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Court of Appeals
Division III
State of Washington

No. 34936-5-III

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent

v.

MARK NJORGE NYUTU, Defendant/Appellant

BRIEF OF RESPONDENT

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RESTATEMENT OF THE ISSUES

1. Did the Court have sufficient information to determine that the Defendant made statements prior to custodial interrogation which were admissible?

2. Did the State meet its burden to prove that complete and accurate *Miranda* warnings were provided to Mr. Nyutu for his custodial statements?

3. Even if the admissions of the Defendant were entered in violation of *Miranda*, was the error harmless?

4. Did the Court fail to enter findings of fact and conclusions of law?

BRIEF ANSWERS

1. Yes. There were no objective facts submitted to indicate the Defendant's freedom of movement was curtailed to a degree associate with formal arrest.

2. Yes. The term "constitutional rights" and "*Miranda* rights" are interchangeable.

3. Yes. There was overwhelming untainted evidence to prove the charge of assault second degree beyond a reasonable doubt.

4. Yes. The State believes the Brief of Appellant properly addresses this issue.

STATEMENT OF THE CASE

The Appellant, Mr. Nyutu, threatened to assault and kill Tui Laolagi on April 10, 2016, at Stubblefield's Bar, in Pullman Washington. RP 112, 126, 129-30, 135. The Appellant repeatedly

struck Mr. Laolagi in the side of the head with a broken beer bottle. RP 148-49. Mr. Nyutu also bit Mr. Laolagi in the chest which caused bruising which had not been there before the assault. CP 3, RP 149, 153-54. During the Assault, Mr. Nyutu kept telling Mr. Laolagi "I told you so, I told so." RP 149. Mr. Laolagi had lacerations and severe bleeding from his head, which formed a pool of blood, and easily overran the shirt and towel he wrapped his head with, running down his face and arm. RP 150-52, 195, 226-27, 232, 239-41. Mr. Laolagi had almost 30 staples put into his head, and more in his elbow, and suffered from severe headaches and sharp pains for about 6 weeks after the assault, which also caused a loss of appetite. RP 153-158. The pain in his head was enough to force him to sleep in different positions, and would wake him up at night if he rolled onto that part of his head. RP 159. Furthermore, he changed jobs due to this incident. RP 158.

Subblefields is a dance bar and grill on Greek Row and the largest bar in Pullman, frequented mostly by students. RP 112-13. The bar has two floors, with a dance floor downstairs. RP 112. The bar employs bouncers, and their duties included checking identification at the door, helping to set up, helping the bar staff, and basic security. RP 113-14. The bouncers wore shirts that said

"Stubblefield's" on the front, and "Staff" on the back, and that is what Mr. Laolagi was wearing when he went to talk to the Appellant. RP 114-16, Exhibit 5. The bouncers also carried flashlights to communicate in the loud, dark downstairs where the dancefloor was located, and would use the flashlights to highlight for patrons that they were employees of the bar. RP 120-21.

Early Sunday morning on April 10, 2016, Mr. Laolagi was working at Stubblefield's when he saw the Appellant leaning with his back up against the bar. RP 99, 121-22. Mr. Laolagi walked up to the Appellant, Mr. Nyutu, and told him that he could not lean against the bar per bar policy. RP 124. Mr. Nyutu refused to move, and Mr. Laolagi then turned on his flashlight, and highlighted the shirt showing the Appellant that he worked there. RP 124-25, 134-35. Mr. Nyutu grew more upset, began using profanity and again reiterated that he was not going to move. RP 125-26. It was loud and dark in the dance area, and Mr. Laolagi tried to listen to Mr. Nyutu, but things escalated quickly. RP 126, 194. At this point, Mr. Nyutu started to threaten to assault Mr. Laolagi, and went on to state that he had friends that would "kill [Mr. Laolagi] for free," at which point Mr. Laolagi used his flashlight to signal help from Mr.

Woolridge, another bouncer working that night. RP 129, 135-36. 161, 166, 193-94.

At this point, Mr. Woolridge took over talking to Mr. Nyutu in order to shift attention away from Mr. Laolagi. RP 129-31, 194-95. This switch of personnel was also used in an attempt to help Mr. Nyutu understand that the situation wasn't personal, but was related to the business. *Id.* Mr. Nyutu was holding a beer in his left hand as all of these events proceeded. RP 164, 209-11. However, as Mr. Nytutu continued to be agitated and not calm down, the staff decided it was time to move him out of the bar. RP 136, 168. At this point, Mr. Laolagi went back towards Mr. Nyutu because he was concerned, as Mr. Woolridge was unaware of the threats that Mr. Nyutu had uttered. RP 163-64, 168. When Mr. Nyutu saw Mr. Laolagi again, he said "Man I told you," and then punched Mr. Laolagi in the face, without any provocation from Mr. Laolagi. RP 164, 194-95, 222. Mr. Laolagi tried to grab Mr. Nyutu and prevent him from throwing any more punches, but they both fell backwards, with Mr. Nyutu landing on his back and Mr. Laolagi landing on top and to the side of him. RP 164-65. As they went to the ground, Mr. Laolagi heard the beer bottle break. RP 165. Once on the ground, the Appellant began to repeatedly punch Mr. Laolagi in the side of

the head with the hand holding the broken beer bottle, and telling Mr. Laolagi "I told you so" repeatedly, causing the injuries described above. RP 149, 150-58, 165. Other security personnel followed Mr. Nyutu and Mr. Laolagi as they were falling down the steps and to the floor where they ended up. RP 195, 209-11. Once Mr. Nyutu had calmed down, the bar manager removed the broken beer neck bottle from his hand. RP 212-13. A video recording of much of the interaction between the two men prior to the fight was captured by Stubblefield's bar with their security cameras. RP 131-32. Both parties refer to the video throughout their presentation of evidence and in argument, to corroborate or attack statements made by the witnesses at trial. RP 100, 103-04, 106, 108, 131-37, 145-49, 160, 262-66, 272, 276. The jury therefore had ample opportunity to view the video during the course of the trial.

CrR 3.5 Hearing:

A CrR 3.5 hearing was held prior to the trial, on December 9, 2016. RP 4-11. The Defendant did not choose to present any evidence. The State relied on the probable cause booking sheet, and argued from the report that the Defendant was read his *Miranda* rights, agreed to speak, and that he understood his rights

and voluntarily waived them. RP 4-5. The Court first advised the Defendant of his rights pursuant to a 3.5 hearing, and the Defendant indicated that he understood those rights, and did not choose to present any evidence. RP 5-6. The Court then read the report as far as it concerned Mr. Nyutu and his statements on the record, and both that reading and the probable cause sheet which the court read from are available for review. CP 2-4, RP 7-9.

The evidence provided showed that the officer asked Mr. Nyutu what happened between Mr. Nyutu and Mr. Laolagi at the scene of the incident, after Mr. Nyutu had refused medical attention by medical staff. RP 8, CP 3. Mr. Nyutu indicated that he accidentally bumped into a woman, and at first stated that Mr. Laolagi punched him, but later said he pushed him. RP 8, CP3. Mr. Nyutu further explained to the officer that he didn't know that Mr. Laolagi was a staff member, and Mr. Nyutu was defending himself. *Id.*

Mr. Nyutu was placed under arrest after making these statements, and was read his constitutional rights, and further informed that he was being audio and visually recorded. *Id.* Mr. Nyutu said he understood his rights. *Id.* At the police station, Mr. Nyutu said that he "wanted to tell his side of the story," and then

once again proceeded to explain that he didn't know Mr. Laolagi was staff and he was defending himself. *Id.* He further stated that he had the beer bottle in his hand, but didn't know how it got broken, and that the event occurred so fast he could not fully recall what happened. *Id.*

ARGUMENT

I. The pre-arrest statements of Mr. Nyutu were properly admitted at trial as Mr. Nyutu did not provide any objective facts to indicate he was in custody prior to arrest.

"*Miranda* warnings were designed to protect a defendant's right not to make incriminating statements while in police custody." *State v. Lorenz*, 152 Wn.2d 22, 36 (2004). "Miranda warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent." *Id.* "Custodial" refers to whether the Defendant's movement was restricted at the time of questioning." *Id.* "An objective test is used to determine whether a defendant was in custody—whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associate with formal

arrest." *Id.* at 36-37. It does not matter whether the officer intended to take the defendant into custody or if the defendant was the focus of the investigation. *Id.* at 37.

The burden is on the defendant to prove that he was in custody prior to the reading of *Miranda*. "The defendant must show some objective facts indicating his or her freedom of movement was restricted." *State v. Post*, 118 Wn.2d 596, 607 (1992). A *Terry* type stop does not rise to the level of "'custody' for the purposes of *Miranda*." *State v. Heritage*, 152 Wn.2d 210, 218 (2004). The appellate court will "review a trial court's custody determination de novo." *State v. Lorenz*, 152 Wn.2d at 36 (2004).

In the case at bar, the probable cause report of the officer was submitted and used at the CrR 3.5 hearing. In that report, the officer indicated that he was in the parking lot of Stubblefield's when he saw Mr. Laolagi being treated for head wounds. Mr. Nyutu was then escorted by two officers from the bar to the parking lot, where he refused medical treatment for his injuries. Officer Cornish then asked Mr. Nyutu what happened between the two men, and Mr. Nyutu freely answered those questions, stating that he

was punched or pushed by Mr. Laolagi. He further stated that he did not know that Mr. Laolagi worked for the bar. He then said he defended himself. *Id.*

Mr. Nyutu did not show or argue any objective facts indicating he felt his movement was restricted, and simply relied on the record provided by the State. RP 10. Nothing in the report indicates that the movement of Mr. Nyutu was restricted to a degree associate with formal arrest. The record indicates that the Judge found that these statements were prior to the time Mr. Nyutu was placed into custody. RP 10. There was nothing to indicate coercion or duress of any kind, and that the statements appeared voluntary. *Id.* All of these statements were properly admitted at trial.

II. Complete and Accurate Miranda Warnings were provided to the Defendant .

The case law cited by the Appellant is on point and accurate. However, if there is substantial evidence that a suspect was advised of their *Miranda* rights, and knowingly, intelligently, and voluntarily waived them, then the statements made by the suspect are admissible. 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. *State v. Johnson*, 94 Wn.App. 882 (1999). Furthermore, the terms constitutional rights and *Miranda* rights can be used interchangeably. *Id.*

In *Johnson*, a detective testified that almost immediately after forcing entry into a home on a warrant, Mr. Johnson was put "'down on the floor ... and advised of his constitutional rights.'" *Id.* at 886-87, quotation appears to be from officer's testimony. The Court of Appeals decision then notes that after the detective read Johnson his *Miranda* rights, he "indicated he understood those rights." *Id.* at 887. The Court then went on to state that another detective brought a co-defendant into the room, and the other detective read both co-defendants "<u>their rights</u>." *Id.* at 887-88, emphasis added. Once again, Mr. Johnson stated he understood his rights, and made statements that were used against him at trial. *Id* at 888. The suspect, Mr. Johnson, testified that he was not read his *Miranda* rights until they were leaving the house to go to jail, which was after the incriminating statements at issue in that case. *Id.*

Furthermore, the Washington Supreme Court has referred to *Miranda* rights as *Constitutional* rights. *State v. Unga*, 165 Wn.2d 95, 98 (2008). "Mikulcik advised Unga of his constitutional rights. After Unga signed a statement that stated he acknowledged these rights and voluntarily waived them, Detective Mikulcik asked Unga about the stolen vehicle." *Id.*

In the case at bar, the State acknowledges that this is very poor example of how to prove that the defendant was advised of his rights, and knowingly and voluntarily waived those rights. However, the State could not find one example where officers read a suspect "his rights," "her rights," or their "constitutional rights" that did not refer to the necessary *Miranda* rights. In fact, the Trial Court after reading the report and specifically seeing "constitutional rights" in the report, found that the Defendant had been read his *Miranda* rights. RP 10-11. Once his rights were read, Mr. Nyutu, just as the defendant in *Johnson* above, acknowledged that he understood his rights and voluntarily made statements. The State meekly submits that *Miranda* rights were honored, understood, and knowingly, voluntarily and intelligently waived.

III. If *Miranda* warnings were not sufficient and the statements of the Appellant should have been suppressed, there was still overwhelming untainted evidence to prove the charge of Assault Second Degree beyond a reasonable doubt.

"[A]dmission of an involuntary confession obtained in violation of *Miranda* is subject to treatment as harmless error." *State v. Reuben*, 62 Wn.App. 620, 626 (1991). The reviewing court must find the error harmless beyond a reasonable doubt. *Id.* at 626-27. There must be overwhelming untainted evidence for the error to be harmless, and therefore the reviewing court should only look to the untainted evidence to make the harmless error determination. *Id.* at 627. In that case, the Court of Appeals found that the testimony of two witnesses was overwhelming untainted evidence to prove that the defendant was driving, even without the defendant's confession. *Id.*

In the case at bar, the analysis needs to include only the evidence outside of Mr. Nyutu's statements, but could also include the statements made prior to Mr. Nyutu's arrest. The State will begin with the analysis wherein all of the statements of Mr. Nyutu are excluded.

First, the jury heard from 3 witnesses who worked for the bar, and one police officer whose observations did not center

around Mr. Nyutu's statements. The testimony of each witness bolstered and corroborated the testimony of the others. As an example, Mr. Laolagi testified as to the injuries he received, and the lacerations, blood, staples and pain that accompanied those injuries. The blood loss experienced by Mr. Laolagi was witnessed by Mr. Woolridge, Mr. Golden, and documented at the scene and the hospital by Officer Engle. Mr. Laolagi testified that before Mr. Nyutu initially punched him, he stated "Man I told you." Mr. Woolridge and Mr. Golden both testified that Mr. Nyutu punched Mr, Laolagi as soon as he saw Mr. Laolagi return, and that it was unprovoked. The evidence of the first punch thrown by Mr. Nyutu was evidence of his intent to assault Mr. Laolagi moments later with the broken beer bottle in his hand.

Another example of evidence from multiple sources includes where Mr. Laolagi stated that the Defendant had a beer in his hand when they began to talk, and heard the glass breaking as they fell to the ground during the incident. Mr. Golden testified that he removed a broken bottle neck from Mr. Nyutu's hand towards the end of the incident, and officer Engle documented with pictures where the bottle neck ended up and collected it and other bottle fragments for evidence.

Furthermore, the jury had the 3 videos from the bar (rather than the officer body cameras which caught Mr. Nyutu's statements). The jury had ample time to watch those videos during the trial and observe the body language of Mr. Nyutu and Mr. Laolagi, the time frame in which the events occurred, and to verify many of the little details of the environment of the bar that night that witnesses testified too.

Finally, if the court finds that the statements of Mr. Nyutu prior to his arrest are admissible, there is further overwhelming evidence to indicate that Mr. Nyutu was guilty of Assault Second Degree. Mr. Nyutu stated that Mr. Laolagi punched or pushed him when they first contacted, and the jury could observe that portion of the incident on the bar video. Mr. Nyutu further explained to the officer that he didn't know that Mr. Laolagi was a staff member, and Mr. Nyutu was defending himself. However, again, the jury had the video, the testimony of the bar staff, and the evidence of the shirts they wore that night to take into consideration. There was overwhelming untainted evidence the jury could use to find Mr. Nyutu guilty.

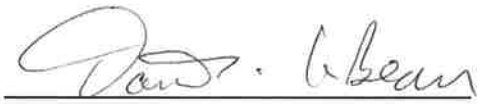
IV. The Court failed to provide findings of fact and conclusions of law.

The Appellants brief properly addresses this issue and the State has nothing to add.

CONCLUSION

For the above reasons, the State respectfully requests that this court deny Mr. Nyutu's appeal issue and affirm the decision below.

Dated this 20th day of October, 2017.



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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. MARK NJORGE NYUTU, Defendant,	Court of Appeals No. 349365 No. 16-1-00065-1 AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

-MAILED TO RICHARD W. LECHICH, ATTORNEY FOR APPELLANT, 1511 THIRD AVENUE, SUITE 701, SEATTLE, WA 98101
-EMAILED TO RICHARD W. LECHICH AT RICHARD@WASHAPP.ORG

DATED this 20th day of October, 2017.

Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 20th day October, 2017.

KRISTINA A. COOPER
NOTARY PUBLIC
COMMISSION EXPIRES 3-09-19
STATE OF WASHINGTON

Kristina A Cp
NOTARY PUBLIC in and for the State of Washington, residing at: Oakesdale
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