Supreme Court No 100457-5
COA No. 81018-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM LIND,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

William Lind was the appellant in COA No. 81018-9.

B. COURT OF APPEALS DECISION

Mr. Lind seeks review of Division One's decision in COA No. 81018-9-I. Appendix A.

C. ISSUES PRESENTED ON REVIEW

1. Where the defendant was given Miranda warnings but he later asked to speak to the deputy "off the record," did the Court err in the objective analysis by deeming Mr. Lind's request to speak off the record as solely a request that the recorder be turned off?

2. Did the Court err in failing to discern that the officer engaged in a deceptive practice in violation of Miranda by taking advantage of Lind's obvious lack of understanding, rather than re-Mirandizing Mr. Lind, as defense counsel argued?

3. Was the actual question presented whether the defendant did not understand his right to silence, and therefore,

absent re-advisement, whether he did not properly waive that right for purposes of his final statements, as demonstrated by his request to speak "off the record"?

D. STATEMENT OF THE CASE

1. Allegations and arrest.

William Lind was hired as a general contractor by Zee Construction to complete remodeling work at the home of Caroline Spence and her daughter Jillian, in Everett. 10/29/19RP at 302-04. On August 8, 2019, Jillian called her sister and asked her to pick her up. 10/29/19RP at 274-75. They drove to Evergreen Health, where Jillian, who was upset, stated to a SANE nurse that she had been raped. 10/29/19RP at 233.

When sheriff's deputies arrived at Mr. Lind's property in Mukilteo, he denied having sex with Jillian, because he was being questioned with his young daughter nearby in the family car. 10/31/19RP at 519-23. Once out of earshot, Mr. Lind admitted to having intercourse with Jillian, as he did again later

during his recorded interrogation with Deputy Myles Bittinger at the Sheriff's Office – but he expressed that he had no idea why Jillian would say he raped her. 10/31/19RP at 524-26.

2. <u>Interrogation</u>.

At Mr. Lind's CrR 3.5 hearing, Deputy Bittinger explained that he took a recorded statement from Mr. Lind at the Sheriff's Office on the evening of his arrest, in which Mr. Lind made clear that he had consensual sex with Jillian. 9/5/19RP at 24-26; <u>see</u> 10/31/19RP at 472-75 (trial). After Deputy Bittinger concluded the interview and turned off his recording device (an I-phone), Mr. Lind asked if he could speak with Bittinger "off the record." 9/5/19RP at 26; <u>see</u> 10/31/19RP at 473-76. Detective Bittinger showed Mr. Lind that his recording feature was off. 9/5/19RP at 27-28; 10/31/19RP at 476-78.

Then, Deputy Bittinger reminded Mr. Lind about a discussion during the first part of the interrogation about a daughter of his own being sexually abused and asked him how

he thought Jillian would feel, Mr. Lind referred to himself as a "piece of shit." 9/5/19RP at 24-29; see 10/31/19RP at 476-78. These statements were later admitted at trial over defense protest at the CrR 3.5 hearing.

3. CrR 3.5 hearing.

The trial court admitted these inculpatory statements by analyzing the issue as whether Mr. Lind was invoking his right to silence. The court ruled that Mr. Lind not invoking his right to silence but was merely asking that further discussions he wanted to have with Deputy Bittinger simply not be *tape-recorded*. 9/5/19RP at 44-47; CP 119 (COL 6, COL 7).

26. When the recorded interview was concluded, the Defendant asked Deputy Bittinger if he could speak with him "off the record."
27. The deputy agreed and showed the Defendant that the recorder was no longer recording.

CP 118 (FOF 26, FOF 27). The defense made several arguments, especially urging that the issue was that Mr. Lind, at that juncture, plainly did not understand his Miranda rights, and that after this mistaken impression, the Miranda warnings

needed to have been re-administered before any statement could be taken from him could be admissible. 9/5/19RP at 43-44.

4. <u>Appeal</u>. The Court of Appeals conceded that Deputy Bittinger *incorrectly* led Mr. Lind to believe that statements Mr. Lind made after the tape *recorder* was turned off would be "off the record," meaning inadmissible in court. The trial court in its CrR 3.5 findings found that "[w]hen the recorded interview was concluded, the Defendant asked Deputy Bittinger if he could speak with him '**<u>off the</u> record**' " and "[t]he Deputy **agreed** and **showed the defendant that the recorder was no longer recording**." FOF 26, 27 (CrR 3.5 findings, at CP 118).

However, **there is no such thing as "off the record**." The State knew this, and knows this. See 9/5/19RP at 27-29 (CrR 3.5 hearing, Deputy Bittinger's agreement that "nothing is off the record when he's speaking to an officer about the case"); see SRB, at p. 14. The Deputy always knew this (SRB, at p. 14 (citing Deputy Bittinger's testimony at 10/31/19RP at 477, stating, "**No**. Anything that a person says to a law enforcement

officer in the course of their duties is – **there is no such thing as off the record**.") (emphasis added).

The Court of Appeals also agreed below that showing an interrogee that a tape recorder is off, to signal agreement with the defendant's request that a conversation will be "off the record," means **no such thing** in itself to render the conversation *inadmissible*. As the Court of Appeals stated, although citing a case in a slightly different posture, "[A] suspect does not invoke his or her right to remain silent merely by refusing to allow the tape recording of an interview, unless that refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others." State v. Piatnitsky, 170 Wn. App. 195, 226, 282 P.3d 1184 (2012)

The Court of Appeals ruled that under an objective inquiry, and pursuant to Davis v. United States, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), a person unequivocally asserts his right to remain silent only where his

invocation is clear enough that "a reasonable police officer in the circumstances" would understand the statements to be an assertion of that right; therefore, Mr. Lind's statements were admissible because he had agreed prior to the recorded interrogation that anything he said could be used against him. Decision, at pp. 6-7 (citing Davis, 512 U.S. at 459).

E. ARGUMENT

1. Review is warranted under RAP 13.4(b)(3).

This case involves the Fifth Amendment, a federal constitutional right which requires the State to establish the admissibility of a defendant's statements made during interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); U.S. Const. amend. V. The issue is significant given the increased use of recordings during interrogations and the likelihood that this issue will be encountered frequently in the future.

1. The defendant's statements at issue were not admissible.

This case involves the Fifth Amendment. A waiver of the right to silence has not been executed when the defendant demonstrates that he lacks the requisite understanding of the consequences of speaking. Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

And prior Miranda warnings do not establish that later statements of hope by the accused that remarks can be made off the record are compatible with an intelligent waiver - indeed, what is more demonstrated by this is total miscomprehension of the fact that the statements will be usable against the defendant in court. See People v. Samayoa, 15 Cal.4th 795, 829-30, 64 Cal.Rptr.2d 400, 938 P.2d 2 (1997).

Mr. Lind was plainly seeking to speak privately and in confidence and believed that if the recorder was off, that meant his statements would not be used at a trial. See State v. Piatnitsky, 170 Wn. App. at 226. The Court of Appeals

wrongly rejected the importance of United States v. Harris, 72 F. Supp.3d 1332, 1335 (M.D. Ga. 2014) to Mr. Lind's case. Decision, at pp. 7-8. As was said in Harris, "By making a misrepresentation to Defendant, whether he thought doing so was proper or not, [the agent] effaced long standing principles established by Miranda." Harris, 72 F. Supp.3d at 1338.

The law and the record in this case makes clear that the detective, the prosecutor and the Court of Appeals were correct – **there is no such thing as off the record**. See Part C. supra. The trial court's legal conclusions regarding Miranda are issues of law that are reviewed *de novo*. State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007). Even if an individual is given Miranda warnings, statements made thereafter which are clearly incompatible with the purpose of Miranda and its progeny conflict with and defeat the viability of the momentous execution of a waiver of constitutional rights. Harris, 72 F. Supp.3d at 1337; see also Piatnitsky, 170 Wn. App. at 226.

Here, the detective could only know at that juncture of the interview - see 9/5/19RP at 24-27 - and no court could do *nothing other than* conclude - that Mr. Lind was no longer, at that juncture, operating under a knowing, voluntary, or intelligent waiver of his right to silence and did not understand that further statements could be used against him. Instead of shaking the turned-off tape recorder in front of Mr. Lind's face when Mr. Lind asked if he could speak "off the record," and thereby misadvising Lind, either with purpose, recklessness, or mistake, the trained Detective should instead have re-advised Mr. Lind just as he later described at trial – because there is no such thing as "off the record" under Miranda v. Arizona, and Lind was laboring under a constitutional misunderstanding. A waiver exists only when it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. at 421.

The statements Mr. Lind challenges in this appeal were improperly admitted under the Fifth Amendment. As thoroughly argued in the Opening Brief, see AOB, at pp. 13-15, the constitutional standardd requires reversal.

F. CONCLUSION

Based on the foregoing, the petitioner respectfully asks that this Court accept review, find error, and remand for entry of an order of suppression.

DATED this 8th day of December, 2021.

This petition has a word count of 1,711 words per RAP 18.17.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. LIND, WILLIAM JAY, DOB: 01/24/1982, Appellant.	)	No. 81018-9-I UNPUBLISHED OPINION

BOWMAN, J. — William Jay Lind appeals his jury conviction for third degree rape. He argues the trial court erred by admitting inculpatory custodial statements after he asked to speak with the officer "off the record." Because Lind did not invoke his right to remain silent and the officer did not engage in deception or misrepresentation about Lind's constitutional rights, we affirm.

FACTS

On the morning of August 8, 2018, 36-year-old Lind was working for a construction company remodeling a family's house. The family's 18-year-old daughter J.L.S. had just returned home to live with her mother and stepfather after being away for about a month. J.L.S. woke up to find Lind entering her bedroom. He said he had to work on a closet. J.L.S. immediately got up and went to the restroom. No one else was home.

Lind made flirtatious and sexual advances to J.L.S. throughout the morning. Around 12:30 p.m., Lind attacked J.L.S. in her bedroom and raped her.

J.L.S. texted her sister and asked her to come pick her up. J.L.S. said that it was an "emergency" and that she was "scared." While driving away from the home, J.L.S. told her sister that Lind had raped her. They drove to the emergency room for a sexual assault examination. At the hospital, J.L.S. reported the rape to medical staff and the police.

During the police investigation, Lind gave officers three statements, two of which officers recorded, after they advised him of his constitutional right to remain silent and right to an attorney. Before trial, the State moved to admit all of Lind's statements to police. The court held a CrR 3.5 hearing. It considered testimony from the three officers who took statements from Lind.

Deputy Robinson Interview

Snohomish County Sherriff's Deputy Lucas Robinson testified that he read Lind Miranda[1] warnings when he arrested Lind at his home and placed him in handcuffs. Deputy Robinson read from a preprinted card and told Lind:

> "You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any point to exercise these rights and not answer any questions or make any statements."

Lind told the deputy he understood these rights and when asked if he wished to talk, "he immediately started talking." Deputy Robinson testified that at no point in their conversation did Lind invoke his right to an attorney or invoke his

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

right to remain silent. When they arrived at the jail, Deputy Robinson asked Lind if he would be willing to speak with a detective and Lind said, " 'Yes.' "

Detective Bittinger Interview

Detective Myles Bittinger testified that he then took custody of Lind and Lind agreed to speak with him at the jail. Detective Bittinger gave Lind a consent form for a recorded interview. A section of the form advised Lind of the same rights Deputy Robinson read to him earlier. Detective Bittinger read the form out loud as Lind followed along. Lind acknowledged that he understood his rights and said that he was willing to speak with the detective. Lind also signed the form both before he made any recorded statements and "at the conclusion of the interview." Detective Bittinger testified that Lind expressed no confusion about his rights and did not invoke his right to counsel or his right to remain silent.

Detective Bittinger used a department-issued Apple iPhone to record his interview with Lind. At one point, an incoming call interrupted the recording. Detective Bittinger stopped the recording and made a record of the interruption. Lind did not make any statements to the detective while the recorder was off.

Later, Lind asked the detective if he could " 'tell [him] something off the record.' " Detective Bittinger turned off the recorder on his iPhone and showed Lind that it was off. Lind then asked the detective if he thought Lind had "done it." The detective said he did and asked Lind "how he thought [J.L.S.] was feeling right now." Lind responded, " '[O]h God, I am such a piece of shit.' "

Detective Bittinger told the court he did not restart the recording or re-advise Lind of his rights because Lind "continued speaking," which the detective

"took . . . to mean that [Lind] was satisfied with what had transpired and was comfortable asking me the question at that point." Because of the "nature" of the unrecorded questions and statements, Detective Bittinger felt it important to note them in his report.

Detective Bennett Interview

Detective David Bennett testified that he and Detective M. Flolid interviewed Lind at the sheriff's office about three weeks later. The detectives used the same form Detective Bittinger used to advise Lind of his rights and to obtain Lind's consent to a recorded interview. Lind again said he understood his rights to an attorney and to remain silent, did not invoke his rights, and agreed to a recorded interview.

Lind did not testify at the CrR 3.5 hearing. The trial court ruled that all of Lind's statements were voluntary and admissible in the State's case in chief.[2] It reasoned that the officers advised Lind of his rights at each interview and that Lind expressed he understood his rights and did not invoke them. The court also determined that Lind's request to talk "off the record" was not an unequivocal invocation of his right to remain silent. The court entered findings of fact and conclusions of law.

A jury convicted Lind of third degree rape. Lind appeals.

[2] The court redacted portions of each interview that it later admitted at trial.

ANALYSIS

Lind argues the trial court erred by admitting statements he made after asking to speak to Detective Bittinger "off the record." He also challenges several of the trial court's findings of fact.

Findings of Fact

"We review challenged findings of fact for substantial evidence, that is, enough evidence to persuade a fair-minded rational person of the truth of the finding. We treat unchallenged findings as verities on appeal." State v. Allen, 138 Wn. App. 463, 468, 157 P.3d 893 (2007).[3]

Lind challenges three of the trial court's factual findings:

> 26. When the recorded interview was concluded, the Defendant asked Deputy Bittinger if he could speak with him "off the record."
> 27. The deputy agreed and showed the Defendant that the recorder was no longer recording.
> 28. The Defendant had previously been advised that anything he said could be used against him.

Substantial evidence supports each of these findings. Detective Bittinger testified that at the end of the recorded interview, Lind asked the detective if he could " 'tell [him] something off the record.' " Detective Bittinger turned off the recording on his iPhone and showed Lind that it was off. And all three interviewing officers told Lind before they asked any questions that " '[a]nything you say can be used against you in a court of law.' " He received the same admonishment twice in writing.

[3] Citation omitted.

Admissibility of Custodial Statements

Lind argues the "erroneous admission of [his] apparent confession to rape was Miranda error that is not overcome by overwhelming untainted evidence." We disagree.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." To counteract the inherent compulsion of custodial interrogation, police must administer Miranda warnings. Miranda, 384 U.S. at 467. Under Miranda, police must inform a person in custody before interrogation that he has a right to remain silent and to have a lawyer present. Miranda, 384 U.S. at 469-70. Once a suspect unambiguously invokes his right to remain silent, police may not continue an interrogation or make repeated efforts to "wear [him] down." State v. I.B., 187 Wn. App. 315, 320, 348 P.3d 1250 (2015). But where an accused makes an ambiguous or equivocal statement about invoking his rights, officers need not ask clarifying questions or stop the interrogation. Berghuis v. Thompkins, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).[4]

We consider the totality of the circumstances when determining whether an accused unequivocally invoked his rights. See State v. Hodges, 118 Wn. App. 668, 671, 77 P.3d 375 (2003). This is an objective inquiry. Davis v. United States, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). A person unequivocally asserts his right to remain silent only where his invocation

[4] Berghuis applied the unambiguous/unequivocal invocation standard announced in Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (determining whether the defendant invoked the right to counsel), to determine whether the defendant invoked the right to remain silent.

is clear enough that "a reasonable police officer in the circumstances" would understand the statements to be an assertion of that right. Davis, 512 U.S. at 459.

> "[A] suspect does not invoke his or her right to remain silent merely by refusing to allow the tape recording of an interview, unless that refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others."

State v. Piatnitsky, 170 Wn. App. 195, 226, 282 P.3d 1184 (2012) (quoting People v. Samayoa, 15 Cal. 4th 795, 829-30, 938 P.2d 2 (1997), aff'd by Samayoa v. Ayers, 649 F.3d 919 (9th Cir. 2011)), aff'd, 180 Wn.2d 407, 325 P.3d 167 (2014); see also State v. O'Neal, 392 S.W.3d 556, 570 (Mo. Ct. App. 2013) (Defendant's statement that "he was willing to tell his story, so long as it was not audio-recorded," was not an invocation of his right to remain silent.); Jones v. State, 344 Ark. 682, 689-90, 42 S.W.3d 536 (2001) (Concluding that the defendant's request to turn off the tape recorder was not an unequivocal invocation of his right to remain silent because "[h]e never indicated that he did not wish to talk, only that he did not wish what he said to be recorded.").

Here, like the cases cited above, Lind asked only if he could tell Detective Bittinger something "off the record." The detective showed Lind that he was no longer recording the conversation and Lind continued to speak. A reasonable officer under these circumstances would not believe Lind made an unequivocal assertion of his right to remain silent.

Citing United States v. Harris, 72 F. Supp. 3d 1332 (M.D. Ga. 2014), Lind suggests that Detective Bittinger deceived him into speaking because Lind clearly misunderstood that anything he said "off the record" could be used

against him. In Harris, the defendant was reluctant to continue talking to officers because " 'all of the things I'm telling you are probably going to hurt me.' " Harris, 72 F. Supp. 3d at 1335. He told officers he would only continue to talk " 'off the record.' " Harris, 72 F. Supp. 3d at 1335. Officers responded, " '[S]ure.' " Harris, 72 F. Supp. 3d at 1335. When Harris asked for a second confirmation that their conversation was " 'off the record,' " officers stated, " '[O]kay, off the record.' " Harris, 72 F. Supp. 3d at 1335. The court suppressed the defendant's statements because the officers led Harris to believe they would not use his statements against him, and "intentionally false representations directly contradicting a Miranda warning are never appropriate." Harris 72 F. Supp. 3d at 1337.

Harris' comments suggested he believed only recorded statements would " 'hurt' " him, and the officers unlawfully fostered that belief. Unlike Harris, Lind did not suggest that he believed no one could use his "off the record" statements against him. And there is no evidence that Detective Bittinger engaged in any misrepresentation or deception. He did nothing to induce Lind to speak to him and did not foster a belief that their conversation would be secret or that no one would use Lind's statements against him. The court did not err in admitting Lind's statements.

Even so, any error by admitting Lind's "off the record" statements was harmless. We apply a harmless error analysis to erroneous admissions of statements obtained in violation of Miranda. State v. Reuben, 62 Wn. App. 620, 626, 814 P.2d 1177, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991). We

presume constitutional error is prejudicial, and the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Guloy, 104 Wn.2d at 425. Under the "overwhelming untainted evidence" test, we look only at the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d at 426. Under this test, we will reverse a conviction where there is a reasonable chance that the use of inadmissible evidence was necessary to reach a guilty verdict. Guloy, 104 Wn.2d at 426.

Here, Lind admitted that he engaged in sexual intercourse with J.L.S. The sole issue at trial was whether the intercourse was consensual. J.L.S. testified that she did not consent to have sex with Lind. She told Lind "no" several times but he continued to assault her.

Other evidence supported J.L.S.' claim. Her sister testified that she received text messages from J.L.S. shortly after the rape stating that "something with the construction worker happened, something bad," that J.L.S. needed to be picked up right away, that it was an "emergency," and that she was "scared." As they drove away from the house, J.L.S. told her sister that Lind raped her. They drove to the hospital, where a forensic nurse gave J.L.S. a sexual assault examination. The nurse testified that J.L.S. appeared to be sad, tired, and "just kind of numb." J.L.S.' description of the rape to medical staff was consistent with

her testimony at trial. Detective Bittinger also interviewed J.L.S. at the hospital. J.L.S.' account of the rape relayed to the detective was consistent with her testimony at trial.

Lind also made several statements during the recorded part of his interview that were similar to his "off the record" comment that " 'I am such a piece of shit.' " He told Detective Bittinger that if J.L.S. would have told him to stop, "it would've been over and I would've felt like a jackass and probably left." Referring to what he believed was consensual sex with a virtual stranger as a married man, Lind told officers he "feel[s] like a fucking tool" and "shouldn't have done it in the first place." Later, he repeated he "felt like an ass" after having sex with J.L.S. because he "ma[d]e out with her" even though he "barely kn[e]w her name." Finally, Lind confided that a member of his own family was a molestation survivor and the current accusation would ruin him. The court admitted all of these statements at trial.[5] Defense counsel argued to the jury that Lind's statements showed he regretted cheating on his wife and feared he would "get in trouble for having sex on the job" with someone he had just met who was also "the homeowner's daughter."

The potentially tainted evidence was substantially repetitive of the untainted evidence. We are convinced a reasonable jury would have reached the same result regardless of Lind's "off the record" statements. As a result, any error was harmless.

[5] Lind also testified at trial.

We affirm Lind's conviction for third degree rape.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81018-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 8, 2021

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