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(Kittitas County Superior Court No. 17-1-00123-20)

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

STATE OF WASHINGTON

Respondent,

v.

JEFFREY WAYNE GERARD

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This action arises out of the trial court's erroneous admission of statements by the Appellant. Additionally, there is insufficient evidence to support a conviction of Burglary in the Second Degree. Therefore, Appellant's burglary conviction should be dismissed with prejudice for insufficiency of evidence, or in the alternative, this matter should be remanded for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the testimony of Deputy Gunnyon who testified that Mr. Gerard was in custody and asked questions regarding the alleged offense without a valid Miranda waiver in light which was necessary due to the nature of the questioning and length of detainment without a formal Miranda warning.

2. There is insufficient evidence to convict the Appellant of the Burglary in the Second Degree.

III. STATEMENT OF THE CASE

Jeffrey Wayne Gerard was charged by information with a sole count of Burglary in the Second Degree. (CP 1-2)¹. On October 27, 2017 Mr. Gerard is alleged to have, with intent to commit a crime against a

¹ The Clerk's Papers consist of 173 pages and will be referenced as 'CP'

person or property therein, did enter or remain unlawfully in a building, other than a dwelling or vehicle located at 2233 Highway 97, Goldendale, Washington. (CP 1). Craig Overdorf owned the property at 2233 Highway 97 in Goldendale, Washington. (VRP 67)². Mr. Overdorf owned 70 acres total, with 40 acres in the rear of the parcel and 30 acres on the front of the parcel of land. (VRP 67). Contained on the front 30 acres of Mr. Overdorf's property was an 'old building.' (VRP 67). According to Mr. Overdorf, the 'old building' was located a couple hundred yards off the highway. (VRP 68). Mr. Overdorf used the building as a shop and for storage. (VRP 68). In addition to the shop, there were other outbuildings on the front 30 acres of the property. (VRP 69). A boat was stored on the front 30 acres of the property near the 'old building.' (VRP 70). Mr. Overdorf allowed customers and friends to come on to the property and did not have any 'No Trespassing' signs. (VRP 71). Mr. Overdorf, the land owner, did not post "No Trespassing" signs "because I am doing business out of there." (VRP 71). There are no "for sale" signs on Mr. Overdorf's property or the boat on his property. (VRP 71).

² The Verbatim Report of Proceedings consist 309 pages, so counsel will refer to them by 'VRP'

On October 27, 2017 about 7:15 p.m. Mr. Overdorf observed a glow in the building and a light in the window of the building. (VRP 74). Mr. Overdorf admitted the glow was “so faint it was hard to distinguish so I sat there for probably five minutes trying to decide if it was actually a light or not.” (VRP 74). Mr. Overdorf drove to his home. (VRP 74) Ten minutes later Mr. Overdorf returned to the area around the building noting nothing was out of place, but this time armed with his rifle. (VRP 74). When Mr. Overdorf approached the building, he noticed the headlights of a car behind the shop. (VRP 75). Mr. Overdorf had not seen the car when he had been there before, so he called 911. (VRP 75) While standing about 30-40 feet from the building Mr. Overdorf observed Mr. Gerard walking from the building. (VRP 76). Mr. Overdorf pointed his rifle at Appellant and ordered him to stand still and Mr. Gerard complied. (VRP 76). Mr. Overdorf held Mr. Gerard at gun point for 10-15 minutes. (VRP 77). Mr. Overdorf never asked Mr. Gerard why he was on the property. (VRP 83). When Mr. Overdorf saw Mr. Gerard, he did not have anything in his hands. (VRP 86). At some point, Mr. Gerard went to his car and drove away. (VRP 78).

As Mr. Gerard drove towards the end of the driveway, law enforcement arrived pulling in to the driveway. (VRP 78). At approximately 8:00 p.m. Trooper Pont made contact with Mr. Gerard.

(VRP 100). When Trooper Pont arrived at 2233 Highway 97, Goldendale, Washington he turned into the driveway and observed headlights coming toward him. (VRP 103). Trooper Pont observed the vehicle approach the driver's side of the vehicle slowly.(VRP 103). Trooper Pont noted the vehicle turn on his turn signal and stop on Highway 97. (VRP 103-04). Trooper Pont contacted Mr. Gerard in his vehicle a couple hundred yards away from the driveway. (VRP 104). Mr. Gerard immediately put his hands outside the vehicle. (VRP 104). Trooper Pont confronted Mr. Gerard with the reason he had stopped him, a reported burglary "that he was involved in." (VRP 105). Mr. Gerard responded to Trooper Pont's accusation stating, "he did not know the property was owned by anybody and was looking for an abandoned boat that his buddy told him about." (VRP 105). Trooper Pont's interaction with Mr. Gerard lasted about five to ten minutes. (VRP 105).

Sheriff's Officer Gunnyon arrived at Mr. Gerard's stopped vehicle approximately 8:00 p.m. on October 27, 2018. (VRP 112). Officer Gunnyon contacted Mr. Gerard and asked Mr. Gerard about why he was on Mr. Overdorf's property. (VRP 113). Mr. Gerard again stated he was there looking at a boat, and that a buddy had told him about an abandoned boat on the property. (VRP 113). Officer Gunnyon advised Mr. Gerard that he was detained for further investigation and Mr. Gerard

was not free to leave. (VRP 114). Officer Gunnyon responded to Mr. Overdorf's location while Mr. Gerard was detained and not free to leave. (VRP 114). The total time Mr. Gerard sat in his car, detained and not free to leave, was 40 minutes. (VRP 18). Officer Gunnyon returned from Mr. Overdorf's location and took Mr. Gerard into formal custody. (VRP 114). Officer Gunnyon secured the vehicle with evidence tape and obtained a search warrant. (VRP 115). During the execution of the search warrant Officer Gunnyon discovered mail belonging to Mr. Gerard, suspected drugs and paraphernalia. (VRP 116-17). Jason Stenzel of the Washington State Patrol Crime Lab tested the suspected drugs and confirmed it was Methamphetamine. (VRP 97).

Prior to trial, the Court conducted a CrR 3.5 hearing. (VRP 1-23). During the CrR 3.5 hearing Deputy Gunnyon testified about his contact with Mr. Gerard. (VRP 4). Deputy Gunnyon noted that he had contacted Mr. Gerard and asked him what "he was doing out in the middle of the night snooping around other vehicles property." (VRP 6). Deputy Gunnyon noted this initial contact with Mr. Gerard lasted about five minutes and was after Mr. Gerard had already been sitting there for 10 minutes. (VRP 8). Deputy Gunnyon went to further investigate with the property owner which took "roughly half an hour." (VRP 9). At no point was Mr. Gerard free to leave. (VRP 12). The total time Mr. Gerard was

detained, and not free to leave, was 45 minutes. (VRP 18). Finally, when Mr. Gerard was formally arrested, he was given his Miranda warnings. (VRP 13).

On April 16, 2018 the prosecutor amended the information to include a charge of Possession of a Controlled Substance and Bail Jump. (CP 42-43). Trial for Mr. Gerard began June 6, 2018 and concluded June 7, 2018 with verdicts of guilty on all three counts. (CP 147-150). Mr. Gerard was given an exceptional sentence of 84 months on Count 1, Burglary in the Second Degree, with the other counts to run concurrent. (CP 161-171). Mr. Gerard appealed.

IV. LAW AND ARGUMENT

1. Trial court erred in failing to suppress the testimony of Deputy Gunnyon where Mr. Gerard was in custody and asked questions regarding the alleged offense.

- a. Mr. Gerard was subject to custodial interrogation in the absence of a valid *Miranda* waiver which violates the protection against self-incrimination *Miranda* provides.

At a CrR 3.5 hearing, Deputy Gunnyon testified that he detained Mr. Gerard for 45 minutes, while he investigated the alleged offense. (VRP 18). The Fifth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment, provides that no person “shall be compelled in any criminal case to be a witness against himself.” Griffin v. California, 380 U.S. 609, 615- 16 (1965). Article 1,

section 9 of the Washington Constitution provides that “[n]o person shall be compelled in any criminal case to give evidence against himself.” Both clauses are liberally construed to protect the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996). “[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination.” Miranda v. Arizona, 384 U.S. 436, 475 (1966). This was based on the concerns for “the dual purposes of (1) protecting the individual from the potentiality of compulsion or coercion inherent in in-custody interrogation, and (2) protecting the individual from deceptive practices of interrogation.” State v. Hensler, 109 Wn.2d 357, 362 745 P.2d 34 (1987) (citing Heinemann v. Whitman County, 105 Wn.2d 796, 806, 718 P.2d 789 (1986)). In practice, this requires the State to prove voluntariness by a preponderance of the evidence. State v. Abdulle, 174 Wn.2d 411, 420, 275 P.3d 1113 (2012). In light of the concerns about the reliability of custodial confessions which have developed recently, it is imperative that the courts stridently maintain these safeguards.³

³ A growing body of contemporary research and experience confirms there is a real risk of involuntary confessions by suspects in custody. See, e.g., Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3 (2010) (finding that interrogation techniques produce high rates of involuntary confessions and advocating for the recording of all custodial interrogations); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L.Rev. 1051, 1052-53 (2010) (finding that 42 of the 252 inmates exonerated by the innocence project had falsely confessed to their crime).

“Custodial interrogation” is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Miranda, 384 U.S. at 444. Mr. Gerard was plainly subject to custodial interrogation under the circumstances described at the CrR 3.5 hearing. The fact that neither the prosecutor or Deputy did not want to call it that does not matter. Ultimately, a court determines the voluntariness of a defendant’s custodial statements by reviewing the totality of the circumstances. State v. Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996).

Whether the prior Miranda warnings became stale and thereby preclude a finding of a voluntary waiver is judged not by the mere length of time what has passed but by all the relevant circumstances. United State v. Rodriguez-Preciado, 399 F.3d 1118, 1128 (9th Cir.2005). There is no rigid rule relating to the passage of time. United States v. Andaverde, 64 F.3d 1305, 1311 (9th Cir., 1995).

Here Mr. Gerard was contacted and stopped, by law enforcement for the sole purpose of investigating the call that Mr. Overdorf had made to 911. Law enforcement admits that Mr. Gerard was never free to leave.

The trial court seems to mischaracterize Mr. Gerard's initial statement as "unsolicited." (VRP 21). This does not comport with Deputy Gunnyon's pointed question upon initial contact, "Yeah, I just asked him why he was out here in the middle of the night?" (VRP 5). Finally, the record reflects that Mr. Gerard had already been detained by Officer Pont for purposes of the investigation. (VRP 104).

b. Suppression of Mr. Gerard's statements were necessary.

In the absence of a valid contemporary waiver of his Miranda rights, the trial court erred in finding the statements to Deputy Gunnyon admissible. See generally, Missouri v. Seibert, 542 U.S. 600 (2004). Mr. Gerard was only advised of his Miranda warnings after he had been advised he was being detained, not free to leave, a 45 minute investigation was done, and the Deputy asked questions designed to elicit an incriminating response.

The only thing the trial court should have done was suppressed Mr. Gerard's statements as they were clearly not unsolicited.

2. The evidence is insufficient because the State did not provide any evidence that Mr. Gerard entered the building with the intent to commit a crime.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. at 364; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. CONST.

AMEND. XIV; WASH. CONST. ART. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

By statute, a person is guilty of second degree burglary "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030. The "to convict" instruction required the State to prove: (1) Gerard "entered or remained unlawfully in a building" on October 27, 2017; and (2) "that the entering or remaining was with intent to commit a crime against a person or property therein. (CP 126) Both elements are at issue here; the element of "entered or remained unlawfully in a building" and "with the intent to commit a crime against a person or property therein. A person unlawfully enters or remains in a building when he is not then "licensed, invited, or otherwise privileged to enter or remain." RCW 9A.52.010(3). The State was required to prove Gerard had no right to be in the residence. State v. Gregor, 11 Wn. App. 95, 99, 521 P.2d 960 (1974), review denied, 84 Wn.2d 1005 (1974)

(citing State v. Rio, 38 Wn.2d 446, 230 P.2d 308 (1951)).

The evidence presented included that the owner had not posted “No Trespassing” signs. (VRP 71). Moreover, the property also had the property owner’s business located on it, which allowed his customers to come on to his property. (VRP 71). The evidence the jury heard was that this property was accessible from the road, and there were no signs telling anyone, including Mr. Gerard that they were not permitted to be there. The property owner describes the building as dilapidated, and the boat as not operational. (VRP 84, 89) In fact, the property owner conceded that he burnt the dilapidated building down because it was an attraction and wanted to keep people off the property. (VRP 89). There simply is no evidence that Mr. Gerard entered the building, let alone whether he had an intent to commit a crime against person or property. There was no evidence presented that Mr. Gerard was personally not allowed to be on the property. Contrary to the State’s conflation of a trespass and burglary, there was nothing preventing Mr. Gerard from entering the property to investigate whether either the property itself or items on the property were for sale.

Where insufficient evidence supports conviction, the charge must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Mr. Gerard’s burglary conviction must be reversed,

and the charge dismissed with prejudice because the State failed to prove each element of the charged offense

V. CONCLUSION

The trial court should not have admitted the statements Mr. Gerard made to law enforcement absent a valid Miranda waiver. Moreover, there was insufficient evidence to convict Mr. Gerard of the second degree burglary. Therefore, this matter should be remanded to the trial court for a new trial or in the alternative, the conviction for burglary dismissed.

RESPECTFULLY SUBMITTED this 9th day of November, 2018.

ROBERTS | FREEBOURN, PLLC

s/ Derek Reid
Derek Reid, WSBA #34186
Attorneys for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 9th day of November, 2018, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

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Attorney	Facsimile	<input type="checkbox"/>
205 S. Columbus Ave. Stop 18	Email	<input type="checkbox"/>
Goldendale, WA 98620-9054		
Email : davidq@klickitatcounty.org		

DATED this 9th day of November, 2018 at Spokane, Washington.

s/ Derek Reid
Derek Reid, WSBA #34186

ROBERTS FREEBOURN

November 13, 2018 - 11:31 AM

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