his *Miranda* rights. It could not, however, make that forbidden presumption. *Adams, supra*. Therefore, the court erred erred by concluding Mr. Bockman's statements "were made knowingly, freely, and voluntarily." (CP 127).

Admission of an involuntary statements obtained in violation

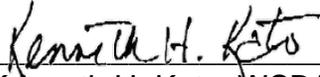
of *Miranda* is subject to a harmless error analysis. *State v. Rueben*, 62 Wn. App. 620, 626, 814 P.2d 1177, *review denied*, 118 Wn.2d 1006 (1991). The error must be harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 295-96, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991). A defendant's own statements have a profound effect on the jury and are probably the most probative and damaging evidence that can be admitted against him. *Bruton v. United States*, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed.2d 476 (1968).

This was a circumstantial evidence case in which convictions were obtained by stacking inference on inference. Mr. Bockman's statements to Officer Sullivan certainly had a role in convicting him. When the trial court fails to even address the issue of waiver, its error is not only a constitutional one but also far from harmless. *Fulminante, supra*. Mr. Bockman is entitled to a new trial.

IV. CONCLUSION

Mr. Bockman respectfully urges this court to reverse his convictions and remand for new trial.

DATED this 5th day of July, 2015.


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CERTIFICATE OF SERVICE

I certify that on July 5, 2015, I served a copy of the brief of appellant by first class mail, postage prepaid, on Monty Bockman, # 250495, PO Box 769, Connell, WA 99326; and by email, as agreed by counsel, on Andrew K. Miller at prosecuting@co.benton.wa.us.

