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COA NO. 64017-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

FEISAL OMAR,

Appellant.

REC'D

JAN 29 2010

TK

King County Superior Court
Appellate Dept

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

The Honorable Richard McDermott, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the Fifth Amendment in failing to suppress appellant's incriminating statement to police.

2. The court erred in concluding "the detective's question to the defendant asking if he was willing to talk about the incident was not a question designed to elicit an incriminating response from the defendant; and was not a question that the officer should have known was reasonably likely to elicit an incriminating response from the defendant." CP 46 (CL 4.a.).¹

3. The trial court erred in prohibiting use of non-prescribed drugs as a condition of community custody.

4. The trial court erred in ordering substance abuse and evaluation as a condition of community custody.

5. The trial court erred in ordering appellant to complete a domestic violence batterer's treatment program as a condition of community custody.

¹ The trial court's "Written Findings Of Fact and Conclusions Of Law On CrR 3.5 Motion To Suppress the Defendant's Statement(s)" are attached as appendix A.

Issues Pertaining to Assignments of Error

1. Without giving Miranda² warnings, the detective informed appellant he was investigating the crime for which appellant had been arrested, told appellant he would like to talk about the incident, and then asked if appellant would like to talk about the incident. Appellant then talked about the incident, giving an incriminating response used by the State as evidence of guilt at trial. Is reversal required because the trial court wrongly concluded the detective did not "interrogate" appellant and the erroneous admission of appellant's incriminating statement was not harmless beyond a reasonable doubt?

2. Did the trial court err when it prohibited appellant from using any non-prescribed drug as a condition of community custody where the evidence did not show use of a non-prescribed drug was directly related to the offense?

3. Did the trial court err when it ordered appellant to submit to substance abuse evaluation and treatment as a condition of community custody where the evidence did not show appellant consumed a controlled substance and the evidence did not otherwise show a controlled substance was directly related to the offense?

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

4. Did the trial court err when it ordered appellant to "enter and successfully complete a state certified domestic violence batterer's treatment program" where the evidence did not show appellant assaulted or otherwise threatened the subject of the no-contact order during the course of violating the order?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Feisal Omar with felony violation of a no contact order, alleging he had violated a no contact order on two previous occasions. CP 1. The previous violations elevated the offense from a gross misdemeanor to a felony. RCW 26.50.110(1), (5).

A jury convicted Omar of the charged offense. CP 35. Omar had no felony history. CP 37. The court imposed a nine month term of confinement and a number of community custody conditions. CP 39, 42. Omar faces deportation as a result of his felony conviction. 1RP 26-27; 2RP 5-6; 5RP 6, 8-9.³ This appeal timely follows. CP 49.

2. CrR 3.5 Hearing

The facts are undisputed. CP 44-45. Omar was in custody at the Auburn Municipal Jail after being arrested on January 23, 2009 for Felony

³ The verbatim report of proceedings are referenced as follows: 1RP - 7/6/09; 2RP - 7/7/09; 3RP - 7/8/09; 4RP - 7/9/09; 5RP 7/24/09; 6RP - 4/21/09.

Violation of a Court Order. CP 44 (FF 1.a.). Detective Jordan went to the jail for the purpose of interviewing Omar. CP 44 (1.b.); 2RP 8. The detective had reviewed the report of the arresting officer and knew violation of an active no contact order was the basis for arrest. 2RP 20. The detective requested that a jail officer bring Omar from his holding cell into the booking area hallway so that the detective could speak with him. CP 44 (FF 1.c.).

The detective introduced himself and told Omar he was investigating the case. CP 44 (FF 1.d.). The detective said "I'd like to talk to you about this incident." and asked "Would you like to talk to me about this incident?" CP 44 (FF 1.d.). Omar replied "there was nothing to talk about, there was a no-contact order in place and he was at the location." CP 44 (FF 1.e.); 2RP 13.

The detective informed Omar of the charges he was being held on. CP 44 (FF 1.f.). Omar asked why he was being held on a felony. CP 44 (FF 1.f.). The detective told him it was because of three prior convictions. CP 44 (FF 1.f.). Omar responded "yes, they were with a different woman." CP 44 (FF 1.f.).

The detective again asked Omar if he would like to talk to him about the incident. CP 44 (FF 1.g.). Omar repeated "there was nothing to talk about, there was a no-contact order in place and he was at the

location." CP 44 (FF 1.g.). The detective then left the jail. CP 44 (FF 1.h.). At no time did the detective read Omar his Miranda rights. 2RP 19.⁴

The trial judge determined and the parties agreed Omar was in custody at the jail after being arrested for felony violation of a court order. CP 45; 2RP 23, 30. The only disputed issue was whether Omar was subjected to interrogation. 2RP 23, 30.

The judge concluded Omar's first statement to the detective — "there was nothing to talk about, there was a no-contact order in place and he was at the location" — was admissible because Miranda did not apply. CP 46 (CL 4.a.). The judge ruled "the detective's question to the defendant asking if he was willing to talk about the incident was not a question designed to elicit an incriminating response from the defendant; and was not a question that the officer should have known was reasonably likely to elicit an incriminating response from the defendant." CP 46 (CL 4.a.).

⁴ Jordan's trial testimony differed in some respects. He testified he introduced himself, told Omar he was the lead detective on this particular incident and would like to talk to him about it. 4RP 35. He told Omar what the charges were. 4RP 35-36. The detective then asked Omar if he wanted to talk. 4RP 36. The detective did not remember his exact words, but testified he always said "I would like to hear your side of the story, and I would like to talk to you about the incident." 4RP 36.

In support of this ruling, the judge relied on State v. Wilson, 144 Wn. App. 166, 181 P.3d 887 (2008). The judge quoted the definition of the functional equivalent of express questioning as follows: "Any words or action on the part of the police other than those normally attended [sic] to arrest and custody that the police should know are reasonably likely to elicit an incriminating response from the suspect." 2RP 31 (quoting Wilson, 144 Wn. App. at 184). The judge then put his gloss on this legal definition: "Not any kind of response but an incriminating response." 2RP 31. The judge concluded the detective's question of whether Omar wanted to talk about this incident required only a yes or no response, not an incriminating response, and therefore did not amount to interrogation. 2RP 31-32.⁵

The judge, however, drew a line and did not allow Omar's second statement to be admitted because "I think it is a fair statement that the police officer by continuing to interrogate him certainly should have expected that there would be further incriminating responses at that point in time. And nothing after that is properly admissible, because I think that is the product of interrogation. The initial response is the only thing that comes in, and that is because *I do not believe that the police officer had in*

⁵ The court incorporated its oral findings and conclusion into its written findings and conclusions. CP 46.

his mind that this was going to elicit a response that could have been incriminating. I think he expected a yes or no response. He got more than he bargained for. But then further questioning after the initial response by Mr. Omar, it seems to me without a Miranda warning is not permissible." 2RP 33 (emphasis added). The judge also "objectively" found that "the detective thinking a yes or no would be the answer would be reasonable." 2RP 34.

The defense objected to this ruling. 2RP 34. The judge responded "the finding is that it would have been reasonable for him to have expected a simple yes or no response to his question, which I believe is consistent with the requirement of State versus Wilson, which again says that the functional equivalent of the expressed questioning was defined by the Court as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. And I think it is reasonable for the Detective not to think that he was getting an incriminating response from his initial question of, I asked if he wanted to talk to me about this incident." 2RP 34-35.

The defense responded the court misunderstood the law to be applied in determining the existence of interrogation. 2RP 35-37. Wilson distinguished between express questioning and the functional equivalent of questioning. 2RP 36. The question of whether something an officer

says is designed to elicit an incriminating response applies only to the functional equivalent of questioning, not express questioning. 2RP 36-37. The detective in this case expressly questioned Omar. 2RP 26-37. The judge replied that he did not believe the detective expressly questioned Omar, differentiating the facts in Wilson. 2RP 37-38.

3. Jury Trial

In June 2006, judgment and sentence was imposed on Omar for two counts of "violation of a no contact order - domestic violence." Exh. 6. The violation involved contact with Genet Mekebeb. Exh. 6.

In July 2006, judgment and sentence was imposed on Omar for "domestic violence misdemeanor violation of a court order RCW 26.50.110(1)." Exh. 5. This violation also involved contact with Genet Mekebeb. Exh. 5.

On June 23, 2008, a Kent Municipal Court judge entered an order prohibiting Omar from contacting Hattie Lee. Exh. 1. On June 26, 2008, the judge entered a modified order continuing the effect of the previous order and setting a termination date of June 26, 2010. Exh. 2.

On January 23, 2009, Auburn police officer Jonathan Pearson responded to a certain apartment address. 3RP 4-5, 9-10. He knocked on the door and Omar answered. 3RP 11. Omar was fairly quiet and seemed surprised to see the police. 3RP 11; 4RP 25. The officer contacted Hattie

Lee inside the apartment and spoke with her. 3RP 13; 4RP 23. He arrested Omar for violating the protection order. 3RP 13. The officer did not talk with Omar. 3RP 13.

Detective Jordan later asked Omar if he wanted to talk about the incident, to which Omar responded "there is nothing to talk about since there is a no contact order in place and he was at the location." 4RP 36. The detective did not ask Omar whether he knew he had a no contact order preventing him from seeing Hatti Lee as opposed to someone else. 4RP 41-42.

Omar used a Swahili interpreter during pre-trial and trial proceedings in this case. 1RP 3-4; 3RP 6; 4RP 56-57; 5RP 3-4. Neither Omar nor Lee testified at trial.

On the June 23 no contact order, Omar's signature appears below the statement "I have read, or had read to me, this order including the 'Warnings to the Defendant' ON THE BACK of this order. I understand the terms and conditions of this order and the 'Warning to the Defendant' and the consequences of violating this order or the 'Warning to the Defendant.' I agree to abide by the terms and condition set forth in this order." Exh. 1. On the modified order entered June 26, Omar's signature appears below the statement "I have received, read and understand the above Order." Exh. 2

There was no indication on the face of either no contact order involving Lee that an interpreter was present and had interpreted the proceedings or translated the no contact orders for Omar. Exh.1, 2. The interpreter's declaration was left blank on both orders. Exh. 1, 2.

Kent Municipal Court clerk Kristi Stewart laid the foundation for admitting the no contact orders into evidence at trial. 4RP 8-15. On cross examination, defense counsel elicited her testimony that an interpreter had not signed either order. 4RP 17-18.

On redirect, the clerk said "The general process is, yes, every interpreter is required to read the front and the back of the document, and sometimes interpreters that are not familiar with our court, unfortunately, the signatures sometimes does get missed." 4RP 19.

On recross, the clerk said Kent Municipal Court does not normally have Swahili interpreters. 4RP 20. It would be abnormal if an interpreter did not sign the document he or she interpreted. 4RP 20. She admitted the general practice was for an interpreter to not only interpret the document but also sign the document to show that it had in fact been interpreted. 4RP 20. This applied especially to no contact orders. 4RP 20.

When pressed further on this point, she bristled, answering "no" to the question of whether she would expect interpreters, especially interpreters of unusual languages, to sign the documents they interpreted.

4RP 20-21. The clerk said she would verify that an interpreter was probably there but did not know he had to sign it. 4RP 41.

But the clerk had not looked at the docket to verify an interpreter was present for Omar when the no contact orders were entered. 4RP 21. The clerk testified "I know that the judge goes over everything on the record and asks if there are any questions and asks if the defendant understands, and that's interpreted by the interpreter to the defendant." 4RP 21. But she did not know whether an interpreter was present in Omar's case, "[b]esides the fact that he needs one, and we would normally have that." 4RP 21. She had no personal knowledge whether someone interpreted the documents for Omar. 4RP 18.

In closing argument, the prosecutor argued Omar was guilty because he knowingly violated the no contact order, referencing his statement to Detective Jordan and his signature on the no contact orders involving Lee. 4RP 61-62. The prosecutor told the jury, in considering whether a reasonable doubt existed, that it should consider whether Jordan's testimony about what Omar told him was true. 4RP 65-66.

The defense argued English is not Omar's first language and the State had not proven beyond a reasonable doubt that Omar knowingly violated a provision of the no contact order because there was no interpreter present when either of the no contact orders was entered, as

shown by the fact that no interpreter signed the orders. 4RP 67-68. The fact that the municipal court did not have a Swahili interpreter supported this inference. 4RP 69. Defense counsel further argued many people sign documents they have not fully understand, especially pre-printed documents containing legalistic language. 4RP 68-69.

In rebuttal, the prosecutor hoped Omar did not sign documents without reading them and that it was unreasonable to believe he did not understand their contents. 4RP 74-75. The prosecutor further pointed out "Detective Jordan told you in no uncertain terms the Defendant confessed to him in English." 4RP 76.

C. ARGUMENT

1. THE COURT WRONGLY FAILED TO SUPPRESS AN INCRIMINATING STATEMENT MADE BY OMAR GIVEN IN RESPONSE TO CUSTODIAL INTERROGATION.

Omar's incriminating statement, admitted as evidence of guilt at trial, should have been suppressed because he was subject to custodial interrogation without being read his Miranda rights. Reversal is required because this constitutional error was not harmless beyond a reasonable doubt.

a. Miranda Rights Must Precede Custodial Interrogation.

The Fifth Amendment to the United States Constitution commands "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The right against self-incrimination protects an accused from being compelled to provide the state with "testimonial or communicative" evidence. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings." State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney,

either retained or appointed." Miranda, 384 U.S. at 444. Statements elicited in noncompliance with this rule must not be admitted as evidence at trial. Id. at 444, 476-77.

There is no dispute the detective did not read Omar his Miranda rights before questioning him. There is no dispute Omar gave an incriminating statement in response to the detective's question. There is no dispute Omar was in custody when questioned. The only dispute is whether the detective subjected Omar to "interrogation." If the detective's question qualifies as "interrogation," then Omar's statement should have been suppressed.

"[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). "The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts." Sargent, 111 Wn.2d at 651.

b. Whether Interrogation Took Place Is A Question Of Law Reviewed De Novo.

"It is the function of an appellate court to determine questions of law." State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). "Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether a trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusion of law." Am. Nursery Prods. v. Indian Wells Orchards, 115 Wn.2d 217, 222, 797 P.2d 477 (1990). Questions of law are reviewed de novo. State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

Whether an interrogation was "custodial" is a question of law reviewed de novo. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004); State v. Solomon, 114 Wn. App. 781, 787-89, 60 P.3d 1215 (2002) (mixed question of law and fact reviewed de novo) (citing Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)).

Whether a question or its functional equivalent qualifies as "interrogation" should also be reviewed de novo. The trial court here correctly treated the issue of whether an interrogation took place as a conclusion of law. CP 46.

However, it has been stated "[w]hether an interrogation took place is a question of fact, subject to a clearly erroneous standard of review." State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992) (citing United States v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1981)); see also State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633 (2009) (citing Walton for same standard without analysis). This is not the correct standard of review.

Walton relied on the Ninth Circuit's decision in Booth for this proposition. Booth held whether a suspect is in "custody" and whether "interrogation" occurred are both factual determinations subject only to the clearly erroneous standard of review. Booth, 669 F.2d at 1235-38. Booth is no longer good law.

The United States Supreme Court in Thompson later held the issue of whether a suspect is in "custody" for Miranda purposes is a mixed question of law and fact subject to independent review. Thompson, 516 U.S. at 111-12. Thompson rejected the reasoning relied on by Booth. Thompson, 516 U.S. at 112-16.⁶ Washington courts have followed suit.

⁶ The Supreme Court vacated the Ninth Circuit's decision because it applied the wrong standard of review. Thompson, 516 U.S. at 116. The Ninth Circuit had relied on Krantz v. Briggs, 983 F.2d 961, 963-64 (9th Cir.1993). Id. at 106 n.4. Krantz in turn relied on Booth and cases traced back to Booth. Krantz, 983 F.2d at 963-64.

Lorenz, 152 Wn.2d at 30; Solomon, 114 Wn. App. at 787-89.

The Ninth Circuit no longer follows Booth, and instead recognizes whether questioning was an "interrogation" for Miranda purposes is a mixed question of law and fact, subject to de novo review. United States v. Chen, 439 F.3d 1037, 1040 (9th Cir. 2006); United States v. Foster, 227 F.3d 1096, 1102 (9th Cir. 2000). The analytical framework employed in Thompson compels this standard of review.

In addressing the "custody" part of the custodial interrogation question, the Supreme Court recognized the factual inquiry determines "the circumstances surrounding the interrogation." Thompson, 516 U.S. at 112. The legal inquiry determines, given the factual circumstances, whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Id. This is an objective test. Id. at 112. This second, legal, inquiry "calls for application of the controlling legal standard to the historical facts" and that application is reviewed de novo. Id. at 112-13. "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" Id. at 112 (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)).

There is no sound basis to apply a different kind of analysis to the issue of whether an "interrogation" took place for Miranda purposes. The presence or absence of "interrogation" is an objective test, as is the test for whether a suspect is in "custody." This is a legal standard. The legal inquiry calls for application of the "interrogation" standard to the historical facts of the case. Whether an interrogation took place is the ultimate inquiry calling for independent review.

This approach is consistent with established Washington law, from which cases like Walton have strayed. "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." Williams, 96 Wn.2d at 221 (internal quotation marks omitted) (quoting Leschi Improvement Council v. Wash. State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974)). "If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact, but if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law." State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986). Accordingly, "if a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law." Para-Medical Leasing, Inc. v.

Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987); accord State v. Hutsell, 120 Wn.2d 913, 918-19, 845 P.2d 1325 (1993).

The term "interrogation" carries legal implications. It has its own legal test for whether it exists. The determination of whether an interrogation took place is a conclusion of law because it "is made by a process of legal reasoning from facts in evidence." Niedergang, 43 Wn. App. at 658-59. Stated another way, whether the trial court derived proper conclusions of law from its findings of fact is a question of law reviewed de novo. Solomon, 114 Wn. App. at 789 (citing State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)).

c. The Detective Interrogated Omar Without The Benefit Of Miranda Warnings.

The detective informed Omar he was investigating this incident and asked Omar if he wanted to talk about this incident. Omar talked about this incident. The State persuaded the trial court that Omar was not interrogated and therefore no Miranda warning was needed. The State would have this Court believe an objective officer could not reasonably foresee a suspect would talk about this incident when asked if he wanted to talk about this incident. The assertion does not bear scrutiny.

"Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."

Innis, 446 U.S. at 300-01. As stated earlier, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Innis, 446 U.S. at 301. The test for whether a question posed in a custodial setting qualifies as "interrogation" is "whether under all of the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect." State v. Bradley, 105 Wn.2d 898, 903-04, 719 P.2d 546 (1986) (citing United States v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir.1985)).

This is a test of foreseeability measured in objective terms. Sargent, 111 Wn.2d at 651; Innis, 446 U.S. at 301-02. "[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Innis, 446 U.S. at 301-02. In other words, the test of whether the words of a police officer constitute an interrogation for Miranda purposes is "whether an objective observer could foresee that the officer's conduct or words would elicit an incriminating response." State v. Cunningham, 144 Wis.2d 272, 278, 423 N.W.2d 862 (Wis. 1988).

The trial court erred in applying the legal test for whether interrogation occurred here. The focus of the definition of "interrogation" is on the defendant's perception, not the officer's intent. State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992). "The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts. The subjective intentions of the officer are not at issue." Sargent, 111 Wn.2d at 651. Viewed from an objective standpoint, "the defendant's perception of an interrogation, not the questioner's intent, is determinative." Denney, 152 Wn. App. at 672.

The trial court, however, did not consider the issue from Omar's perspective at all. The court focused exclusively on Detective Jordan's perspective. This error in applying the legal test for interrogation was compounded by the court's reliance on its interpretation of Detective Jordan's subjective state of mind: "*I do not believe that the police officer had in his mind that this was going to elicit a response that could have been incriminating. I think he expected a yes or no response. He got more than he bargained for.*" 2RP 33 (emphasis added).

In determining whether interrogation occurred, what the officer had in his mind is not at issue. Sargent, 111 Wn.2d at 651. The trial court's analytical blunder is curious, given that so much attention was given to Wilson at the CrR 3.5 hearing. In Wilson, the trial court ruled a

statement was admissible because the officer did not intend to elicit an incriminating response. Wilson, 144 Wn. App. at 184. The trial court applied the wrong test: "The proper test is whether the words notifying Ms. Wilson that her 'husband' was dead were spoken by an officer when he should have known that the words were reasonably likely to elicit an incriminating response." Id.⁷

Applying the proper objective test here compels the conclusion that interrogation occurred. There is no dispute that the detective's question called for a response. There is no dispute that Omar's response to this question was incriminating. The trial court's ruling hinged on the idea that the detective could not have expected to receive an "incriminating" response.

"Incriminating response" encompasses "any response — whether inculpatory or exculpatory — that the prosecution may seek to introduce at trial." Innis, 446 U.S. at 301 n. 5. "No distinction can be drawn between statements which are direct confessions and statements which

⁷ In that case, Ms. Wilson was in jail for stabbing her husband. Wilson, 144 Wn. App. at 184. An officer reentered the interrogation room after Ms. Wilson invoked her right to counsel and gave her a "death notification" that "her husband" had died. Id. at 182-83. Ms. Wilson said "I didn't mean to kill him. I didn't mean to stab him." Id. at 183. This was interrogation because "the officer should have known that the death notification was reasonably likely to elicit an incriminating response." Id. at 184-85.

amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." Miranda, 384 U.S. at 476-477.

Omar was faced with express questioning, not its functional equivalent. The detective introduced himself and told Omar he was investigating the case. CP 44 (FF 1.d.). The detective said "I'd like to talk to you about this incident" and then asked "Would you like to talk to me about this incident?" CP 44 (FF 1.d.). Omar replied "there was nothing to talk about, there was a no-contact order in place and he was at the location." CP 44 (FF 1.e.); 2RP 13.

The detective did not specifically ask Omar to talk about this incident, but asked if he would like to talk about this incident. The trial court seized on the semantic difference, asserting the detective's question, as phrased, called only for a "yes" or "no" response and the detective merely "got more than he bargained for." 2RP 33.

Protection of the constitutional right to silence should not turn on the fine semantic distinction drawn by the trial court here. The trial court's notion that interrogation did not take place here because the detective's question only called for a "yes" or "no" response betrays an artificially narrow view of the right to silence.

"The Fifth Amendment privilege 'is as broad as the mischief against which it seeks to guard.'" Estelle v. Smith, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (quoting Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S. Ct. 195, 198, 35 L. Ed. 1110 (1892)). The trial court's ruling cuts against the very principle of the Miranda rule, the purpose of which is to "insure that what was proclaimed in the Constitution had not become but a 'form of words' . . . in the hands of government officials." Miranda, 384 U.S. at 444 (quoting Silverthorn Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920)). Innis accordingly gave a broad and practical definition to the term "interrogation," recognizing "[t]o limit the ambit of Miranda to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of Miranda.'" Innis, 446 U.S. at 299 n.3 (quoting Commonwealth v. Hamilton, 445 Pa. 292, 297, 285 A.2d 172 (Pa. 1971)).

The detective in this case asked Omar if he would like to talk about this incident without first giving the Miranda warnings. Is this a practice that this Court wants to condone and thereby encourage? The trial court's ruling elevates police ingenuity in asking questions above the protections served by the Miranda warnings.

The court's conclusion that no interrogation occurred here boils down to the idea that Omar gave a non-responsive answer to the detective's question. "Volunteered statements of any kind are not barred by the Fifth Amendment." Miranda, 384 U.S. at 478. A defendant's incriminating statement "that is not a response to an officer's question" is therefore admissible. Bradley, 105 Wn.2d at 904. But that is not what happened here and comparison with precedent shows it. The question and response in Omar's case is categorically different from those cases where an incriminating statement was truly non-responsive.

For example, incriminating statements made while an officer collects background information on personal history are admissible because they are "spontaneous and unrelated to the questions posed." Bradley, 105 Wn.2d at 904 (the statement "You sure are making a big deal about a little bit of coke" while being questioned about personal history was admissible because it not made in response to interrogation).

In State v. McWatters, the officer's reason for going to the hospital was to issue a citation to the suspect for a traffic offense and did not undertake to interrogate the suspect about a possession offense. State v. McWatters, 63 Wn. App. 911, 915-16, 822 P.2d 787 (1992). The suspect's statement that "not all of the money was drug money" was admissible

because it was spontaneous and unrelated to the reason why the officer was there. Id. at 916.

In Gonzalez-Mares, an incriminating statement was admissible because "the questions asked by the probation officer-whether appellant ever used any other names and whether she had a prior criminal record-were not directly related to the facts of the crime with which appellant was then charged." Gonzalez-Mares, 752 F.2d at 1489.

The common thread in cases like Bradley, McWatters and Gonzalez-Mares is that officers were not asking about the crime being investigated. The incriminating statements were truly volunteered because the context of the questioning did not provoke the response.

Omar's case stands in contrast. The detective went to the jail for the purpose of interviewing Omar about this incident and told Omar he wanted to talk about it. The detective here point blank asked Omar if he would like to talk about this incident. Cf. State v. Grieb, 52 Wn. App. 573, 576, 761 P.2d 970 (1988) ("Since the officers intended to question Mr. Grieb regarding his suspected involvement in specific burglaries, it was foreseeable the questioning could elicit an incriminating response."). The relationship of the question asked to the crime suspected is highly relevant. Gonzales-Mares, 752 F.2d at 1489. There is a direct relationship between the question asked and the response given. Omar's incriminating

statement cannot be deemed a spontaneous reaction unrelated to the question posed.

An objective officer in Jordan's position could reasonably foresee Omar would interpret the question of whether he would like to talk about this incident as an invitation to talk about this incident. Again, Omar's perspective is determinative. Denney, 152 Wn. App. at 672. If Omar misunderstood the detective, the State bears burden of that misunderstanding. Sargent, 111 Wn.2d at 650.

Omar's case is closer to those where courts have found interrogation than those cases where courts did not. See, e.g., State v. Christmas, 980 A.2d 790, 794 (Vt. 2009) (detective "asked the defendant if he wanted to talk to him" and commented "about the importance of the defendant's 'side' of the events being heard and understood"; detective certainly should have known such a request was reasonably likely to elicit an incriminating response); Cuervo v. State, 967 So.2d 155, 164 (Fla. 2007) (interrogation occurred where officer told defendant "now would be your opportunity if you wish to speak and explain your side of your story, your version of what happened."); State v. Hoeplinger, 206 Conn. 278, 287 n.6, 537 A.2d 1010 (Conn. 1988) (no question officer's request that

defendant give him a statement concerning what happened that night was an "interrogation" for Miranda purposes).⁸

For the reasons set forth above, the court erred in concluding Omar was not interrogated. CP 46 (CL 4.a.). Police cannot evade the Miranda requirements by provoking statements with questions that they objectively should know are reasonably likely to elicit an incriminating response from a suspect.

d. The Error In Admitting Omar's Incriminating Statement Was Not Harmless Beyond A Reasonable Doubt

Admission of statements in violation of Miranda is an error of constitutional magnitude. Wilson, 144 Wn. App. at 185. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The presumption of prejudice "may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute

⁸ As stated earlier, the detective at trial testified he first told Omar what the charges were and then asked Omar if he wanted to talk, saying something like "I would like to hear your side of the story, and I would like to talk to you about the incident." 4RP 35-36.

to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

Constitutional error is therefore harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Stated another way, such error is harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Miller, 131 Wn.2d 78 at 90. The reviewing court decides whether the actual verdict "was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999); accord Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

To convict, the State needed to prove Omar knew of the existence of the protection order involving Hattie Lee and that he "knowingly violated a provision of this order." CP 29 (Instruction 7). Defense counsel argued the State could not prove beyond a reasonable doubt that

Omar knowingly violated a provision of the protection orders because no interpreter was present when they were entered and the documents were therefore not translated for Omar.

The no contact orders were written in English. They contained legal language. English is not Omar's first language. He required a Swahili interpreter at trial to ensure he understood what was being said. There is no indication on the face of the orders that they were translated for Omar, despite their being a special place on the documents for interpreter verification. The direct inference from those omissions is that these orders were not translated for Omar because no interpreter was present.

The clerk's speculative testimony on the issue was hardly compelling. Kent Municipal Court, where these orders were entered, does not normally have Swahili interpreters. 4RP 20. The general practice was for interpreters, if present, to sign these documents. 4RP 20. It would be abnormal if an interpreter did not sign the document. 4RP 20. The clerk's explanation was that "signatures sometimes get missed." 4RP 19. A reasonable juror could legitimately ask how likely it was for an interpreter's signature to "get missed" for the same defendant in two different hearings in a court where the general practice is to sign.

The clerk did not know whether an interpreter was present in Omar's case, "[b]esides the fact that he needs one, and we would normally have that." 4RP 21. The clerk had not looked at the docket to verify an interpreter was present for Omar when the orders were entered. 4RP 21. She had no personal knowledge whether someone interpreted the documents for Omar. 4RP 18. The clerk was defensive in her answers. She was responsible for ensuring the proper administrative operation of the municipal court. Sensing administrative failure now jeopardized a successful prosecution, she was unwilling to admit proper protocol had not been followed in this case.

Aside from the clerk's questionable testimony, the State presented no evidence that the protection orders were translated for Omar or even that an interpreter was present during the hearings in which these orders were entered. A rational juror had grounds for believing these protection orders were not translated for Omar and that, as a result, he may not have knowingly violated a provision in them.

The persuasive force of that defense, however, was severely lessened when coupled with Omar's confession that he knew about the no contact order. An officer's testimony about a confession has significant impact on a jury. Wilson, 144 Wn. App. at 185. The trial court recognized "the case could very easily rise or fall on the 3.5 hearing."

1RP 10-11. Omar's statement, which the jury never should have heard, severely damaged the credibility of an otherwise viable defense theory.

Prejudice is presumed. Reversal and remand for a new trial is required because the State cannot show beyond a reasonable doubt that error in admitting Omar's statement could not have possibly influenced the jury and contributed to the guilty verdict. Ashcraft, 71 Wn. App. at 465; Jackson, 87 Wn. App. at 813.

2. THE COURT WRONGLY ORDERED OMAR NOT TO USE "NON-PRESCRIBED DRUGS" AS A CONDITION OF COMMUNITY CUSTODY.

As a special condition of community custody, the court ordered Omar to "not consume any . . . non-prescribed drugs." CP 42. The court lacked statutory authority to impose this condition.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007).

Former RCW 9.94A.700(5)(e) states a sentencing court shall impose conditions that require the offender to "comply with any crime-related prohibitions."⁹ A condition is "crime-related" only if it "directly relates to the circumstances of the crime." Motter, 139 Wn. App. at 802.¹⁰ There is no evidence Omar used or suffered from the effects of a non-prescribed drug on the day in question. A non-prescribed drug had nothing to do with the offense. The condition prohibiting use of such drugs is not crime related and therefore unauthorized by statute. A community custody condition cannot be imposed if it is unauthorized by statute. Motter, 139 Wn. App. at 801.

Former RCW 9.94A.715(2)(a) requires a sentencing court to impose the conditions listed in former RCW 9.94A.700(4) and allows the imposition of the conditions listed in former RCW 9.94A.700(5).¹¹

⁹ Laws of 2003, ch. 379 § 4. All references to RCW 9.94A.700 are to this version. This was the law in effect at the time of Omar's offense on January 23, 2009. Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345.

¹⁰ RCW 9.94A.030(10) provides "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct."

¹¹ Laws of 2006, ch. 130, § 2. This was the law in effect at the time of Omar's offense on January 23, 2009. All references to RCW 9.94A.715 are to this version.

Former RCW 9.94A.700(4)(c) states an "offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions." The court here correctly imposed this condition on Omar because the law required it. CP 42.

But it lacked authority to additionally order Omar, as a non-mandatory condition of community custody, not to use any non-prescribed drugs. This condition is not limited to use of controlled substances and encompasses any legal drug not prescribed by a physician.

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). "When a sentence has been imposed for which there is no authority in law, the trial court has the Power and the duty to correct the erroneous sentence, when the error is discovered." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)). This Court should therefore order the sentencing court to strike the condition pertaining to substance abuse evaluation and treatment. State v. Jones, 118 Wn. App. 199, 207-08, 212, 76 P.3d 258 (2003).

3. THE TRIAL COURT WRONGLY ORDERED
SUBSTANCE ABUSE EVALUATION AND
TREATMENT AS A CONDITION OF COMMUNITY
CUSTODY.

As a condition of community custody, the court ordered Omar to "participate in the following crime-related treatment or counseling services: obtain substance abuse evaluation and comply with any treatment recommendations." CP 42. The court lacked authority to impose this condition.

Former RCW 9.94A.700(5)(c) allowed the court to impose "crime-related treatment or counseling services" as a condition of community custody. Former RCW 9.94A.715(2)(a) allowed the court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."

But when a court orders evaluation and treatment under these provisions, the evaluation and treatment must address an issue that contributed to the offense. Jones, 118 Wn. App. at 207-08.

The record shows Omar drank alcohol on the day of the incident, but there is nothing in the record to indicate a controlled substance was involved. SRP 8. Under the Sentencing Reform Act, a substance abuse condition can be imposed only when controlled substances, as opposed to alcohol alone,

contribute to the defendant's crime. Jones recognized a difference between controlled substances and alcohol in holding alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense. Jones, 118 Wn. App. at 202, 207-08; see also Motter, 139 Wn. App. at 801 (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody). At the sentencing hearing, the court remarked "you must obtain an alcohol *or* substance abuse evaluation and then follow whatever treatment recommendations are made." 5RP 9 (emphasis added). The judge himself recognized a distinction between substance abuse and alcohol treatment.

The trial court checked a box next to the line in the pre-printed judgment and sentence that stated "The court finds that chemical dependency contributed to this offense justifying treatment conditions imposed herein (RCW 9.94A.607)." CP 39. RCW 9.94A.607(1) provides:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1) has been used to justify imposition of drug treatment as a condition of community custody where evidence showed the

defendant consumed methamphetamine before committing the offense. State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007), rev. on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009). Findings of fact that underlie the imposition of community custody are reviewed for substantial evidence. Motter, 139 Wn. App. at 801. Even assuming a chemical dependency could be construed as encompassing alcohol, there is no evidence to support a finding that Omar was dependent on a controlled substance.

The trial court acted beyond its statutory authority in requiring Omar to undergo a substance abuse evaluation and comply with any recommended treatment as part of his community custody sentence because substance abuse is not related to the circumstances of his offense. Remarks made at the sentencing hearing addressed the effects of alcohol on the crime committed. 5RP 8. But the broad imposition of "substance abuse" evaluation and treatment as a condition of community custody was beyond the court's power. This Court should therefore order the sentencing court to strike the condition pertaining to substance abuse evaluation and treatment. Jones, 118 Wn. App. at 207-08, 212.

4. THE TRIAL COURT WRONGLY ORDERED SUCCESSFUL COMPLETION OF A BATTERER'S TREATMENT PROGRAM AS A CONDITION OF COMMUNITY CUSTODY.

As a special condition of community custody, the court ordered Omar to "enter and successfully complete a state certified domestic violence batterer's treatment program." CP 42. The court lacked statutory authority to impose this condition.

This condition needed to be crime related. Former RCW 9.94A.700(5)(c); Former RCW 9.94A.715(2)(a). To legitimately impose it, evidence at least needed to show Omar assaulted or threatened to assault Hattie Lee as part of the offense for which he was convicted.

No evidence produced at trial showed Omar assaulted or threatened to assault Lee. At sentencing, the prosecutor alleged Omar threatened her when he violated the no contact order. 5RP 5. Defense counsel objected, noting the trial evidence did not show Omar threatened her and the defense was not otherwise stipulating to the fact: "We have not agreed to any real facts or anything of that kind." 5RP 5-6. The court responded, "Well, I'm not going to rely on those. I don't have any problem with that." 5RP 6.

The real facts doctrine precludes a trial court from considering unproved facts at sentencing. State v. Quiros, 78 Wn. App. 134, 138-39,

896 P.2d 91 (1995); RCW 9.94A.530(2). The purpose of a real facts hearing is to protect the defendant from "consideration of unreliable or inaccurate information." State v. Morreira, 107 Wn. App. 450, 456-57, 27 P.3d 639 (2001) (quoting State v. Handley, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990)). RCW 9.94A.530(2) codifies the doctrine as follows:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

The sentencing court here appropriately disregarded the prosecutor's allegation of threat under the real facts doctrine because defense counsel properly objected. The facts established at trial showed Omar violated the no contact order against Lee, not that he threatened or assaulted her at the time of the offense. The court therefore lacked authority to impose the batterer's treatment program as a condition of community custody. It was not directly related to the circumstances of the offense. This Court should therefore order the sentencing court to strike this condition. Jones, 118 Wn. App. at 207-08, 212.

D. CONCLUSION

For the reasons stated, this Court should reverse the conviction and remand for a new trial. In the event this Court declines to do so, this Court should order the trial court to strike the challenged community custody conditions.

DATED this 29th day of January 2010.

Respectfully Submitted,

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APPENDIX A

FILED
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KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

FEISAL M. OMAR,

Defendant.

No. 09-1-02243-3 KNT

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on July 7, 2009 before the Honorable Judge McDermott.

The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

Daniel T. Satterberg, Prosecuting Attorney
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ORIGINAL

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1 After considering the evidence submitted by the parties and hearing argument, to wit: the
2 testimony of Detective Michael Jordan, the court enters the following findings of fact and
3 conclusions of law as required by CrR 3.5.

4 1. THE UNDISPUTED FACTS:

5 a. The defendant was in-custody at the Auburn Municipal Jail after being arrested on
6 January 23, 2009 for Felony Violation of a Court Order;

7 b. Detective Jordan went to the jail to make contact with the defendant;

8 c. Detective Jordan requested that a jail officer bring the defendant ^{from his holding} ~~out into the~~
9 ~~cell into the booking area hallway~~ ~~hallway~~ so that Detective Jordan could speak with him;

10 *RAM* d. The defendant and Detective Jordan spoke in the hallway. Detective Jordan

11 introduced himself to the defendant, told the defendant he was investigating the
12 ^{saying, "I'm Detective Jordan. I'd like to talk} case, and asked the defendant if he would like to speak with him about the incident.

13 *RAM* e. The defendant replied, "there was nothing to talk about, there was a no-contact
14 ^{to you about this incident. Would you like to} ~~order in place and he was at the location."~~
^{talk to me about this incident?"}

15 f. The detective informed the defendant of the charges he was being held on and the
16 defendant then asked the detective why he was being held on a felony. The
17 detective told him that it was because he had three prior convictions. The
18 defendant then said, "yes, they were with a different woman."

19 g. The detective again asked the defendant if he would like to talk to him about the
20 incident and the defendant repeated, "there was nothing to talk about, there was a
21 no-contact order in place and he was at the location."

22 h. The detective then left the jail.

23
24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

1 2. THE DISPUTED FACTS:

2 No facts in dispute.

3 3. CONCLUSIONS AS TO THE DISPUTED FACTS:

4 a. The defendant was in-custody at the Auburn Municipal Jail after being arrested on
5 January 23, 2009 for Felony Violation of a Court Order;

6 b. Detective Jordan went to the jail to make contact with the defendant;

7 c. Detective Jordan requested that a jail officer bring the defendant out into the
8 hallway so that Detective Jordan could speak with him;

9 d. The defendant and Detective Jordan spoke in the hallway. Detective Jordan
10 introduced himself to the defendant, told the defendant he was investigating the
11 case, and asked the defendant if he would like to speak with him about the incident.

12 e. The defendant replied, "there was nothing to talk about, there was a no-contact
13 order in place and he was at the location."

14 f. The detective informed the defendant of the charges he was being held on and the
15 defendant then asked the detective why he was being held on a felony. The
16 detective told him that it was because he had three prior convictions. The
17 defendant then said, "yes, they were with a different woman."

18 g. The detective again asked the defendant if he would like to talk to him about the
19 incident and the defendant repeated, "there was nothing to talk about, there was a
20 no-contact order in place and he was at the location."

21 h. The detective then left the jail.

1 4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S
2 STATEMENT(S):

3 a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

4 The following statement(s) of the defendant is/are admissible in the State's case-
5 in-chief:

6 "there was nothing to talk about, there was a no-contact order in place and he was
7 at the location."

8 This/These statement(s) is/are admissible because Miranda was not applicable
9 because the court finds that the detective's question to the defendant asking if he
10 was willing to talk about the incident was not a question designed to elicit an
11 incriminating response from the defendant; and was not a question that the officer
12 should have known was reasonably likely to elicit an incriminating response from
13 the defendant.

14 b. ADMISSIBLE FOR IMPEACHMENT

15 The following statement(s) of the defendants is/are admissible only for
16 impeachment because the custodial statements were not knowingly and
17 intelligently made after waiver of Miranda rights, but the statement(s) was/were
18 voluntary:

19 No findings were made.

20
21 In addition to the above written findings and conclusions, the court incorporates by
22 reference its oral findings and conclusions.

1 Signed this 24 day of July 2009.

2
3 
4 JUDGE RICHARD F. McDERMOTT

5 Presented by:

6 
7 Jennifer L. Worley, WSBA #32800
8 Deputy Prosecuting Attorney

9 
10 Kevin Dolan, WSBA #2682
11 Attorney for Defendant

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24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 5

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64017-8-I
)	
FEISAL OMAR,)	
)	
Appellant.)	

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 29 PM 4:04

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FEISAL OMAR
C/O FRANCIS MWALE
600 146TH AVENUE NE, APT. 72
BELLEVUE, WA 98007

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JANUARY, 2010.

x *Patrick Mayovsky*