No. 29658-0-III

IN THE COURT OF APPEALS, DIVISION III,

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

LEONARD WILLIAM BOSTON

Appellant

BRIEF OF RESPONDENT

Shadan Kapri
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Stevens County
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I.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Boston's motion to suppress statements made to Office Manke in the jail.
2. The trial court erred in instructing the jury it had to be unanimous in its answer to the special verdict.
3. The evidence was insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses.

II.

ISSUES PRESENTED

1. Whether the trial court abused its discretion in denying Mr. Boston's motion to suppress statements made to Office Manke in the jail.
2. Whether the issue of the jury instruction regarding the special verdict is waived on appeal.
3. Whether the seating capacity of the school bus is viewed as an element of the charged crime.

III.

STATEMENT OF THE CASE

The State does not accept the Appellant's Statement of the Case. The State relies on the trial court's Findings of Facts and Conclusions of Law in the record filed on December 28, 2010 as the statement of the facts. (Clerk's Papers 272 – 282)

IV.

ARGUMENT

A. THE COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE TO DETECTIVE MANKE WHILE HE WAS IN JAIL.

The Fifth Amendment privilege against self-incrimination precludes the use of a Defendant's statement unless the privilege was knowingly and intelligently waived following the giving of *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966); *State v. Holland,* 98 Wash.2d 507, 519, 656 P.2d 1056 (1983). Here *Miranda* warnings were given and the trial court judge ruled that a waiver occurred given the circumstances surrounding the case. (CP 272 – 277)

Under CrR 3.5 when a statement of the accused is to be offered in evidence, the judge shall hold a hearing for the purpose of determining whether the statement is admissible. CrR 3.5(a). A CrR 3.5 hearing is mandatory, *State*

v. Myers, 86 Wash.2d 419, 425–26, 545 P.2d 538 (1976); whether requested or not. *State v. Lampshire,* 74 Wash.2d 888, 447 P.2d 727 (1968); *State v. Joseph,* 10 Wash. App. 827, 830–31, 520 P.2d 635 (1974). The purpose of the hearing is to protect constitutional rights. *See State v. Taylor,* 30 Wash. App. 89, 632 P.2d 892 (1981). This occurs by assuring a Defendant of his/her right to have the voluntariness of their statement or confession determined prior to trial, and to allow the court to rule on its admissibility. *State v. Fanger,* 34 Wash. App. 635, 636–37, 663 P.2d 120 (1983).

In this case, a CrR 3.5 hearing was held regarding the admissibility of statements made to Detective Manke while Mr. Boston was in jail. (CP 272 – 277) The subsequent Findings of Fact and Conclusions of Law were filed on December 28, 2010. (CP 272 – 277) Unchallenged findings are verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697 (1997), *cert denied by Stenson v. Washington*, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998); *State v. Crist*, 80 Wn. App. 511, 514, 909 P.2d 1341 (1996).

The Court of Appeals reviews the trial court's conclusions of law de novo, but conclusions entered by a trial court following a suppression hearing carry great significance for a reviewing court. *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993); *State v. Daugherty*, 94 Wn.2d 263, 269, 616 P.2d 649 (1980), *cert. denied*, 450 U.S. 958, 101 S. Ct. 1417, 67 L. Ed. 2d 382 (1981). Assertions of erroneous findings contained in the brief are waived if not supported by argument. *Goodman*, 150 Wn.2d at 782.

Opposing counsel argues that Mr. Boston did not waive his *Miranda* rights and therefore the statements made to Detective Manke were inadmissible and should have been suppressed by the trial judge. He assigns error to the trial court's conclusion of law that the Defendant waived his Miranda rights by implication. (Conclusion of Law B, CP 276 277) And that the officer returned at Mr. Boston's verbal request. (Finding of Fact G, CP 276)

The court relied on evidence in the record that Mr. Boston said he did not want to talk to Detective Manke because his head was not clear and explicitly asked the Detective to come back the next day. (Report of Proceedings, RP 270 – 274) The Court relied on this testimony to make Finding of Fact G (CP 276). This finding helped to support the trial court's conclusion that the statements made to the officer were admissible based upon a valid waiver of *Miranda*. (Finding of Facts A – H, CP 272 – 276).

Specifically, the search warrant was executed on May 14, 2010. (Finding of Fact A, CP 273) The police read the full *Miranda* warnings to the Defendant and two other individuals at the location of the search. (Finding of Fact A – C; CP 273) The Defendant did not show any confusion regarding his constitutional *Miranda* rights. (Finding of Fact C; CP 273) Mr. Boston stated that he understood his *Miranda* rights. (Finding of Fact C; CP 273)

Later on May 14, 2010, Detective Manke contacted the Defendant in the conference room of the jail. (Finding of Fact E, CP 274) The officer advised the Defendant of the charges against him and asked him if he wanted to speak.

(Finding of Fact F, CP 273) Mr. Boston explained that he was a heroin addict with a drug habit of up to ¼ oz. per day. (Finding of Fact F, CP 273) Mr. Boston then told the officer that he was getting sick from heroin withdrawals and needed medical attention. (Finding of Fact F, CP 273) Mr. Boston told the Detective that he wanted to talk with him and asked him to come back in a day. (Finding of Fact F, CP 273)

The officer returned the next day. (Finding of Fact G, CP 274) Mr. Boston informed him that he had gotten medical attention. (Finding of Fact G, CP 274) Mr. Boston stated, "Let's cut to the chase. What do you want?" (Finding of Fact G, CP 274) The Detective answered "I want to know about your heroin dealings." (Finding of Fact G, CP 274) The Defendant stated "I'm small time – not big time. I'm just a junkie keeping other junkies well." (Finding of Fact G, CP 274)

Based upon these Findings of Fact, the court concluded that the Defendant waived his *Miranda* rights by implication when he volunteered information in the absence of duress, promises, or threats. (Conclusion of Law B, CP 276) The court concluded that the Officer followed up "pursuant to the defendant's directive." (Conclusion of Law B, CP 276 – 277) Based upon these findings, the court concluded that Mr. Boston did knowingly, intelligently, and voluntarily waive his *Miranda* rights. (Conclusion of Law C, 277) These Findings of Fact support the trial court's Conclusion of Law that the statements

made to Detective Manke were admissible at trial. *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993);

B. THE ISSUE OF THE JURY INSTRUCTION REGARDING THE SPECIAL VERDICT IS WAIVED ON APPEAL.

The Appellant assigns error to the jury instruction regarding the special verdict in this case. Unless jury instructions are objected to before they are read to the jury, they become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 105, 954 P.2d 900 (1998). This instruction was not objected to in the trial court level. This issue regarding this special verdict and whether it can be brought up for the first time on appeal is before the Washington Supreme Court currently in *State of Washington v. Enrique Nunez.* The Washington Supreme Court granted review of that case on August 9, 2011. *State v. Nunez,* 172 Wash.2d 1004, 258 P.3d 676.

Division III held in *Nunez* that essentially because "we are satisfied that the claimed instructional error was not manifest constitutional error, we will not review it for the first time on appeal." *State v. Nunez,* 160 Wash. App. 150, 165, 248 P.3d 103 (2011) The State contends that the same analysis applies in this case. The issue should be waived for purposes of appeal. *Nunez,* 160 Wash. App. at 165.

C. THE SEATING CAPACITY OF THE SCHOOL BUS IS NOT AS AN ELEMENT OF THE CHARGED CRIME.

The Appellant argues the special verdict should be stricken because the State presented no evidence as to the seating capacity of the school buses for which stops were officially designed by the school district within 1000 feet of Ms. Remington's home. He argues that whether seating capacity is viewed as an element of the crime or as an added element under the law of the case doctrine, the evidence was insufficient to support the special verdict.

The State argues that the seating capacity of the school buses is not an element of the crime or an 'added' element under the law of the case doctrine. Opposing counsel does not cite to any legal authority or case precedent that supports his assertion.

RCW 69.50.435 is a penalty enhancement and *not a criminal offence*. *See* RCW 69.50.435. *State v. Williams,* 70 Wash. App. 567, 570, 853 P.2d 1388 (1993). In *State v. McGee,* 122 Wash.2d 783, 788, 864 P.2d 912 (1993), the Court of Appeals has stated that "**RCW 69.50.435(a) does not itself criminalize manufacturing, delivering, or possessing a controlled substance; it merely imposes an additional penalty for violating RCW 69.50.401(a) within a school zone**." *State v. McGee,* 122 Wash.2d 783, 788, 864 P.2d 912 (1993),

"In addition, legislative history, appropriate to turn to in situations of ambiguous statutory interpretation, further leads to the conclusion that RCW

69.50.435, and the corresponding provision in RCW 9.94A.310(5), were intended to enhance penalties, not create a separate crime." *State v. Silva-Baltazar,* 125 Wash.2d 472, 477 - 479, 886 P.2d 138 (1994). Therefore, Appellant's argument that the seating capacity is viewed as an element of the crime or as an added element under the law of the case doctrine is without merit. RCW 69.50.435; *State v. McGee,* 122 Wash.2d 783, 788, 864 P.2d 912 (1993).

CONCLUSION

Based upon the legal arguments above the State requests that the jury's convictions for delivery of a controlled substance, possession with intent to deliver a controlled substance, use of drug paraphernalia, and bail jumping be affirmed in this case.

Dated this 7th day of November, 2011.

Shadan Kapri WSBA # 39962
Senior Deputy Prosecuting Attorney
Stevens County
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Mr. David Gash, P.O. Box 30339, Spokane, WA, 99223 and Mr. Leonard Boston DOC # 838940, P.O. Box 769, Connell, WA 99326 on November 7, 2011.

Shadan Kapri,
Senior Deputy Prosecuting Attorney

COA No. 29658-0-III

Amended Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to Mr. Leonard Boston's new address provided to me by the Court of Appeals. The Brief of Respondent was mailed to Mr. Leonard Boston, #838940, P.O. Box 514, Monroe, WA 98272 on November 10, 2011.

Shadan Kapri,
Senior Deputy Prosecuting Attorney