

FILED

SEP 29, 2015

Court of Appeals
Division III
State of Washington

NO. 32641-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MONTY RAY BOCKMAN, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-01346-4

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Kristin M. McRoberts, Deputy
Prosecuting Attorney
BAR NO. 39752
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. **The defendant's statements were admissible at trial because he made a knowing, voluntary, and intelligent waiver of his Miranda rights prior to speaking with Officer Sullivan.**
- B. **Even if the defendant's statements should have been suppressed, the error was harmless.**

II. STATEMENT OF FACTS

Ryan Boyce's Kennewick residence was burglarized sometime during the late morning of December 9, 2013. Report of Proceedings (RP)¹ at 4, 7-8. Mr. Boyce is a West Richland police officer who at the time of the burglary was detailed to an undercover regional drug task force. RP at 5. Mr. Boyce did not typically share his occupation with his neighbors and did not bring a marked patrol vehicle home with him. RP at 6-7.

The testimony at trial of Mr. Boyce, his neighbor Michael Hennessey, four Kennewick police officers, a forensic scientist, and a court clerk established the following events. Mr. Boyce had left his residence around 9:00 a.m. or 9:30 a.m. to take his wife to the store and then drop her off at their child's school. RP at 7-8. He then returned home approximately two hours later with one of his young children. RP at 11.

¹ Unless otherwise indicated, "RP" refers to the verbatim report of proceedings for jury trial dated 06/30/2014 to 07/01/2014, and sentencing dated 07/28/2014, one volume.

He was driving the family's only vehicle, a noisy diesel truck. RP at 8-9. Upon entering his residence, Mr. Boyce observed the sliding glass door was open; it had been closed when he left that morning. RP at 9, 11. Looking out into his fenced backyard, Mr. Boyce observed five to six fence boards that separated his backyard from neighbor Michael Hennessey's fenced backyard had been kicked out. RP at 12-13, 16, 54. The fence had not been damaged when Mr. Boyce left his residence that morning. RP at 30. The damaged boards were on the ground in Mr. Hennessey's yard near the fence. RP at 16. There was also an unfamiliar bicycle tire leaning up against the fence inside Mr. Boyce's backyard. RP at 12, 16. Mr. Boyce observed some footprints near the fence as well, which he later determined were on both sides of the fence. RP at 17, 33-34.

Mr. Boyce armed himself with a firearm and checked the interior of his residence. RP at 17-19. He found doors and closets open in the basement that were previously closed when he left that morning, but he was not sure whether any property was missing. *Id.* The door to a closet containing Mr. Boyce's West Richland police officer uniforms was opened. RP at 36-37. In the upstairs master bedroom, closets and drawers had been opened and rummaged through. RP at 19. Mr. Boyce's work laptop was missing from the master bedroom, but a Samsung tablet that

had been near the laptop was not stolen. RP at 19-20. Other valuables in the house, including electronics, two safes, firearms, and ammunition, were not stolen. RP at 20-21. Mr. Boyce called 911 and continued checking his residence for missing property while waiting for police to arrive. RP at 22.

Kennewick Police Officer Joshua Sullivan arrived at Mr. Boyce's residence ten to fifteen minutes later, at approximately 11:50 a.m. RP at 22, 57. A second officer arrived shortly thereafter. *Id.* As part of his investigation, Officer Sullivan went through the hole in the fence into Mr. Hennessey's fenced backyard along with Mr. Boyce. RP at 24-25, 62. Mr. Hennessey was not home. RP at 24. Officer Sullivan verified that the two gates bordering each side of the front of Mr. Hennessey's house were locked. RP at 62. Officer Sullivan did not check inside a shed in Mr. Hennessey's backyard. RP at 25, 42. Officer Sullivan examined and photographed the footprints that Mr. Boyce had seen. RP at 24-25, 61-62. Mr. Boyce described the footprints as looking like someone stepped through his fence and into Mr. Hennessey's backyard. RP at 25. Officer Sullivan noted that all of the footprints except one were on Mr. Boyce's property. RP at 61.

Mr. Boyce advised Officer Sullivan that he believed his neighbor, the defendant, may have committed the burglary of his residence. RP at

26. The defendant lived across the street from Mr. Boyce. RP at 14. Mr. Boyce advised that he did not have any relationship with the defendant and that the defendant had never been given permission to come inside Mr. Boyce's residence. RP at 14, 49-50.

Officer Sullivan was at Mr. Boyce's residence approximately twenty minutes before he left to canvas the neighborhood. RP at 26-27, 64. He then drove back and notified Mr. Boyce that he was leaving at 1:20 p.m. RP at 41, 65. Mr. Boyce was concerned about the theft of his work laptop given that it was valued at \$5000 to \$6000. RP at 41. He decided to go outside and look around to see if it had been dropped or hidden somewhere near his house. RP at 41-42.

Mr. Boyce crawled through the hole in the fence into Mr. Hennessey's adjacent back yard. RP at 42. He decided to open Mr. Hennessey's shed to see if his laptop had been hidden there. RP at 42-43. The doors to the shed would not initially open and Mr. Boyce thought that they were stuck. RP at 43. As he tried more forcefully to open the shed, Mr. Boyce observed hands inside the shed holding the doors closed. *Id.* He stepped back from the shed and called 911. *Id.* As Mr. Boyce was speaking with dispatch, he could hear a male voice inside the shed stating "Hey, don't call the police" and "Hey, we can work this out." RP at 44. Suddenly, the shed doors opened and the defendant walked out. *Id.* He

told Mr. Boyce, "I told you not to call the police." *Id.* Mr. Boyce believed the defendant was about to assault him based on the aggressive tone of the defendant's voice and his stance. RP at 44-45. Mr. Boyce put his cell phone in his pocket with the line still open to 911 and placed the defendant on the ground by grabbing him by his clothing. RP at 45. Once on the ground, the two began struggling. *Id.* The defendant called Mr. Boyce a pig and stated that he and "Grego" were what was wrong with the world. *Id.* Mr. Boyce believed the defendant was referring to Sergeant Grego who works with him at the West Richland Police Department. *Id.* Mr. Boyce had never previously discussed his occupation with the defendant. *Id.* The defendant also stated that Mr. Boyce did not deserve his house. *Id.*

After Officer Sullivan had completed his canvas and left Mr. Boyce's residence, he drove toward the transit authority, where office space was available for him to write his report regarding the burglary. RP at 65-66. The transit authority was about a five minute drive from Mr. Boyce's residence. RP at 66. Officer Sullivan did not make it to that location before being advised by dispatch that he needed to return to Mr. Boyce's residence because Mr. Boyce and a suspect who had been in the neighbor's shed sounded as if they were in a scuffle. *Id.* Officer Sullivan activated his emergency lights and sirens and made it back to Mr. Boyce's residence in two to three minutes. RP at 67.

Kennewick Police Detective Rick Runge was on duty and driving when he heard dispatch advise at 1:23 p.m. that Mr. Boyce was struggling with a burglary suspect. RP at 78. Based on his proximity and the nature of the call, he responded and arrived at Mr. Boyce's residence just before Officer Sullivan. RP at 67, 79. Detective Runge was going to climb the fence into Mr. Hennessey's backyard but Officer Sullivan advised him they could get in through a hole in Mr. Boyce's fence. RP at 67-68, 80. The two climbed through the hole into Mr. Hennessey's backyard and observed Mr. Boyce and the defendant on the ground in a physical struggle. RP at 68. Officer Sullivan ordered the defendant to stop resisting but he did not comply. *Id.* The defendant refused to show his hands so they could be cuffed. *Id.* It took Officer Sullivan, Detective Runge, and Mr. Boyce to secure the defendant in handcuffs. RP at 68-69, 81.

The defendant had lost one of his boots during the struggle with Mr. Boyce. RP at 71. Officer Sullivan looked at the bottom of the boot and based on the tread pattern believed it was the same boot that made the footprints found in Mr. Boyce and Mr. Hennessey's backyards by the broken fence boards. RP at 71, 74-76. The defendant's boots were admitted at trial along with photos of the footprints. RP at 29, 73.

Officer Sullivan searched the defendant incident to arrest and located in his pants pocket a blue digital camera, a pink feather, a small

black flashlight, and a purple USB thumb drive on a purple lanyard. RP 39-40, 69. With the exception of the pink feather, Mr. Boyce immediately recognized the items as belonging to him even though he did not initially realize they were missing from his residence. RP at 39, 48, 70. He later verified the thumb drive contained his documents and family photos. RP at 40. The flashlight had been in a closet in the basement that Mr. Boyce found opened. RP at 48. The thumb drive had been in the basement computer room and the camera had been in either the computer room or a kitchen drawer. *Id.*

Officer Sullivan advised the defendant of his Miranda rights while still in Mr. Hennessey's backyard. RP at 70. He asked the defendant what was going on and the defendant responded that Mr. Hennessey had given him permission to be in his backyard. RP at 70-71. The defendant also stated that his bike had a flat tire and he was trying to fix it or replace it. RP at 71.

Neighbor Michael Hennessey testified at trial that his fenced backyard has locked gates on each side of his house and that those gates had been locked the day Mr. Boyce's residence was burglarized. RP at 54. Mr. Hennessey did not give anyone permission to be in his backyard or shed when he was not home. RP at 55. He believed he was working out of town when Mr. Boyce's residence was burglarized. *Id.*

Immediately after the defendant was taken into custody, Kennewick Police Detective Marco Montebianco applied for a search warrant for the defendant's residence to search for Mr. Boyce's missing work laptop. RP at 82, 90. Detectives executing the search warrant located Mr. Boyce's computer in a bag just inside the front door. RP at 83, 109. In the same bag, detectives observed mail addressed to the defendant, a pair of pink high-heeled shoes, sex toys, and lubricant. RP at 83-84, 99, 109. The shoes were identified as belonging to Mr. Boyce's wife. RP at 49, 99. In a second bag located next to the one containing the laptop, detectives found a wallet containing the defendant's bank card as well as a glass smoking device with white crystalline residue consistent with methamphetamine. RP at 93-94. The substance in the smoking device was later tested at the Washington State Patrol Crime Lab and forensic scientist Jason Trigg testified it contained methamphetamine. RP at 125. While inside the defendant's residence, detectives observed a bicycle missing a tire. RP at 98.

The trial concluded with Deputy Clerk Lori Sakota of the Benton County Superior Court Clerk's Office testifying regarding certified court documents that showed the defendant failed to appear in court at an omnibus hearing on January 16, 2014, and that a warrant was issued for his arrest. RP at 132-33.

III. COURSE OF PROCEEDINGS

Prior to trial in this matter, a 3.5 hearing was held. Officer Sullivan was the only witness at this hearing. RP 6/19/2014 at 11-17. Officer Sullivan testified that he advised the defendant of his Miranda rights using his department-issued Miranda card. RP 6/19/2014 at 13. The defendant verbally responded to Officer Sullivan that he understood his rights. *Id.* Officer Sullivan then asked the defendant what he was doing in the backyard where he was located. *Id.* The defendant responded that “Mike” (identified above as Michael Hennessey) had given him permission to be in the back yard. *Id.* Officer Sullivan then asked the defendant about a bicycle tire found in Mr. Boyce’s backyard. RP 6/19/2014 at 14. The defendant responded that the tire was flat. *Id.* Officer Sullivan declined to ask the defendant any further questions, as he began mumbling and acting incoherently. *Id.* Officer Sullivan testified that he believed the defendant understood the two questions he asked him. *Id.* Officer Sullivan also indicated that he did not make any threats or promises to the defendant regarding answering questions. RP 6/19/2014 at 15.

The defendant declined to testify at the 3.5 hearing. RP 6/19/2014 at 17. The court held that the statements the defendant made to Officer Sullivan were admissible because the defendant was advised of his Miranda rights prior to questioning and that the defendant acknowledged

that he understood those rights. *Id.* The court indicated that the defendant's answers were given freely, voluntarily, and knowingly. *Id.* Findings of fact and conclusions of law were subsequently signed by a deputy prosecutor, counsel for the defendant, and the judge who presided over the 3.5 hearing. CP 126-27.

IV. ARGUMENT

A. The defendant's statements were admissible at trial because he made a knowing, voluntary, and intelligent waiver of his Miranda rights prior to speaking with Officer Sullivan.

The State must establish that the defendant knowingly and intelligently waived his right to remain silent before any statement that the defendant made during custodial interrogation may admitted at trial.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A court determines whether there was waiver by examining the totality of the circumstances, including the background, experience, and conduct of the excused. *State v. Young*, 89 Wn.2d 613, 574 P.2d 1171 (1978). A waiver shall not be inferred from silence alone, but an express verbal waiver is also not required. *State v. Thomas*, 16 Wn. App. 1, 11, 553 P.2d 1357 (1976). Waiver may be inferred from the facts and circumstances surrounding the giving of the statement without express verbal waiver. *State v. Blanchey*, 75 Wn.2d 926, 933, 454 P.2d 841 (1969).

In the instant matter, the defendant was advised of his Miranda rights and indicated that he understood those rights. While the defendant did not expressly state that he was now willing to answer questions, there is no indication from the record that he was confused about his rights or that Officer Sullivan somehow tricked him into answering questions. Instead, Officer Sullivan asked the defendant two very straightforward questions after the defendant indicated he understood his rights and the defendant answered those questions. Officer Sullivan then elected to terminate questioning the defendant. Based on that record, the trial court in this matter could have inferred that the defendant waived his right to remain silent. The statements to Officer Sullivan were therefore properly admitted at trial.

B. Even if the defendant's statements should have been suppressed, the error was harmless.

Even if the defendant's two statements to Officer Sullivan should have been suppressed, the evidence at trial of the defendant's guilt on all three charges was overwhelming. Admission of an involuntary confession is subject to harmless error analysis. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991) (citing *Arizona v. Fulminante*, 499 U.S. 279, 291, 111 S. Ct. 1246, 1255, 113 L. Ed. 2d 302 (1991), *reh'g denied*, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 472 (1991)). The Washington

Supreme Court has adopted the “overwhelming untainted evidence” standard in harmless error analysis; constitutional errors are harmless if the untainted evidence is so overwhelming that it necessarily leads to the same outcome. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The defendant’s statements had nothing to do with his charges of Unlawful Possession of a Controlled Substance or Bail Jumping; they only pertained to the Residential Burglary charge. The statements were not a confession to the burglary. Quite the opposite, the statements provided some explanation, however unbelievable, as to why the defendant would be hiding in his neighbor’s shed: he had permission to be there and he was fixing his flat bicycle tire. And he was able to get those statements before the jury without having to testify himself. The absence of those two statements at trial would not have weakened the State’s case in the least. Mr. Hennessey testified that the defendant did not have permission to be in his backyard or his shed. The defendant’s actions in holding the shed doors closed and telling Mr. Boyce not to call police were also inconsistent with the defendant having permission to be in the backyard. The defendant’s statement that he had permission to be in the backyard did not make the witness testimony to the contrary any more incriminating than it already was.

The same is true of the defendant's statement about the bike tire. The State did not need the defendant's statement that the tire was flat to show his ownership of the tire; a detective testified that he saw a bicycle missing a tire inside the defendant's residence when he executed a search warrant. The defendant's statement regarding the tire actually supported the defendant's theory of the case that he was only in Mr. Hennessey's shed to fix his bicycle tire, not to hide after committing a residential burglary.

The defendant's two statements to Officer Sullivan did not taint any evidence supporting convictions for Unlawful Possession of a Controlled Substance or Bail Jumping. The following evidence regarding the Residential Burglary was also untainted by the admission of the defendants' statements. The defendant was apprehended several hours after a neighbor's residential burglary, hiding in an adjacent backyard. He told residential burglary victim Mr. Boyce not to call police. He was willing to fight with Mr. Boyce, a police officer, to avoid apprehension. He called Mr. Boyce a pig and referred to one of Mr. Boyce's co-workers at the West Richland Police Department even though Mr. Boyce was an undercover officer who had not advised the defendant of his occupation. The defendant only knew Mr. Boyce worked for the West Richland Police Department because he saw Mr. Boyce's police uniforms hanging in a

closet he opened while he was inside Mr. Boyce's residence that morning. Footprints consistent with the boots the defendant was wearing were located in both Mr. Boyce and Mr. Hennessey's back yards near the newly damaged fence. The defendant had Mr. Boyce's camera, thumb drive, and flashlight in his pocket when he was arrested. All of those items had previously been in Mr. Boyce's residence, where the defendant had never had permission to go. Mr. Boyce's work laptop and his wife's shoes, which had also been in his residence prior to the burglary, were located just inside the defendant's front door in a bag next to dominion for the defendant. The evidence of the defendant's guilt in burglarizing Mr. Boyce's residence was overwhelming.

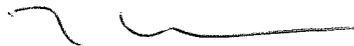
V. CONCLUSION

The defendant's convictions should be affirmed. His statements to Officer Sullivan were properly held admissible, and even if they were not, overwhelming untainted evidence supported the defendant's convictions.

RESPECTFULLY SUBMITTED this 29th day of September, 2015.

ANDY MILLER

Prosecutor



Kristin M. McRoberts, Deputy

Prosecuting Attorney

Bar No. 39752

OFC ID NO. 91004

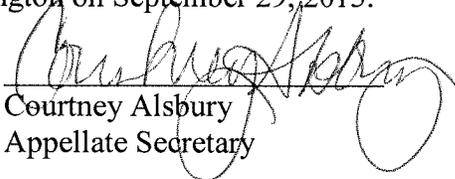
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Kenneth H Kato
Attorney at Law
1020 N Washington St
Spokane WA 99201-2237

E-mail service by agreement
was made to the following
parties: khkato@comcast.net

Signed at Kennewick, Washington on September 29, 2015.


Courtney Alsbury
Appellate Secretary