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No. 72024-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANDRA HIMMELMAN,

Appellant.

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

The Honorable David A. Kurtz

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

A worker hired by Sandra Himmelman to complete repairs in her house, alleged that someone broke into a storage shed and stole his tools. The worker also alleged that Ms. Himmelman pawned these items. Ms. Himmelman gave a statement to the police denying any involvement. This statement was made without any warnings and while in her house but confronted by two police officers who had accused her of committing a crime. Ms. Himmelman submits the trial court erred when it refused to suppress her initial statements to the police which were the result of custodial interrogation.

B. ASSIGNMENTS OF ERROR

1. Ms. Himmelman's federal and state constitutional rights to silence and due process were violated when the court admitted at trial her statements to the police in the absence of *Miranda* warnings.

2. To the extent it is deemed to be a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 4(a), which stated:

The defendant was neither in custody nor were her movements restricted to the degree associated with formal arrest until the police actually arrested her. There were no facts to show that the defendant was in custody. There were no facts to show a reasonable person in a

same or similar situation to the defendant would feel that they were in custody.

3. To the extent it is deemed to be a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 4(e), finding Ms. Himmelman's statements admissible.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The Fifth and Fourteenth Amendments to the United States Constitution as well as article I, section 9 of the Washington Constitution forbid admission of a defendant's statements which resulted from custodial interrogation absent evidence the defendant was provided with valid *Miranda*¹ warnings. A person is in custody for the purposes of *Miranda* where a reasonable person in the defendant's position would have believed she was in custody to the degree associated with formal arrest. Here, Ms. Himmelman gave unwarned statements to the police while inside her home surrounded by two police officers who had accused her of a crime. Must these unwarned statements which were the product of custodial interrogation be suppressed under *Miranda*?

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

D. STATEMENT OF THE CASE

Sandra Himmelman owned a home in Mill Creek. Derryn Van Sickle, who was doing work on Ms. Himmelman's home, contacted the police and reported that his tools had been stolen and that he suspected Ms. Himmelman. CP 74.

Mill Creek Police Officers Bridgman and Kidwell knocked on Ms. Himmelman's entry door and were let inside. CP 75. The officer told Ms. Himmelman he was there to investigate a theft and asked her questions. CP 75. Ms. Himmelman answered Bridgman's questions. CP 75. Bridgman then arrested Ms. Himmelman. CP 75. Bridgman then advised Ms. Himmelman of her *Miranda* rights and interrogated her further at the police station where she made additional statements. CP 75.

Ms. Himmelman was charged with two counts of second degree trafficking in stolen property. CP 72-73. Ms. Himmelman moved to suppress the initial statements she made to Bridgman in the absence of advisement of her *Miranda* rights. CP 78-86. At the conclusion of the evidentiary hearing, the trial court filed written findings of fact and conclusions of law finding that Ms. Himmelman was not in custody

prior to the questioning in her house, and her statements were admissible a trial. CP 76.

At trial, the state admitted Ms. Himmelman's statements made in the absence of *Miranda* warnings. 4/15/2014RP 59-60. Following the jury trial, Ms. Himmelman was subsequently convicted as charged. CP 40-41.

E. ARGUMENT

Ms. Himmelman's initial statements to the police were the result of custodial interrogation and must be suppressed.

1. A person in custody must be advised of their rights prior to any questioning.

Under the federal and state constitutions, a defendant possesses rights against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. A person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "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. If the warnings are not given, any statements elicited are inadmissible for certain purposes

in a criminal trial. *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

The requirement that police administer *Miranda* warnings does not attach when “there has been such a restriction on a person’s freedom as to render him ‘in custody.’” *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). Whether someone is in custody depends on all of the circumstances surrounding the interrogation, but “the ultimate inquiry is simply whether there [was] a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983), quoting *Mathiason*, 429 U.S. at 495. See also *State v. Daniels*, 160 Wn.2d 256, 266, 156 P.3d 905 (2007).

In determining whether a suspect is “in custody,” a court engages in an objective inquiry in the sense that it should not consider the “subjective views harbored by either the interrogating officers or the person being questioned.” *Stansbury*, 511 U.S. at 323. The United States Supreme Court has articulated the test as follows:

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at

liberty to terminate the interrogation and leave. 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 formal arrest.

J.D.B. v. North Carolina, ___ U.S. ___, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011), quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (alteration, and footnote omitted). Thus, a reviewing court considers the situation from the suspect's point of view, but does not consider undisclosed contemporaneous beliefs of either the suspect or the officers about the nature of the interrogation.

In holding that the brief detention and questioning of a motorist did not amount to custodial interrogation, even though a motorist in such a situation is not free to leave, the United States Supreme Court distinguished such stops from the kind of police station interrogations that gave rise to the *Miranda* rule. *Berkemer v. McCarty*, 468 U.S. 420, 437-40, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). First, the Court noted that "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief," and, second, that "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police . . . most importantly, [because] the typical

traffic stop is public, at least to some degree.” *Berkemer*, 468 U.S. at 438.

The fact that the interrogation takes place in the suspect’s residence does not establish that the suspect was not in custody. *See Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) (suspect surrounded by four officers in his bedroom was in custody).

Whether the defendant was in custody is a mixed question of fact and law. *State v. Solomon*, 114 Wn.App. 781, 787, 60 P.3d 1215 (2002). *Miranda* claims are issues of law which are reviewed *de novo*. *Daniels*, 160 Wn.2d at 261.

2. When confronted by the two police officers in her house, Ms. Himmelman was “in custody” for the purposes of *Miranda*.

Here, Police Officers Bridgman and Kidwell confronted Ms. Himmelman in her home and accused her of a crime. 9/19/2013RP 5, 17. Ms. Himmelman answered Bridgman’s questions without being advised of her *Miranda* rights, who then immediately arrested her. 9/19/2013RP 18. Ms. Himmelman submits she was in custody when confronted by the officers and her subsequent statements to the police must be suppressed as a violation of *Miranda*.

Instructive on this issue is the decision of the United States Supreme Court in *Orozco, supra*. In *Orozco*, the defendant was suspected of shooting a man to death. In the early morning hours, four police officers arrived at the defendant's boardinghouse, were admitted by an unidentified woman, and were told that defendant was asleep in the bedroom. All four officers entered the bedroom and began to question petitioner. According to the testimony of one of the officers, from the moment the defendant gave his name, he was not free to go where he pleased but was 'under arrest.' The officers asked him if he had been to the restaurant where the shooting occurred that night and when he answered 'yes' he was asked if he owned a pistol. The defendant admitted owning one. After being asked a second time where the pistol was located, he admitted that it was in the washing machine in a backroom of the boardinghouse. *Orozco*, 394 U.S. at 325. The defendant had not been advised his rights prior to the officers questioning. The Supreme Court held "that the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda. Id.* at 326.

In addition, *State v. Dennis*, 16 Wn.App. 417, 558 P.2d 297 (1976), Division Two of this Court held an interrogation custodial under circumstances similar but not identical to those presented here. One officer, invited into the apartment by one of the suspects, accused the suspects of possessing drugs and questioned them in their kitchen. *Dennis*, 16 Wn.App. at 419. Although the officer apparently told the suspects they were free to leave, one suspect testified that she asked the officer to go into the living room, but he refused. *Dennis*, 16 Wn.App. at 420. The Court held that “the atmosphere was . . . dominated by the officer’s unwelcome presence and his insistence on remaining in a position where he could monitor and thus restrict the occupants’ freedom of movement within their home.” *Dennis*, 16 Wn.App. at 421-22.

The only difference between *Orozco* and Ms. Himmelman’s situation is that according to the officers’ testimony in *Orozco*, the defendant was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning. *Orozco*, 394 U.S. at 327. Here, Bridgman did not testify that Ms. Himmelman was under arrest, but he also never testified that she was free to leave. But this point is of no matter. The question is not the subjective view of

Bridgman or Ms. Himmelman but objectively whether she was in custody.

3. Since Ms. Himmelman was in custody when questioned without being advised of her rights, her statements must be suppressed.

The erroneous admission of statements obtained in violation of *Miranda* is subject to constitutional harmless error analysis: the “error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless.” *State v. Nysta*, 168 Wn.App. 30, 43, 275 P.3d 1162 (2012), *review denied*, 177 Wn.2d 1008 (2013) , *citing State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless “if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Nysta*, 168 Wn.App. at 43.

Ms. Himmelman’s statements to Bridgman, especially her initial statement made inside her entry door, became a focal point of the prosecutor’s closing argument, where it was used to emphasize that what she said proved her actions were reckless, an essential element of the charged offense:

When did she talk to Officer Bridgman? She said first they were Ryan’s tools. And when she was caught on that at the police station, she gave a different version and mentioned Derrick for the first time. But, again, what she

said about Derrick – no phone number, no last name, the reasons she didn't want his last name – clearly shows her actions were reckless, certainly a deviation from what a reasonable person would do.

...

Instruction number 9 says that she acts recklessly – a person acts recklessly when they know of and disregard a substantial risk that trafficking in stolen property may occur. By her own statement and the fact that she didn't know his last name, she didn't want to know his last name so she wouldn't get entangled in subsequent legal issues, . . . is a substantial risk she disregarded. And this disregard is a gross deviation from what a reasonable person would do.

...

I would go farther, that her changed stories, first saying Ryan, not to Mr. VanSickle, she told him I pawned your stuff, but then to Officer Bridgman two days later. And when he questioned her about it – because it wasn't until he questioned her. I know Ryan. I've never known him to have a job or tools. Then it changed and Derrick came out.

The change of the story shows consciousness of guilt. She's changing her story in an attempt to exculpate herself from this situation.

4/16/2014RP 15, 49, 52

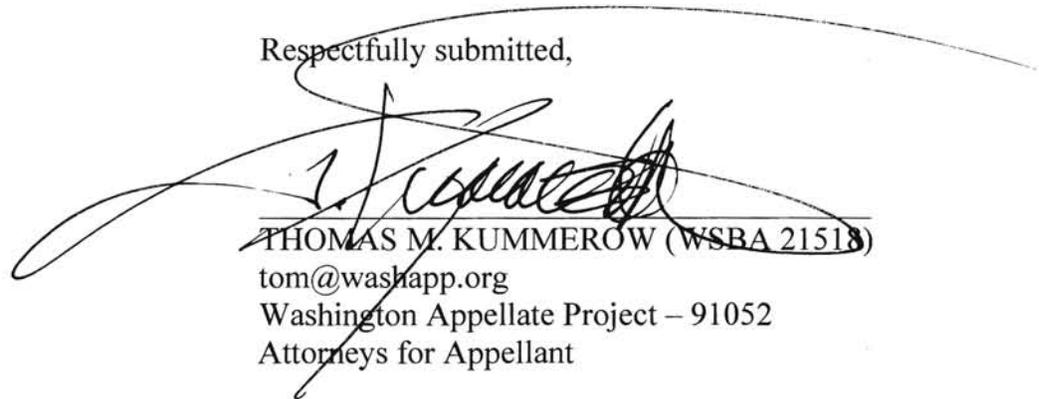
Given this emphasis by the prosecutor urging the jury to use Ms. Himmelman's disputed statement to prove an essential element of the charged offense, it cannot be said that any reasonable jury would have reached the same result in the absence of the error. As a result, the error in admitting Ms. Himmelman's disputed statement was not a harmless error and her convictions must be reversed.

F. CONCLUSION

For the reasons stated, Ms. Himmelman asks this Court to suppress her initial statements to the police and reverse her convictions.

DATED this 30th day of December 2014.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read 'T. Kummerow', is written over the typed name and contact information.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 72024-4-I
)	
)	
SANDRA HIMMELMAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
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SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF DECEMBER, 2014.

X _____ 