NO. 91430-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

SHERRY NIELSEN, Respondent

FROM THE COURT OF APPEALS, DIVISION II – NO. 44052-1-II
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01182-6

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. IDENTITY OF PETITIONER

The State of Washington asks this Court to accept review of the published decision in Part B of this Petition.

B. DECISION

Petitioner, State of Washington, seeks review of the Court of Appeals, Division II unpublished decision filed on December 16, 2014, reversing the defendant's conviction for forgery because the erroneous admission of the defendant's statements was not harmless. A copy of the opinion of the Court of Appeals is attached.

C. ISSUES PRESENTED

I. WHETHER THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN *STATE v. GULOY.*

II. WHETHER THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' DECISION INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

III. **WHETHER THE COURT OF APPEALS ERRED IN APPLYING THE "CONTRIBUTION" TEST TO DETERMINE WHETHER THE ERROR WAS HARMLESS INSTEAD OF THE "OVERWHELMING UNTAINTED EVIDENCE" TEST.**

IV. **WHETHER THE COURT OF APPEALS ERRED IN GRANTING A REMEDY OF REVERSAL OF THE CONVICTION INSTEAD OF REMANDING FOR ENTRY OF FINDINGS.**

D. STATEMENT OF THE CASE

Sherry Nielsen (hereafter 'Nielsen') was charged by information with Forgery and Making a False Statement to a Public Servant. CP 1-2; 50-51. In the Amended Information, the State alleged aggravating factors pursuant to RCW 9.94A.535(2)(b), (c), and (d). A jury convicted Nielsen of Forgery and Making a False Statement to a Public Servant. CP 102-03. The trial judge found that Nielsen's standard range was clearly too lenient in light of Nielsen's 28 unscored misdemeanor convictions and imposed an exceptional sentence of 14 months. CP 110, 136; 3 RP at 21.

At trial, evidence was presented that in 2007 Nielsen rented a room in a house in Vancouver, Washington, from Michael Miller for $450.00 per month. 1 RP at 119. Nielsen moved out in June 2009. 1 RP at 120. Mr. Miller moved out of the house and had all utilities shut off. 1 RP at 128. Approximately three years later, Mr. Miller received a water bill charging for recent usage at his home in Vancouver. 1 RP at 128. The water

department informed him that Nielsen had requested water service at Mr. Miller's Vancouver home. 1 RP at 128. Nielsen was not authorized to be at Mr. Miller's home at that time. 1 RP at 128.

Vancouver Police Officer Ed Prentice contacted Nielsen who was at Mr. Miller's Vancouver house on June 11, 2012. 1 RP at 169. Nielsen told Officer Prentice that she had moved back into the home approximately a week prior and was paying rent to the bank. 1 RP at 171. Nielsen showed Officer Prentice a rental agreement dated May 4, 2008, and a print out of a Facebook conversation where she discussed taking over the Vancouver property with Mr. Miller. 1 RP at 172.

Nielsen attempted to set up a water account to obtain water services at Mr. Miller's Vancouver home about two weeks after Officer Prentice first contacted her. 1 RP at 77. Nielsen provided the City of Vancouver water department with a rental agreement from 2008, a rental agreement from April 1, 2012, which purported to have Mr. Miller's signature on it, and excerpts from a Facebook conversation. 1 RP at 79, 88. The water department employee believed the documents were false. 1 RP at 90-91. The water department supervisor then called Mr. Miller who told the water department that he had not signed a rental agreement dated April 1, 2012. 1 RP at 129.

Mr. Miller called the Vancouver Police and reported that his house was occupied by a former tenant who had no authority to be there. 1 RP at 138. Police Officer James Watson obtained copies of the documents Nielsen had presented to the water department. 1 RP 94, 138-189. Officer Watson and Officer O'Meara went to Mr. Miller's Vancouver home and contacted Nielsen. Nielsen came to the door after her friend answered it; the officers explained that they were investigating a report that Nielsen was squatting in the home. 1 RP at 144-45. Officer Watson asked if they could speak to Nielsen inside and she agreed and said, "sure, let's go inside and talk." 1 RP at 145. The officers asked Nielsen's friend to leave so the officers could speak to Nielsen alone. 1 RP at 153. The officers and Nielsen stood in the kitchen of Mr. Miller's Vancouver home and spoke.

Nielsen told the officers that she had been living in the home continuously non-stop since 2007. She showed the officers a rental agreement dated 2008. 1 RP at 145. Officer Watson asked to see something more recent, and Nielsen presented a Facebook conversation between herself and Mr. Miller. 1 RP at 146. Officer Watson then read Nielsen the *Miranda* warnings. 1 RP at 147. Nielsen continued to speak with the officers and when the officers asked her about the purported 2012 agreement, Nielsen kept referring to the 2008 rental agreement. 1 RP at 147-48. Nielsen told the officers that she had been living in the home since

2007. 1 RP at 149. The officers confronted her about the differences in her statements and what Mr. Miller had reported. 1 RP at 149. The conversation continued, and the officers placed Nielsen under arrest for Forgery. 1 RP at 151.

Mr. Miller testified at trial that he never had a written rental agreement with Nielsen, but that they had a verbal agreement she could stay in the house for $450.00 per month, an agreement which terminated when Mr. Miller moved out of his home in July 2009. 1 RP at 120-21. Mr. Miller testified he never signed the rental agreement that Nielsen presented to the water department. 1 RP at 123-24. A City of Vancouver water department employee testified that water to Mr. Miller's house had been shut off and then restarted by Nielsen at a later time. 2 RP at 194.

The jury convicted Nielsen of Forgery and Making a False or Misleading Statement. CP 102, 103. At sentencing, the Court made a finding that Nielsen's case was deserving of more time than the standard sentencing range based on her 28 prior misdemeanors and four prior felony convictions and imposed an exceptional sentence of 14 months. CP 136.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE DECISION IS IN CONFLICT WITH THIS COURT'S RULING IN *STATE v. GULOY*

The Court of Appeals' decision below conflicts with a decision of the Supreme Court, namely *State v. Guloy,* 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986) in that the Court of Appeals failed to properly apply the "constitutional harmless error" test. Pursuant to RAP 13.4(b)(1), this Court should accept review of the Court of Appeals' decision in this case. In *Guloy*, this Court found the "overwhelming untainted evidence" test was the better test for determining whether constitutional error was harmless. *Guloy*, 104 Wn.2d at 426. The Court of Appeals below, in failing to analyze whether the overwhelming untainted evidence proved Nielsen's guilt beyond a reasonable doubt, instead focused on whether the erroneously admitted evidence affected the jury's verdict, thus applying the "contribution" test. This is in conflict with this Court's pronouncement in *Guloy*.

II. THE COURT OF APPEALS IMPROPERLY APPLIED THE 'CONTRIBUTION' TEST AS OPPOSED TO THE 'OVERWHELMING UNTAINTED EVIDENCE' TEST TO DETERMINE WHETHER THE ERROR WAS HARMLESS

The question of how to determine whether a constitutional error is harmless is not very well-settled in our jurisprudence. Despite this Court's

statement in *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986) that the "overwhelming untainted evidence" test is the preferred test for determining constitutional harmless error, it has not been consistently applied in the years since the *Guloy* opinion. The Court of Appeals' decision below conflicts with *Guloy* in that it misapplies the "overwhelming untainted evidence" test. The issue of which test to apply to a constitutional harmless error analysis involves a significant question of law under the State Constitution and under the Federal Constitution. This Court should accept review of this case in order to resolve this issue pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(3).

The Court of Appeals below found that the trial court improperly admitted the defendant's statements to police because the trial court had not settled the disputed facts during a CrR 3.5 hearing, so it was not possible for the reviewing court to determine whether the statements were properly admitted. In analyzing whether this admission was harmless, the Court of Appeals indicated it employed the "overwhelming untainted evidence" test. Slip Op. at 9. Under that test, the reviewing court must look "only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). However, despite its assertion that it employed the

"overwhelming untainted evidence" test, the Court of Appeals actually employed the "contribution" test and analyzed whether the improperly admitted evidence contributed to the jury's verdict. Slip Op. at 10. In this respect, the Court of Appeals erred.

In 1985, this Court stated that the "overwhelming untainted evidence" test was the preferred test for determining whether constitutional error was harmless. *Guloy*, 104 Wn.2d at 426. Many cases following *Guloy* applied the "overwhelming untainted evidence" test, some even assuming that this test is "our universal standard for harmlessness." *State v. Coristine*, 177 Wn.2d 370, 393, 300 P.3d 400 (2013, Gonzales dissenting) (referring to *State v. Frost*, 160 Wn.2d 765, 782, 161 P.3d 361 (2007) and *State v. Watt*, 160 Wn.2d 626, 635-36, 160 P.3d 640 (2007)). However, as Justice Gonzales pointed out in his dissent in *Coristine, supra*, our appellate courts have not universally applied the "overwhelming untainted evidence" test in determining whether constitutional error was harmless. For example, in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011), this Court discussed whether the error *contributed* to the jury's verdict. *Irby*, 170 Wn.2d at 901. This is the hallmark of the "contribution" test. Under the rejected "contribution" test, the Court looks to whether the tainted evidence could have contributed to the jury's verdict. *Guloy*, 104 Wn.2d at 426.

In *Guloy*, the Supreme Court settled the question of whether the appellate courts of this State apply the "contribution" test or the "overwhelming untainted evidence" test in its analysis of whether error was harmless. *Guloy*, 104 Wn.2d at 426. The Supreme Court rejected the "contribution" test under which an appellate court looks to whether the tainted evidence could have contributed to the jury's determination of guilt. *Id.* Instead, the Supreme Court found the "overwhelming untainted evidence" test would better allow appellate courts to avoid reversal on technical or academic grounds. *Id.* This test further insures that a conviction is reversed where there is a reasonable possibility that the use of the tainted evidence was necessary to find the defendant guilt. *Id.*

Especially in cases involving improperly admitted evidence, the "overwhelming untainted evidence" test better analyzes whether the error truly was harmless. In *Neder v. U.S.*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), the United States Supreme Court stated that in a case where the error was the admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination, the proper harmless error test must be whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]" thus clearly rejecting the "contribution" test. *Neder*, 527 U.S. at 18. However, no matter what test our courts should apply, there should be one

test and the reviewing court needs to apply the test properly. In the opinion below, the Court of Appeals claims to employ the "overwhelming untainted evidence" test, yet discusses how the tainted evidence contributed to the jury's verdict. Slip Op. at 10. This is clearly an improper application of the "overwhelming untainted evidence" test. In fact, the Court of Appeals does not discuss the untainted evidence presented in Nielsen's trial and whether or not it tended to show guilt beyond a reasonable doubt. Under the "overwhelming untainted evidence" test, the Court of Appeals should have looked *only* at the untainted evidence to determine if it was so overwhelming as to necessarily lead to a finding of guilt. Instead, the Court of Appeals focused on the tainted evidence and how it impacted the verdict.

In this case, there is overwhelming untainted evidence of Nielsen's guilt. The untainted evidence presented in this case necessarily leads to a finding of guilt. This evidence included testimony from a customer service representative at the utility department that Nielsen gave her documents which alleged she was authorized to live in the house, along with a 2008 rental agreement. 1 RP at 88. Another customer service representative testified that Nielsen said she was authorized to live in the house and that Nielsen again presented a 2008 rental agreement, a copy of an online conversation between Nielsen and the owner of the house, and a 2012

rental agreement. 1 RP at 79. Officer Prentice testified that on June 11, 2012, Nielsen told him she was renting the house and first said she paid no rent, but then amended that to say she paid rent to the bank. 1 PR at 169-72. Nielsen also gave Officer Prentice a copy of the 2008 rental agreement and an online conversation between Nielsen and the homeowner. *Id.* The homeowner, Miller, testified that Nielsen moved out of the house in 2009 and the water was shut off in 2011. 1 RP at 120-21. Miller testified he had not seen before or signed the 2008 rental agreement, the 2012 rental agreement, or the online conversation. 1 RP at 123-24.

This untainted evidence shows that Nielsen presented a forged 2012 rental agreement to the utility company in order to get water provided to the house. The evidence overwhelmingly supports that the 2012 rental agreement was a forgery and that Nielsen knew it was a forgery. Nielsen did not dispute this, but rather disputed that it was done with the intent to injure or defraud. The untainted evidence presented at trial showed that Nielsen was not permitted to live in the house, that she forged documents in order to have the water turned on so she could live there, and that if Nielsen failed to pay the water, Miller was liable. Nielsen's actions injured Miller by living in his house without his permission and imposing a financial obligation on him without his consent. Nielsen had the intent to injure Miller by using the forged rental

agreement to get the water turned on in Miller's house so she could continue living there without permission. This evidence is overwhelming and necessarily leads to a finding of guilt on the forgery charge. The Court of Appeals erred in failing to consider this overwhelming untainted evidence in its analysis of whether the error was harmless.

There is a split, not just amongst the divisions, but amongst the various opinions of this Court on how to determine whether constitutional error is harmless. The State urges this Court to accept review of this case to settle this dispute and to adopt one test for determining constitutional harmless error. In *Coristine*, this Court declined to consider whether it should adopt a new harmless error test as review was not granted on that issue and the parties had not briefed the issue. *Coristine*, 177 Wn.2d at 380-81. This Court should now take this opportunity to accept review of this case in order to settle whether the "overwhelming untainted evidence" test is the appropriate test for determining whether admission into evidence of a defendant's statements obtained in violation of his Fifth Amendment Right against self-incrimination was harmless.

III. THE COURT OF APPEALS ERRED IN EMPLOYING AN IMPROPER REMEDY

The Court of Appeals below found the proper remedy for the trial court's CrR 3.5 rule violation, by failing to settle the disputed facts, was to

vacate the conviction and remand for a new trial. Slip Op. at 11. This remedy ignores judicial efficiency concerns and could easily cause a retrial of all the exact same evidence being presented to a new jury, and is in conflict with this Court's reasoning in *State v. Alvarez*, 128 Wn.2d 1, 904 P.2d 754 (1995).

In deciding to employ the remedy it does, the Court of Appeals cites to *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997) to support its chosen remedy. Slip Op. at 11. However, the Court of Appeals notes that in *Bourgeois*, the court examined whether the erroneous admission of testimony required a new trial. *Id.* But this case presents a different posture than did *Bourgeois*. Here, the trial court's admission of the defendant's statements to police has not been determined to be a violation of Nielsen's Fifth Amendment rights. Instead, the Court of Appeals finds it was error to admit these statements without having properly entered the findings and resolving disputed facts pursuant to CrR 3.5. So in this case, it is possible, even likely, that the trial court would remedy this on remand and again find that Nielsen's statements were not obtained in violation of *Miranda* and find the statements admissible at trial.

The Court of Appeals below did not consider whether Nielsen's statements were obtained while she was in custody. The Court of Appeals

found it could not determine whether or not Nielsen was in custody because the trial court did not settle disputed facts from the CrR 3.5 hearing that were essential to the determination of her custodial status. Slip Op. at 5-9. Given this finding, the Court of Appeals should have remanded the matter to the Superior Court to settle the disputed facts and enter findings and facts and conclusions of law consistent with CrR 3.5.

The same reasoning from this Court in *State v. Alvarez*, 128 Wn.2d 1, 904 P.2d 754 (1995) should be applied here. In *Alvarez*, a juvenile prosecution, the trial court did not enter findings on the ultimate facts it found and relied upon in reaching its verdict. *Alvarez*, 128 Wn.2d at 18. In discussing a proper remedy for this error, this Court found that the proper remedy for a trial court's error in entering a judgment without findings of fact and conclusions of law is to subsequently enter findings, conclusions and the judgment. *Id.* (citing *State v. Mercy*, 55 Wn.2d 530, 532, 348 P.2d 978 (1960)). And in that case, the trial court had entered findings, but had failed to enter ultimate findings. *Id.* The proper remedy was remand to the trial court to enter the findings, and not reversal of the conviction. *Id.*

In Nielsen's case, it is feasible, even likely, that at a new trial, the trial court will once again hold a CrR 3.5 hearing as the State will once again move to admit statements Nielsen made to police. If the trial court settles the fact it previously found was disputed, and finds that the officer

did not deny Nielsen's request to leave the room until after he placed her under arrest and until after the contested statements were made, then the trial court may once again rule the statements are admissible. If this occurs, the State is likely to present the exact same evidence at trial, only in front of a new jury of 12 members of the community. This is an undue use of judicial and community resources. It would be more economical and make more sense to stay the reversal of Nielsen's conviction, and remand this matter back to the trial court for further proceedings and findings on the CrR 3.5 hearing, and then reconsider the issue after the trial court's findings and conclusions as to the timing of Nielsen's request and the admissibility of the statements are entered. This would be a more economical use of resources and an appropriate remedy to ensure that Nielsen's rights are protected. A re-trial may be unnecessary if the exact same evidence would be presented to a new jury. The same result is likely to occur, and the State's proposed remedy could save a significant amount of time and resources, while still preserving Nielsen's rights.

F. CONCLUSION

This Court should accept review of the Court of Appeals decision reversing Nielsen's convictions and remanding for a new trial because this decision is in conflict with State v. Guloy and raises a significant question

of constitutional law, and because the Court of Appeals employed an improper remedy. Pursuant to RAP 13.4(b)(1) and (b)(3), the State requests this Court accept review.

DATED this 13th day of March, 2015.

Respectfully submitted:

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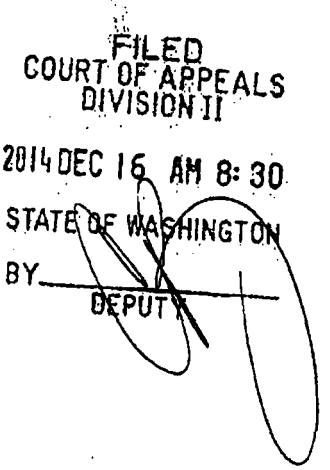
APPENDIX



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

STATE OF WASHINGTON, Respondent, v. SHERRY NIELSEN, Appellant.	No. 44052-1-II UNPUBLISHED OPINION

BJORGEN, J. — Sherry Nielsen appeals her convictions of forgery and making a false statement to a public servant. Nielsen also appeals her exceptional sentence for her forgery conviction, based on a finding that the presumptive sentence was clearly too lenient in light of her long history of unscored misdemeanor offenses. She contends that her convictions must be reversed because the trial court erred in admitting statements she made to police officers before they administered the *Miranda*[1] advisements. She also challenges her exceptional sentence, arguing that the sentencing court violated her jury trial rights by increasing her punishment based on a fact not found by the jury.

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

We reverse Nielsen's conviction for forgery, because the trial court did not determine whether the interrogating police officers denied her request to leave the room before she was advised of her *Miranda* rights. We also hold that the proper remedy is to remand for a new trial. We affirm Nielson's conviction for making a false statement to a public servant, because any error regarding that conviction was harmless beyond a reasonable doubt. Because we reverse the forgery conviction, we do not reach the challenge to the exceptional sentence imposed for that conviction.

FACTS

In June 2011, Michael Miller received a bill for water service at a house he owned in the city of Vancouver. Miller had left the Vancouver house vacant, stopped making payments on it, and was negotiating with a bank to surrender a deed in lieu of foreclosure. When Miller contacted the Vancouver utilities department, he learned that his former tenant, Nielsen, had activated water service at the address. Miller informed city officials that Nielsen did not have permission to live at the house.

Vancouver police officer Ed Prentice visited the house and interviewed Nielsen. Nielsen told Prentice that she had permission from the bank to live at the house and showed him a 2008 rental agreement between her and Miller, as well as records of an online discussion with Miller concerning the possibility of Nielsen taking over the house. Prentice decided that he did not have sufficient basis to take further action and advised Miller to go through the usual eviction process.

Miller subsequently received a call from the Vancouver utilities department informing

him that Nielsen had again requested water service at the Vancouver house and presented various documents, including the documents described by Prentice and a 2012 lease agreement purportedly bearing Miller's signature. Miller called the Vancouver police and reported what had occurred, informing them that he had no such agreement with Nielsen and asking them to investigate.

After speaking with Miller and obtaining a copy of the documents Nielsen submitted to the utilities department, police officers James Watson and Bill O'Meara, in uniform, went to the house to contact Nielsen. A guest initially answered the door, but Nielsen, who wore a nightgown and, due to a recent surgery, an arm brace, eventually came to the door and let the officers in. Watson asked Nielsen's guest to leave and the two officers questioned Nielsen in the kitchen for about 15 to 30 minutes.

When confronted with Miller's accusation, Nielsen told Watson that she had lived at the house continuously since 2007 and produced the 2008 rental agreement. Watson demanded something more recent, and Nielsen produced the records of her online discussion with Miller. Watson testified at trial that at that point he administered the *Miranda* advisements to Nielsen. According to Watson's testimony, Nielsen continued to speak with the police officers, giving arguably inconsistent accounts of her residence at the house and answering some questions evasively. At that point, Watson testified that he placed Nielsen under arrest on suspicion of forgery, handcuffed her, and drove her to jail. Nielsen testified at the CrR 3.5 hearing that Watson did not read her the *Miranda* advisements until he arrested her.

At some point during the interview, Nielsen asked to leave so she could change into regular clothes, but the officers did not allow her to do so. Watson gave inconsistent testimony on this point at the CrR 3.5 hearing, first saying he told Nielsen she could not leave prior to

arresting her, then correcting himself and claiming that she did not ask to change clothes until after he placed her under arrest. Nielsen testified at the CrR 3.5 hearing that she "kept asking" if she could go, and "kept asking" if she could change clothes, but Watson refused. Verbatim Report of Proceedings (VRP) at 60. Nielsen also testified that she first requested to leave to change clothes about 10 minutes into the interview and that one of her requests occurred right before she was placed under arrest.

The State charged Nielsen with forgery and making a false or misleading statement to a public servant. On the forgery count, the State alleged as aggravating factors that Nielsen's "prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient," that Nielsen "has committed multiple current offenses and [her] high offender score results in some of the current offenses going unpunished," and that "[t]he failure to consider the [Nielsen's] prior criminal history, which was omitted from the offender score calculation . . . results in a presumptive sentence that is clearly too lenient." Clerk's Papers (CP) at 50-51.

Nielsen argued prior to trial that the aggravating factors raised factual issues that the trial court had to submit to the jury in a bifurcated procedure. The court declined to do so.

The jury returned guilty verdicts on both counts. The court ordered an exceptional sentence of 14 months, less time served, on the forgery count based on a finding that Nielsen's history of "prior unscored misdemeanor offenses results in a presumptive sentence that is clearly too lenient." CP at 136. The court sentenced Nielsen to 364 days, less time served, on the charge of making a false statement, and with 180 days suspended. Nielsen timely appeals.

ANALYSIS

I. CUSTODIAL INTERROGATION

Nielsen argues that the trial court erred in admitting statements she made before Watson administered the *Miranda* advisements, because she made the statements under custodial interrogation. We agree that the trial court erred in admitting those statements, but for different reasons.

After ruling on the admissibility of a statement a defendant made to police, a trial court must

> set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5(c). We consider unchallenged findings of fact entered by a trial court after a CrR 3.5 hearing verities, but review de novo the trial court's conclusion as to whether a suspect was in custody. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

A. The Trial Court's Determination of Custody

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 v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). 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, however, until "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); *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)) (internal quotation marks, 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 on two grounds 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). In *State v. Dennis*, 16 Wn. App. 417, 558 P.2d 297 (1976), we 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. We 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.

Here, two uniformed officers confronted Nielsen and accused her of a crime. They asked Nielsen's guest to leave. At some point during the interview, Watson refused Nielsen's request to step into another room to change out of her night clothes. In these circumstances, Watson's denial of Nielsen's request to leave bears directly on whether a reasonable person would have

felt he or she was at liberty to terminate the interrogation and leave. Under *Thompson*, 516 U.S. at 112, the determination of when that occurred is material to determining when Nielsen was in custody.

> As noted, after holding a hearing under CrR 3.5, the court is under a duty to
>
> set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5(c). A trial court's failure to comply with the duty to make a record imposed by CrR 3.5 amounts to error, "but such error is harmless if the court's oral findings are sufficient for appellate review." *State v. France*, 121 Wn. App. 394, 401, 88 P.3d 1003 (2004). Here, the trial court's oral ruling does not establish whether Nielsen asked to leave before Watson advised her under *Miranda*.

> In its order on the CrR 3.5 hearing, the trial court listed the following as a disputed fact:
>
> At some point during the interaction the defendant asked to change clothes and officer Watson told her she could not. The defendant testified this happened during the conversation in the kitchen. Officer Watson testified it happened after he placed the defendant under arrest and handcuffed her.

CP at 106. The order's conclusions did not mention these disputed circumstances or indicate whether it credited Watson over Nielsen on the timing of Nielsen's request to leave.

The conclusions of law, however, strongly signal that the court did not deem the request to leave to play any role in determining when custody began. The conclusions stated in full:

> 1. The defendant invited Officer Watson into her home to speak with her and Officer Watson told the defendant's friend to leave the kitchen while he spoke with the defendant. This action was not equivalent to a custodial arrest.
> 2. Therefore, the conversation between the defendant and Officer Watson did not amount to custodial interrogation.
> 3. The Court need not reach the issue of *Miranda* warnings and their application to custodial interrogation based on the above-findings and conclusions.

CP at 107.

Conclusions 1 and 2 plainly rely on only Nielsen's invitation to Watson and Watson's request that the friend leave in concluding that the interview was not a custodial interrogation. These conclusions do not imply that the court credited Watson's testimony over Nielsen's on the issue of the request to leave. Rather, they disclose the court's view that it was unnecessary to decide when Watson refused Nielsen's request to leave in determining when the situation became custodial. In this the trial court erred, since, as concluded above, the determination of when Watson refused Nielsen's request is material in determining when custody began. Because the court erred in omitting this material consideration in its determination of custody, it also erred in admitting Nielsen's statements from this interview.

B. Harmless Error

Whether this error merits reversal is a separate question. 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), (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)), *review denied*, 177 Wn.2d 1008, 302 P.3d 180 (2013). 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 (citing *Guloy*, 104 Wn.2d at 425). If the "untainted evidence . . . is so overwhelming that it necessarily leads to a finding of guilt," the error does not warrant reversal. *Guloy*, 104 Wn.2d at 426.

1. Forgery

Turning first to forgery, a necessary element of that offense is acting with intent to injure or defraud. RCW 9A.60.020. Nielsen argued that, while the State may have proved she submitted a fake rental agreement to the utilities department, she submitted it so that she would receive the bill in her name. Thus, Nielsen contended that the only intent the State had proved was her intent to take responsibility for the water bill herself, not intent to injure or defraud anyone.

In arguing that Nielsen acted with intent to injure or defraud, the State relied principally on evidence that Nielsen deceived both the utilities department and Miller in attempting to establish water service and remain at the house. However, the State then bolstered its argument by referring to the arguably evasive and inconsistent statements Nielsen made to Watson during the interview at the house. These statements had been introduced through Watson's trial testimony.

These arguably evasive and inconsistent statements by Nielsen, however, are among those which the court erred in admitting. Evidence tending to show evasiveness or contradictory statements in one setting may support a claim of fraudulent intent in another. At the least, we cannot say 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. The error was not harmless in the forgery conviction.

2. False Statement

To commit the crime of making a false statement to a public servant, one must knowingly make a false or misleading material statement to a public servant. RCW 9A.76.175. The charging document expressly based this charge on Nielsen's statements the day that Prentice interviewed her, which occurred over two weeks before her interview with Watson. In its

closing argument about this offense, the State relied on Nielsen's statements to Prentice, but did not bring up the interview with Watson. Instead, the State's argument summarized strong, unambiguous evidence that Nielsen's statement that she was renting a room from Miller was false, that she knew it was false, and that it was material. The error in admitting statements from the interview with Watson was harmless beyond a reasonable doubt in its effect on the conviction of making a false statement to a public servant.

3. Remedy

In *State v. Bourgeois*, the court examined whether the erroneous admission of testimony required a new trial. 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The court held that an error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *Bourgeois*, 133 Wn.2d at 403 (citing *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)). The court looked to the harmless error test to determine prejudice. *Bourgeois*, 133 Wn.2d at 403.

Here, we hold that the trial court erred in admitting evidence of Nielsen's statements and that the error was not harmless under the proper standard. Therefore, consistently with *Bourgeois*, we reverse Nielsen's conviction of forgery and remand for a new trial.

II. THE EXCEPTIONAL SENTENCE

Nielsen argues that whether a standard sentence is "clearly too lenient" under the RCW 9.94A.535(2)(b) aggravating factor is a factual determination for the jury. Br. of Appellant at 12-14. Nielsen's exceptional sentence, however, was imposed only on her forgery conviction. Because we reverse that conviction, we do not reach Nielsen's challenge to the exceptional sentence.

CONCLUSION

We reverse the defendant's conviction for forgery and remand for a new trial on that charge. We affirm her conviction for making a false statement to a public servant.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.

BJORGEN, A.C.J.

I concur:

Maxa, J.

MAXA, J.

LEE, J. (concurring in part/dissenting in part) — I concur with the majority in so far as the majority has determined that the trial court's written order on the CrR 3.5 hearing was erroneous. However, my concurrence is based exclusively on the trial court's violation of the plain language of CrR 3.5 by failing to set forth in writing its conclusion to the disputed fact of whether Nielsen asked to change clothes before or after she was placed under arrest by Officer Watson and read her *Miranda* warnings.

I dissent from the majority's determination that the error was not harmless as to the forgery conviction. Any error in the trial court's CrR 3.5 order was harmless because even if Nielsen's statements to Officer Watson were improperly admitted and excluded, I am convinced beyond a reasonable doubt that a jury would have found Nielsen guilty of the forgery charge based on the overwhelming untainted evidence. I would affirm Nielsen's convictions.

A. TRIAL COURT'S WRITTEN CRR 3.5 ORDER

Under CrR 3.5 trial courts are required to enter a written order regarding the admissibility of a defendant's statements. Specifically, CrR 3.5(c) states:

> After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

Here, the trial court's order identifies disputed facts, including when Nielsen asked to change her clothes. However, the trial court never entered a conclusion resolving this disputed fact. Under the plain language of CrR 3.5(c), the trial court was required to enter a written finding or conclusion as to the facts that it identified as disputed. It did not. Therefore, in so far as the trial court's order violated the requirements of CrR 3.5, it was erroneous.

B. HARMLESS ERROR

The majority concludes that Nielsen's statements to Officer Watson were improperly admitted and that the error was not harmless. Majority at 9-10. I respectfully disagree that the error was not harmless. The majority improperly focuses on the potential prejudice from the admission of the statements rather than on the strength of the other untainted evidence the State presented. Considering all the untainted evidence the State presented at trial, I am convinced beyond a reasonable doubt that, even if Nielsen's statements to Officer Watson were improperly admitted, any error was harmless.

Constitutional errors are harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the constitutional error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). We apply the "overwhelming untainted evidence" test to determine whether a constitutional error is harmless. *Guloy*, 104 Wn.2d at 426. "Under the 'overwhelming untainted evidence' test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Guloy*, 104 Wn.2d at 426.

Here, the majority asserts that the admission of Nielsen's statements to Officer Watson was not harmless because Nielsen's statements were "arguably evasive and inconsistent" and evidence "tending to show evasiveness or contradictory statements in one setting may support a claim of fraudulent intent in another." Majority at 10. But the salient question is not whether the improperly admitted evidence was prejudicial to the defendant or if the improperly admitted evidence may have gone toward proving an element of the State's case. Rather, when applying the constitutional harmless error standard, we must carefully examine all of the other evidence

presented at trial and determine whether the untainted evidence necessarily leads to a finding of guilt. In this case, I would conclude that even if Nielsen's statements to Officer Watson were improperly admitted, all of the State's other untainted evidence necessarily leads to a finding of guilt as to the forgery charge, rendering any error harmless.

At trial, Jamie Swenson, a customer service representative from the utility department, testified that Nielsen gave her documents allegedly showing that she was authorized to live in Miller's house. These documents included a copy of a 2008 rental agreement and an online conversation between Nielsen and Miller

Lisa Eruhow-Hagen, a senior customer service representative at the utilities department, also testified that Nielsen told her she was authorized to live in Miller's house. Nielsen presented Eruhow-Hagen with a copy of a 2008 rental agreement, an online conversation between Nielsen and Miller, and a 2012 rental agreement to support Nielsen's assertion that she was authorized to live in Miller's house.

Officer Edward Charles Prentice testified that, when he contacted Nielsen on June 11, 2012, Nielsen told him that she was renting the house. At first, Nielsen stated that she was not paying rent, but she later stated that she was paying rent to the bank. Officer Prentice also testified that Nielsen presented him with a 2008 rental agreement and an online conversation between Nielsen and Miller as proof that she was renting the house from Miller.

Miller testified that Nielsen moved out of the house in 2009. He also testified that the water had been shut off to the house since he moved out in 2011. When he was shown the 2008 rental agreement, the online conversation between Nielsen and himself, and the 2012 rental agreement, Miller testified that he had not seen or signed any of the documents.

To convict Nielsen of forgery, the State was required to prove that Nielsen (1) falsely made, completed or altered a written instrument or (2) possessed, uttered, disposed of, or put off as true a forged document. RCW 9A.60.020(1)(a), (b). The State must also prove that Nielsen acted with the intent to injure or defraud. RCW 9A.60.020(1).

Here, the untainted evidence demonstrates that Nielsen told two employees of the utilities department that she was authorized to live in Miller's house and that she supported her assertion by presenting the two rental agreements and an online conversation between Nielsen and Miller to utility company employees. The untainted evidence also demonstrates that Nielsen told the same story and gave Officer Prentice the 2008 rental agreement and the online conversation. This untainted evidence, along with Miller's testimony that he had not seen nor signed the two rental agreements or the online conversation, overwhelmingly establishes that Nielsen presented the forged the 2012 rental agreement to Eruhow-Hagen in order to get the utility company to provide water to the house. Therefore, there was overwhelming evidence to support that the 2012 rental agreement was a forgery and that Nielsen knew the document was a forgery. The majority does not appear to dispute this.

And, Nielsen did not argue that she did not forge the 2012 rental agreement or that she did not know the document was forged. The ultimate fact at issue was whether she acted with the intent to injure or defraud. Here, the State presented untainted evidence establishing that Nielsen was not permitted to live in Miller's house and that she forged several documents, including the 2012 rental agreement, in order to have the water turned on so she could continue living there. And, the State presented untainted evidence through Eruhow-Hagen's testimony that Miller was liable for the water bill if Nielsen failed to pay. Nielsen's conduct in presenting forged documents to continue living in Miller's house without his permission and imposing a financial obligation on

Miller without his consent is injurious to Miller. Thus, the overwhelming untainted evidence showed that Nielsen intended to injure Miller by using the forged 2012 rental agreement to get the water turned on in Miller's house so she could continue to live there without permission.

In my opinion, the State presented overwhelming untainted evidence that necessarily leads to a finding of guilt on the forgery charge. Therefore, I respectfully disagree with the majority's conclusion that, if Nielson's statements to Watson were improperly admitted, the error was not harmless.

Accordingly, I concur with the majority's determination that the trial court's CrR 3.5 order was erroneous in so far as the trial court's order did not comply with the requirements of CrR 3.5(c). However, I dissent from the majority's determination that, if Nielsen's statements were improperly admitted, the error was not harmless. I would hold that any error was harmless, and I would affirm Nielsen's convictions.

Lee, J.

CLARK COUNTY PROSECUTOR

March 13, 2015 - 11:54 AM

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