No. 47030-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CHARLES S. LONGSHORE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 12-1-00219-3

STATE'S ANSWER TO LONGSHORE'S STATEMENT OF ADDITIONAL GROUNDS

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A. INTRODUCTION

Longshore filed a statement of additional grounds on appeal. The court directed the State to file an answer to No. 12 of Longshore's statement of additional ground.

B. STATE'S RESTATEMENT OF THE ISSUE PERTAINING TO LONGSHORE'S STATEMENT OF ADDITIONAL GROUND NO. 12

On June 1, 2012, while Longshore was under arrest in the instant case and after receiving Miranda warnings, Longshore voluntarily agreed to speak to detectives. Near the end of the interview, Longshore made ambiguous statements in which he insinuated that he might wish to end the interview if detectives persisted in disbelieving him. Detectives responded by suggesting that they should end the interview. When detectives began to formally end the interview, however, Longshore then engaged the detectives in further conversation about the investigation. Where Longshore instigated further discussion, did error occur when the detectives responded by resuming the interrogation?

C. FACTS

The State's Brief of Respondent, filed previously with the court, contains a summary of the facts of this case. Additional facts that are pertinent to the issue above are as follows:

On June 1, 2012, detectives with the Shelton Police Department conducted a post-arrest, in-custody of interview of Longshore. Ex. 5. At the start of the interview, detectives read *Miranda* rights to Longshore. Ex. 5, p. 2; RP 108-10. Longshore said he understood his rights, and he said that he wished to answer questions. *Id.*

A partially redacted version of the audio-recorded interview was played to the jury at trial. Ex. 127; RP 1434-35. When the audio-recorded interview was played to the jury, the jury was also provided with an 85-page transcript of the redacted interview. Ex. 128; RP 1434-35.

After 61 pages of the interview, Longshore made an ambiguous remark to the effect of "that concludes it[.]" Ex. 128, p. 62 (line 14). Longshore made this statement in the context of his trying to convince detectives that "this other dude" is the perpetrator who committed the murders at issue in this case. *Id.* When detectives expressed some skepticism about Longshore's assertion, Longshore stated, in part, as follows: "... if we're not willing to go any further with this investigation to try to apprehend this other dude to f[***]ing see what's going on then that concludes it, you know..." *Id.* at lines 13-14. A detective responded, "So what are you saying?" *Id.* at line 17. Longshore responded by continuing to talk at length. Ex. 128, p. 62-63.

Detectives then sought clarification and asked Longshore the following question: "Do you or do you not wanna continue on talking with us?" Ex. 128, p. 62 (line 43). But rather than answer the question as asked, Longshore instead said: "If we're not willing to f[***]ing go that route to try to get this dude…". *Id.* at line 24.

After more talking, Longshore then later said: "…that's the only f[***]ing option that we have right now to f[***]ing prove this case and if – and if it's been shutdown the f[***]ing uh, then there's nothing else further." Ex. 128, p. 63 (lines 11-13). The detective sought clarification, asking (or stating) as follows: "Okay. So you don't wanna continue on with the interview." *Id.* at line 15. Longshore answered with a question, as follows: "What else is there to do?" *Id.* at line 17. The detective answered: "Well, what there is to do – to do, is to get to the truth, and get the actual what happened out in the open." *Id.* at lines 19-20. Longshore responded: "I've already said my f[***]ing story and f[***]ing nobody's willing to f[***]ing believe me or even go towards even trying to even see if the – about this dude." *Id.* at lines 22-23.

Longshore then stated, "So uh, then it's done." *Id.* at line 27. The State contends that in the context in which these statements existed, it was not clear that Longshore actually intended to assert the right to silence. Still more, it appears that it was the detectives, rather than Longshore, who

wanted to end the interview – or at least that the detectives wished to make the impression that they wanted to end the interview. Either way, the detective sought to end the interview, stating: "Okay. All right, let's make it a formality then." *Id.* at line 29. But then – as the detective was obtaining Longshore's signature on a declaration form to formalize the conclusion of the audio-recorded interview – Longshore protested and reinitiated conversation, stating: "This can't be – nobody's even taken in consideration to even try to..." *Id.* at p. 64, line 8; RP 112, 126. This reinitiation of conversation then led to an additional 22 pages of interview. *Id.* at p. 64-85; RP 112-13, 118-24.

The State contends that the only evidentiary value of Longshore's June 1 statement was to show that during the investigation he gave various, conflicting accounts of what had happened, and to show his deceit and lack of credibility when he testified – because none of what he said in the June 1 interview was reliable as information, nor was any of it directly incriminating, and Longshore himself freely admitted that his June 1 statement was false. RP 2139-45. Testifying in regards to the June 1 statement, Longshore testified that it "was ninety-eight percent lies." RP 2145. When asked to clarify which two percent was the truth, Longshore testified as follows: "I have no idea, because it's so much of a lie I can't even sit here and collaborate what I even said that night." RP 2145.

Longshore freely admitted in his trial testimony that each one of his stories, to include the June 1 statement, was a test for the detectives and that when they passed each test he would then move on to a new version of the story. RP 2179.

D. ARGUMENT

1) Longshore's purported reference to the right to remain silent was ambiguous and equivocal, but even if it constituted an effective invocation of the right, Longshore knowingly and voluntarily waived the right when he knowingly and voluntarily reinitiated conversations with detectives.

a) *Standard of Review*

The trial court entered written findings of fact and conclusions of law and denied suppression of Longshore's June 1 statement. CP 757-67. The reviewing court reviews the trial court's factual findings for substantial evidence. *State v. Elkins*, 188 Wn. App. 386, 396, 353 P.3d 648 (2015), *review denied*, 184 Wn.2d 1025, 361 P.3d 748 (2015). "Unchallenged findings are verities on appeal." *Id.* (citations omitted). Issues of law, however, are reviewed de novo. *Id.* at 397 (citations omitted).

b) *The trial court's findings of fact are verities on appeal*

Relevant to the June 1 statement, the trial court made findings of fact numbers 5 through 8. CP 760-62. Longshore does not challenge

these findings of fact. Thus, the trial court's findings of fact are verities. *State v. Elkins*, 188 Wn. App. 386, 396, 353 P.3d 648 (2015), *review denied*, 184 Wn.2d 1025, 361 P.3d 748 (2015).

c) *Detectives did not err by continuing the interrogation because Longshore knowingly and voluntarily reinitiated the contact.*

Police must cease interrogation if the subject at any time, in any manner, indicates a desire to remain silent. *Id.* at 397, citing *State v. Wheeler*, 108 Wn.2d 230, 237, 737 P.2d 1005 (1987). Here, the State contends that it was not, and is not, clear that Longshore actually desired to remain silent, because he continued to spontaneously engage the detectives in conversation even while insinuating that he wished to stop talking. Ex. 128, p. 62-64. "If the suspect's invocation of his right is *equivocal*, then officers may carry on questioning." *In re Cross*, 180 Wn.2d 664, 682, 327 P.3d 660 (2014), citing *Davis v. United States*, 512 U.S. 452, 461-62, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). But even if Longshore's ambiguous signaling of a desire to remain silent was an effective indicator that he wished to remain silent, officers were free to "resume questioning under certain circumstances even if the defendant has asserted his right to silence." *Elkins* at 397, citing *Wheeler* at 238. These circumstances include the following:

> (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.*

Elkins at 398 (emphasis in original)(citations omitted).

Here, even though Longshore gave ambiguous responses to the detective's questions about whether Longshore wished to end the interview, the detective nevertheless cut off questioning when Longshore said, "So uh, then it's done." Ex. 128, p. 63. Longshore had not requested an attorney at that time, and the detective did not engage in further interrogation, nor did he engage conduct to coerce further interrogation. *Id.* However, Longshore knowingly and voluntarily waived his right to remain silent and reinitiated conversation with the detective by protesting the end of the interview, stating: "This can't be – nobody's even taken in consideration to even try to..." *Id.* at p. 64, line 8; RP 112, 126. This reinitiation of conversation led to an escalating cascade of further discussion. Ex. 128, p. 64-85.

The Elkins court explained that the reviewing court should "also look at whether there was a significant passage of time *before the law enforcement officers attempted to reinitiate interrogation* because the passage of time weighs in favor of finding that a defendant's rights have

been scrupulously honored." *Elkins* at 398 (emphasis added)(citations omitted). Here, there was no passage of time between the end of the interview and the reinitiation of the interview, but it was Longshore, and not the detective, who reinitiated the interview. Ex. 128, p. 64.

If the detectives had fully readvised Longshore of his *Miranda* rights before resuming the interview after ending it, then they could have eliminated the current controversy on appeal. *Elkins* at 396. However, "[t]his 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." *Elkins* at 400. Instead, "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. *Elkins* at 401, citing *State v. Boggs*, 16 Wn. App. 682, 559 P.2d 11 (1977). Here, the facts show that Longshore knowingly and voluntarily waived his right to remain silent when he reinitiated conversation with interrogators.

2) If error occurred by admitting the final 25% of Longshore's June 1 statement into evidence, the error was harmless beyond a reasonable doubt because the only evidentiary value of the statement was to show that Longshore consistently gave

inconsistent accounts of what happened, which was also proved by the first 75% of the statement.

Wrongful admission of a defendant's statement obtained in violation of Miranda or the right to remain silent may be harmless error. *In re Cross*, 180 Wn.2d 664, 688-90, 327 P.3d 660 (2014). "Constitutional errors are harmless if the untainted evidence is so overwhelming that it necessarily leads to the same outcome." *Id.* at 688 (citation omitted).

Here, approximately 75% of Longshore's June 1 statement is untainted by any claim of an assertion of the right to remain silent. Longshore's claim of error is limited to the final 25% of the statement. But there is nothing in the final 25% of the statement that directly contributed to the verdict or that indirectly contributed to the verdict in a way that is distinguishable from the first 75% of the statement. This is so because the entire statement was a fabrication, which is a fact that Longshore himself freely admitted to when he testified at trial. RP 2139-45, 2179. As such, the evidentiary value of the June 1 statement is that, when combined with Longshore's other statements, it showed that Longshore consistently changed his story and fabricated facts. The final 25% of the June 1 statement added nothing incriminating, because the point was made with the first 75% and with Longshore's other

consistently inconsistent statements. Thus, the State contends that error in admitting the final 25% of the June 1 statement, if any error occurred, was harmless beyond a reasonable doubt. *In re Cross*, 180 Wn.2d 664, 688-90, 327 P.3d 660 (2014).

E. CONCLUSION

Longshore's reference to the right to remain silent was ambiguous and equivocal, but even if his references were an effective assertion of the right to remain silent, Longshore nevertheless knowingly and voluntarily waived the right to remain silent when he reinitiated conversation with detectives after he purportedly asserted the right.

And even if it was error to all the final 25% of Longshore's June 1 statement into evidence, the error was harmless beyond a reasonable doubt as argued above.

DATED: June 21, 2016.

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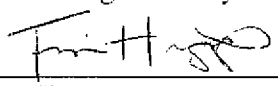

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Comments:

Enclosed, please find the State's brief in response to Appellant Longshore's statement of additional grounds.

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