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Division III  
State of Washington  
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No. 34936-5-III

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

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STATE OF WASHINGTON,

Respondent,

v.

MARK NYUTU,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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## A. ARGUMENT

**The State did not meet its burden to have Mr. Nyutu's custodial statements admitted. The admission of Mr. Nyutu's statements is constitutional error requiring reversal.**

### **1. The State failed to prove that Mr. Nyutu was provided complete and accurate *Miranda* warnings.**

After a physical encounter at a bar between Mark Nyutu, a patron, and Faatuiolemotu Laolagi, a bouncer, police arrested Mr. Nyutu. Statements elicited from Mr. Nyutu by police, as recorded by a body camera worn by one of the officers, were admitted and used at trial to persuade the jury to convict Mr. Nyutu of second degree assault. RP 10-12; Ex. 4. The issue is whether these statements were improperly admitted.

The State begins by discussing the statements Mr. Nyutu made before he was formally arrested and taken into custody. Br. of Resp't at 7-9. But Mr. Nyutu is not arguing that the admission of these statements was error.

What Mr. Nyutu is arguing is that the admission of statements elicited following his arrest was constitutional error. Br. of App. at 20. The State bore the burden of proving that complete and accurate Miranda<sup>1</sup>

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

warnings were provided to him. State v. Mayer, 184 Wn.2d 548, 558, 566, 362 P.3d 745 (2015). The State did not meet its burden. Br. of App. at 16-20.

The State concedes that the cases cited by Mr. Nyutu are “on point and accurate.” Br. of Resp’t at 9. The State agrees that the sole evidence offered at the CrR 3.5 hearing was the certification of probable cause statement written by Officer Thomas Cornish. Br. of Resp’t at 5. Although the report states that Mr. Nyutu “was advised of his constitutional rights,” no details are provided on what this means. CP 3.

The State contends that this cursory statement was enough for the trial court to conclude that Mr. Nyutu had been “given his full Miranda warnings.” RP 10-11. In support of its argument, the State cites State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999). Without providing a pincite, the State argues that this case stands for the proposition that: “When the evidence is simply testimony that *Miranda* rights were read, and there is no evidence of the individual statements, a court can still find that a suspect was advised of their *Miranda* rights.” Br. of Resp’t at 9. The State also says this case stands for the proposition that “constitutional rights and *Miranda* rights can be used interchangeably.” Br. of Resp’t at 9.

Johnson does not say these things or stand for these propositions. There, the argument from the defendant was “that because the police failed to read him the waiver portion of the *Miranda* warnings his statement regarding the location of the handgun was made neither voluntarily nor knowingly.” Johnson, 94 Wn. App. at 897. Whether complete and accurate Miranda warnings were provided to the defendant was not the issue. Johnson is simply not on point. And even if Johnson said what the State represents (which it does not), it would not be controlling because Mr. Nyutu is making a different argument. Cont’l Mut. Sav. Bank v. Elliott, 166 Wash. 283, 300, 6 P.2d 638 (1932); ETCO, Inc. v. Dep’t of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992).

That the Washington Supreme Court has referred to Miranda rights as “constitutional rights” in passing does not help the State’s argument. Br. of Resp’t (citing State v. Unga, 165 Wn.2d 95, 98, 196 P.3d 645 (2008)). Even assuming that “constitutional rights” are synonymous with “Miranda rights,” this does not show the State met its burden to prove Mr. Nyutu was read a complete and accurate statement of his rights. The statement must convey to the suspect that, before any questioning, (1) the suspect has the right to remain silent; (2) anything said can be used against the suspect; (3) the suspect has the right to have counsel present before

and during questioning, and (4) if the suspect cannot afford counsel, one will be appointed. In re Woods, 154 Wn.2d 400, 434, 114 P.3d 607 (2005). A cursory statement that a suspect was “advised of his constitutional rights,” does not establish the foregoing.

The Court should hold that to prove a person was provided complete and accurate Miranda warnings, more is needed than a written report stating only that the person was “advised of his constitutional rights.” Therefore, the admission of Mr. Nyutu’s custodial statements was error.

**2. The State does not prove the error harmless beyond a reasonable doubt.**

Because the admission of Mr. Nyutu’s statements was constitutional error, prejudice is presumed and the State bears the burden of proving harmlessness beyond a reasonable doubt. Br. of App. at 20-21. For the State to meet its burden, this Court must conclude beyond a reasonable doubt that “*any reasonable jury* would have reached the same result, despite the error.” State v. DeLeon, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (internal quotation omitted). This is a stringent test. Because this Court cannot “say that *beyond a reasonable doubt* that *any reasonable jury* would have reached the same result if given only the untainted evidence,” reversal is required. Id. at 489.

Mr. Nyutu was charged and convicted of second degree assault. This required proof beyond a reasonable doubt that Mr. Nyutu intentionally assaulted Mr. Laolagi and that Mr. Nyutu thereby recklessly inflicted substantial bodily harm on Mr. Laolagi. CP 26 (to-convict instruction); RCW 9A.36.021(1)(a). Recklessness required proof that Mr. Nyutu was aware of a substantial risk of substantial bodily harm, but disregarded this risk. CP 35 (instruction on recklessness). The State's theory of prosecution was that Mr. Nyutu committed this offense by intentionally striking Mr. Laolagi in the head several times with a broken beer bottle (which likely broke in the fall to the ground). RP 265-66.

The State does not dispute that, in support of its theory, the prosecutor repeatedly used the statements at issue against Mr. Nyutu during its closing summations before the jury. Br. of App. 21-22. The prosecutor cited Mr. Nyutu's statements as evidence that Mr. Nyutu acted intentionally. RP 270. The prosecutor argued he showed that Mr. Nyutu acted recklessly because he knew he had a beer bottle in his hand, but hit Mr. Laolagi anyway. RP 272-73.

Defense counsel had a different theory. He argued during closing that the evidence indicated that Mr. Nyutu was not aware of a substantial risk that he would cause substantial bodily harm in hitting Mr. Laolagi with his fists. RP 275. Mr. Nyutu was under the influence of alcohol and

on the floor under Mr. Laolagi. RP 275. Thus, defense counsel argued the jury should find Mr. Nyutu not guilty.

To rebut the defense's claim, the prosecutor played portions of the police recording, which contained Mr. Nyutu's statements. RP 286-88; Ex. 4.

This record shows that the statements were integral to the prosecution's case. The prosecution relied on the tainted evidence to affirmatively prove its case and to rebut Mr. Nyutu's defense. Thus, the error is not harmless beyond a reasonable doubt.

Nevertheless, the State maintains the untainted evidence overwhelming established all the elements of the offense beyond a reasonable doubt. Br. of Resp't at 12-14. The State is wrong.

The testimony from witnesses do not overwhelmingly establish that Mr. Nyutu committed second degree assault. The testimony by the witnesses do not establish that Mr. Nyutu acted recklessly while on the ground under Mr. Laolagi. The same is true as to the statements Mr. Nyutu made prior to custody. The videos from the bar, while important, do not clearly show what happened when the confrontation escalated. As for the evidence indicating that Mr. Laolagi was a staff member, this does not relate to whether Mr. Nyutu acted with the required mental states.

The Court should reject the State's argument and hold the error has not been shown to be harmless beyond a reasonable doubt.

**B. CONCLUSION**

Mr. Nyutu establishes constitutional error. Because the State fails to prove this error harmless beyond a reasonable doubt, this Court must reverse the conviction.

DATED this 20th day of November, 2017.

Respectfully submitted,

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**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2017.

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# WASHINGTON APPELLATE PROJECT

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