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Court of Appeals  
Division III  
State of Washington  
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No. 36260-4-III  
Consolidated with No. 36261-2-III

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,  
Respondent,

v.

KURTIS P. JONES-TOLLIVER,  
Appellant.

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**BRIEF OF RESPONDENT**

Will Ferguson, WSBA 40978  
Deputy Prosecuting Attorney  
Office of the Stevens County Prosecutor  
215 S. Oak, Room #114  
Colville, WA 99114  
Phone: (509) 684-7500  
Fax: (509) 684-7589  
[wferguson@stevenscountywa.gov](mailto:wferguson@stevenscountywa.gov)  
[trasmussen@stevenscountywa.gov](mailto:trasmussen@stevenscountywa.gov)

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## I. STATEMENT OF THE CASE

Respondent is the State of Washington (hereinafter the “State”). Appellant is Kurtis P. Jones-Tolliver (hereinafter “Mr. Jones-Tolliver”). Mr. Jones-Tolliver was charged with one count of Theft of a Motor Vehicle and two counts of Burglary in the Second Degree. Clerk’s Papers 16-18.

On July 3, 2018, the Stevens County Superior Court Judge Patrick Monasmith (hereinafter “Superior Court Judge”) presided over a WA CrR 3.5 hearing (hereinafter “Confession Hearing”). Report of Proceedings 5. At the Confession Hearing, the State offered the sworn testimony of Officer Anthony Gorst and Officer Adam Kowal, both of the Colville Police Department. RP 10, 21. Both Officers testified that Officer Gorst read Miranda warnings to Mr. Jones-Tolliver and that Mr. Jones-Tolliver agreed to speak to the Officers, having his Miranda rights in mind. RP 11-13, 22-23. Mr. Jones-Tolliver’s confession took place at the Colville Walmart. RP 11-12. Mr. Jones-Tolliver was detained with another suspect, Mr. Colton Haynes. RP 11, 13. Both subjects were read their Miranda rights from Officer Gost’s department-issued card. RP 12. Both subjects agreed to speak to Officers Gorst and Kowal. RP 12-13. The subsequent conversation and Mr. Jones-Tolliver’s confession, seem to

have continued for an extended time. RP 12-17. There was no testimony of threats or promises made by Officers Gorst and Kowal. RP 12-25.

The State and Counsel for Defendant offered argument, but Counsel for Defendant did not argue the specifics of the Miranda warnings and did not argue that Mr. Jones-Tolliver's waiver of his rights was involuntary. RP 24-27. After hearing argument, the Superior Court Judge found that Officer Gorst testified that he provided Miranda warnings to Mr. Jones-Tolliver. RP 27, lines 17-21. Next, the Superior Court Judge found that Officer Gorst obtained a knowing waiver from Mr. Jones-Tolliver. RP 27, lines 22-24. More specifically, the Superior Court Judge found that Officer Gorst's testimony had not been countervailed. RP 27, line 25. The Superior Court Judge summarized his findings by saying, "[s]o it is clear, then, that appropriate Mirandas and warnings were provided that there was a waiver. There's no indication that the waiver was anything other than knowing and voluntary. So I make those findings." RP 28, lines 1-4.

The Superior Court Judge entered an order that found "[t]he defendant was given Miranda warnings prior to being questioned; the defendant waived those rights." CP 14. The Superior Court ordered that the statements made by Mr. Jones-Tolliver were admissible. CP 14.

At trial, both Officer Gorst and Officer Kowal testified that Mr. Jones-Tolliver was read Miranda warnings, that he waived his right to

remain silent, agreed to speak with the officers, and made incriminating statements. RP 179-180, 222.

Mr. Jones-Tolliver was convicted of Theft of a Motor Vehicle and two counts of Burglary in the Second Degree. CP 62-64. Mr. Jones-Tolliver was sentenced on July 31, 2019. CP 67. This appeal followed the convictions and sentencing.

## II. STANDARD OF REVIEW

The standard of review for determining voluntariness of a confession is substantial evidence in the record from which the trial court could have found the confession was voluntary, by a preponderance of the evidence. State v. Broadaway, 133 Wash.2d 118, 942 P.2d 363 (1997) (see also State v. Rafay, 168 Wash. App. 734, 757–58, 285 P.3d 83, 97 (Div. I, 2012)).

## III. SUMMARY OF ARGUMENT

The Superior Court Judge properly admitted Mr. Jones-Tolliver's statements to Colville Police Department Officers Gorst and Kowal. Mr. Jones-Tolliver was read Miranda warnings, acknowledged his rights, and provided incriminating statements. Even if admission of Mr. Jones-Tolliver's confession was improper, it was harmless error, given the mountain of evidence presented by the State.

#### IV. ARGUMENT

1. Mr. Jones-Tolliver's statements to police were properly admitted because the State proved Mr. Jones-Tolliver was fully and accurately advised of his Miranda Rights and the State proved that he knowingly and voluntarily waived those rights.

“The State's evidentiary burden is to establish a voluntary waiver of rights by a preponderance of evidence.” State v. Mark, 34 Wash.App. 349, 351, 661 P.2d 157, 158 (Div. II, 1983) (citing State v. Braun, 82 Wash.2d 157, 509 P.2d 742 (1973)). Where a defendant's testimony contradicts that of the State's witnesses, corroborating testimony from the State is required. Id. at 351–52. However, where the State's testimony is uncontradicted, a court can be satisfied that the testimony is sufficient to sustain the State's burden. Id. at 352.

A confession is involuntary or coerced if, based on the totality of the circumstances, the defendant's will was overborne. State v. L.U., 137 Wash. App. 410, 413, 153 P.3d 894, 896 (Div. I, 2007), aff'd sub nom. State v. Unga, 165 Wash.2d 95, 196 P.3d 645 (2008) (citing State v. Broadway, 133 Wash.2d 118, 132, 942 P.2d 363 (1997)). “Some of the factors we consider when deciding whether a statement was voluntary include the defendant's age, mental condition, physical condition, and experience.” Id. at 413-14.

“If there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary, we will not disturb the trial court’s determination of voluntariness on appeal.” State v. L.U., 137 Wash.App. at 414 (Div. I, 2007), aff’d sub nom. State v. Unga, 165 Wash.2d 95, 196 P.3d 645 (2008). “Findings of fact entered following a [Confession Hearing], if unchallenged, are verities on appeal.” Id. (see also State v. Reid, 98 Wash.App. 152, 156, 988 P.2d 1038, 1041 (Div. II, 1999) (“Findings of fact entered following a [Confession Hearing] will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record.”). “Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the stated premise.” State v. Reid, 98 Wash.App. at 156.

Mr. Jones-Tolliver did not offer any argument or raise an issue with the Miranda warnings or his waiver and agreement to speak with officers. RP 25-26. The Superior Court Judge was therefore deprived of the ability to take notice of the issue. Regardless of the fact that Mr. Jones-Tolliver failed to raise the issue before the Superior Court, this Court should hold that substantial evidence supported the Superior Court Judge’s conclusion that the State met its burden of preponderance of the evidence.

**A. Substantial evidence and the only evidence supports a finding that Mr. Jones-Tolliver was advised of his Miranda Rights.**

“[T]here is no requirement that the warnings be given in the precise language stated in Miranda. No talismanic incantation is required. State v. Brown, 132 Wash.2d 529, 582, 940 P.2d 546, 574 (1997), as amended (Aug. 13, 1997) (internal quotations omitted). “Reviewing courts need not examine Miranda warnings as if construing a will or defining the terms of an easement.” Id. (internal quotations omitted). “The question is whether the warnings reasonably and effectively conveyed to a suspect his rights as required by Miranda.” Id.

No Washington State caselaw could be found to require entry into evidence of the officer’s Miranda rights warning card. In fact, all cases reviewed seem to require only a reading of Miranda rights to a suspect. See State v. Woods, 34 Wash.App. 750, 759, 665 P.2d 895, 900–01 (Div. I, 1983) (“The record indicates that Woods was read his Miranda rights and that he signed a standard waiver of rights form.”); see also State v. Braun, 82 Wash.2d 157, 159, 163, 509 P.2d 742, 744, 746 (1973) (“Mr. Smoot identified himself as a police officer, informed Maine of his constitutional rights and that he was under suspicion of attempted murder. Maine indicated that he understood his rights and was willing to talk.

Thereafter, he confessed to the entire series of crimes...”, “Braun was fully advised of his rights at the original interview.”).

The uncontroverted testimony before the Superior Court Judge was that Officer Gorst read standard Miranda warnings from a department-issued card to Mr. Jones-Tolliver. RP 12-13. Officer Gorst was asked at the Confession Hearing: “Okay. But you know you read from that – verbatim from that department-issued card.” RP 12, lines 9-10. Officer Gorst responded, “I do, because I do it the same way ever time.” RP 12, line 11. Officer Gorst confirmed that he reads Miranda rights verbatim, so that he Mirandizes a suspect the same way, every time:

A When I -- arrived at Walmart, him and -- the other suspect were -- I believe that they were sat down on the bench -- And -- I read them their -- their Miranda rights, their constitutional rights.

Q So let me -- Okay. And you read them at Walmart. Now, when you read Miranda do you have a specific way you read it.

A I do. I have a department-issued rights card,--

Q Okay.

A --and -- I always remove that card and -- and read what it says **verbatim** so that it’s done the same every time.

RP 11, lines 21-25; 12, lines 1-6 (emphasis added). Officer Gorst’s Confession Hearing testimony was unchallenged and Defense Counsel offered no demand that Officer Gorst read the Miranda warning card into the record. Substantial evidence, and really the only evidence, dictated

the Superior Court Judge's finding that Mr. Jones-Tolliver was advised of his rights, consistent with Miranda.

**B. Substantial evidence and the only evidence supports a finding that Mr. Jones-Tolliver made a knowing and voluntary waiver of his Miranda Rights.**

“A determination of waiver must be made on the basis of the whole record before the court, and must be determined on the basis of testimony accepted as correct by the trial court.” State v. Gross, 23 Wash.App. 319, 324, 597 P.2d 894, 897 (Div. I, 1979). “Further, a trier of fact may draw from the evidence all inferences fairly deducible therefrom.” Id.

The burden of proof “...is upon the State to show an intelligent and voluntary waiver by a preponderance of the evidence.” State v. Woods, 34 Wash.App. at 759 (Div. I, 1983). “However, where the record indicates there is substantial evidence upon which a trial court could find by a preponderance of evidence that a confession was given voluntarily, the trial court's determination of voluntariness will not be disturbed on appeal.” Id. (citing State v. Snook, 18 Wash.App. 339, 348, 567 P.2d 687 (Div. III, 1977)). “Moreover, a waiver need not be explicit but may be inferred from particular facts and circumstances.” Id. at 759-60. “Instead, the inquiry is whether, under the totality of the circumstances, the confession was coerced.” State v. Broadway, 133 Wash.2d 118, 132, 942

P.2d 363, 371–72 (1997) (citing State v. Rupe, 101 Wash.2d 664, 678–79, 683 P.2d 571 (1984)) (totality of circumstances test of voluntariness; circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police). “In assessing the totality of the circumstances, a court must consider any promises or misrepresentations made by the interrogating officers. Id. “The inquiry is whether the Defendant's will was overborne.” Id.

A court may even infer waiver when the facts so indicate. “The testimony in the record reflects only that the defendant understood his rights and volunteered information after reaching such understanding. The court was entitled to infer waiver, however, from his understanding of his rights, and from the voluntariness of his conversation with the officers on all four occasions.” State v. Gross, 23 Wash.App. at 324 (quoting State v. Cashaw, 4 Wash.App. 243, 251, 480 P.2d at 533 (Div. I, 1971): “The court had the right to infer the existence of waiver from its finding that the defendant's answers were freely and voluntarily made without duress, promise or threat and with full understanding of his constitutional rights.”).

Mr. Jones-Tolliver’s confession was not obtained through coercion, promise, or deceit. Nowhere does the record contain any evidence of malice, foul play, or deceit on the part of Officers Gorst and Kowal. At the

Confession Hearing, Officer Gorst's testimony was unchallenged on cross-examination by Defense Counsel RP 17-19, 20.

Officer Gorst took care to make sure that not only did Mr. Jones-Tolliver hear the Miranda warnings, but that Mr. Jones-Tolliver also wanted to speak to Officer Gorst, with Miranda rights in mind:

Q Okay. And -- what happened after you read those rights. Did you ask, I guess, if they wanted to speak to you.

A Yes, I did. And being that I read both of them their rights out loud, and not individually -- Like I didn't read it twice, I just read it once -- **and so I made sure to -- individually get that they understood that -- you know, that they were read their rights and that they understood their rights, and both subjects agreed to speak with us--**

Q (Inaudible).

A --waiving their rights.

Q **Okay. So individually you got the waiver from Mr. Jones-Tolliver.**

A **Correct.**

RP 11-13 (emphasis added). After Officer Gorst testified, Officer Kowal testified that he was present when Officer Gorst read Miranda warnings to Mr. Jones-Tolliver. RP 22, lines 23-25. Officer Kowal was also in the room when Mr. Jones-Tolliver waived his rights and spoke with the officers. RP 23, lines 3-5. Counsel for Mr. Jones-Tolliver did not cross-examine Officer Kowal at the Confession Hearing. RP 24, lines 11-12. Mr. Jones-Tolliver did not present any witnesses at the Confession Hearing. RP 24, lines 18-20.

“Gorst testified he read the rights from his Department-issued card, but the card was never admitted.” Opening Brief of Appellant at 11. “There

was no factual support for a finding that Jones-Tolliver was properly advised of all his Miranda rights before he was questioned.” Opening Brief of Appellant at 11.

Mr. Jones-Tolliver claims that there was an improper burden shift. Opening Brief of Appellant at 12. Mr. Jones-Tolliver points to the Superior Court Judge’s ruling: “There’s no indication that the waiver was anything other than knowing and voluntary.” RP 28, lines 3-4. In other words, all facts that had been presented to the court, pointed toward waiver. Such a conclusion is not an improper burden shift; it is a statement as to the sufficiency of the facts before the court.

At trial, Officer Gorst testified:

Q And what was Mr. Jones-Tolliver -- what were the responses.

A They -- they both said that they -- I -- I read -- I read Miranda out loud to both of them -- not independently; I didn’t read it twice. I read it. And then I acknowledged -- I made -- contact with each of them and asked them, “Do you understand your rights,” “Do you understand your rights.” “Yes.” “Will you speak to us now,” “Will you speak to us now,” and the answer was “Yes.”

RP 180-81. Officer Kowal also testified at trial about the Miranda warnings and Mr. Jones-Tolliver’s waiver:

Q Okay. And what did you do with them once they were detained.

A We applied handcuffs, placed handcuffs on them, advised them that they were -- detained at this point and that we

would be escorting them to the front of the office and talk -- and then talk to them further.

Q Okay. And when you got in there, what -- I guess what happened once you were in the room.

A Once we were in the room we sat both subjects down on the -- on a -- on the benches -- there's a bench there that -- We go to that -- we go to Walmart quite often for loss prevention, for -- people stealing. So they have a room designated for this kind of -- investigation. So there's a bench. We sat both subjects down on the bench.

RP 221-222. When asked what happened next, Officer Kowal testified:

A At that point, Off. Gorst, he used his Miranda card and Mirandized the subjects.

Q Okay. And, -- after that you began to speak with them.

A Yes.

RP 222, lines 12-16. The only evidence at the Confession Hearing and at trial was that Mr. Jones-Tolliver knowingly and voluntarily waived his Miranda rights

2. Implications of admission of a confession obtained in violation of Miranda.

Mr. Jones-Tolliver claims that the Superior Court Judge violated his constitutional rights, that such a violation is presumed prejudicial, and that reversal is required if this Court finds such a violation. Opening Brief of Appellant at 12-13. Mr. Jones-Tolliver devotes two paragraphs to this position and this Court should devote even less attention.

Neither case cited by Mr. Jones-Tolliver, for the proposition that Miranda issues constitute manifest constitutional error and therefore may

be raised for the first time on appeal, have anything to do with Confession Hearings under WA CrR 3.5. See Opening Brief of Appellant at 13 (citing State v. Malone, 193 Wn.App. 762, 767, 376 P.3d 443 (Div. III, 2016) and State v. Koss, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014)).

Even if Mr. Jones-Tolliver's confession was not properly obtained, the admission of his confession is subject to harmless error analysis, unlike what Mr. Jones-Tolliver claims in his Opening Brief. State v. Reuben, 62 Wash.App. 620, 814 P.2d 1177 (Div. III, 1991) (citing Arizona v. Fulminate, 499 U.S. 279, 111 S.Ct. 1246 (1991) (see also State v. Spotted Elk, 109 Wash.App. 253, 261-62, 34 P.3d 906 (Div. III, 2001))).

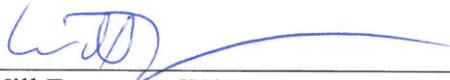
Even without Mr. Jones-Tolliver's confession, the jury heard testimony from victims, including Mrs. Lisa Karre, the owner of the burglarized coffee shop, and Mr. Steven Fogle, who testified about the stolen motorcycle. RP 156, 165. The jury also heard testimony from Officers Gorst and Kowal, regarding the primary evidence they gathered in their investigation, including surveillance camera footage, showing Mr. Jones-Tolliver committing the several crimes. RP 174-75, 177, 209, 212-14.

Even if this Court finds that the Superior Court Judge should not have admitted Mr. Jones-Tolliver's confession, this Court should find that doing so was harmless error.

IV. CONCLUSION

For the reasons stated above, this Court should affirm the admission of Mr. Jones-Tolliver's confession and affirm the convictions.

Dated this 3<sup>rd</sup> day of May, 2019.



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Will Ferguson, WSBA 40978  
Deputy Prosecuting Attorney  
Office of the Stevens County Prosecutor  
215 S. Oak, Room #114  
Colville, WA 99114  
Phone: (509) 684-7500  
Fax: (509) 684-7589

**Affidavit of Certification**

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, e-mailed a true and correct copy to Eric J. Nielsen, Attorney for Appellant at [nielsene@nwattorney.net](mailto:nielsene@nwattorney.net) and mailed to Kurtis Jones-Tolliver, #385475, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 on May 3, 2019.



Michele Lembcke, Legal Assistant  
for Will Ferguson

**STEVENS COUNTY PROSECUTOR'S OFFICE**

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