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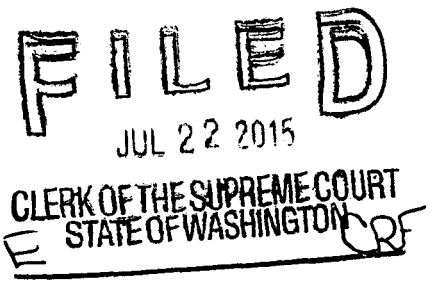

No. 44968-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

EUGENE ELKINS, JR.

PETITION FOR REVIEW

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TABLE OF CONTENTS

Cases

A. Identity of Petitioner

Eugene V. Elkins, Jr. asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

On June 16, 2015, the Court of Appeals, Division II, affirmed Mr. Elkins' conviction for second degree felony murder in a published decision. A copy of this decision is in the Appendix.

C. Issues Presented for Review

Mr. Elkins was subjected to police initiated interrogation five hours after he invoked his right to remain silent without the benefit of being re-advised of his *Miranda* warnings and expressly waiving them. Given that every prior Washington Supreme Court and Court of Appeals case to consider the question has required a re-advisement and express waiver of *Miranda* warnings, should Mr. Elkins' petition for review be granted and his conviction reversed?

D. Statement of the Case

Eugene Elkins was charged by Information with one count of second degree felony murder by means of second degree assault. The victim of the homicide was Kornelia Engelmann, who was Mr. Elkins' girlfriend. RP, 243. Prior to trial, the Court conducted a hearing pursuant

to CrR 3.5. Mr. Elkins filed an extensive motion arguing both federal and state constitutional law to exclude his pre-trial statements. CP, 9-15, 53-74. The trial court admitted all pre-trial statements. RP, 124.

Background Facts

On June 6, 2012, a date described by one witness as D-Day, police were notified of a possible homicide RP, 280. The homicide was reported at the home of Eugene Elkins, who lived in a double wide mobile home on 57 Clemons Road, space 58. RP, 353. Clifford Dotson lives in the same mobile home park, space 65. RP, 272. On that date, he heard "some awful rattling and clanking." RP, 273. There was also a woman screaming and hollering. RP, 273. The noise lasted for about 15 to 20 minutes and came from a mobile home four units away. RP, 273.

Later that morning, Brianne Slosson woke up around 6:00 and saw she had missed a phone call from Mr. Elkins. RP, 245, 280. After unsuccessfully trying to return the call, she finally connected with him around 7:30. RP, 246. Mr. Elkins said something was wrong with Kornelia, he said she was dead and to keep her mouth shut. Then he said he didn't know if she was dead and she should come over. RP, 246.

Ms. Slosson drove to Mr. Elkins' house. In the bedroom, she saw Ms. Engelmann face down and covered with a blanket. RP, 247. Ms. Slosson, who is a Certified Nursing Assistant, checked for vital signs and

discovered she had no pulse, her temperature was very cold, and she was very stiff, indicating rigor mortis had already set in. RP, 248. According to later expert testimony, this would have required her to be dead for at least two hours. RP, 403. She was unclothed and was black and blue from the chest up. RP, 249.

Ms. Slossen asked Mr. Elkins what he had done and he said he had beaten her, but she was fine when they had gone to bed at midnight. RP, 249. He said she must have got up to use the bathroom and fell down the stairs. RP, 249. Mr. Elkins told her not to call 911 and then she helped him put his stuff in his truck. RP, 250. He said to give him a ten minute head start and tell the police he was going to Oregon. RP, 250. As soon as he left, Ms. Slossen called 911. RP, 250.

Lieutenant David Porter was the first officer to arrive. RP, 290. He made contact with Ms. Slossen, who showed him where the dead body lay. RP, 291. In Deputy Porter's opinion, Ms. Engelmann was obviously deceased. RP, 292. Deputy Porter stayed at the scene and coordinated the investigation until Detective Sergeant Steve Shumate arrived and took over. RP, 295.

Detective Shumate was in charge of processing the crime scene. At trial multiple photographs and physical evidence were marked and admitted. CP, 116-120.

Later that day, at about 1:00 in the afternoon, Mr. Elkins showed up unexpectedly at his friend Paul Hansen's house in Yakima County. RP, 280-81. Mr. Elkins did not appear to be injured. RP, 287. Mr. Elkins said his girlfriend was not alive despite his efforts to revive her, so he got scared and left. RP, 281. He said he had shoved her around the night before but he did not hit her. RP, 283. Mr. Elkins said he wanted to have one beer and then he was going to turn himself in. RP, 283.

Autopsy evidence indicated Ms. Engelmann had numerous bruises to the head, neck, and torso. RP, 411. Pooled blood was found inside the skull cavity. RP, 417. There was no evidence of broken bones or cartilage in the neck area, which would normally be found in a case of strangulation. RP, 418. There were several broken ribs and bruising on the lungs in the torso. RP, 418. The liver was lacerated. RP, 423. Dr. Emmanuel Lacsina's conclusion was she died of internal bleeding as a result of multiple blunt force injuries to the head, chest, and torso. RP, 432. Death would have occurred within four to five hours of the injuries. RP, 437.

CrR 3.5 Hearing

The following facts were elicited at the CrR 3.5 hearing on March 19, 2013.

Acting on a tip Mr. Elkins may be in Yakima County, the Grays Harbor Sheriff's Office requested an agency assist. RP, 11-12. Yakima County Sheriff's Deputy Chad Michael was able to locate Mr. Elkins at a residence in Yakima County at 3:34 p.m. on June 6, 2012. RP, 12, 21, 27. Mr. Elkins was arrested and handcuffed. RP, 12. Deputy Michael asked if he had any weapons and he said he did not. RP, 12. He then read Mr. Elkins his *Miranda* warnings. RP, 13. Although he did not recall his exact response, Deputy Michael remembered that Mr. Elkins indicated he did not want to talk to him at that time. RP, 14. Yakima Sheriff's Chief Stew Graham was standing nearby and observed Deputy Michael read the *Miranda* warnings. RP, 20. Chief Graham asked Mr. Elkins if he wished to speak with them and he said, "No." RP, 21. Deputy Michael and Chief Graham did not ask any further questions. RP, 21.

Grays Harbor Sergeant Don Kolilis, who was processing the murder scene, learned of Mr. Elkins' arrest soon thereafter and immediately made arrangements to drive to Yakima. RP, 27. Detective Keith Peterson accompanied him. RP, 27. They arrived a little after 8:00 p.m. and Chief Graham arranged for them to use an interview room at the Yakima County Sheriff's Office. RP, 22. Chief Graham notified the Grays Harbor authorities that Mr. Elkins had been read his *Miranda* warnings and had invoked his right to remain silent. RP, 24-25, 28.

When Mr. Elkins arrived at 8:35, he was ushered into a small interview room. RP, 45, 74. The three men were "huddled" around a "little itty bitty table." RP, 45. The detectives offered him drinks and an opportunity to use the restroom. RP, 29. Detective Peterson asked if he remembered his rights and if he understood they were still in effect. RP, 29. According to Sergeant Kolilis, Mr. Elkins "advised he was willing to speak with us." RP, 29. The detectives did not, however, re-advise Mr. Elkins of his *Miranda* rights. RP, 44. Mr. Elkins was interviewed for a half an hour and then became upset and asked for a lawyer. RP, 32, 46. The interview was terminated. RP, 32. The interview was audio and video recorded, although Mr. Elkins was not apprised of that fact. RP, 42. The detectives knew the interview was being recorded but made no effort to tell Mr. Elkins. RP, 42.

The next day, June 7, the detectives picked Mr. Elkins up at the jail and began the transport to Grays Harbor. RP, 32. Mr. Elkins was riding in the back seat on the passenger side of Sergeant Kolilis' patrol car. RP, 33. On the trip, Sergeant Kolilis and Mr. Elkins engaged in small talk about subjects such as snacks for the road and white water rafting in the Titan Valley. RP, 34. Sergeant Kolilis did not mention the small talk in his report and the first time Mr. Elkins' lawyer learned of it was during the CrR 3.5 hearing. RP, 48. The small talk was initiated by Sergeant Kolilis

when they stopped for gas and drinks. RP, 49. On cross-examination, Sergeant Kolilis admitted he was hoping by initiating small talk Mr. Elkins would eventually start to talk about the case because, as he put it, "Stuff like that does happen." RP, 50-51. When they passed White Pass, Mr. Elkins started mumbling to himself and Sergeant Kolilis said he could not understand him RP, 34. Sergeant Kolilis could hear him say that "he really loved her." RP, 51. Mr. Elkins said something about knowing about guns and wanted to make some kind of deal. RP, 35. Sergeant Kolilis, who knew firearms were not involved in the murder of the victim, made it clear he was concerned about the existence of guns that could potentially hurt someone RP, 53. Sergeant Kolilis asked him about the location of the guns knowing that it was likely to produce an incriminating response. RP, 54. Mr. Elkins then asked if it was better to talk to the detectives or not. RP, 35. Sergeant Kolilis said he thought he had already made that decision RP, 35. Mr. Elkins said he wanted to come forward and talk. RP, 35 Sergeant Kolilis said it was his choice and he needed to make his own decision. RP, 36. He said he would need to be re-advised of his rights RP, 36. Mr. Elkins said he was aware of his rights and would wait until they reached the police station RP, 37. No further questions were asked in the car. RP, 36

At the Grays Harbor Sheriff's Office, Mr. Elkins was advised of his *Miranda* warnings in writing. RP, 37. A *Miranda* form was filled out and Mr. Elkins went over it. RP, 38. Mr. Elkins signed it. RP, 38. Sergeant Kolilis told Mr. Elkins that he was re-advising him of his rights because he had already invoked his right to a lawyer. RP, 39. The detectives then questioned him about the circumstances. RP, 39. As Mr. Elkins gave details, Sergeant Kolilis wrote out what he said. RP, 39. At the end of the written statement, Mr. Elkins was given the opportunity to make corrections, which he did. RP, 39. Mr. Elkins signed the statement on the bottom of each page. RP, 40. At the end, Mr Elkins added a paragraph in his own handwriting. RP, 40.

Prior to the hearing, the issue of the admissibility of Mr. Elkins' statements in the vehicle was discussed. Defense counsel said, "Those – I would agree -- Mr. Elkins would agree that those statements were not the product of interrogation, Sergeant Kolilis didn't ask the detective – or didn't ask Mr. Elkins any questions during the transport in the vehicle. I'm not concerned about those statements." RP, 9. The Court asked, "So you're not objecting to the admissibility of the statements of the vehicle on the trip." To which defense counsel responded, "We're going to see how the testimony pans out, but I don't anticipate those are going to be an issue." RP, 9. During the hearing, the State objected to questions

pertaining to the admissibility of the statements in the vehicle. RP, 54. Defense counsel stated, "But it ties in to the – but it ties into his subsequent statement. I'm not objecting to the statements themselves, but it's the lead up." RP, 55.

At trial, the jury heard the substance of Mr. Elkins' statements to detectives.

In the first statement, on June 6 taken at the Yakima County Sheriff's Office, Mr. Elkins said the arguing occurred on Friday, which would have been June 1. On that date, he and Ms. Engelmann had been drinking and they got into an argument that escalated into pushing and shoving. RP, 459. He said Ms. Engelmann knew how to push his buttons. RP, 459. At one point Ms. Engelmann scratched him and he hit her with an open hand. RP, 460. He said he hit her quite a few times. RP, 460.

Sergeant Kolilis confronted him about the number of bruises on the body and suggested there was a substantial amount of bruising. RP, 460. Mr. Elkins lowered his head and looked emotional. RP, 460. The Sergeant then told the jury, "He said he didn't want to speak with us any further at that point and didn't know if he should talk to attorney or not . . when I clarified him that he wanted to speak with an attorney or what. --" RP, 461. Defense counsel promptly objected and the objection was sustained. RP, 461. The Court instructed the jury to "disregard the statement " RP,

461. Mr. Elkins then moved for a mistrial. RP, 461. After much deliberation, the court denied the mistrial. RP, 468-70.

The transport from Yakima County to Grays Harbor County was not the subject of detailed testimony for the jury. The jury was told there was conversation between Sergeant Kolilis and Mr. Elkins where he indicated he wished to speak further with the detectives about what had happened. RP, 473. Mr. Elkins indicated it was okay to wait until they arrived at Montesano. RP, 474. Once they arrived at Montesano a written statement was taken from Mr. Elkins. RP, 474. Mr. Elkins was given an opportunity to make corrections and he made a couple of changes. RP, 475. He signed each page. RP, 475. The statement was admitted without any commentary by the Sergeant. RP, 476.

The written statement of June 7 is six pages long, with some portions excised for the jury. Trial exhibits 73 and 74. In general terms, the statement says that on June 1, 2012, Mr. Elkins and Ms. Engelmann were arguing over her perceived flirting with a mutual friend. The argument escalated into pushing, shoving, scratching, and hitting. He struck her several times with his fist. The next day he could tell he had hit her too hard. On Tuesday (June 5) they were drinking and arguing, but nothing was physical. When Mr. Elkins went into the bedroom and discovered Ms. Engelmann lying on the floor next to the closet. He tried

to revive her with CPR but was unable to do so. He then called Bree [Slosson] and asked her to come down and check on her. He knew he should have called 911 but he was really scared. He saw the bruises and "knew what it would look like." He "thought [he] could go to prison and was scared." He concluded the statement in his own handwriting saying, "I gene [sic] wish the world it was me that passed not Kornelia. I truly loved her and will live with this every day for the rest of my life."

E. Argument Why Review Should Be Accepted

This Court should grant review of cases when the case is in conflict with a case from this Court or another Court of Appeals case, or involves a significant issue under the Constitutions of the United States and Washington, or involves an issue of substantial public interest. RAP 13.4(b). In its published Court of Appeals decision, the Court determined that Mr. Elkins invocation of his right to remain silent was "scrupulously honored" despite the fact the detectives did not re-advise him of his *Miranda* warnings. This holding is in conflict with the every decision from this Court and the Court of Appeals to discuss the issue, involves a significant issue under the Constitutions of the United States and Washington, and involves an issue of substantial public interest. Review should be granted.

The Grays Harbor detectives did not scrupulously honor Mr. Elkins' invocation of his right to remain silent. The seminal case on this issue is *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). *Mosley* holds that police must "scrupulously honor" a suspect's invocation of his or her right to remain silent, which is accomplished when the police "immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." *Mosley* at 106. The last requirement, that the interrogation be about an unrelated crime, has been the subject of some debate, but the other requirements have remained essentially unchanged. Washington follows *Mosley* is all material respects. Prior to Mr. Elkins' case, there are at least 17 Washington cases discussing the propriety of subsequent interrogation after an invocation of the right to remain silent by the suspect. In six of those cases[1] the subsequent interrogation was found to

[1] *State v. Brown*, 158 Wn.App. 49, 240 P.3d 1175 (2010) (subsequent interrogation preceded by re-advisement); *State v. Stewart*, 113 Wn.2d 462, 780 P.2d 844 (1989) (each subsequent interrogation preceded by re-advisement); *State v. Pierce*, 94 Wn.2d 345, 618 P.2d 62 (1980) (subsequent interrogation preceded by re-advisement); *State v. Kaiser*, 34 Wn.App. 559, 663 P.2d 839 (1983) (subsequent interrogation preceded by re-advisement); *State v. Vannoy*, 25 Wn.App. 464, 610 P.2d 380 (1980) (subsequent interrogation preceded by re-advisement); *State v.*

be proper, but the subsequent interrogation was preceded by a re-advisement of *Miranda* rights in each of those six cases. Conversely, in every other case, the Court found the subsequent interrogation improper.[2] Undersigned counsel has been unable to find a single Washington case prior to *Elkins* where the subsequent interrogation was held to be proper where it was not preceded by a re-advisement of *Miranda* warnings and an express waiver of constitutional rights.

Robbins, 15 Wn App. 108, 547 P.2d 208 (1975) (second interrogation preceded by re-advisement in writing of *Miranda* rights and written waiver). Cf. *State v. Mason*, 31 Wn.App. 41, 46, 639 P.2d 800 (1982) (suspect's "blurted out statement" was admissible despite lack of re-advisement because by "voluntary and unsolicited action a person can waive a previous exercise of his constitutional rights without first having his Miranda warnings re-read to him.")

[2] *In re Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987) (subsequent interrogation improper, but harmless); *State v. Fedoruk*, 184 Wn.App 866, 339 P.3d 233 (2014) (subsequent interrogation improper); *State v. Reuben*, 62 Wn.App. 620, 814 P.2d 1177 (1991); *State v. Coates*, 107 Wn.2d 882, 735 P.2d 6455 (1987) (State conceded subsequent statement was improperly obtained); *State v Bradley*, 105 Wn.2d 898, 719 P.2d 546 (1986) (subsequent statement was product of improper interrogation, but harmless); *State v. Cornethan*, 38 Wn.App. 231, 233-34, 684 P.2d 1355 (1984); *State v. Coles*, 28 Wn.App. 563, 625 P.2d 713 (1981); *State v Marcum*, 24 Wn.App. 441, 601 P.2d 975 (1979) (admission of statement error; fact that suspect answered questions after invoking rights did not indicate waiver); *State v. Boggs*, 16 Wn.App. 682, 687, 559 P.2d 11 (1977); *State v Haynes*, 16 Wn.App. 778559 P.2d 583 (1977) (admission of statement error, although harmless).

It was barely one year ago this Court held that subsequent interrogation must be preceded by re-advisement of *Miranda* warnings, saying "[Police] may not resume discussion with the suspect until the suspect reinitiates further communication with the police, or a significant period of time has passed and officers reissue a fresh set of *Miranda* warnings and obtain a valid waiver." *In re Cross*, 180 Wn.2d 664, 674, 327 P.3d 660 (2014). In making this statement, this Court was simply reiterating the consistent position expressed in every Washington case to consider the question since *Mosley*. In *State v Boggs*, 16 Wn.App. 682, 559 P.2d 11 (1977) the Court said:

> When a person has chosen to remain silent, we think, and *Mosley* seems to indicate, that the *Miranda* warnings must be readministered before law enforcement agencies can recommence interrogation. To permit otherwise would enable the police to convey the impression that any previous assertion of the right to remain silent was merely a technical obstacle requiring only token observance before questioning could resume. On the other hand, to readvise the individual of his Miranda rights demonstrates that his earlier decision to remain silent has been recognized by the police, and also reminds the individual that he can continue to exercise those rights

Boggs at 687. In *State v. Reuben*, 62 Wn.App. 620, 814 P.2d 1177 (1991) the Court said, "[R]esumption of interrogation after a very short respite, about the same incident and without new warnings, violates the *Miranda* guidelines." In *State v. Cornethan*, 38 Wn.App. 231, 233-34, 684 P 2d 1355 (1984) the Court said, "[T]he police may resume questioning after a

'significant period' of time has passed, but only if the accused's original request to cut off questioning was "scrupulously honored" and he is provided with a fresh set of *Miranda* warnings on re-questioning." See also *State v. Coles*, 28 Wn.App. 563, 625 P.2d 713 (1981) (Officers did not scrupulously honor invocation of rights when they conversed with the suspect without re-advisement of rights)

In Mr. Elkins' case, the Court of Appeals dismissed these consistent and unequivocal pronouncements as dicta and distinguishable. But given that Mosely was decided 40 years ago and has been consistently interpreted as requiring a subsequent advisement of *Miranda* warnings, this Court should grant review and reverse.

Mr. Elkins was first subjected to interrogation by the detectives at the Yakima police station in a tiny interview room huddled over a small table. He had previously invoked his right to remain silent and the detectives knew this fact. Rather than re-advise his of his *Miranda* rights and obtain an express waiver of those rights, the detectives asked if he remembered his rights and if he understood they were still in effect. RP, 29. Then, according to Sergeant Kolilis, Mr. Elkins "advised he was willing to speak with us." RP, 29. But Sergeant Kolilis did not obtain a written, or even an oral, waiver of his *Miranda* rights. The detectives then interviewed him for a half an hour until Mr. Elkins said he wished to

speak to a lawyer. This interrogation was improper and the trial court should have suppressed the statement.

The group then moved to the police vehicle for the long ride from Yakima to Montessano. During the ride, the detectives continued to speak Mr. Elkins. The subject matter was small talk, but Sergeant Kolilis hoped that by continuing to engage in conversation the topic would return to the homicide because "stuff like that does happen." RP, 50-51. And he was right. As they got close to Montessano, Mr. Elkins did express a desire to discuss the homicide again. This time, the detectives decided to re-advise him of his *Miranda* rights, but it was too little, too late. After several hours of conversation, all done without a proper waiver of his constitutional rights, the officers should not then be rewarded for finally following the correct procedure. *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

F. Conclusion

This Court should grant review of Mr. Elkins' case and reverse for a new trial.

DATED this 13th day of July, 2015.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EUGENE V. ELKINS, JR., Appellant.	No. 44968-4-II PUBLISHED OPINION

SUTTON, J — Eugene V. Elkins Jr. appeals his jury trial conviction for second degree felony murder predicated on his assault of the victim. He argues that (1) the trial court erred when it denied his motion to suppress three sets of statements that he made to law enforcement officers after he asserted his right to silence or right to counsel, (2) the trial court erred when it denied his motion for a mistrial after a deputy commented on Elkins' exercise of his right to counsel and right to silence, and (3) the second degree felony murder statute, RCW 9A.32.050(1)(b), is unconstitutionally vague when the predicate felony offense is the assault of the same victim. We hold that whether the officers have scrupulously honored the defendant's right to silence and right to counsel under *Miranda*[1] must be determined on a case-by-case basis and that there is no bright-

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

line rule requiring law enforcement officers to fully readvise previously *Mirandized* suspects when reinitiating interrogation. We further hold that the trial court did not err in admitting Elkins' statements, that any comment on Elkins' right to counsel was harmless, and that the second degree felony murder statute is not vague. Accordingly, we affirm.

FACTS

I. BACKGROUND

A. Murder, Flight, and Arrest

At about 3:00 AM on the morning of June 6, 2012, one of Elkins' neighbors in the mobile home park in which Elkins resided heard "some awful rattling and clanking" and a woman screaming from the area of Elkins' trailer. 2 Verbatim Report of Proceedings (VRP) at 273. The noise lasted for 15 to 20 minutes.

At about 4:00 AM, Elkins left a voice mail on his friend Brianne Elaine Slosson's phone asking her to contact him about something important. Approximately three and a half hours later, Slosson contacted Elkins. He first told Slosson that his girlfriend Kornelia Engelmann was dead and that Slosson should "keep [her] mouth shut." 2 VRP at 246, 248. Elkins then said that he was not sure if Engelmann was dead and told Slosson, who was a certified nursing assistant, that he wanted her to come over and check on Engelmann. Slosson immediately went to Elkins' home.

She found Engelmann laying face up on the bedroom floor; Engelmann was dead. Slosson could see that Engelmann was black and blue from the chest up. When Slosson asked Elkins if he had done this to Engelmann, he responded that he had beaten her but that she was fine when she went to bed around midnight. He also said that she must have fallen when she got up to use the bathroom.

Elkins then left, telling Slosson to give him a 10 minute head start before she called 911 and to tell the police that he had gone to Oregon. As soon as he left, Slosson called 911. Several deputies arrived and verified that Engelmann was dead.[2]

That afternoon, Elkins arrived unexpectedly at a friend's house in Wapato. He told his friend that Engelmann was not alive despite his efforts to revive her, so he got scared and left. He also told his friend that he had "shoved [Engelmann] around" but that he had not hit her. 2 VRP at 283. Elkins also denied having killed Engelmann. Yakima County deputies arrived around an hour later and arrested Elkins.

At about 3:30 PM, the Yakima County deputies advised Elkins of his *Miranda* rights Elkins declined to make a statement, and the Yakima County deputies did not question him further

B. June 6 Interview

That evening, Sergeant Don L. Kolilis and Detective Keith A. Peterson from the Grays Harbor County Sheriff's Office arrived in Yakima The Yakima County deputies told Kolilis and Peterson that Elkins had been advised of his rights and had not wanted to speak to the Yakima County deputies.

Kolilis and Peterson interviewed Elkins at about 8:30 PM. Although they did not readvise Elkins of his *Miranda* rights, Kolilis and Peterson asked Elkins if he had been advised of these rights, if he remembered them, and if he understood those rights were still in effect. After Elkins

[2] A forensic pathologist later testified about Engelmann's numerous injuries and concluded that she had died of internal bleeding caused by multiple blunt force injuries to her head, chest, and abdomen inflicted over a short period of time. He opined that death would have occurred within four or five hours of the injuries.

confirmed that he recalled being advised of his *Miranda* rights and that he understood those rights were still in effect, Elkins agreed to talk to the deputies.[3]

During this interview, Elkins told the deputies that he and Engelmann had gotten into an argument the Friday[4] before her death because he believed that she had been flirting with another man and that this argument had escalated into "pushing, shoving and continued on." 3 VRP at 459, 493. Elkins explained that during this altercation, Engelmann scratched him and he hit her "quite a few times" with an open hand. 2 VRP at 460. When the deputies commented on the extensive bruising on Engelmann's body and asked Elkins if he had kicked her, hit her with something, or hit her with a closed fist, Elkins said that he did not want to talk to the deputies any longer and requested an attorney. The deputies ended the interview.

C. Statements during Transit and June 7 Interview

The next day, Kolilis transported Elkins back to Grays Harbor County. During the drive, Kolilis engaged Elkins in small talk.[5] Towards the end of the drive, Elkins told Kolilis that he wanted to talk about what had happened and about some guns he (Elkins) may have taken with him from his home. Kolilis told Elkins to wait until they arrived at the sheriff's office and they could properly advise him of his *Miranda* rights. After arriving at the Grays Harbor sheriff's

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[3] At the later suppression hearing, Kolilis testified that Elkins was not handcuffed during the interview, that the deputies did not threaten or make any promises to Elkins, and that the general tone of the interview was "conversational" as opposed to confrontational. 1 VRP at 29-31. Peterson testified that they did not make any promises or threats and that the interview was "very relaxed" and Elkins appeared "lucid" and seemed to understand everything the deputies were saying. 1 VRP at 66-67.

[4] June 1, 2012.

[5] At the suppression hearing, Kolilis admitted to having started the conversation during the drive from Yakima to Grays Harbor County, but he denied asking Elkins any questions during the drive.

office, being readvised of his *Miranda* rights,[6] and signing a written waiver of these rights, Elkins gave a written statement.

In his signed statement, Elkins admitted to having had a physical altercation with Engelmann on June 1, during which he struck her with a closed fist several times, knocked her down at least once, and caused "bad" bruising. Ex. 74 at 2. The next day, they were both hung over, he was scratched, and she was bruised. But neither of them complained other than to say they "felt like hell." Ex. 74 at 3. Engelmann put ice on her face. But they did not go to the hospital because Engelmann had warrants and Elkins "knew there would be trouble if we went to the hospital," and Engelmann never asked to go. Ex. 74 at 3.

Elkins further stated that on the night before Engelmann died, they had been drinking and they had a nonphysical fight. Engelmann went into the bedroom; Elkins remained in the living room where he watched television and drank. Later, Elkins found Engelmann on the bedroom floor. After trying to administer cardiopulmonary resuscitation for "what felt like 1 hour," he realized she was dead. Ex 74 at 4. He was frightened and did not call 911 because he "knew what it would look like." Ex. 74 at 6

Elkins admitted that he had contacted Slosson and told her to come over to check on Engelmann and that he had told Slosson that he "thought" he had killed Engelmann. Ex. 74 at 5. When Slosson arrived, she verified that Engelmann was dead. He then left, telling Slosson to give him a 10 minute head start. Elkins then drove to his friend's house and told his friend that Engelmann was dead. They shared a beer and the police arrived. Elkins stated that he left because

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[6] At the suppression hearing, Kolilis testified that he specifically addressed Elkins' previous request for counsel, that he explained to Elkins that they were reading him his *Miranda* rights again because he had already asked for counsel, and that they wanted to be sure that he understood what he was doing.

he wanted time to mentally prepare himself because he knew he would be going to prison. He also stated that he regretted the drinking, fighting, arguing, and hitting, and that he wished he had died rather than Engelmann. He stated, "I truly loved her and will live with this every day for the rest of my life." Ex. 74 at 6.

II. PROCEDURE

The State charged Elkins with second degree felony murder predicated on his assault of Engelmann.[7] The case proceeded to a jury trial.

A. Motion to Suppress

Before trial, Elkins moved to suppress the statements he made to the Grays Harbor County deputies on June 6 and June 7. Defense counsel told the trial court that Elkins was not challenging the admission of any statements he made while being transported from Yakima to Grays Harbor County because those statements were not the result of an interrogation. At the suppression hearing, the Yakima County and Grays Harbor County deputies testified as described above.

In addition, on cross-examination, defense counsel asked Kolilis whether he had engaged in "small talk" with Elkins on the drive from Yakima to Grays Harbor County in hope that Elkins would give a statement or say something incriminating. 1 VRP at 50-51. Kolilis answered that was not his intent and that he was talking to Elkins only because it was a long drive. But Kolilis also stated, "And, you know, do—do I always hope that people come forward and be truthful? That is my hope on all occasions. So I guess what you're saying is partly right." 1 VRP at 51.

The trial court gave a lengthy oral ruling setting out its factual findings of fact and conclusions of law and admitted all of Elkins' statements.[8]

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[7] RCW 9A.32.050(1)(b).

[8] We discuss the relevant findings in more detail below.

B. Trial Testimony and Mistrial Motion

At trial, the State's witnesses testified as described above, although they generally did not comment about when or whether Elkins asserted his *Miranda* rights. Elkins did not present any witnesses. The trial court also provided the jury with a redacted copy of Elkins' June 7 written statement, also as described above.

Kolilis, however, did testify that he and Peterson had ended the June 6 interview when Elkins requested an attorney after the deputies asked him if he had hit Engelmann with something, kicked her, or hit her with a closed fist. Elkins objected to this testimony and moved for a mistrial. The trial court denied the motion for a mistrial but instructed the jury to disregard that statement.

The jury found Elkins guilty of second degree felony murder. Elkins appeals. He argues that the trial court erred in denying his motion to suppress his statements and motion for mistrial and that the felony murder statute is unconstitutionally vague as applied to him.

ANALYSIS

I. DENIAL OF SUPPRESSION MOTION

Elkins first argues that the trial court erred when it denied his motion to suppress (1) the June 6 statements he made to Peterson and Kolilis in Yakima, (2) the statements he made to Kolilis while being transported, and (3) the June 7 statements he made in Grays Harbor County. We disagree.

We acknowledge that fully readvising a suspect of his *Miranda* rights is clearly the best practice when resuming questioning of a suspect who has asserted his right to silence. But we hold that there is no bright-line rule that law enforcement officers must always fully readvise a defendant of his or her *Miranda* rights and that whether a defendant's rights have been scrupulously honored must be determined on a case-by-case basis.

Under these facts, the deputies' subsequent questioning of Elkins was permissible without a readvisement of his *Miranda* rights because his right to cut off questioning was scrupulously honored. There were no further words or actions amounting to interrogation before the officers obtained a waiver, the officers did not engage in any coercive tactics, and Elkins' subsequent waiver was knowing and voluntary.

A. Standard of Review

Although the trial court did not enter written findings of fact and conclusions of law as required by CrR 3.5(c), it made detailed oral findings of fact and conclusions of law that are sufficient to allow review.[9] *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). We review these oral findings and conclusions to determine whether substantial evidence in the record supports the findings and then we determine whether those findings support the trial court's conclusions of law. *State v. Hughes*, 118 Wn. App. 713, 722, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004). Unchallenged findings are verities on appeal. *Hughes*, 118 Wn. App. at 722. We review de novo issues of law. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

B. June 6 Statements

Elkins argues that the trial court should have suppressed the statements he made to the Grays Harbor County deputies when they interviewed him in Yakima on June 6. Relying on *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), and *State v. Brown*, 158 Wn. App. 49, 240 P.3d 1175 (2010), *review denied*, 171 Wn.2d 1006 (2011), he contends that the June 6 statements were not admissible because he had already asserted his right to silence and the

[9] Neither party argues that we cannot review the oral findings and conclusions of law.

Grays Harbor County deputies failed to readvise him of his *Miranda* rights and obtain an "express waiver of those rights" before questioning him. We disagree.

Once "an individual 'indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *State v. Wheeler*, 108 Wn.2d 230, 237, 737 P.2d 1005 (1987) (quoting *Miranda*, 384 U.S. at 473-74). Law enforcement officers may, however, resume questioning under certain circumstances even if the defendant has asserted his right to silence. *Wheeler*, 108 Wn.2d at 238.

The test for determining whether a defendant's statements to law enforcement officers are admissible once the defendant initially asserts his right to silence or right to counsel was succinctly stated in *State v. Mason*:[10]

> The admissibility of a confession obtained after the assertion of *Miranda* rights depends on whether the request was "scrupulously honored." [*Mosley*, 423 U.S. at 104]; *State v. Boggs*, 16 Wn. App. 682, 559 P.2d 11[, *review denied*, 88 Wn.2d 1017] (1977). A per se prohibition of any further interrogation, once an accused has asserted his right to counsel, has been rejected in this state. Further questioning of a suspect is allowed provided the following conditions exist: (1) the right to cut off questioning was scrupulously honored; (2) the police engaged in no further words or actions amounting to interrogation before obtaining a waiver or assuring the presence of an attorney; (3) the police engaged in no tactics which tend to coerce the suspect; and (4) *the subsequent waiver was knowing and voluntary* *State v. Pierce*, 94 Wn.2d 345, 618 P.2d 62 (1980)[, *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (addressing whether law enforcement officers can recontact a defendant after that defendant has asserted his or her right to counsel)].

31 Wn. App. 41, 44-45, 639 P.2d 800 (1982) (emphasis added); *see also Wheeler*, 108 Wn.2d at 238. We also look at whether there was a significant passage of time before the law enforcement

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[10] We note that this test is characterized in the Washington Practice as a "totality of the circumstances" test requiring a showing that "the defendant voluntarily waived his rights at this subsequent interrogation." 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 3312, at 867 (3d ed. 2004).

officers attempted to reinitiate interrogation because the passage of time weighs in favor of finding that a defendant's rights have been scrupulously honored. *See State v Boggs*, 16 Wn. App. 682, 687, 559 P.2d 11 (1977). If the defendant has not yet requested counsel, however, there is no requirement that law enforcement officers cannot resume questioning unless counsel is present *State v. Wheeler*, 43 Wn. App. 191, 200 n.2, 716 P.2d 902 (1986) (noting that the court in *Mosley* stated that the court in *Miranda* distinguished the procedural safeguards triggered by a request for counsel and a request to remain silent and had required interrogation to cease until counsel was present only if the accused had in fact requested counsel), *aff'd*, 108 Wn.2d 230 (1987).

Elkins does not challenge the trial court's oral findings that before the Grays Harbor County deputies interviewed him on June 6, (1) the Yakima County deputies had advised him of his *Miranda* rights, (2) Elkins fully understood those rights, stated that he understood those rights, and chose to exercise his right to silence at that time, (3) the Yakima County deputies immediately honored Elkins' request and did not attempt to further question him, (4) the Yakima County deputies informed the Grays Harbor County deputies that Elkins had been advised of his rights, (5) approximately five hours after Elkins was first advised of his rights, the Grays Harbor County deputies asked him if he recalled his rights, (6) Elkins confirmed that he recalled his rights, (7) Elkins further said that he understood that those rights were still in effect, (8) the Grays Harbor County deputies did not coerce or trick Elkins in any way, and (9) Elkins agreed to talk to the deputies. Thus, the questions we must now answer are, first, whether there is a bright-line rule that the Grays Harbor County deputies were required to fully readvise Elkins of his *Miranda* rights or whether we must instead examine Elkins' later waiver under a totality of the circumstances analysis, and, second, if there is no bright-line rule, whether the trial court's findings were

sufficient to establish that Elkins knowing and voluntarily waived his *Miranda* rights before the June 6 interview.

1. Readvisement of Rights

Elkins argues that under *Mosely* and *Brown*, the Grays Harbor County deputies were required to fully readvise him of his *Miranda* rights before interviewing him on June 6. We disagree.

In both *Mosley* and *Brown*, the law enforcement officers fully readvised the defendants of their *Miranda* rights before reinitiating interrogation. Thus, even though *Brown* contains language stating that officers must "provid[e] a fresh set of *Miranda* warnings before resuming the interrogation," 158 Wn. App. at 59 (citing *Mosley*, 423 U.S. at 104-06), neither *Mosley* nor *Brown* had reason to address whether other means of ensuring that a defendant's waiver of his rights was knowing and voluntary were sufficient because the defendants were fully readvised of their rights. Accordingly, *Mosley* and *Brown* are not controlling here.

We acknowledge, however, that our decision in *Boggs* may suggest that a full readvisement of the *Miranda* rights is required before law enforcement officers can reinitiate questioning after the defendant has asserted his right to silence. *Boggs*, 16 Wn. App. at 687. We stated in *Boggs*:

> It is our opinion that the factors which caused the court in *Mosley* to conclude defendant's rights had been "scrupulously honored" were [(1)] that the police had ceased interrogation immediately upon the defendant's exercise of his rights, [(2)] that they resumed their interrogation only after the passage of a significant period of time, and [(3)] that *subsequent interrogation was preceded by a reiteration of the Miranda rights*. . . . In the instant case defendant's *Miranda* rights were not repeated prior to his allegedly responding to the deputy's remarks with incriminating statements. *When a person has chosen to remain silent, we think, and Mosley seems to indicate, that the Miranda warnings must be readministered before law enforcement agencies can recommence interrogation*. To permit otherwise would enable the police to convey the impression that any previous assertion of the right to remain silent was merely a technical obstacle requiring only token observance before questioning could resume. On the other hand, *to readvise*

> *the individual of his Miranda rights demonstrates that his earlier decision to remain silent has been recognized by the police, and also reminds the individual that he can continue to exercise those rights* This is not to say the individual could not by his own voluntary and unsolicited action waive a previous exercise of his constitutional rights without first having the *Miranda* warnings reread to him. . . . That situation differs factually from one in which the state is responsible for reinitiating the interrogation process. *When the police either reopen a formal interrogation or solicit a response from a defendant in some other way, such statements will be admissible only if they were preceded by the Miranda warnings.*

16 Wn. App. at 687 (citations omitted) (emphasis added).

Although *Boggs* suggests that full readvisement of *Miranda* rights might be required, the facts in *Boggs* were also very different from the facts here. In *Boggs*, the law enforcement officer reinitiated interrogation during a casual conversation without any mention of Boggs's *Miranda* rights and did not verify that Boggs understood his rights or that he understood those rights were still in effect [11] *Boggs*, 16 Wn. App. at 684. Here, in contrast, although the Grays Harbor County deputies did not fully readvise Elkins of his rights on June 6, they verified that he understood those rights and understood they were still in effect, and they reminded Elkins that he could continue to exercise those rights. By proceeding in this fashion, the law enforcement officers avoided the issues raised in *Boggs*. Thus, we do not find *Boggs* determinative.

As noted above, the test described in *Mason* allows for subsequent questioning if the defendant's right to cut off questioning was scrupulously honored, there were no further words or actions amounting to interrogation before officers obtained a waiver, the officers did not engage

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[11] In *Boggs*, deputies advised Boggs of his *Miranda* rights on a Friday and then questioned him several times over the course of a weekend. 16 Wn. App. at 683-84. On at least two occasions he refused to answer questions and requested counsel. 16 Wn. App. at 684. On Sunday, Boggs and a deputy were engaging in casual conversation while the deputy was escorting Boggs back to the jail after Boggs made a phone call. 16 Wn. App. at 684. During this conversation, the deputy suggested "it would be helpful if the defendant could clear up a couple of unresolved matters in connection" with the crime. *Boggs*, 16 Wn. App. at 684. This time Boggs responded. 16 Wn. App. at 684. But at no time during this conversation did the deputy confirm that Boggs knew and understood his rights or that Boggs understood that his rights were still in effect.

in any coercive tactics, and the subsequent waiver was knowing and voluntary. *Mason*, 31 Wn. App. at 45. Similarly, *Boggs* suggests that the key concern is that the defendant understand his rights and that he also understand that those rights were still in effect, which is necessary for a knowing and voluntary waiver. *Boggs*, 16 Wn. App. at 687

The facts here show that (1) the Yakima deputies ceased questioning Elkins immediately when he asserted his right to silence, (2) no law enforcement officer attempted to interrogate Elkins for a significant period of time, five hours, before his subsequent contact with the Grays Harbor County deputies, (3) no law enforcement officer engaged in any coercive tactics, and (4) the Grays Harbor County deputies did not interrogate Elkins until after they confirmed that he had been read his rights, that he recalled those rights, and that he understood those rights were still in effect Although the record does not show that the Grays Harbor County deputies fully readvised Elkins of his *Miranda* rights on June 6, Elkins does not direct us to any case involving a situation such as the one here, where the defendant was advised of and previously asserted his right to silence and, although the law enforcement officers did not fully readvise the defendant of his *Miranda* rights before reinitiating the interrogation, they ensured that he understood his rights and that those rights were still in effect at the time of the officers' later contact with him. Nor have we been able to locate any such case.

The main focus in *Mosley*, *Brown*, *Mason*, and *Boggs* is that the subsequent waiver is knowing and truly voluntary. Although a full readvisement of *Miranda* rights is undoubtedly the best way to ensure a defendant's waiver is knowing and voluntary, there are other ways to achieve this. Given this, we hold that there is no bright-line rule that law enforcement officers must always fully readvise a defendant of his or her *Miranda* rights, and whether a defendant's rights have been scrupulously honored must be determined on a case-by-case basis. When, as was the case here,

the other three factors enumerated in *Mason* are met, the subsequent interrogation is proper if the State has shown that the defendant knowingly and voluntarily waived those rights given the totality of the circumstances, not whether the subsequent contact was preceded by law enforcement fully readvising the defendant of his or her *Miranda* rights.[12] When this and the other factors described in *Mason* are met, the officers have scrupulously honored the defendant's rights

2. Knowing and Voluntary Waiver

We now turn to whether Elkins' June 6 waiver was knowing and voluntary under the circumstances here. We hold that it was.

When the Grays Harbor County deputies contacted Elkins on June 6, he had previously been advised of his *Miranda* rights that same day, and he had chosen to exercise his right to silence, thus demonstrating that he understood his rights. The Grays Harbor County deputies verified that Elkins had been advised of his *Miranda* rights and that he had understood those rights And, importantly, they verified that he understood that these rights were still in effect There was also no evidence that the deputies threatened or tricked Elkins into talking to them. We agree with the trial court that these facts establish a knowing and voluntary waiver of Elkins' right to silence before the June 6 interview and hold that the trial court did not err in admitting Elkins' June 6 statements.[13]

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[12] We acknowledge that fully readvising a suspect of his *Miranda* rights is clearly best practice and would lessen the concern that the suspect did not knowingly waive his or rights.

[13] We acknowledge that *Mosley* also considered that the officers had questioned the defendant about a different offense when they reinitiated questioning and that the deputies here reinitiated questioning about the same offense. *Mosley*, 423 U.S. at 106; *see also* Br. of Appellant at 14 (arguing, without citation to authority, that any violation of his right to silence was aggravated by the fact the deputies questioned him about the same offense) But we do not consider this fact dispositive given the other facts establishing a knowing and voluntary waiver of Elkins' right to silence. *See State v Robbins*, 15 Wn. App. 108, 110, 547 P.2d 288 (1976) (similarly holding that

Our conclusion is also consistent with our decision in *Mason*. Although we acknowledge that *Mason* addressed both the right to silence and the right to counsel and that the test applied to a subsequent waiver of the right to counsel is different from the test applied here, we still find this case helpful insofar as it examines whether a waiver of *Miranda* rights can be knowing and voluntary without the defendant having been expressly advised of his rights again following and assertion of those rights.

In *Mason*, officers advised the defendant of his *Miranda* rights on January 8, 1980, and the defendant then gave a statement. *Mason*, 31 Wn. App. at 42-43. Officers arrested the defendant on February 4, and they advised him of his *Miranda* rights again. *Mason*, 31 Wn. App. at 43. Officers then transported the defendant to the juvenile detention center and booked him. *Mason*, 31 Wn. App. at 43. After booking, the defendant requested to talk to a detective and asked the detective some procedural questions. *Mason*, 31 Wn. App. at 43. The detective then asked the defendant if he wanted to make a statement; the defendant declined and said he wanted to see an attorney. *Mason*, 31 Wn. App. at 43. Fifteen to twenty minutes later, the defendant asked to speak to the detective again, and he told the detective he was scared. *Mason*, 31 Wn. App. at 43. The detective told the defendant that he did not blame the defendant for being scared because the charges were serious, and the defendant made an incriminating statement. *Mason*, 31 Wn.2d at 43. The defendant later gave a written statement. *Mason*, 31 Wn. App. at 44. The trial court admitted the defendant's oral statements. *Mason*, 31 Wn. App. at 44.

On appeal, we discussed the voluntariness of the defendant's waiver, noting that a voluntary waiver could be inferred from the defendant's understanding of his rights and the

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the fact the later questioning was about the same crime was not a determinative factual distinction), *review denied*, 87 Wn.2d 1012 (1976); *see also Boggs*, 16 Wn. App. at 687.

voluntary nature of his conversation with the officer. *Mason*, Wn. App. at 45-46 In reaching this conclusion, we considered the fact the defendant had been advised of his *Miranda* rights 30 minutes before making his incriminating statement, the fact the defendant had a substantial criminal history, and fact the defendant had been advised of his *Miranda* rights 12 times in five years. *Mason*, 31 Wn. App. at 46 We look to similar factors here and come to the same conclusion in regard to the June 6 interview in Yakima.

C. Statements During Transport

Elkins next argues that the trial court should have suppressed the statements he made to Kolilis while Kolilis was transporting him to Grays Harbor County. Elkins contends that because his statements were in response to statements Kolilis made that were reasonably likely to elicit an incriminating response and because these statements were part of a continuing violation of his constitutional rights, the statements should have been suppressed. Elkins concedes, however, that these statements were never presented to the jury, so any error in admitting these statements was harmless error. But he argues that we should still "analyze the statements because of their impact on the third set of statements." Br. of Appellant at 14.

Even assuming, but not deciding, that this issue was preserved below,[14] any potential error in failing to suppress these statements was clearly harmless because these statements were never presented to the jury. Accordingly, we decline to address this issue further However, we discuss below the extent to which these statements relate to Elkins' June 7 statement.

[14] RAP 2.5(a).

D. June 7 Statements

Elkins next argues that the trial court should have suppressed the statements he made after his arrival in Grays Harbor County on June 7 because these statements were made as part of an ongoing violation of his right to silence and his right to counsel[15] and because Kolilis was responsible for initiating the further interrogation. We disagree.

Once a defendant has asserted his right to counsel, a waiver of the right to counsel is valid only if the police scrupulously honored that request, the defendant initiated further relevant conversation, and the defendant's waiver was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 382-383, 805 P.2d 211 (1991). "Courts indulge every reasonable presumption against waiver of constitutional rights." *Earls*, 116 Wn.2d at 383 (citations omitted).

Elkins first contends that his June 7 statements should be suppressed as "'fruit of the poisonous tree'" because they were the result of "the earlier constitutional violations." Br. of Appellant at 17 (quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). But, as discussed above, the deputies did not violate Elkins' right to silence when they interrogated him on June 6, and Elkins did not request counsel until the end of the June 6 interrogation, at which point the deputies ended the interview. Thus, this argument fails.

Elkins next contends that Kolilis improperly initiated the further interrogation on June 7 by engaging in conversation with him during the drive from Yakima County to Grays Harbor

[15] Elkins did not argue at the suppression hearing that these statements should have been suppressed because the law enforcement officers failed to make all reasonable efforts to put him in contact with an attorney after he invoked his right to counsel on June 6 as required by CrR 3.1(c)(2). *See State v. Pierce*, 169 Wn. App. 533, 543-44, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012). Because Elkins did not raise this issue in the trial court, we do not address any issues related to any potential delay in obtaining counsel and limit this discussion to whether his *Miranda* rights were respected.

County. Elkins asserts that he did not voluntarily initiate further conversation related to the case because (1) the conversation in the car was lengthy, over four hours, (2) Kolilis initiated the conversation, and (3) Kolilis admitted that he had hoped to encourage Elkins to talk about the case by initiating small talk. Br. of Appellant at 15-16. Again, we disagree.

Kolilis's uncontradicted testimony established that Elkins was the one who changed the direction of the conversation from a casual conversation to one focused on the crime, and Kolilis merely told Elkins to wait until they arrived in Grays Harbor County and they could properly advise him of his rights. And the law prohibits improper interrogation, not casual conversation. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003) (*Miranda* applies to custodial interrogations by state agent; "[a]n interrogation occurs when the investigating officer should have known his or her questioning would provoke an incriminating response").

Furthermore, although Elkins argues that under *State v. Ladson*, 138 Wn.2d 434, 979 P.2d 833 (1999), we can consider the law enforcement officer's subjective intent as a factor when determining who reinitiated the interrogation, Kolilis testified that it was *not* his intent to persuade Elkins to say anything incriminating or to encourage him to give a statement by engaging in small talk. Although Kolilis also admitted that he "always *hope*[*d*] that people come forward and be truthful," he never said that was why he engaged in conversation with Elkins during the drive. 1 VRP at 51 (emphasis added). Thus, even assuming, but not deciding, that we can consider Kolilis's intentions, Elkins does not show that Kolilis's subjective intent was a factor here. Accordingly, Elkins fails to show that the trial court erred in admitting his June 7 statements.

II. DENIAL OF MOTION FOR MISTRIAL

Elkins next argues that the trial court erred when it denied his motion for a mistrial after Kolilis commented on Elkins' exercise of his right to silence and right to counsel. We disagree.

We review for abuse of discretion a trial court's denial of a motion for mistrial. *State v Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The trial court abuses its discretion only when "'no reasonable judge would have reached the same conclusion.'" *Rodriguez*, 146 Wn.2d at 269 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). We will overturn the trial court's decision to deny a motion for mistrial only "when there is a 'substantial likelihood' that the error prompting the mistrial affected the jury's verdict." *Rodriguez*, 146 Wn.2d at 269-70 (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (internal quotations omitted), *cert. denied*, 514 U.S. 1129 (1995)).

Elkins has not established a substantial likelihood that Kolilis's testimony affected the jury's verdict. Although it was arguably improper for Kolilis to mention Elkins' exercise of his right to silence and request for counsel, the jury also heard that Elkins later willingly spoke to law enforcement and gave a statement. Thus, any negative implication from Elkins' refusal to talk to law enforcement and his request for counsel was significantly eroded by his later willingness to forgo counsel and give a statement. Furthermore, the trial court directed the jury to disregard Kolilis's statement, and we presume that the jury follows the trial court's instructions. *State v Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Accordingly, this argument fails.

III. RCW 9A.32.050(1)(B) Not Vague

Finally, Elkins argues that second degree felony murder based on the predicate offense of the assault statute is unconstitutionally vague as applied. We disagree.

A. Standard of Review

The constitutionality of a statute is a question of law that we review de novo. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). Where, as here, the challenged statute "does not involve First Amendment rights, we evaluate the vagueness challenge by examining the statute as

applied under the particular facts of the case." *State v. Jenkins*, 100 Wn. App. 85, 89, 995 P.2d 1268 (citing *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)), *review denied*, 141 Wn.2d 1011 (2000). We presume statutes to be constitutional, and the challenger bears the burden of proving vagueness beyond a reasonable doubt. *Coria*, 120 Wn.2d at 163. To meet this burden, Elkins "must show, beyond a reasonable doubt, that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Coria*, 120 Wn.2d at 163.

B. Definiteness

RCW 9A.32.050 provides in part:

> (1) A person is guilty of murder in the second degree when:
>
> . . .
>
> (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c),[16] and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.

Elkins argues that, as the *Andress*[17] court discussed, the "in furtherance of language" in the second degree felony murder statute makes no sense when the predicate felony is assault and this results in an unduly harsh result, particularly because manslaughter is not a lesser included offense of felony murder. Br. of Appellant at 25 (citing *Andress*, 147 Wn.2d at 615-16). But the language in *Andress* was part of our Supreme Court's legislative intent analysis in *Andress* and does not establish that the statute is vague. *Andress*, 147 Wn.2d at 615-16; *see also State v. McDaniel*, 185

[16] RCW 9A.32.030(1)(c) enumerates the predicate offenses for first degree felony murder.

[17] *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

Wn. App. 932, 344 P.3d 1241, 1243-44 (2015)[18] (holding that the statute establishing the offense of felony murder based on the predicate offense of the assault of the victim is not ambiguous); *State v. Gordon*, 153 Wn. App. 516, 528-29, 223 P 3d 519 (2009) (addressing the rule of lenity and rejecting the appellant's argument that the second degree felony murder statute was ambiguous when based on the predicate felony of assault), *reversed in part on other grounds*, 172 Wn 2d 671, 260 P.3d 8874 (2011). That a criminal statute's legislative intent may be difficult to determine or application of the statute produces a harsh result does not establish that the statute fails to define the offense sufficiently to allow an ordinary person to understand what conduct is prescribed or that the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

RCW 9A.32.050(1)(b) clearly and unequivocally states that an assault that results in the death of the assault victim is second degree felony murder; this is sufficient to allow an ordinary person to understand what conduct is prescribed.

C. Ascertainable Standards

Elkins' argument could also be construed as claiming that the second degree felony murder based on the predicate felony of assault statute fails to provide ascertainable standards of guilt because it allows the State to charge and convict a defendant of second degree murder without establishing that the defendant intended to kill the victim. This argument also fails.

The requirement that a statute provide ascertainable standards of guilt protects against arbitrary, erratic, and discriminatory enforcement. *City of Spokane v. Douglass*, 115 Wn 2d 717, 180, 795 P.2d 693 (1990). "In this respect, the due process clause forbids criminal statutes that contain no standards and allow police officers, judge, and the jury to subjectively decide what

[18] Petition for review pending.

conduct the statute proscribes or what conduct will comply with a statute in any given case." *Douglass*, 115 Wn.2d at 181 (citing *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996 (1984)).

Elkins' argument focuses on the fact the statute allows the State to convict a person of second degree murder without requiring the State to prove that the defendant intended to kill the victim. But the legislature has the authority to define the elements of a crime, including the required mens rea required to prove the crime. *State v. Evans*, 154 Wn.2d 438, 447 n.2, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005); *State v. Bash*, 130 Wn.2d 594, 604, 925 P.2d 978 (1996). And Elkins does not explain how defining second degree murder based on the predicate offense of assault to require only the mens rea for the assault rather than intent to murder fails to provide ascertainable standards of guilt. Accordingly, this argument fails.

IV. CONCLUSION

We hold that there is no bright-line rule that law enforcement officers must always fully readvise a defendant of his or her right to silence or right to counsel, and whether a defendant's rights have been scrupulously honored must be determined on a case-by-case basis. When, as was the case here, the other three factors enumerated in *Mason* are met, the interrogation following the defendant's assertion of his or her rights is proper if the State has shown that the defendant knowingly and voluntarily waived those rights given the totality of the circumstances, not whether the subsequent contact was preceded by law enforcement fully readvising the defendant of his or her *Miranda* rights.

Elkins' statements in Yakima were admissible because the law enforcement officers scrupulously honored Elkins' assertion of his right to silence by ensuring that he understood his rights and knew these rights applied to any subsequent interrogation. Elkins' statements in Grays Harbor were admissible because he initiated the relevant conversation following his assertion of

his right to counsel and then knowingly and voluntarily waived his *Miranda* rights. Additionally, because the deputy's comment on Elkins' right to silence and right to counsel during trial was harmless, his challenge to the trial court's denial of his motion for mistrial also fails. And, finally, because Elkins fails to show that the felony murder statute does not define the offense sufficiently to allow an ordinary person to understand what conduct is prescribed or that the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement, his vagueness challenge fails. Accordingly, we affirm.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, J.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. EUGENE ELKINS, Defendant/Appellant.	Court of Appeals No : 44968-4-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action

On July 13, 2015, I e-filed the Petition for Review in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to Katherine Svoboda of the Grays Harbor County Prosecuting Attorney's Office via email to: ksvoboda@co.grays-harbor.wa.us through the Court of Appeals transmittal system.

On July 13, 2015, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Petition for Review to the defendant:

Eugene Elkins, DOC # 844475
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

////

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 13, 2015, at Bremerton, Washington.

Alisha Freeman

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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Transmittal Letter

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Case Name: State of WA v Eugene Elkins
Court of Appeals Case Number: 44968-4

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- ○ Cost Bill
- ○ Objection to Cost Bill
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