No. 31272-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ETHAN D. YORK,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding Mr. York was not in custody at the time of his contact with Detective Welton. CrR 3.5 Hearing Conclusion of Law No. 1, CP 18.

2. The trial court erred in concluding the entire contact between Detective Welton and Mr. York did not constitute an interrogation by the detective. CrR 3.5 Hearing Conclusion of Law No. 2, CP 18.

3. The trial court erred in admitting Mr. York's statements to Detective Welton into evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Mr. York's confession to the police inadmissible because it was obtained as a result of custodial interrogation without *Miranda* warnings?

C. STATEMENT OF THE CASE

A police officer driving a patrol car responding to a late-night incident struck a log lying in the roadway causing his car to spin out of control and flip over. RP 33-34. Police noticed other branches of wood were also in the roadway. RP 22. A few days later, police received a Crime Check tip that Ethan York and Curtis Whittikind were responsible for the wood being in the roadway. RP 43.

Detective Welton spoke with Whittikind who showed him where he and Mr. York had obtained the wood they threw in the road. RP 47. Whittikind also directed the detective to a house where Mr. York had been staying. RP 50. Detective Welton went to that house accompanied by Deputy Moser. He spoke with Erin Carlson, the mother of Mr. York's girlfriend. Ms. Carlson gave Detective Welton and Deputy Moser permission to enter the home and told them that her daughter and Mr. York were downstairs in the basement. RP 51-52.

Detective Welton asked Ms. Carlson to go get Mr. York from the basement while he and Moser waited in the living room. She returned shortly with Mr. York and her daughter, Bailey. RP 53-54. Detective Welton introduce himself to Mr. York. He was deliberately vague as to why he and Deputy Moser were there. Both men were in uniform and their guns were exposed. RP 55-57, 75. Detective Welton told Mr. York he had already talked to Whittikind. RP 58. In response to that statement, Mr. York became solemn. He sat on the couch in the living room and sort of hung his head. RP 59.

Detective Welton then told Mr. York things like, "It's okay, you can tell me," or "It's better to get this out," or "You need to get this off your chest." He also asked Mr. York questions that elicited responses. RP

62, 76. Mr. York told the detective that Whittikind put the log in the road and he put the branch in the road. RP 93. He also gave a written confession at the detective's direction. RP 70.

Mr. York had just recently turned 16 years old. RP 72-73. Detective Welton never told Mr. York he did not have to talk with him or that Mr. York was free to leave. RP 75. Detective Welton testified he knew he was going to arrest Mr. York and would have arrested him if he tried to leave. RP 74, 76. During the entire interview, Deputy Moser stood in the foyer between the living room and the front door effectively blocking that exit. RP 74. No Miranda warnings were given until later after Mr. York had been arrested. RP 60.

The trial court admitted Mr. York's statements under CrR 3.5 concluding Mr. York was not in custody at the time of his contact with Detective Welton, and the entire contact between Detective Welton and Mr. York did not constitute an interrogation by the detective. CrR 3.5 Hearing Conclusions of Law Nos. 1 & 2, CP 18.

Testimony from other witnesses collaborated Mr. York's statement that he was not the one who caused the accident; that Whittikind put the log in the road and Mr. York only put the branch in the road. RP 170-73, 182. The prosecutor did not argue that Mr. York was an accomplice. The

prosecutor insisted Mr. York participated directly in the crime, as evidenced by his written confession. RP 189-90.

Mr. York was convicted of first degree malicious mischief and second degree reckless endangerment. RP 205. The court found that Mr. York's confession was the evidence that elevated Mr. York from simply being present and aware of what Whittikind was doing, to being a participant in the crime. RP 204. In its written findings the Court stated:

> The contact with the log caused the Deputy to lose control of the vehicle . . .
>
> The only evidence presented to this Court indicates that the log which Deputy Olson's vehicle struck was actually physically placed in or on the roadway by someone other than this defendant. That person was identified as the co-defendant, Curtis Whittikind. The real issue is, in considering the defendant's conduct, was he simply there and aware of what the other person was doing or did he, as the *Wilson*[1] case cited by counsel states, "participate in it as something he wishes to bring about and try to make it succeed through his actions."
>
> To answer the above issue, this Court considered the written confession of the defendant, which has been admitted as Exhibit 6. In that confession, Mr. York writes, "I was with my cousin, Curtis Whittekiend, putting things in the road." He did not write, nor did he ever state that "Curtis was putting things in the road", not that "I watched Curtis put things in the road," but "I was with him putting things in the road." This Court finds that from all the evidence that this is a joint action, it is participation and jointly wanting to bring about a result.

CP 20-21.

[1] *In re Wilson*, 91 Wn.2d 487, 588 P.2d 1161 (1979).

This appeal followed. CP 14-16.

D. ARGUMENT

Mr. York's confession to the police was inadmissible because it was obtained as a result of custodial interrogation without *Miranda* warnings.

In order to protect a defendant's Fifth Amendment right against compelled self-incrimination, the United States Supreme Court determined in *Miranda v. Arizona*, that a suspect must be given the right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The Washington State Constitution provides the same protection as the Fifth Amendment. Article 1, § 9, *State v. Warness*, 77 Wn.App. 636, 893 P.2d 665 (1995) (citing *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979)).

Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The *Miranda* rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." *State v.*

Post, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing *State v. Sargent*, 111 Wn.2d 641, 649-53, 762 P.2d 1127 (1988)). Unless a defendant has been given the *Miranda* warnings, his statements during police interrogation are presumed to be involuntary. *Sargent*, 111 Wn.2d at 647-48, 762 P.2d 1127.

Interrogation. *Miranda* interrogation is not limited to express questioning. It includes words or conduct by the police "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Pejsa*, 75 Wn.App. 139, 147, 876 P.2d 963 (1994) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297 (1980)). Here, Detective Welton first told Mr. York he had already talked to Whittikind. RP 58. This statement by the detective was obviously intended to elicit an incriminating response, since it communicated to Mr. York something akin to, "Hey, we the police already know all about your involvement in this incident so you might as well come clean."

Similarly intended was Detective Welton telling Mr. York things like, "It's okay, you can tell me," or "It's better to get this out," or "You need to get this off your chest." He also asked Mr. York questions that elicited responses. RP 62, 76. Therefore, the trial court erred in

concluding the entire contact between Detective Welton and Mr. York did not constitute an interrogation by the detective. CrR 3.5 Hearing Conclusion of Law No. 2, CP 18.

Custodial. The custody requirement to invoke *Miranda* is also at issue in this appeal. In *Miranda,* the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444, 86 S.Ct. 1602.

Miranda focuses on custodial interrogations because of their secrecy. When an interrogator is alone with a suspect, police may employ a number of subtle psychological pressures. A suspect's will is much more likely to be overcome in an atmosphere controlled by the police. *State v. Mahoney*, 80 Wn.App. 495, 497, 909 P.2d 949 (1996) (citing *Pejsa*, 75 Wn.App. at 147, 876 P.2d 963). Isolation is the key aspect of a custodial setting. *Pejsa*, 75 Wn.App. at 147, 876 P.2d 963 (police in interrogation setting can restrain a suspect and apply "whatever psychological techniques they think will be most effective") (quoting *United States v. Mesa*, 638 F.2d 582, 586 (3d Cir.1980)).

In *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the United States Supreme Court refined the definition of "custody." The court developed an objective test—whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Id.* at 441–42, 104 S.Ct. 3138. Washington has adopted this test. See *State v. Short*, 113 Wash.2d 35, 40, 775 P.2d 458 (1988).

Here, Mr. York had just recently turned 16 years old (RP 72-73) so his youthfulness and naivety must be taken into account. Both Detective Welton and Deputy Moser were in uniform and their guns were exposed. RP 55-57, 75. Detective Welton never told Mr. York he did not have to talk with him or that Mr. York was free to leave. RP 75. In fact, Detective Welton knew he was going to arrest Mr. York and would have arrested him if he tried to leave. RP 74, 76.

During the entire interview, Deputy Moser stood in the foyer between the living room and the front door effectively blocking that exit. RP 74. No Miranda warnings were given. RP 60. Considering all these factors, under the totality of the circumstances a reasonable person in Mr. York's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Therefore, the trial court erred in

concluding Mr. York was not in custody at the time of his contact with Detective Welton. CrR 3.5 Hearing Conclusion of Law No. 1, CP 18.

Harmless Error. A confession erroneously admitted in violation of the defendant's *Miranda* rights is harmless only when the remaining evidence overwhelmingly supports a guilty verdict. See *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177, rev. denied 118 Wn.2d 1006, 822 P.2d 288 (1991); *State v. Cervantes*, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991). Here, there is insufficient evidence to support the conviction without Mr. York's tainted confession.

Testimony from other witnesses collaborated Mr. York's statement that he was not the one who caused the accident; that Whittikind put the log in the road and Mr. York only put the branch in the road. RP 170-73, 182. More importantly, the trial court found that Mr. York's confession was the evidence that elevated Mr. York from simply being present and aware of what Whittikind was doing, to being a participant in the crime. RP 204. The Court found in its written findings that without the confession, "The only evidence presented to this Court indicates that the log which Deputy Olson's vehicle struck was actually physically placed in or on the roadway by someone other than this defendant. That person was

identified as the co-defendant, Curtis Whittikind." CP 20-21. Therefore, the erroneous admission of Mr. York's confession was not harmless error.

E. CONCLUSION

For the reasons stated, the convictions should be reversed.

Respectfully submitted May 10, 2013,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on May 10, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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