NO. 33099-1-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

DONALD GLENN SMITH,

Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

On March 28th, 2013 at about 1:00 P.M. Derik Sterling went to his Grandfather's home in Moses Lake to put some insulation into the garage. TRP 56-57.[1] When he pulled up there was a car there that he did not recognize with a lady in it. TRP 57. He came up to the car and asked the lady what she was doing. He then saw a male in the garage. TRP 58. Mr. Sterling called the police. While he was on the phone the male walked passed him and left. TRP 59-60. There were several items of Mr. Sterling's property in the car. TRP 61-65. The door to the garage had been broken open. TRP 68.

[1] TRP refers to the trial report of proceedings.

The first officer to arrive was Deputy Jacob Fisher. TRP 117. Mr. Sterling was there with Ms. Benevides, the driver of the car. Deputy Fisher saw Smith running away from the residence across a field to the south. TRP 118. Smith attempted to hide behind a wood pile. *Id.* Deputy Fisher went over to Smith's location and detained him. PRP 36[2] As Deputy Fisher and Smith were walking back to the house Smith started making statements. PRP 37. Deputy Fisher stopped Smith and read him his *Miranda* warnings. PRP 37. Smith admitted going into the garage and taking the items. TRP 119-20. He claimed he had permission from Mr. Sterling. TRP 122.

Deputy Patrick Pitt also responded to the call. TRP 110. When he got there, there were already two other Deputies on scene, as well as Mr. Smith and Derik Sterling. TRP 111. Smith told Deputy Pitt that he had been given permission to be there by someone named Celeste, that he did not know Mr. Sterling, and that he admitted taking items out of the garage. TRP 111-112. He was not able to give an address or phone number for Celeste. He also admitted running away to Deputy Pitt, claiming he did not like police.

The Court held a 3.5 hearing regarding the statements to Deputy Fisher. PRP 33-44. This hearing did not cover the statements to Deputy

[2] PRP refers to the proceedings transcript that records various proceedings in the case.

Pitt. PRP 39. The 3.5 hearing was handled by Deputy Prosecuting Attorney Elise Abramson. PRP 33. The rest of the case and trial were handled by Deputy Prosecuting Attorney Ryan Valaas. During trial that started on September 10, 2014, there was no objection to Deputy Pitt introducing Smith's statements. TRP 111-12. The first objection to the introduction of the statements came in a motion for a new trial filed on October 2, 2014. CP 148. During argument on the motion the prosecutor stated that the court could look at the record to determine the statements were voluntary, and if it was unclear, could hold a post facto 3.5 hearing. Only if the statements were inadmissible would a new trial possibly be ordered. PRP 113. The trial judge agreed and offered to hold a 3.5 hearing with Deputy Pitt. PRP 114-115. Smith declined to take up that offer. PRP 120, 123-24.

IV. ARGUMENT

The State does not dispute, and never disputed, it made a mistake in failing to hold a 3.5 hearing regarding the statements made to Deputy Pitt. As trial defense counsel stated, there were many medical issues for Smith and defense counsel, the case took a long time to bring to trial, and it just got forgotten. PRP 127. However the proper place to correct mistakes such as this is in the trial court, not to wait until the case gets to the Court of Appeals. Smith waived this issue and invited the error. It

should not be reviewed, and even if it was reviewed the failure to hold a 3.5 hearing is demonstrable harmless, as the statements were clearly voluntary.

A. The alleged error is neither manifest nor constitutional.

RAP 2.5(a) sets forth the general policy of this State—appellate courts will not consider arguments not first presented to the trial court. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). However, RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of "manifest error affecting a constitutional right." This authority is permissive; an appellate court will refuse to consider constitutional issues if the record is not sufficient to permit review of the claim. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Mr. Smith argues out that there was no CrR 3.5 hearing and no evidence that he was afforded his Miranda warnings during the conversation with Deputy Pitt. However, CrR 3.5 was designed to implement the constitutional right to challenge an involuntary statement; compliance with the rule is not itself a constitutional issue. *State v. Williams*, 137 Wn.2d 746, 749-755, 975 P.2d 963 (1999). Thus, the failure to hold a CrR 3.5 hearing does not make a defendant's statement inadmissible. *State v. Vandiver*, 21 Wn. App. 269, 272, 584 P.2d 978 (1978); *State v. Mustain*, 21 Wn. App. 39, 42-43, 584 P.2d 405 (1978).

Accordingly, the failure to conduct a CrR 3.5 hearing does not alone present a constitutional issue. Although the State should schedule and hold a hearing whenever it desires to use a defendant's statement at trial, the failure to conduct such a hearing is not a basis for challenging on appeal the admission of a defendant's statement that was not challenged at trial.

Nor can the appellate court review whether the statements in this case were the product of unconstitutional coercion. While this would be a constitutional error, it is not manifest. Manifest, among its other meanings, includes that the facts necessary to adjudicate the claimed error must be in the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Here Mr. Smith incorrectly contends that the record is insufficient to determine whether the statements were coerced. The record is clear that Smith was read his Miranda warnings by Deputy Fisher before talking to Deputy Pitt. There is no evidence of actual coercion. Therefore any error that may rise to a constitutional level is not manifest because it is not apparent in the record.

B. The appellate court can review the record and determine the statements were voluntary.

Smith concedes, citing *State v. Myers*, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976), that the appellate court can examine the record and make its own determination of voluntariness, but argues that the record is insufficient to determine this. The State agrees this correctly states the law, but the record as a whole is sufficient to make this determination.

According to Mr. Sterling Smith left as he was calling the police. According to Deputy Fisher's testimony at the 3.5 hearing he read Smith his *Miranda* warnings while they were walking back to the house from the wood pile where Smith was hiding. PRP 37. Deputy Pitt testified he talked to Smith back at the house. Deputy Pitt also testified he arrived after Deputy Fisher and everyone else. TRP 110-12, It is clear on the complete record, not just the trial transcript Smith cites, that he was read his *Miranda* warnings prior to the conversation with Deputy Pitt by Deputy Fisher. There is absolutely no indication of threats or force or other instances of unconstitutional coercion. The appellate court can look at this record and determine the statements were voluntarily made. *State v. Mustain*, 21 Wn. App. 39, 42-43, 584 P.2d 405 (1978).

C. Assuming there was reviewable error, Mr. Smith has waived his remedy.

In the trial court Mr. Smith moved for a new trial based on the failure to hold a 3.5 hearing, with no citation to authority as to the proper

remedy. CP 148-49. Failure to hold a 3.5 hearing is not per se reversible error. *Mustain*, 21 Wn. App. at 43. At the conclusion of his appellate brief Smith asks that the case be remanded for *further proceedings*, citing *State v. McKeown*, 23 Wn. App.582, 585, 596 P.2d 1100 (1979). Assuming there was reviewable error in this case, the proper remedy would be to remand to conduct a 3.5 hearing. If that hearing was favorable to the defendant then the trial court would conduct a constitutional harmless error analysis. Only if that finding was made favorable to the defendant would a new trial be ordered.

However, Mr. Smith waived his right to a 3.5 hearing. The court offered to have a post-trial 3.5 hearing. RP 127. Mr. Smith declined. The invited error doctrine prevents him from now asking for the relief that was expressly offered in the trial court. There is an exception to RAP 2.5, recognized in *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), for issues which an appellant had clear notice of and chose not to raise. "A conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver." *Id.* at 370. This follows the public policy expressed in RAP 2.5. Some rights are too important to allow an oversight by a defense attorney to preclude appellate review. However, an intentional choice not to pursue the issue by a defense attorney, that would still be appealable would allow "sophisticated defense counsel [to]

deliberately avoid raising constitutional issues of little or no significance to the jury verdict but which might be a basis for a successful appeal." *Walton*, 76 Wn. App. at 370. This is exactly what is occurring in this case. "Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

State v. Valladares, 99 Wn.2d 663, 671-72, 664 P.2d 508 (1983), is controlling and on point. There a defendant filed his CrR 3.6 motion to suppress, then later affirmatively withdrew the motion. The Court ruled that the claimed suppression issue would not be reviewed, as "Valladares elected not to take advantage of the mechanism provided him for excluding the evidence. Valladares thus waived or abandoned his Fourth Amendment objections." *Id.* at 672. Similarly here Mr. Smith has waived or abandoned this issue by not electing to take the trial court's offer of a CrR 3.5 hearing. If he had, he would have had the opportunity to create a record that may call into question the voluntariness of the statements. Because Mr. Smith abandoned his relief in the trial court, he cannot claim it now on appeal.

D. Any error in admitting the statements to Deputy Pitt was harmless.

Even if the court were to determine that the statements should have been suppressed, any error in admitting them was harmless beyond a reasonable doubt. Smith admitted taking the items to Deputy Fisher. He claimed he had permission from Mr. Sterling, which Sterling denied. Deputy Fisher was the one who saw Smith run from the scene and hunted him down. The trial outcome would have been the same without the statements from Deputy Pitt. "The rule is now definitely established in this state that the verdict of the jury in a criminal case will be set aside and a new trial granted to the defendant, because of an error occurring during the trial of the case, only when such error may be designated as prejudicial." *State v. Martin*, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). Any error in admitting the statement was harmless beyond a reasonable doubt.

V. CONCLUSION

While the State should have held a 3.5 hearing, the lack of the hearing is not constitutional error, and there is nothing in the record to support the statements were coerced, thus any constitutional error is not manifest. The burden is on the party seeking review to ensure a record is complete. *State v. Tracy*, 158 Wn.2d 683, 691, 147 P.3d 559 (2006). Indeed, the record shows the statements were voluntary. This is probably why Smith declined the court's offer of a 3.5 hearing and invited the error,

as he would not gain any practical relief from the hearing. Finally even if the statements were suppressible, admitting them was harmless beyond a reasonable doubt. The trial court should be affirmed.

Dated this 7th day of December 2015.

Respectfully submitted,

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Attorneys for Respondent

COURT OF APPEALS
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DIVISION III

STATE OF WASHINGTON,	)	
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Respondent,	)	No. 33099-1-III
	)	
vs.	)	
	)	
DONALD GLENN SMITH,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kenneth H. Kato
khkato@comcast.net

Dated: December 9, 2015.

Kaye Burns