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State of Washington  
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NO. 36260-4-III  
Consolidated w/ 36261-2-III

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

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STATE OF WASHINGTON,

Respondent,

v.

KURTIS P. JONES-TOLLIVER,

Appellant.

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

The Honorable Patrick Monasmith, Judge  
The Honorable Jessica Reeves, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE OFFICER’S TESTIMONY THAT HE ADVISED JONES-TOLLIVER OF HIS MIRANDA RIGHTS BY READING HIM THOSE RIGHTS FROM A DEPARTMENT ISSUED CARD IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT’S FINDINGS THAT JONES-TOLLIVER WAS GIVEN MIRANDA WARNINGS AND THAT HE KNOWINGLY AND VOLUNARILY WAIVED HIS MIRANDA RIGHTS.

Miranda<sup>1</sup> requires that before a person is subjected to custodial interrogation police must reasonably convey “that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” State v. Brown, 132 Wn.2d 529, 582-83, 940 P.2d 546 (1997). Adequate Miranda warnings are a prerequisite to the admission of a defendant’s statements. State v. Mayer, 184 Wn.2d 548, 559, 362 P.3d 745 (2015).

“A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.” State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Evidence is only substantial if there is a sufficient quantity of evidence in the record to “persuade a fair-

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

mindful, rational person of the truth of the finding.” State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The State asserts substantial evidence supports the trial court’s findings that Jones-Tolliver was advised of the Miranda warnings and he knowingly and voluntarily waived his Miranda rights. Its assertion relies on officer Anthony Gorst’s testimony at the CrR 3.5 hearing that he read Jones-Tolliver Miranda warnings from a department issued rights card. Brief of Respondent at 7 (citing RP 11-12). The issue, however, is what Gorst told Jones-Tolliver. The State’s briefing does not illuminate that issue because the record is silent.

The department issued card Gorst referred to was not admitted. Nor did the State ask Gorst what was written on the card or if he even remembered what rights he read to Jones-Tolliver. In this record there is no evidence that the warnings mandated in Miranda were adequately conveyed to Jones-Tolliver by Gorst. Thus, Jones-Tolliver’s subsequent statements to police should have been suppressed.<sup>2</sup>

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<sup>2</sup> In two recent unpublished cases this Court and Division Two held the defendants’ statements to police in those cases were erroneously admitted at trial under facts like the facts in this case. In State v. Anderson, noted at 5 Wn.App.2d 1051, 2018 WL 53050941 (2018) at \*6 this Court accepted the State’s concession Anderson’s statements to police were erroneously admitted where the officer testified he warned Anderson of his Miranda rights either verbally or from the department issued rights card but the card was not admitted into evidence, the record did not reveal what the card said, and the officer did not testify what warnings he gave Anderson. In State v. Haley, noted at 4 Wn.App.2d 1015, 2018 WL 2947942 (2018) at \*1, 9, Division Two held Haley’s statements to police were erroneously admitted where the officer only testified that he read Haley his “constitutional

2. THE ADMISSION OF JONES-TOLLIVER'S STATEMENTS TO POLICE WAS NOT HARMLESS.

A trial court's admission of a defendant's statement obtained in violation of Miranda is an error of constitutional magnitude. State v. Rhoden, 189 Wn. App. 193, 202, 356 P.3d 242 (2015). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is only harmless if this Court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425. When reviewing whether constitutional error is harmless, this Court looks at the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426. Reversal of a conviction is required if there is any "reasonable possibility" that the use of inadmissible evidence was necessary to reach the guilty verdict. Id.

The State argues that even if Jones-Tolliver's statements to police were erroneously admitted, the error was harmless. Brief of Respondent at 13. The State does not support its harmless error claim with any scrutiny or

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rights" and "right to remain silent." Jones-Tolliver does not cite these cases as binding authority and this Court may give them such persuasive value as it deems appropriate. GR 14.1(a).

the trial record. Id. The State fails to meet its burden of proving the admission of Jones-Tolliver's statements was harmless.

The State charged Jones-Tolliver as an accomplice to the Jammin' Java and Colville Motor Sports burglaries, and theft of the motorcycle taken during the burglary of Colville Motor Sports. Colin Haynes was the principal in the burglaries and theft.

The jury was instructed on accomplice liability. CP 53 (Instruction 20). That instruction correctly told the jury that a person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he (1) solicits, commands, encourages, or requests such other person to commit the crime; or (2) aids or agrees to aid such other person in planning or committing the crime. RCW 9A.08.020(3). The instruction also told the jury that "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice." CP 53.

#### Jammin' Java Burglary

Haynes testified Jones-Tolliver did not want him to break into Jammin' Java, tried to get him to leave, and stood to the side while Haynes committed the burglary. RP 260, 262, 263. Jones-Tolliver testified Haynes never discussed burglarizing Jammin' Java with him and he stood outside while Haynes broke into the building. RP 292-293. Both Jones-Tolliver

and Haynes testified Haynes later gave Jones-Tolliver some money taken during the burglary. RP 263, 298.

#### Colville Motor Sports Burglary and Theft

Jones-Tolliver testified that Haynes had “an idea” about how they could get back to Spokane, but he did not explain that idea to him. Jones-Tolliver followed Haynes who led him to Colville Motor Sports. RP 294. Haynes testified that he jumped the fence at Colville Motor Sports, grabbed a couple of helmets and stole a motorcycle. RP 264. He testified Jones-Tolliver refused to jump the fence with him. When Haynes gave one of the helmets he took to Jones-Tolliver, Jones-Tolliver laid it on the ground. Furthermore, Jones-Tolliver also refused to ride with Haynes on the motorcycle Haynes stole and instead walked away while Haynes left with the motorcycle. Id. Jones-Tolliver’s testimony was consistent with Haynes’s testimony. RP 296-297, 304-305.

#### Surveillance Video

The surveillance video is also consistent with Haynes’ and Jones-Tolliver’s testimony. Jones-Tolliver testified that after Hayne’s broke into the Jammin’ Java he went up to the window and sked Haynes what he was doing and to leave. RP 293-294. Jones-Tolliver testified he crossed the Colville Motor Sports fence line because Haynes called for him because he

knew Haynes was doing something illegal and he was scared and wanted to hide. RP 295, 305-307.

The defense theory was that Jones-Tolliver was present and knew Haynes was committing the crimes, but he did not aid, solicit, command encourage or request Haynes to commit the crimes. RP 343-349. The evidence reasonably supported that theory, just as it reasonably supported the State's theory. The evidence was not so overwhelming, however, that it necessarily leads to a finding of guilt. But for the admission of Jones-Tolliver's statements to police that he admitted he actually participated in the crimes (RP 182, 185), jurors could have found that he was present and knew Haynes was committing the crimes was not an accomplice to the crimes. There was a reasonable possibility that his statements that he participated in the crimes were necessary to reach the guilty verdicts. Admission of the statements was not harmless.

B. CONCLUSION

Jones-Tolliver's statements to police should have been suppressed. Without those statements the evidence was not overwhelming and there is a reasonable chance that his statements were necessary to reach the guilty verdicts. For the above reasons and reasons in Jones-Tolliver's opening brief, his burglary and theft convictions should be reversed.

DATED this 16 day of May 2019.

Respectfully submitted,  
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