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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

STATE OF WASHINGTON,

Respondent,

v.

KURTIS P. JONES-TOLLIVER,

Appellant.

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

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting appellant's statements made during custodial interrogation when the State failed to prove he was fully and correctly advised of his constitutional rights as required by Miranda v. Arizona¹ and that he knowingly and voluntarily waived his constitutional rights.

2. The court erred in entering its written findings of fact that appellant "was given Miranda warnings prior to being questioned" and that he "waived those rights." CP 014.

3. The court erred in ordering the statements appellant made to police were admissible. CP 014.

Issue Pertaining to Assignments of Error

When the State seeks to admit statements made by a defendant during custodial interrogation, it bears the burden to prove by a preponderance of the evidence that the statements were made after a knowing, intelligent, and voluntary waiver of the rights to silence and to counsel. The officer who interrogated appellant testified he read appellant his Miranda rights from a card, but the card was not admitted into evidence and there was no testimony as to the content of the rights he read. Did the

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

court err in admitting appellant's statements absent proof appellant was advised of his rights as required under Miranda v. Arizona?

B. STATEMENT OF THE CASE

1. Procedural Facts

In one cause number, the State charged Kurtis Jones-Tolliver by amended information with one count of theft of a motor vehicle belonging to a customer of Colville Motor Sports (Count I), and two counts second degree burglary. Colville Motor Sports was the named victim in one burglary charge (Count 11) and Jammin' Java was the named victim in the other burglary charge (Count III). CP 016-018. It was alleged Jones-Tolliver was an accomplice to those offenses. Id. In separate cause number the State charged Jones-Tolliver with one count of bail jumping. CP 091-092.

All the charges were joined for trial.² A jury found Jones-Tolliver guilty as charged. CP 062, 063, 064 and 093. Jones-Tolliver agreed to his offender score, RP 382-383³, and was sentenced under a prison-based drug offender sentencing alternative. CP 071-072, 100-101.

² A Notice of Appeal was filed in both cause numbers and the appeals were consolidated.

³ RP refers to the verbatim report of proceedings of July 3, 10, 12, 13, and 31, 2018, which are sequentially paginated.

2. Substantive Facts

a. Burglary and Theft Charges

On July 8, 2016, the Jammin' Java was burglarized. The main door to the business was broken. RP 156-158, 174. Also, broken were two surveillance cameras outside the building. RP 158-159, 163, 210. Nonetheless, surveillance cameras captured the break-in. RP 163. The inside of the building was described as trashed, and about \$150.00 was stolen. RP 164, 174, 216.

On July 8, 2016, the Colville Motor Sports was also burglarized. Colville Motor Sports sells and services motorcycles, other sport vehicles, and sells helmets and apparel. RP 166. The business has an alarm system. When the alarm was activated the owner was contacted by the alarm company. RP 167. When the owner arrived, he discovered part of the chain link fence that surrounds the building was pulled back. RP 167-168. He also found a helmet on the ground in front of the shop's service gate. RP 167. Keys, another helmet, and a motorcycle that belonged to one of his customer's was missing. RP 169-171. The shop also had surveillance cameras that captured the break-in. RP 169.

Officers with the Colville Police Department investigated both incidents. Officer Kowal viewed footage from the surveillance cameras from both Jammin' Java and Colville Motor Sports and he downloaded the

footage onto a disk. RP 204, 212. However, some of the footage captured from the Jammin' Java's cameras was not downloaded on the disk and Kowal's did not know why. RP 212. Kowal's testified he saw the missing footage and it showed two people hiding behind a nearby embankment. RP 214. Footage from the Jammin' Java and Colville Motor Sports surveillance cameras were played for the jury. RP 272; Ex. 16.

The next day, July 9th, Kowal, Sergeant Kendall and officer Gorst, responded to a call from the Walmart store that it had detained two men who were possibly involved in the burglaries. RP 178, 220-221. The men were Colton Haynes and Jones-Tolliver. RP 180, 221. The officers spoke to both Haynes and Jones-Tolliver, but the conversations were not recorded, nor did police take any notes of the conversations. RP 230. Gorst described Haynes as very talkative. RP 181. Gorst was permitted to testify that while police spoke with Haynes, Jones-Tolliver interjected that "I was telling him not to do it." RP 181. Gorst also testified that after he told Jones-Tolliver that he had seen video footage of the burglaries, Jones-Tolliver "quit denying it and conceded that he did participate." RP 182. Gorst, however, did not remember exactly what Jones-Tolliver told him. RP 182, 184. Police searched Jones-Tolliver incident to his arrest and found some money in his wallet. Jones-Tolliver told them was money taken from Jammin' Java. RP 222-223.

The State convinced the court to issue a material witness warrant for Haynes. RP 30-31. Haynes was eventually arrested on the warrant. Haynes earlier pleaded guilty to two counts of second degree burglary and theft of a motor vehicle for his part in the crimes and was sentenced to probation. RP 261.

Haynes testified that he broke into the Jammin' Java while Jones-Tolliver stood off to the side. RP 260, 262. He said Jones-Tolliver did not want him to break into the building and tried to get him to leave. RP 263. Haynes gave Jones-Tolliver some of the money he took from the business. Id.

Haynes and Jones-Tolliver then went to Colville Motor Sports. Haynes said he jumped the fence, grabbed a couple of helmets and a motorcycle. RP 264. Jones-Tolliver refused to jump the fence with Haynes. Haynes gave one of the helmets he took to Jones-Tolliver, but Jones-Tolliver laid on the ground. Jones-Tolliver also refused to ride on the motorcycle with Haynes and he walked off. Id. Haynes denied he told police that Jones-Tolliver was acting as a look-out. RP 265. He also admitted that he told the prosecuting attorney that his testimony could vary

depending on whether the prosecutor could get him some Suboxone.⁴ RP 267, 271.

Jones-Tolliver also testified. He admitted he was a drug addict and had a prior conviction for burglary. RP 310. On July 8th, he and Haynes got a ride from Spokane to visit Haynes' brother, but they were left stranded in Colville sometime between 2:00 a.m. and 3:00 a.m. RP 290-291. The two ingested heroin and then Jones-Tolliver followed Haynes to the Jammin' Java. Haynes broke into the building while Jones-Tolliver stood outside waiting for him. RP 292-293. Haynes never discussed breaking into the business with Jones-Tolliver. Id. Eventually Jones-Tolliver stuck his head in the window and told Haynes to leave. Id.; RP 302.

Afterwards they went to the house of a friend of Haynes, but the friend was not home. Jones-Tolliver then followed Haynes to Colville Motor Sports. RP 294-295. Jones-Tolliver was scared so he hid while Haynes jumped the fence. RP 295. Haynes then called for him, so Jones-Tolliver went in through where the fence was broken. RP 304. Haynes had two helmets. Jones-Tolliver took one of the helmets but when the alarm went off, he set it on the ground and ran. RP 296, 304-305. Haynes got on

⁴ Soboxone is a prescription drug given to heroin addicts. RP 273.

the motorcycle and rode off. RP 297. A short time later, Haynes came back and found Jones-Tolliver. Id.

The two then went to a Safeway store and Haynes gave Jones-Tolliver some money and he used some of the money to buy some food. RP 298. From there they went to Walmart. Id. When interrogated by police Jones-Tolliver told them he was a part of everything. RP 299.

b. Bail Jumping Charge

The State presented evidence that Jones-Tolliver was required to appear at his court hearings as a condition of his release. Ex.'s 12, 13 14, and 15; RP 189-190. He failed to appear at an October 18, 2016 status hearing. RP 190-193. A warrant was issued for his arrest. RP 194.

Jones-Tolliver testified that when he was released from jail he went back to Spokane. His mother drove him to his first two court appearances then refused to drive him to court after that. He attended his third court appearance but failed to attend the October 18, 2016 hearing because of his drug addiction. RP 300, 308-309.

c. CrR 3.5 Hearing

Pretrial, a hearing was held pursuant to CrR 3.5. Officer Gorst testified that Jones-Tolliver was picked up by two other officers at Walmart and taken to the store's security office, along with Haynes. RP 11, 13. Gorst testified he read Jones-Tolliver his "Miranda rights." because Jones-

Tolliver was in custody and police wanted to interrogate him. RP 11. Gorst said he read the rights from a card he carried, but he did not have the card with him at the hearing. RP 12. Gorst said that after reading the rights from the card, he “made sure” Jones-Tolliver understood them, and Jones-Tolliver agreed to speak with police. Id.

Based solely on Gorst’s testimony, the court found Jones-Tolliver was given the Miranda warnings and waived his rights. RP 27-28. The court ruled “There’s no indication that the waiver was anything other than knowing and voluntary.” RP 28. It ruled the statements Jones-Tolliver made to police admissible. RP 28-29.

The court entered the following written findings of fact: “The defendant was given Miranda warnings prior to being questioned; the defendant waived those rights.” CP 014. It concluded the statements made to police were admissible. Id.

C. ARGUMENT

JONES-TOLLIVER’S STATEMENTS TO POLICE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE STATE FAILED TO PROVE HE WAS FULLY AND ACCURATELY ADVISED OF HIS MIRANDA RIGHTS AND THAT HE KNOWINGLY AND VOLUNARILY WAIVED THOSE RIGHTS.

The State failed to prove Jones-Tolliver was advised of his constitutional rights before custodial interrogation and that he waived those right. Thus, his statements to police should have suppressed.

The Fifth Amendment guarantees that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. To protect against coerced self-incrimination prohibited by the Fifth Amendment, Miranda requires that, before being subjected to custodial interrogation, a person must be advised of the right to silence, the right to counsel, and the right to appointed counsel in case the person cannot afford counsel. 384 U.S. at 478-79.

The mere decision to speak to police is not a waiver of these rights; waiver will be found only if, after being fully and accurately advised of these rights, the person intelligently and understandably waives them. Miranda, 384 U.S. at 475. “Under Miranda, a suspect in custody “must be warned prior to any questioning 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). Statements made without the protections Miranda requires are generally inadmissible at trial. Id. at 479.

Without advice regarding the Miranda rights, an accused person “cannot be presumed to know” them. State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988). Under Miranda, “no amount of circumstantial

evidence that the person may have been aware of this right will suffice.” 384 U.S. at 471-72. The only way to establish whether the accused knew of the rights is to establish that he was specifically advised of them. Id. The warnings need not follow the exact language of Miranda, but the reviewing court must be able to determine from the record that the warnings reasonably and effectively conveyed all the necessary rights. State v. Hopkins, 134 Wn. App. 780, 785, 142 P.3d 1104 (2006) (citing Brown, 132 Wn.2d at 582). The record must show that the person was advised of each distinct right. See State v. Erho, 77 Wn.2d 553, 560-61, 463 P.2d 779 (1970) (record inadequate where officer did not testify he told defendant his statements could be used against him or that he had a right to an attorney); see also State v. Tetzlaff, 75 Wn.2d 649, 652, 453 P.2d 638 (1969) (warnings inadequate when officer did not tell suspect of right to free legal counsel at time of interrogation). The legal question of whether the Miranda warnings were adequate is reviewed *de novo*. In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014); State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

Further, the inherently coercive nature of a custodial interrogation places a heavy burden on the State to show the accused person’s decision to speak was “an intentional relinquishment or abandonment of a known right or privilege.” State v. Jones, 19 Wn. App. 850, 853, 578 P.2d 71 (1978)

(quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Courts must indulge every reasonable presumption against a waiver. Miranda, 384 U.S. at 475; Johnson v. Zerbst, 304 U.S. at 464. To that end, the State bears the burden to “establish by a preponderance of the evidence that the defendant, after being fully advised of his rights, knowingly and intelligently waived them.” State v. Haack, 88 Wn. App. 423, 435-36, 958 P.2d 1001 (1997). The State failed to meet that burden here.

The evidence in this case fails to show that Jones-Tolliver was specifically advised of his rights to silence and to counsel because it does not establish what officer Gorst told him beyond the mention of “Miranda rights.” Gorst testified he read the rights from his Department-issued card, but the card was never admitted. RP 12. There was no testimony or evidence establishing what, precisely, Gorst told Jones-Tolliver about his constitutional rights. There was no factual support for a finding that Jones-Tolliver was properly advised of all his Miranda rights before he was questioned. And, because there was no factual basis for finding that Jones-Tolliver was properly advised of all his Miranda rights, there was no factual support for finding he knowingly and intelligently waived those rights.

The court’s written findings, “The defendant was given Miranda warnings prior to being questioned; the defendant waived those rights,” are

not factual findings but legal conclusions. CP 014. And, in its oral ruling, the court relied on the absence of evidence to admit the statements: “There’s no indication that the waiver was anything other than knowing and voluntary.” RP 28. The court erroneously placed the burden on Jones-Tolliver to show that the warnings were incorrectly or improperly administered and that he did not knowingly and voluntarily waive his rights.

The mere mention of “Miranda rights” with no further explanation of what, precisely, Jones-Tolliver was told, leaves this Court with a silent record on the crucial question of whether he was fully and adequately informed of his constitutional rights and whether he knowingly and voluntarily waived those rights. His subsequent statements to police should have been suppressed.

Violation of the dictates of Miranda is constitutional error. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). Prejudice is presumed and reversal is required unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. Rhoden, 189 Wn. App. 193, 202-03, 356 P.3d 242 (2015) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). As a result of this error, the jury heard what essentially amounted to a confession he was an accomplice to the burglaries and theft. “Admission of a confession ‘will seldom be harmless.’” United States v. Barnes, 713 F.3d 1200, 1207 (9th Cir. 2013)

(quoting United States v. Williams, 435 F.3d 1148, 1162 (9th Cir. 2006)).

Thus, those convictions should be reversed.

The violation of Miranda also constitutes manifest constitutional error that may be raised for the first time on appellate review. Constitutional error is manifest when the record is sufficient to show the necessary facts to adjudicate the issue. State v. Malone, 193 Wn. App. 762, 767, 376 P.3d 443 (2016) (citing State v. Koss, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014)). Additionally, to be manifest, the error must have caused practical and identifiable consequences. State v. Harris, 154 Wn. App. 87, 94, 224 P.3d 830 (2010). Here, the error had the practical and identifiable consequence of Jones-Tolliver's alleged admission as an accomplice to the burglaries and theft being used as evidence against him at his trial, in violation of Miranda.

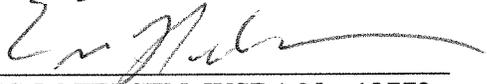
D. CONCLUSION

For the foregoing reason, Jones-Tolliver's burglary and theft convictions should be reversed.

DATED this 7 day of February 2019.

Respectfully submitted,

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