No. 44258-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARTIN IVIE,

Appellant.

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

BRIEF OF APPELLANT

VICTORIA J. LYONS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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1. The trial court erroneously admitted Mr. Ivie's involuntary statement to officers in violation of the Due Process Clause of the Fourteenth Amendment.

2. Jury misconduct deprived Mr. Ivie of a fair trial.

3. Mr. Ivie's sentencing was unconstitutional because the State failed to prove prior convictions by a preponderance of the evidence.

4. The trial court failed to meet the requirement of filing written CrR 3.5 Findings of Fact, where the prosecutor as prevailing party neglected to draft proposed findings or present them to the court following the hearing, as required by the Rule.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant's statement may only be used at trial if it was given voluntarily. When questioned by detectives, Mr. Ivie had just undergone surgery and was still under the influence of narcotic pain medications. Was Mr. Ivie's statement a product of rational intellect and free will?

2. A defendant has the right to a fair trial and this right includes an impartial jury. Actions of an individual juror that rise to the level of jury misconduct may deny the defendant a fair trial in violation of

Article I, section 22 and the Sixth Amendment. During deliberations the jury foreperson intimidated and bullied other jurors and failed to pass juror inquiries on to the court. Where the jury foreperson bullies other jurors and fails to ask questions of the court when there is confusion over the law does that conduct deny Mr. Ivie a fair trial?

3. Due process requires that the State prove a defendant's prior convictions for use at sentencing by a preponderance of the evidence. Simple assertions unsupported by evidence are not sufficient to prove prior convictions. Where there is no production of evidence documenting prior convictions can the sentencing be held constitutional?

4. CrR 3.5 requires a filing of written findings of fact following a ruling on the voluntariness of defendant's statement. Whether the failure to file written CrR 3.5 findings of fact independently requires reversal, where the trial court did not issue an adequate oral ruling on the question of the voluntariness of defendant's statement?

C. STATEMENT OF THE CASE

Mr. Ivie was convicted of one count of theft in the second degree, one count of attempting to elude, one count of assault in the third degree, and two counts of assault in the first degree. CP 38-47.

The incident leading to his arrest arose from a timber theft. 6/27/12RP 57, 63, 72. The area of the theft is remote and between 15 and 60 minutes from Shelton, the nearest town. 6/27/12RP 76. On February 9, 2012, Deputy Reed, investigating possible wood theft, kept watch on the area with the use of night-vision goggles. 6/27/12RP 68-70, 73-74.

At approximately 8:00pm a pick up arrived and a person Deputy Reed later identified as Mr. Ivie exited the vehicle. 6/27/12RP 76. The two men had multiple contacts with one another in the past. 6/27/12RP 123; 7/3/12RP 584. In response to Deputy Reed's request for back up, Sergeant Adams responded. 6/27/12RP 78. Deputy Reed watched Mr. Ivie for approximately 25 minutes but did not see him use a chainsaw. 6/27/12RP 76, 119, 125. Deputy Reed testified that he confronted Mr. Ivie, who appeared agitated and failed to heed the deputy's instructions. 6/27/12RP 81-82. Mr. Ivie got into his vehicle and drove off.[1] 6/27/12RP 83.

The incident continued to devolve and resulted in Sergeant Adams firing eight shots, of which at least 4 of hit Mr. Ivie and one hit

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[1] Mr. Ivie testified at trial that he simply wanted to take his dog home, as he feared he would be taken to the pound if Mr. Ivie were indeed arrested. 7/3/12RP 585.

[2] Mr. Ivie requested a new attorney following the conclusion of trial, but prior to the hearing on his motion for a new trial and sentencing original defense counsel James Foley was allowed to withdraw. The court appointed Charles Lane in his absence. CP34; 8/3/2012RP 797-803.

[3] Mr. Ivie filed a subsequent Motion for a New Trial on October 12, 2012

his dog Shane. 6/29/12RP 485-86. Mr. Ivie was taken first to Mason General County Hospital and then transferred to Tacoma General Hospital, where he underwent surgery for the bullet wounds. 7/3/12RP 644. Detective Simper and Sergeant Breen took his statement while Mr. Ivie was still in the hospital on the morning of February 10, 2012. 6/29/12RP 502.

Mr. Ivie objected to admission of his statement contending it was involuntary. 4/2/12RP 2. During a pretrial hearing, Detective Simper testified he knew Mr. Ivie had been shot, was in the hospital, and had undergone surgery recently prior to conducting the interview. 6/29/12RP 502. When Simper advised Mr. Ivie of his *Miranda* rights, Mr. Ivie invoked his right to his attorney. The two detectives then left the room. 6/29/12RP 505-507. Mr. Ivie called for the detectives to return to the room to speak with him. 6/29/12RP 507; 7/2/12RP 529. They proceeded to interrogate Mr. Ivie recording his statement. *Id.*

Neither officer inquired as to how long Mr. Ivie had been out of surgery or what medications he was being given but both officers believed that Mr. Ivie was not intoxicated. 6/29/12RP 511, 514-15; 7/2/12RP 533-534, 542. Breen did note that at the beginning of the

interview Mr. Ivie had his eyes closed and they had to ask him to open them. 7/2/12RP 557.

Mr. Ivie testified that he only vaguely remembered speaking with the detectives. 7/2/12RP 543. He was unclear as to how many times exactly he had been shot and had no memory of being transferred from Mason County General Hospital to Tacoma General. 7/2/12RP 543-544. After listening to the taped interview, Mr. Ivie believed he sounded as if he was under the influence of narcotics. *Id.* He testified to being dosed with morphine and Oxycontin. 7/2/12RP 552. He remembered the detectives telling him they were there to investigate a wrongful shooting. The majority of his statement was "cloudy" and he was "pretty drugged up" and had a concussion. 7/2/12RP 546. Mr. Ivie never received physical therapy while at Tacoma General but prior to giving his statement he was up and walking, in part to prevent pneumonia. *Id.* The court noted that Mr. Ivie was slurring at the beginning of the taped interview. The court ruled that Mr. Ivie's statement was voluntary and available for impeachment purposes. 7/2/12RP 567-69. The court did not file written findings of fact.

The jury convicted Mr. Ivie on all counts. CP 38-47. The jury was polled and all jurors answered affirmatively. *Id.* at 792-793. This

included Juror 4, Marjorie Steinke. *Id.* at 792. Four days later, Ms. Steinke contacted Mr. Ivie's trial counsel and advised him that foreperson of the jury refused to send out questions to the court during deliberations, that she had serious concerns about the law and this left her without enough information to reach a proper verdict.[2] CP36-37. Mr. Ivie filed Motion for a New Trial on July 12, 2012.[3] *Id.* Ms. Steinke submitted a declaration stating she "did not believe Mr. Ivie committed the First Degree Assault against Deputies Reed and Adams." *Id.* She continued:

> The foreperson was very pushy. She made comments during deliberation to the effect of "after all, he is a thief and a liar" and she made up her mind that Mr. Ivie was guilty early on in deliberation. She did not want to submit questions to the bailiff to be answered by the court and left so many questions unanswered.... Even though I had questions about that rule, I knew that the lead juror would not ask them.

Id.

Mr. Ivie argued that the foreperson actions were misconduct and that they removed the mechanism for the jurors to make inquiries of the court. 11/9/2012RP 810-11. The foreperson's conduct caused

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[2] Mr. Ivie requested a new attorney following the conclusion of trial, but prior to the hearing on his motion for a new trial and sentencing original defense counsel James Foley was allowed to withdraw. The court appointed Charles Lane in his absence. CP34; 8/3/2012RP 797-803.

[3] Mr. Ivie filed a subsequent Motion for a New Trial on October 12, 2012 following Mr. Lane's appointment. CP 31-33.

confusion, which impacted the verdict and prejudiced Mr. Ivie. *Id.* 811. The court ruled that this behavior did not rise to the level of jury misconduct and inhered in the verdict. *Id.* at 821-23.

Mr. Ivie's prior convictions were listed during his sentencing hearing but there is no record of any other evidence to support the statements made by the State. 11/13/12 RP 827-30, 834-36. The State offered that Mr. Ivie had a prior felony conviction for malicious mischief in the second degree in Mason County Superior Court for which he was sentenced on April 11, 2005.[4] 11/13/12 RP 828. This unproven conviction gave Mr. Ivie an offender score of 5 as to Count I, theft in the second degree. *Id.* As to Count III and VI, both assaults in the first degree, one would have an offender score of 4, and the other of 0. Count V, assault in the third degree carried an offender score of 5. 11/13/12RP 829. The court sentenced Mr. Ivie to a total of 222 months of incarceration. 11/13/12RP 835.

[4] The State also recited numerous prior misdemeanor and gross misdemeanor convictions that did not impact Mr. Ivie's offender score. 11/13/12 RP 828.

D. ARGUMENT

1. **The admission of his involuntary statement deprived Mr. Ivie of his right to due process.**

a. The due process clause of the Fifth and Fourteenth Amendments protects against compelled evidence.

The use of an involuntary statement in a criminal trial for any purpose is a denial of due process of law. *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1968); *U.S. Const. amends., V, XIV; Const. art. I, §§ 3, 9.*[5] This fundamental protection stems from a "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Blackburn v. Alabama*, 361 U.S. 199, 206-207, 80 S. Ct. 274, 4 L.Ed.2d 242 (1960). The coercion used by a state agency need not be physical as, "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Jackson v. Denno*, 378 U.S. 368 at 389.

[5] "...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." *U.S. Const. amend., V.* "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..." *U.S. Const. amend., XIV.* "No person shall be deprived of life, liberty, or property, without due process of law." *Const. art. I § 3.* "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." *Const. art. I § 9.*

Numerous cases have demonstrated that government compulsion can be mental well as physical.[6]

The detectives questioned Mr. Ivie after he had undergone surgery for law enforcement inflicted gunshot wounds. He was under the influence of narcotics. 7/2/12RP 552. Therefore his statement to Detective Simper and Sergeant Breen was not a "product of rational intellect and a free will." *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L Ed. 2d 770 (1963) *quoting Blackburn v. Alabama*, 361 U.S. 199 at 208. It was involuntary and should not have been admitted for any purpose.

b. Mr. Ivie's statement was not made voluntarily when considered under a totality of the circumstances analysis.

The Supreme Court stated that "it is hard to imagine a situation less conducive to the exercise of a 'rational intellect and free will'" than that of someone who has been "seriously wounded just a few hours" prior to being questioned by police. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Much like the petitioner in *Mincey*, Mr. Ivie was questioned in the hospital, after

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[6] *See Gallegos v. Colorado*, 370 U.S. 49, 82 S. Ct. 1209, 8 L.Ed.2d 325 (1962); *Culombe v. Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L.Ed.2d 1037 (1961); *Spano v. New York*, 360 U.S. 315, 79 S. Ct. 1202.

being shot at least four times on a remote, mountainous dirt road. 6/27/12RP 76. Mr. Ivie had no memory of being transported to Mason County General Hospital or subsequently being transferred to Tacoma General. 7/3/12RP 644. Following surgery for gunshot wounds, two officers questioned Mr. Ivie regarding the incident surrounding his arrest. 6/29/12RP 502.

The voluntariness of a statement is determined under a totality of the circumstances analysis and should include factors such as "defendant's physical condition, age, mental abilities, experiences and police conduct." *State v. Rupe*, 101 Wn.2d 664, 679, 692, 683 P.2d 571 (1984). Although not definitive, a defendant's drug use should also be considered. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). In applying these factors to Mr. Ivie's statement it is clear that the trial court was erroneous in finding it voluntary.

Mr. Ivie was in poor physical condition following surgery. 7/2/12RP 546. Mr. Ivie was not confined to a bed but hospital staff dictated any mobilization on his part in attempts to prevent pneumonia. *Id.* Mr. Ivie had been prescribed opiate painkillers, including morphine and felt like he was in a dream state, 7/2/12RP 552. The officers testified that Mr. Ivie did not appear to be under the influence of drugs

but neither were medical professionals fully equipped to comment on Mr. Ivie's physical condition. 6/29/12RP 511; 7/2/12RP 533.

Mr. Ivie was questioned by two officers while in the hospital, under the influence of narcotics, very close in time to having undergone surgery and he remembers very little of the statement he provided. Like in *Mincey* the situation as a whole demonstrates the involuntariness of Mr. Ivie's statement to police , which would require it be excluded at trial.

c. Mr. Ivie's conviction must be reversed.

A constitutional error requires reversal of a conviction unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The use of an involuntary statement is always unconstitutional. *Jackson v. Denno*, 378 U.S. 368. Mr. Ivie was impeached with a statement he barely remembers making and this resulted in a severe prejudice against him. 7/2/12RP 543; 567-69. Mr. Ivie's statement to police following surgery and under the influence of pain medication was not voluntary and therefore his convictions were unconstitutional and must be reversed.

2. **Jury misconduct deprived Mr. Ivie of due process.**

a. The right to an impartial jury is a fundamental right.

A criminal defendant's right to a fair trial is fundamental. *U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22*; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed.2d 126 (1976).[7] This right includes the right to an unbiased jury and a trial unburdened by jury misconduct. *Smith v. Kent*, 11 Wn. App. 439, 443, 523 P.2d 446 (1974). Prejudice to the defendant and "a strong affirmative showing of misconduct is necessary" and to prove that this fundamental right has been violated and to provide "stable and certain verdicts." *State v. Balisok*, 123 Wn.2d 114, 117-118, 866 P.2d 631 (1994). However, once demonstrated a new trial is warranted. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008).

b. The foreperson's failure to transmit questions of law to the court violated Mr. Ivie's due process rights.

In evaluating an accusation of juror misconduct the court may only hear factual information regarding the misconduct. *State v.*

[7] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..." *U.S. Const. amend. VI.* "The right to trial by jury shall remain inviolate." *Const. art. I, § 21.* "...to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases..." *Const. art. I, § 22.*

Marks, 90 Wn. App. 980, 986, 955 P.2d 406 (1998.) Ms. Steinke's declaration addresses the misconduct directly. CP 28-29. A person alleging misconduct has the burden to show that such misconduct occurred. *State v. Earl*, 142 Wn. App. at 774. Mr. Ivie meets this burden.

Ms. Steinke provided evidence that she was confused as to the law and that she knew that the jury foreperson would not ask questions to the court on behalf of the jury. CP 28. Despite believing that Mr. Ivie was not guilty of the two counts of first-degree assault she felt that she had no choice but to change her vote and to say she thought Mr. Ivie was indeed guilty. *Id.* The foreperson's actions were a "strong, affirmative showing of misconduct." *State v. Balisok*, 123 Wn.2d at 117.

There was also evidence presented as to the foreperson's inherent bias, that she felt Mr. Ivie was a "thief and a liar." *Id.* This bias violated Mr. Ivie's right to due process. *Smith v. Kent*, 11 Wn. App. at 443.

c. Mr. Ivie's conviction must be reversed.

"In a criminal proceeding a new trial is necessary only when the 'defendant has been so prejudiced that nothing short of a new trial can

[e]nsure that the defendant will be treated fairly.'" *State v. Reynoldson*, 168 Wn. App. at 543, 547, 277 P.3d 700 (2012) (quoting *State v. Chanthabouly*, 164 Wn. App. 104, 140, 262 P.3d 144 (2011)). Jury misconduct that prejudices the defendant by directly impacting the verdict rises to this level and Mr. Ivie's convictions should be reversed.

3. **The State failed to meet its burden of proving Mr. Ivie's prior convictions by a preponderance of the evidence for purposes of sentencing.**

a. The failure to prove prior convictions is a violation of a defendant's due process right.

Under RCW 9.94A.530(2) a court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." This is rooted in the defendant's right to due process. *U.S. Const. amend., XIV; Const. art. I, §3.* Case law has long upheld that the state has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 473, 480, 973 P.2d 452 (1999).

This burden is not met by simple assertions made by prosecutors during sentencing and some type support evidence must be introduced. *State v. Lopez*, 147 Wn.2d 515, 523, 55 P.3d 609 (2002); *Ford*, 137 Wn.2d at 480. This was reaffirmed by the Supreme Court in *State v. Hunley* despite an attempt by the legislature to change the RCW

9.94A.500(1) and .530(2) to shift the prosecutor's burden of proving prior convictions. *Hunley*, 175 Wn.2d 901, 909, 917, 287 P.3d 584 (2012). The State made a declaration that Mr. Ivie had a prior felony conviction for malicious mischief in the second degree but provided no documentation to prove such a prior. 11/13/12 RP 828.

b. The State made no showing as to Mr. Ivie's prior conviction at sentencing.

The State's burden is not "overly difficult" to meet but they must introduce some supporting evidence. *Ford*, 137 Wn.2d at 480. Although the best evidence of prior convictions is a certified copy of a past judgment, other documents may be introduced. *Hunley*, 175 Wn.2d at 910. Documents such as a certified copy of a docket sheet showing a guilty plea or DISCIS criminal history are also sufficient as long as they are "official government records, based on information obtained directly from the courts." *Id.* at 910-11, quoting *State v. Vickers*, 148 Wn.2d 91, 120-21 59 P.3d 58 (2002). Although the State recited Mr. Ivie's prior convictions during the sentencing hearing there is no record of any other evidence to support the State's assertions. 11/13/12 RP 827-30, 834-36. Thus, the State did not meet its burden of proving the existence of Mr. Ivie's prior convictions.

c. This case must be remanded to the sentencing court to ensure the State meets its burden.

The State must uphold its burden to prove the defendant's prior convictions at sentencing, when it fails to do so a defendant's constitutional right is violated. Mr. Ivie was prejudiced by increasing his offender score based on the State's foundationless assertions. This gave Mr. Ivie an offender score of 5 as to Count I, theft in the second degree. 11/13/12 RP 828. As to Count III and VI, both assaults in the first degree, one would have an offender score of 4, and the other of 0. Count V, assault in the third degree carried an offender score of 5. 11/13/12RP 829. The court sentenced Mr. Ivie to a total of 222 months of incarceration. 11/13/12RP 835.

The remedy for that violation is to remand the case back to the sentencing court to ensure the State meets its burden. Mr. Ivie's case must be remanded.

4. **Reversal is independently required for the failure to file written CrR 3.5 findings.**

a. Either written findings of fact or adequate oral findings are required following a CrR 3.5 hearing.

CrR 3.5 requires the entry of written findings following a suppression hearing, which must set forth the disputed and undisputed facts, the court's findings as to the latter, and the court's legal

conclusions. CrR 3.5. The absence of written findings of fact and conclusions of law, as CrR 3.5(b) requires may be excusable, but only if the trial court made detailed oral findings of fact and conclusions of law. *State v. Riley*, 69 Wn. App. 349, 352–53, 848 P.2d 1288 (1993). Even with this in mind the caveat remains that a trial court's oral statements are "no more than a verbal expression of (its) informal opinion at that time..." *State v. Dailey*, 93 Wn.2d 454, 458, 610 P.2d 357 (1980).

b. The prosecutor did not submit written findings of fact and conclusions of law to the trial court and the court's oral findings were inadequate.

In the present case, the absence of written findings requires reversal, where the trial court's oral findings were inadequate regarding the voluntariness of defendant's statement. *See State v. Emery*, 161 Wn. App. 172, 201-092, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012) (on review of a suppression ruling, appellate court must be able to review the trial court's findings as to the facts arising prior to the search). A lack of written findings produces confusion and inconsistency. A record that provides only oral statements hinders the ability of all parties involved in appellate review, the court, counsel and the defendant to expediently and accurately engage in appellate

challenge and review. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998).

c. Mr. Ivie's convictions should be reversed.

Here, in the absence of either adequate oral or written findings, this Court should follow the rule of reversal as the presumptive outcome where written 3.5 findings are not filed. *State v. Smith*, 68 Wn. App. 454, 458, 610 P.2d 357 (1980).

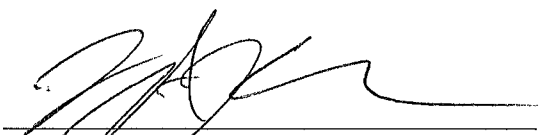
E. CONCLUSION

Mr. Ivie's convictions must be reversed because his due process rights were violated when his involuntary statement was used at trial to impeach him, he received a verdict nullified by jury misconduct and he was prejudiced by the failure to file findings of fact following a 3.5 hearing.

In the alternative, Mr. Ivie's sentence must be vacated and the case remanded for the State to meet its burden to prove any prior convictions.

DATED this 3rd day of July 2013.

Respectfully submitted,



Victoria J. Lyons – WSBA # 45531
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. MARTIN IVIE, Appellant.	)))))))))	NO. 44258-2-II

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