

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.

---

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

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APPELLANT'S OPENING BRIEF

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RICHARD W. LECHICH  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## **A. INTRODUCTION**

Shortly before closing time at a crowded bar and after a night of drinking, Mark Nyutu was accosted by the bar's bouncers, or as the trial court later remarked at sentencing, "thugs." His offense? Leaning backward against the bar. After a bouncer repeatedly placed his hands on Mr. Nyutu, Mr. Nyutu defended himself and was tackled to the ground. The bouncer was injured by a glass bottle Mr. Nyutu had in his hand. Mr. Nyutu was charged and convicted of second degree assault. Because Mr. Nyutu's custodial statements to police were improperly admitted and used to persuade the jury to convict Mr. Nyutu, this Court should reverse.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution, the trial court erred in admitting Mr. Nyutu's statements to the police after his arrest.

2. The trial court erred in concluding that Mr. Nyutu had been read his full Miranda warnings.

3. The trial court failed to enter written findings of fact and conclusions of law following the CrR 3.5 hearing.

### **C. ISSUE**

To have a defendant's custodial statements admitted at trial, the government bears the burden to prove that the defendant was provided complete and accurate Miranda warnings. These warnings must convey 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 this case, the sole evidence was a police report, which stated Mr. Nyutu "was advised of his constitutional rights." But the report provided no details or explanation as to what this meant. Did the State fail to meet its burden to prove that Mr. Nyutu was provided complete and accurate Miranda warnings?

### **D. STATEMENT OF THE CASE**

On April 10, 2016, at around 1:30 a.m., Pullman police responded to a call about a "fall" that resulted from a fight at "Stubblefields." CP 3; RP 111, 173-74, 232. Stubblefields is large bar. RP 112. It features a dance floor and is frequented by many college students. RP 112-13. On Fridays and Saturdays, the bar employs around 6 to 10 bouncers, sometimes more if there was an event. RP 117. As it was a Saturday

night (early Sunday morning), Stubblefields was busy and crowded. Ex. 4 (videos 2 and 3).<sup>1</sup>

Inside, police found Mark Nyutu, a young college student, injured and lying in a pool of blood:

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<sup>1</sup> Exhibit 4 contains four videos, all of which were admitted. Three videos are surveillance from Stubblefields. It also contains video taken from an officer's body camera. The video showing the walkway of the bar is referred to as "video 1"; the video of the dance floor as "video 2"; the video of the bar as "video 3"; and the video from the body camera as "body camera."



Ex. 31; CP 3; Ex. 4 (body camera) at 15:48-52. Mr. Nyutu had a swollen right eye and cuts on his hands and head. CP 3. Glass shards from a broken beer bottle were found nearby. RP 223-24, 226-27; Ex. 11-12.

Mr. Nyutu had encountered Faatuiolomotu Laolagi, a bouncer at Stubblefields. CP 3; RP 113. Mr. Laolagi was about 6 feet, 1 inch tall, weighed 215 pounds, and played rugby at Washington State University.

RP 159. In contrast, Mr. Nyutu was shorter and estimated to weigh around 135 pounds. RP 184, 273; ex. 4 (video 3).

Police found Mr. Laolagi in the parking lot being treated for injuries to his head. CP 3. Mr. Laolagi went to the hospital for treatment. CP 3.

After speaking with Mr. Nyutu, Mr. Laolagi, and Demaundray Woolridge, another bouncer at Stubblefields, the police decided to arrest Mr. Nyutu. CP 3.

Following Mr. Nyutu's arrest, Officer Thomas Cornish recorded his interaction with Mr. Nyutu on his body camera. RP 177-78. Mr. Nyutu, Officer Cornish, and another officer, engaged in a back and forth discussion on the drive to the station. Ex. 4 (body camera) at 6:30 to 10:25. In response to being told that he put the "other guy" in the hospital, Mr. Nyutu explained that there was a scuffle and he defended himself. Ex. 4 (body camera) at 7:35-7:49. They continued to speak at the police station. Ex. 4 (body camera) at 11:00: to 29:13. Mr. Nyutu expressed that he felt like the victim. Ex. 4 (body camera) at 17:26-28. Officer Cornish asked Mr. Nyutu to tell him what happened, from the beginning to the end. Ex. 4 (body camera) at 19:10-20.

Mr. Nyutu explained he went to the bar because he was almost done with his drink. Ex. 4 (body camera) at 19:24-30. He recalled that a

man shoved him. Ex. 4 (body camera) at 21:29-32. He did not realize he was pushed by security. Ex. 4 (body camera) at 21:34-38. He felt like he was assaulted. Ex. 4 (body camera) at 22:07-08. He recalled he lost his balance and he swung. Ex. 4 (body camera) at 22:50-52. He remembered being shoved and then retaliating. Ex. 4 (body camera) at 23:10-13. The officers asked Mr. Nyutu about the beer bottle and asked if it broke when he threw the punch. Ex. 4 (body camera) at 23:30-38. Mr. Nyutu said the bottle broke during the confrontation. Ex. 4 (body camera) at 23:43-45. He could not say if it broke when he retaliated or when he was pushed. Ex. 4 (body camera) at 23:49-53. He said holding a beer does not restrict him from throwing a punch. 24:10-15. He stated he was getting “mowed” on the ground. Ex. 4 (body camera) at 24:25-27. Mr. Nyutu explained he played soccer and was ambidextrous with all his limbs. Ex. 4 (body camera) at 24:45-50. After the punch, he recalled being taken to the ground and being overpowered. Ex. 4 (body camera) at 25:00-10.

Mr. Nyutu was charged with second degree assault. CP 5-6; RCW 9A.36.021(1)(a).<sup>2</sup>

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<sup>2</sup> This is a “most serious offense.” RCW 9.94A.030(33)(b). Three convictions for most serious offenses exposes a person to a life sentence. RCW 9.94A.570; RCW 9.94A.030(38)(a)(i).

Before trial, the court held a CrR 3.5 hearing. Based solely on the probable cause document, the court admitted Mr. Nyutu's statements to the police. RP 10-11.

At trial, Mr. Laolagi testified that he saw Mr. Nyutu leaning against one of the bars. RP 124. According to Mr. Laolagi, people are not allowed to lean on the bar, so he told Mr. Nyutu he could not do so. RP 124. Mr. Laolagi stated that Mr. Nyutu did not follow his instructions, became upset, and threatened him. RP 125-27. With the assistance of other bouncers, including Mr. Woolridge, they moved Mr. Nyutu to an area away from the bar. RP 136-37, 164, 194, 208-09.

According to Mr. Laolagi and Mr. Woolridge, Mr. Nyutu punched Mr. Laolagi using his right hand while holding a beer bottle in his left hand. RP 164, 195. Mr. Laolagi tackled Mr. Nyutu to the ground. RP 164-65. On the ground, Mr. Nyutu purportedly punched Mr. Laolagi and hit him with the bottle, which had broken. RP 148-49, 165. Mr. Laolagi denied hitting Mr. Nyutu. RP 165. Mr. Laolagi and other security restrained Mr. Nyutu on the ground. RP 165, 195.

Surveillance footage from the bar was admitted. Ex. 4 (videos 1-3). One of the videos captures the encounter between Mr. Nyutu and Mr. Laolagi before matters escalated. Ex. 4 (video 3). It shows Mr. Laolagi, in the upper left area (wearing a black shirt), start to approach Mr. Nyutu,

in the bottom left area (wearing a dark shirt), before Mr. Nyutu leans backward against the bar:



Ex. 4 (video 3). About 4 seconds later, Mr. Laolagi places his hands on Mr. Nyutu and starts a conversation:



Ex. 4 (video 3). The exchange appears to quickly escalate as Mr. Laolagi forcibly moves Mr. Nyutu away from the bar:





Ex. 4 (video 3). Mr. Laolagi and other staff detain Mr. Nyutu and he is moved further away from the bar and out of the view of the camera:



Ex. 4 (video 3). Video from of the dance floor shows a physical struggle between people moving from the upper left to the upper right, but it is difficult to see:





Ex. 4 (video 2). Video from another camera shows Mr. Nyutu with Mr. Laolagi on top of him (on the right side of the screen):



Ex. 4 (video 1). Mr. Nyutu is then restrained and left in a pool of blood until police arrive:





Ex. 4 (video 1).

Officer Cornish testified about what Mr. Nyutu said to him after his arrest and at the police station. RP 175-78. Part of Officer Cornish's body camera footage, which contained audio, was admitted and played for the jury. Ex. 4 (body camera); RP 178.

During closing, the prosecutor emphasized particular statements made by Mr. Nyutu in answering questions by the police at the station. RP 286-88.

The jury convicted Mr. Nyutu of second degree assault. RP 292.

At sentencing, Mr. Nyutu told the court he did not recall much of the incident. RP 302-03. The court also heard from Mr. Nyutu's mother, father, and other relatives. RP 298-99.

The State recommended a sentence of nine months, the high end of the standard range. RP 296. The trial court rejected the State's recommendation and sentenced Mr. Nyutu to three months, the low end of the standard range. RP 308; CP 45. The court explained Mr. Nyutu was not entirely to blame and that the staff at Stubblefields had appeared to act "like a bunch of thugs":

Well, here, this bar fuels you -- and that's no excuse, you drank it -- but it doesn't sound to me like it bothered this bar or the people at the bar too much to take your money and get you drunk, and get you as belligerent as you were.

They're so highly trained in dealing with intoxicated people, and belligerent intoxicated people, apparently, that they get a nice stake; and then it looked to me like a bunch of thugs dealing with someone that was -- they got right down on your level. So I think there's some blame to go around to everyone, including this bar and the people that worked at the bar -- not so much the victim, he seemed to be fairly polite -- but I think if they were as trained and as professional as they claim to be, they wouldn't have got you in this state or helped get you in the state you were in, and could have handled this so nobody would have got as hurt, and you wouldn't have been in on a felony.

307-08.

Mr. Nyutu appeals.

## E. ARGUMENT

**The State did not meet its burden to prove that Mr. Nyutu was provided adequate *Miranda* warnings and that he validly waived his rights. The admission of his statements requires reversal.**

**1. Statements elicited from suspects during custodial interrogation are inadmissible absent a valid waiver of the suspect's *Miranda* rights.**

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these constitutional rights, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before interrogation. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). Absent a valid waiver, statements obtained from custodial interrogation are inadmissible. Miranda, 384 U.S. at 475.

To have a defendant's custodial statement admitted, the government bears the burden of proof. State v. Mayer, 184 Wn.2d 548, 558, 362 P.3d 745 (2015); Missouri v. Seibert, 542 U.S. 600, 609 n.1, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (plurality). Statements elicited during custodial interrogation are inadmissible unless the government meets its "heavy burden" to prove that the defendant knowingly and intelligently waived his right to silence and counsel. Miranda, 384 U.S. at

475; Mayer, 184 Wn.2d at 548. “To be knowing and intelligent, a waiver must be ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” Mayer, 184 Wn.2d at 548 (quoting Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

To meet its burden, the government must show that the Miranda warnings were accurate, although the exact words from the Miranda opinion need not be used. Mayer, 184 Wn.2d at 548. “The Government cannot and should not presume that individuals are already aware of what rights they possess prior to being questioned.” United States v. San Juan-Cruz, 314 F.3d 384, 389 (9th Cir. 2002). The warnings 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). Conflicting or confusing sets of warnings may invalidate a defendant’s waiver. Mayer, 184 Wn.2d at 562. A legal conclusion concerning the adequacy of the Miranda warnings is an issue of law reviewed de novo. Id. at 548.

**2. Without proof that valid *Miranda* warnings were provided, the court admitted Mr. Nyutu's statements.**

If a statement of an accused person is to be offered into evidence, the court must hold a hearing to determine the admissibility of the statement, at which the prosecution bears the burden of proof. CrR 3.5(a). The State sought to admit Mr. Nyutu's statements to the police into evidence. CP 8.

The court held a hearing on December 9, 2016. RP 4. At the hearing, the sole evidence consisted of the certification of probable cause, i.e., a police report, written by Officer Cornish. RP 6-7; CP 2-4.

Concerning his interaction with Mr. Nyutu, Officer Cornish wrote that Mr. Nyutu "was advised of his constitutional rights," but provided no further details:

I asked Nyutu to tell me what happened between Laolagi and him. Nyutu was heavily intoxicated. Nyutu said he was getting a beer from the bar. He said he inadvertently bumped into a female. Initially Nyutu said Laolagi punched him, but later said Laolagi only pushed him. He did not know that Laolagi was an employee. He said he defended himself. I asked him to explain to me what he meant by defended himself. Nyutu would not elaborate. I placed Nyutu under arrest for Assault in the 2nd Degree. Nyutu was advised of his constitutional rights and that he was being audio and visually recorded. Nyutu said he understood. Once at the station Nyutu said he wanted to tell his side of the story. Nyutu said Laolagi pushed him at the bar. He said Laolagi was not wearing a 'staff' shirt and he did not know Laolagi was an employee. He said he

reacted and punched Laolagi with his right hand. He said they both fell to the ground. He said he punched Laolagi because he felt like he was getting attacked. He said the beer bottle was in his hand, but he was unsure how the bottle got broken. He said it happened so fast he could not recall his exact actions after being pushed.

CP 3 (emphasis added). The other parts of the report relate to Officer Cornish's observations and statements made by others. CP 3.

Based on this report, the prosecutor argued that all of Mr. Nyutu's statements were admissible. RP 10-11. Although the report just says Mr. Nyutu was "advised of his constitutional rights," the prosecutor asserted Mr. Nyutu had been "read his full Miranda Rights." RP 9. Based on the body camera video, which was not submitted into evidence at the hearing,<sup>3</sup> the prosecutor disclosed that custodial interrogation occurred after Mr. Nyutu's formal arrest, but that it was not coercive. RP 9-10.

The court admitted all of Mr. Nyutu's statements. RP 10-12. The court ruled that Mr. Nyutu had been "given his full Miranda warnings" and that Mr. Nyutu validly waived his rights by acknowledging them and speaking with the police. RP 10-11.

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<sup>3</sup> This appears to refer to the body camera video that was admitted into evidence at trial, but not at the CrR 3.5 hearing. Ex. 4 (body camera). The video, close to 30 minutes long, does not show an officer providing Mr. Nyutu Miranda warnings. The video begins with Mr. Nyutu in handcuffs being escorted to a police car. Once in the car, Mr. Nyutu states he was not provided his Miranda rights, to which the officer states that "we did." Ex. 4 (body camera) at 3:43-47.

**3. The State did not meet its burden to prove that complete and accurate *Miranda* warnings were provided to Mr. Nyutu.**

The State failed to prove that Mr. Nyutu was provided complete, accurate, and nonconflicting Miranda warnings. The only evidence before the court on this issue was that “Nyutu was advised of his constitutional rights.” CP 3. It is unclear what “constitutional rights” the officer is referring to. There are many constitutional rights. Even if it could be inferred that this meant that Mr. Nyutu was read Miranda warnings, this does not establish that the warnings were adequate. Thus, the State failed to meet its burden. See Mayer, 184 Wn.2d at 566 (State failed to meet burden establishing valid waiver of Miranda rights because explanation of rights was deficient).

Accordingly, the trial court erred in concluding that Mr. Nyutu had been “given his full *Miranda* warnings.” RP 10. Mr. Nyutu’s subsequent statements to the police should have been ruled inadmissible.

**4. The error is not harmless beyond a reasonable doubt.**

The admission of statements obtained in violation of Miranda are subject to the constitutional harmless error test. Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Prejudice is presumed and the State bears the burden of proving the error

is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

The State cannot meet its burden. At trial, Mr. Nyutu's post-arrest statements were recounted by Officer Cornish. RP 177-79. Additionally, a lengthy video taken from Officer Cornish's body camera was admitted and played for the jury. RP 178. This video contains audio. Ex. 4. It shows Mr. Nyutu being transported to the police station and his interaction with police at the station before being placed in a cell. Ex. 4. Mr. Nyutu's statements to the police on the video are not unsolicited, rather they were in response to police questioning. RP 286-88; Ex. 4.

To prove Mr. Nyutu guilty of second degree assault, the State bore the burden of proving that Mr. Nyutu intentionally assaulted Mr. Laolagi and that he thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021; CP 26. During closing argument, the prosecutor cited Mr. Nyutu's statements to police at the station in support of its argument that it had proved these elements beyond a reasonable doubt:

He says to the officer at the station, "I know in my mind that I have a beer, whether the beer is broken or not, I'm throwing a punch. That's what's going to come first because the beer doesn't restrict me from throwing the punch." He didn't care that the broken bottle was in his hand. He didn't care that Tui Laolagi told him what to do and now is taking him to the ground. He was going to hit

him. So has that element been proven beyond a reasonable doubt? Yes.

RP 270. The prosecutor further argued Mr. Nyutu's statements showed he knew he had a bottle in his hand when he struck the bouncer, and thereby proved Mr. Nyutu acted recklessly. RP 272-73. During rebuttal, the prosecutor repeatedly played portions of the video of Mr. Nyutu answering questions from the police at the station and used Mr. Nyutu's words against him. RP 286-88.

Because the error was not harmless beyond a reasonable doubt, this Court should reverse and remand for a new trial.

**5. The trial court failed to enter written findings of fact and conclusions of law.**

After conducting a CrR 3.5 hearing, the court must enter written findings of fact and conclusions of law. CrR 3.5(c). This ensures that there is an adequate record for the review. See State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998).

No findings or conclusions were entered. Unless this Court is satisfied with the record, the remedy is remand for entry of the findings and conclusions. See id. at 624-25.

If this Court is satisfied that the court's oral ruling provides sufficient information, this Court may review the issues without remanding. State v. Radka, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004).

## **F. CONCLUSION**

The State did not meet its burden proving that Mr. Nyutu was provided complete Miranda warnings as necessary to admit his custodial statements at trial. The trial court erred in admitting Mr. Nyutu's statements. The conviction should be reversed.

DATED this 9th day of August, 2017.

Respectfully submitted,

/s Richard W. Lechich  
\_\_\_\_\_  
Attorney for Appellant  
WSBA#43269  
Washington Appellate Project  
1511 Third Ave, Ste 701  
Seattle, WA 98101  
Telephone: (206) 587-2711  
Fax: (206) 587-2711

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DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 34936-5-III
	)	
MARK NYUTU,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **OPENING BREF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] MARK NYUTU 1031 12 <sup>TH</sup> ST. NE AUBURN, WA 98002	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF AUGUST, 2017.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

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