

71608-5

71608-5

NO. 71608-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED AHMED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES

1. During a Terry¹ frisk, an officer may pat down a suspect's outer clothing to detect weapons. The officer may remove or further manipulate any items that, due to their size and density, may be weapons to determine their true nature. Officer Harris stopped Ahmed because Ahmed matched the description of a robbery suspect who had minutes earlier robbed a 7-Eleven with a knife, stealing small bottles of wine. Harris noted that Ahmed's front pants pockets were bulging and thought the bulges could be weapons. Harris also knew that the robbery victim reported that Ahmed had displayed a knife and then put the knife in his front pants pocket. Harris patted down Ahmed's front pants pocket and detected a hard, cylindrical object. He pulled it out and immediately recognized it as the stolen wine. Did the trial court properly conclude that Harris lawfully removed the wine bottle during the frisk because it could have been used as a weapon?

2. A waiver of Miranda² rights may be implied by the defendant's conduct and the circumstances of the questioning. Prior to his arrest, Ahmed answered Harris' questions, asked his

¹ Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

² Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

own questions, and appeared to understand the situation. While being read his rights, Ahmed denied any wrongdoing and interrupted the officer. Ahmed responded with a question of his own to the officer's question of whether he understood his rights. Ahmed then responded to several questions and asked additional questions of his own. Did the trial court properly find a knowing and voluntary implied waiver by Ahmed based on his conduct and the circumstances?

3. Admission of statements in violation of Miranda may be harmless error when the State shows beyond a reasonable doubt that the untainted evidence of guilt is overwhelming. Ahmed was charged with second-degree robbery, but convicted of the lesser offense of third-degree theft. At trial, the 7-Eleven clerks testified that Ahmed stole small bottles of wine, the surveillance video showed Ahmed taking wine and leaving without paying, and Ahmed was arrested nearby with the stolen wine in his pockets. Ahmed testified that he stole the wine, but did not display a knife. Was any error in admitting Ahmed's statements harmless in light of the overwhelming other evidence that Ahmed committed third-degree theft?

4. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. The trial court entered the CrR 3.5 and 3.6 findings while the appeal was pending, and the findings are consistent with the trial court's oral ruling. On appeal, Ahmed seeks to remand his case for entry of these findings. Given that the trial court has now entered findings of fact and conclusions of law, is remand unnecessary?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Mohamed Ahmed with second-degree robbery. CP 1. Ahmed waived his right to counsel and represented himself at trial. CP 7. The Honorable Carol Schapira presided over the CrR 3.5 and 3.6 hearings and jury trial. 5RP 3; CP 84. The jury acquitted Ahmed of second-degree robbery and convicted him of the lesser-included crime of third-degree theft. 12RP³ 89; CP 82-83.

³ The verbatim report of proceedings consists of 13 volumes, which will be referred to in this brief as follows: 1RP (11/4/13); 2RP (11/7/13); 3RP (12/18/13); 4RP (1/15/14); 5RP (1/27/14); 6RP (1/28/14); 7RP (1/29/14); 8RP (1/30/14); 9RP (2/3/14); 10RP (2/4/14); 11RP (2/5/14); 12RP (2/6/14); & 13RP (2/21/14).

2. FACTS FROM THE CrR 3.5 AND 3.6 HEARING.

On August 21, 2013 at shortly before 10:00 p.m., Seattle Police Officers Lloyd Harris and Jacob Leenstra responded to a report of a robbery at 7-Eleven store. 6RP 5, 7, 10. The 7-Eleven clerk had reported that a black, stocky male wearing a white shirt, black undershirt and blue jeans had stolen several small bottles of wine. The male threatened the clerk and displayed a knife. 6RP 10-12. Harris drove to the 7-Eleven and the clerk pointed him in the direction that the male had headed. 6RP 10. Harris then proceeded in that direction. 6RP 10.

Less than 100 yards from the 7-Eleven, Harris encountered Ahmed in the parking lot of a bowling alley. 6RP 12. Ahmed perfectly matched the physical and clothing description of the robbery suspect. 6RP 18-19. Harris contacted Ahmed alone. 6RP 12, 20. To protect himself while he awaited backing officers, Harris positioned himself behind his patrol car door approximately twenty feet away. 6RP 20, 33.

Harris greeted Ahmed and requested his identification. 6RP 18-19; Ex. 21 at 1:20-30.⁴ Ahmed responded to Harris' initial

⁴ Exhibit 21 is a DVD containing Harris' in-car video under the file named 7403@20130821220222. 6RP 14. This exhibit was Pretrial Exhibit 1. 6RP 14-16; CP 113. It appears to have been admitted at trial as Exhibit 14, yet

greeting that he was "doing okay." Ex. 21 at 1:20-30. He did not provide his identification, but did explain that he had military identification. 6RP 18-19; Ex. 21 at 1:20-2:24. Ahmed appeared intoxicated; he smelled of alcohol and was unsteady on his feet. 6RP 18. However, he asked Harris a number of his own questions and appeared to understand the conversation. 6RP 21; Ex. 21 at 1:20-2:45.

Once Leenstra arrived to back up Harris, they handcuffed Ahmed due to him being uncooperative and possibly armed. 6RP 2-22. Harris had already observed that Ahmed's front pockets were bulging and he was concerned that they might contain weapons. 6RP 18, 35. He had also heard updated information from Leenstra that the 7-Eleven clerk reported that Ahmed had put the knife in his front pants pocket after displaying it during the robbery. 6RP 11-12.

Harris began patting down Ahmed for possible weapons, starting with his bulging left front pants pocket. 6RP 21-22. He immediately detected a hard, cylindrical object in the front pocket. 6RP 21-22. He reached in the pocket and saw that the hard object

appellate defense counsel located this DVD in the exhibit labeled Exhibit 21. CP 114; Br. of App. at 4. Consistent with Ahmed's brief, this brief will refer to Harris' in-car video as Exhibit 21. Br. of App. at 4.

was a small bottle of wine that matched the description of those stolen. 6RP 22. Harris and Leenstra paused the frisk, informed Ahmed he was under arrest, and read him his Miranda⁵ warnings. 6RP 22-23, 26.

Ahmed asked questions during and after the reading of his rights, but did not explicitly answer whether he understood his rights despite the fact that Leenstra asked him twice if he understood. 6RP 26-28, 129; Ex. 25⁶ at 1:55-2:55. Instead, he responded with a question of his own: "So someone that looked like me committed a crime?" Ex. 25 at 2:50-55. Harris and Leenstra asked Ahmed questions for a few minutes, such as where he had obtained the wine. 6RP 26-28. Ahmed answered that he had purchased the wine at Safeway for \$20. 6RP 103; Ex. 25 at 2:00-2:30. Ahmed appeared to understand the questions, but selectively responded. 6RP 28, 99. While intoxicated, he did not appear confused about his rights or arrest. 6RP 27-28, 99. Ahmed

⁵ Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁶ Exhibit 25 is a DVD with files containing Officer Leenstra's in-car video under the file named 7479@20130821220247. 6RP 100-01. This file was admitted as Pretrial Exhibit 2 and became Exhibit 25 at trial. 6RP 100-01; CP 114. Exhibit 25 provides the visual of the arrest and clearer audio than Ex. 21, so the citations in this section are to Exhibit 25.

did not request an attorney and never requested that the officers cease questioning him. 6RP 28, 99.

The trial court held a combined CrR 3.5 and 3.6 hearing on Ahmed's motions to suppress. 5RP 2-54; 6RP 5-183; 7RP 3-130. Ahmed moved to suppress the police in-car video alleging that the officers did not inform him that he was being recorded in violation of the privacy act, RCW 9.73.090(1)(c). CP 10-11. Also, Ahmed moved to suppress the wine bottles found in his pockets and his statements, arguing that the officer exceeded the scope of the frisk by removing the bottles. CP 39-46. Lastly, Ahmed moved to suppress his statements, arguing that the officers lacked probable cause to arrest him. CP 39-46.

The trial court denied Ahmed's motions to suppress. 7RP 60, 77-85. The trial court concluded: 1) the officers did not violate the privacy act, 2) the officers properly removed the wine bottles as possible weapons during the frisk, and 3) the officers had probable cause to arrest Ahmed. 7RP 60, 77-85. The trial court also admitted Ahmed's statements immediately after arrest pursuant to CrR 3.5. 7RP 123-30. While this appeal was pending, the trial court entered the CrR 3.5 and 3.6 findings of fact and conclusions of law. Appendix A; CP 116-23.

C. ARGUMENT

1. THE OFFICER LAWFULLY REMOVED THE WINE BOTTLE FROM AHMED'S FRONT POCKET DURING THE TERRY FRISK BECAUSE IT COULD HAVE BEEN USED AS A WEAPON.

Ahmed contends that Officer Harris exceeded the permissible scope of the Terry⁷ frisk by removing the hard object bulging in Ahmed's front pocket. Ahmed's claim fails. The trial court properly found that, while frisking the defendant for weapons, Harris removed the hard, cylindrical object because it could have been used as a weapon. Ahmed's conviction should be affirmed.

An appellate court reviews the trial court's findings of fact for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. Id. The trial court's legal conclusions are reviewed *de novo*. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

The Fourth Amendment and article I, section 7, of the Washington State Constitution prohibit most warrantless searches and seizures aside from a narrow set of exceptions. State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). The Terry stop

⁷ Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

and frisk is one of those exceptions. Id.; Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

During a Terry stop and frisk, an officer may pat down the outer clothing of a person for weapons. Russell, 180 Wn.2d at 867. “A protective frisk is justified ‘when an officer can point to ‘specific and articulable facts’ which create an objectively reasonable belief that a suspect is ‘armed and presently dangerous.’” Id. (quoting State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting Terry, 392 U.S. at 21-24)).

The scope of the frisk is limited to discovery of weapons that may be used to assault the officer. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). If an officer cannot determine if an item is a weapon from the pat-down alone, but it has the size and density that it may be a weapon, then the officer may remove and examine that object. Id. at 113; Terry, 392 U.S. at 30. Once an officer determines that an item is not a weapon, then the search must cease. Hudson, 124 Wn.2d at 113. For example, during a Terry frisk, an officer lawfully removed a hard object bulging in the defendant’s pocket to determine if it was a weapon. Hudson, 124 Wn.2d at 110, 119-20.

Here, Officer Harris reasonably removed the wine bottle from Ahmed's front pants pocket during the frisk because it was a *hard object* that could have been used as a weapon. He did not exceed the lawful scope of the frisk.

First, Ahmed challenges only the scope of the frisk, conceding that Harris lawfully stopped and frisked Ahmed. Br. of App. at 9. Harris reasonably believed that Ahmed was armed and dangerous because Ahmed exactly matched the description of the person who had recently robbed the 7-Eleven by displaying a knife and was located less than 100 yards away from the scene. 6RP 10-12, 18, 20. Further, Ahmed was uncooperative with Harris, refusing to supply his identification despite being asked multiple times. 6RP 18-20.

Prior to beginning the frisk, Harris had specific grounds to believe Ahmed potentially had a weapon in his front pants pockets. He saw bulges in Ahmed's two front pockets and suspected they might have been weapons. 6RP 18, 35. He also received updated information through Officer Leenstra that the victim said that Ahmed had returned the knife displayed in the robbery to his front pocket. 6RP 12.

Harris began his frisk at the location where Ahmed most likely had a weapon—Ahmed's front pants pockets. 6RP 21-22. Harris immediately felt a hard, cold, cylindrical object in Ahmed's left front pocket. 6RP 22, 81. He lifted it out of the pocket to determine exactly what it was, and, upon realizing that it was a bottle of wine, ceased the frisk and arrested Ahmed. 6RP 22, 26 . Harris then removed three bottles of wine from Harris' pockets. 6RP 23. The wine bottles were made of glass and are visible on Leenstra's in-car video. Ex. 24 at 5:05.

Harris' removal of the wine bottle during the frisk was justified because the wine bottle itself could have been used as a weapon. While Harris did not explicitly testify that the wine bottle could have been used as a weapon, he explained that during a frisk he looks for traditional weapons and anything that could be used as a weapon. 6RP 22. Certainly, it was a reasonable inference that a hard, cylindrical wine bottle could be used as a weapon. Thus, the trial court properly concluded that Harris was justified in removing the wine bottle because it could have been used as a weapon. 7RP 83.

Further, in addition to detecting the hard object during the frisk, Harris was justified in removing the wine bottle because he

had reason to believe that Ahmed had a knife in his front pockets. 6RP 21, 61, 80-82. An officer may immediately retrieve a weapon from a suspect during a frisk based on reliable information that the suspect has a weapon concealed in a particular location. Adams v. Williams, 407 U.S. 143, 148, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972) (finding officer justified in Terry frisk in reaching into defendant's waistband and removing gun because informant had provided reliable information that defendant had a gun concealed at his waist). The wine bottle prevented Harris from searching Ahmed's entire pocket because the bottle was visible as soon as Harris opened Ahmed's pocket. 6RP 80-82. Thus, he had to remove it in order to attempt to find the knife.

Ahmed attempts to compare this case to State v. Garvin, 166 Wn.2d 242, 245, 207 P.3d 1266 (2009). Garvin is distinguishable. In Garvin, the officer patted down Garvin's pants pockets and felt a plastic baggie in the front coin pocket. 166 Wn.2d at 245. The officer then continued squeezing the object to determine if it may have been narcotics, despite the fact that he did not detect any weapons or hard objects. Id. at 245-47. The Washington Supreme Court held that the officer exceeded the scope of the frisk because he continued squeezing the pocket after

determining that the pocket did not contain a weapon or hard object. Id. at 253-55.

By contrast, Harris felt a *hard object* in Ahmed's front pocket, a glass wine bottle. 6RP 21-22, 80; Ex. 25 at 5:05. Unlike the officer in Garvin, Harris detected an item that absolutely could have been used as a weapon and he lawfully removed it. The trial court properly concluded that Harris lawfully removed the wine bottle during the frisk.

2. AHMED IMPLIEDLY WAIVED HIS MIRANDA RIGHTS BY ASKING THE OFFICERS QUESTIONS AND THEN SELECTIVELY ANSWERING THE OFFICERS' QUESTIONS.

Ahmed next contends that the trial court erred in admitting his statements pursuant to CrR 3.5 by finding that he had impliedly waived his Miranda rights. Ahmed is incorrect. The trial court properly found that Ahmed waived his rights by asking the officers questions before, during, and after being read his rights; answering questions; and by showing his comprehension of the situation.

a. Ahmed's Statements.

The trial court admitted Ahmed's statements to police immediately before and after arrest. 7RP 123-30. The State did not offer Ahmed's statements to Leenstra in the patrol car.

7RP 103.

Ahmed's statements during and after he was read his Miranda rights are captured on Leenstra's in-car video, Ex. 25 at 2:20-7:00. After the officers informed Ahmed that they were arresting him for robbery, Leenstra read Ahmed his Miranda rights. Ex. 25. Ahmed interrupted and denied committing a crime. Ex. 25. Leenstra twice asked Ahmed if he understood his rights, pausing to allow Ahmed to answer. Ex. 25. Ahmed responded with his own question: "So somebody that looked like me committed a crime?" Ex. 25. Leenstra then asked Ahmed to tell him about the wine in his pocket. Ex. 25. Ahmed answered, explaining that he had paid \$20 for four bottles of wine. Ex. 25. Leenstra and Harris engaged Ahmed in conversation. Ex. 25. They asked where Ahmed had put the knife and why he had threatened the clerk. Ex. 25. Ahmed denied having a knife or committing a robbery. Ex. 25. He did acknowledge that he knew that the 7-Eleven had video cameras. Ex. 25.

b. Ahmed Waived His Miranda Rights.

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides accused persons protection from self-incrimination during custodial interrogation. U.S. Const. amend. V; State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008) (citing Miranda v. Arizona, 384 U.S. 436, 461, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). Miranda warnings are required when a suspect's "freedom of action is curtailed to a 'degree associated with formal arrest.'" State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986) (quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

Miranda requires that a waiver of a defendant's constitutional rights be made "voluntarily, knowingly, and intelligently." Miranda, 384 U.S. at 444. The State bears the burden of establishing a knowing, voluntary and intelligent waiver of Miranda rights by a preponderance of the evidence. Radcliffe, 164 Wn.2d at 905-06.

An express waiver of rights is not required. North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); State v. Young, 89 Wn.2d 613, 620, 574 P.2d 1171 (1978). Waiver may be implied from the facts and circumstances, the defendant's

conduct, and his past experience. Id. at 374. When a suspect received and understood his rights, did not invoke rights, and made an uncoerced statement to police, the suspect impliedly waived his rights. Berghuis v. Thompkins, 560 U.S. 370, 388-89, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). A suspect's understanding of his rights may be shown by his conduct, in place of an explicit affirmative answer. Id.; see also State v. Reuben, 62 Wn. App. 620, 621, 814 P.2d 1177, review denied, 118 Wn.2d 1006 (1991) (holding that intoxicated defendant understood his rights because he paid attention to the officer while they were read, responded with an expletive, and later provided coherent information).

"Intoxication alone does not render a defendant's statement involuntary." State v. Gardner, 28 Wn. App. 721, 724, 626 P.2d 56, review denied, 95 Wn.2d 1027 (1981). However, it may be a factor in determining if the defendant understood and voluntarily waived his rights. Id.; Reuben, 62 Wn. App. at 625. A defendant's intoxication will not affect admissibility of his statement where it did not significantly affect the defendant's understanding. Reuben, 62 Wn. App. at 626 (finding that defendant's intoxication not a significant factor because he was an alcohol-seasoned person); Gardner, 28 Wn. App. at 724 (concluding that defendant's voluntary

waiver not affected by alleged intoxication where defendant able to stand, walk, read rights form, and perform other actions).

Here, the trial court properly concluded that Ahmed impliedly waived his rights by his conduct. Ahmed showed by his questions to the officers and coherent, although uncooperative, responses that he understood and voluntarily waived his rights.

Prior to arrest, Ahmed's questions and statements showed that he appropriately understood the questions and understood that he was being detained. For example, when asked for his identification, he responded that he had military identification, but did not provide it. Ex. 21 at 1:20-2:24. He also appropriately responded to Officer Harris' initial greeting with, "I'm doing okay." Ex. 21 at 1:20-30. Further, Ahmed's questions to Harris as to why back-up officers were responding and whether he was going to jail showed that he understood he was being investigated for a crime. Ex. 21 at 1:20-2:56.

Once Ahmed was informed that he was under arrest for robbery, he continued responding with questions about the crime. After being told he was under arrest for robbery, he stated, "No, I didn't do none [sic] of this." Ex. 25 at 2:24-56. While he was read his rights, he interrupted again. Ex. 25 at 2:20-55. After being

asked twice if he understood his rights, Ahmed simply did not respond to the question. Ex. 25 at 2:44-50. Instead, he asked a question of his own, which evidenced his understanding of the situation: "So somebody that looked like me committed a crime?" Ex. 25 at 2:50-55. Only then did Harris and Leenstra ask Ahmed about where he had obtained the wine found in his pockets. Ex. 21 at 2:50-4:55.

Ahmed's questions and selective answers to the officers' questions showed that he understood his rights and wished to waive his rights. While Ahmed was intoxicated, his conduct showed that he still understood the purpose of the contact and the officers' questions, and implied that he understood and waived his rights. The officers also observed that Ahmed was able to stand on his own. 6RP 21, 27-28, 95, 98, 128-29. Ahmed's own testimony established that he was a seasoned alcohol drinker, did not usually feel intoxicated unless he drank significant amounts of liquor along with beer and wine, and that he remembered key details of the arrest. 6RP 166-69, 181-83; 7RP 23, 24, 38.

The trial court properly found that Ahmed impliedly waived his rights by his conduct and his responses to the officers. 7RP 126-27; CP 119-23.

c. Any Error Was Harmless.

If this Court finds that the trial court erred by admitting Ahmed's statements, any error was harmless in the context of the other evidence. Constitutional harmless error analysis applies to statements improperly introduced in violation of Miranda. State v. Nysta, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012), review denied, 177 Wn.2d 1008 (2013). A constitutional error is harmless when the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); Chapman v. California, 286 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Ahmed was convicted of the lesser-included offense of third-degree theft, rather than second-degree robbery as originally charged. 12RP 89; CP 82-83. At trial, the other evidence was overwhelming: 1) the 7-Eleven clerks testified that Ahmed stole several small bottles of wine and identified Ahmed after police located him nearby, 9RP 12, 18-21, 25-26, 73-74, 77-79; 2) the 7-Eleven surveillance video showed that Ahmed took the wine without paying, 10RP 9-14, 169-72; Trial Ex. 6; 3) police located Ahmed, who matched the suspect's description, near the 7-Eleven

and within minutes of the crime, 10RP 25-28; 4) Ahmed had the three stolen wine bottles on him, 10RP 29-30; and 5) Ahmed testified that he took the wine and did not pay for it, 11RP 20, 39, 55.

The State argued that Ahmed's statements showed that he had recently fabricated the claim that he committed only a third-degree theft. 12RP 51-55. However, the jury disagreed and returned a verdict of guilty only on the lesser charge of third-degree theft. 12RP 89.

Ahmed argues that he may not have decided to testify at trial if the trial court had not admitted his statements to police. This argument is not persuasive. Without his own trial testimony, Ahmed would not have been entitled to have the jury instructed on the lesser-offense because there would not have been evidence that only the lesser-crime was committed. See State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (holding that defendant entitled to a lesser-included offense instruction because the evidence supported the inference that only the lesser crime was committed). Ahmed also benefitted from the introduction of his statements because it included his denial of committing the robbery or having a knife, consistent with his trial testimony. Ex. 25.

Any error in admitting Ahmed's statements was not prejudicial considering the overwhelming, untainted evidence and that the jury did not give weight to Ahmed's statements to police and convicted him only of the lesser-crime.

3. REMAND FOR ENTRY OF CrR 3.5 AND CrR 3.6 FINDINGS IS NOT NECESSARY BECAUSE THE TRIAL COURT ENTERED FINDINGS WHILE THIS APPEAL WAS PENDING.

Lastly, Ahmed seeks remand for the trial court to enter its CrR 3.5 and 3.6 findings of fact and conclusions of law. Because the trial court entered findings of fact and conclusions of law while this appeal was pending, remand is not necessary.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

Remand is not necessary because the trial court has now entered its findings. Appendix A; CP 119-23. Further, Ahmed was not prejudiced by the delayed entry of findings. A review of the findings illustrates that the State did not tailor them to address the

defendant's claims on appeal. Appendix A; CP 119-23. The language of the findings is consistent with the trial court's oral ruling. 7RP 77-85, 123-30; Appendix A; CP 119-23. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Appendix A; CP 116-18. The trial court's CrR 3.5 and 3.6 findings are properly before this Court.

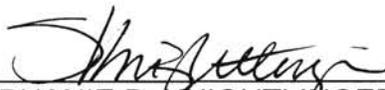
D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Ahmed's conviction.

DATED this 2nd day of January, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE D. KNIGHTLINGER, WSBA #40986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

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FILED
KING COUNTY, WASHINGTON
DEC 23 2014
SUPERIOR COURT CLERK
BY NICHOLAS REYNOLDS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	
vs.)	
)	
MOHAMED A. AHMED,)	
)	Defendant.
)	
)	
)	
)	

No. 13-1-12377-7 SEA
DECLARATION OF DEPUTY
PROSECUTING ATTORNEY

I, the undersigned, hereby declare that I am 18 years of age, I am competent to testify in a court of law, and I am familiar with the facts contained herein:

1. I am a Deputy Prosecuting Attorney with the King County Prosecutor's Office.
2. I was the trial attorney in the above captioned case.
3. I was contacted by my office's appellate unit on November 11, 2014, and informed that findings of fact and conclusions of law, pursuant to CrR 3.5/3.6 could not be located in the electronic court record or the original prosecutor's file. I verified that the documents were not

DECLARATION OF DEPUTY PROSECUTING ATTORNEY - 1

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1 included in the electronic court file. I searched my electronic files and could not locate these
2 documents.

3 4. On November 19, 2014, I obtained transcripts for the day of trial that contained the pretrial
4 hearings in this case. I reviewed the transcripts for that day and located the portions relevant to
5 the findings of fact and conclusions of law pursuant to CrR 3.5/3.6.

6 5. On December 9, 2014, I drafted findings of fact and conclusions of law based on the
7 transcripts referenced in (4) above and I requested a hearing to enter the findings before the
8 trial judge, the Honorable Carol Schapira.

9 6. Because he appeared pro se at trial, I sent notice of the hearing date to the defendant's last
10 known address, as well as to his stand-by counsel, Kari Boyum.

11 7. On December 19, 2014, the defendant was contacted by Ms. Boyum and provided with a copy
12 of the proposed findings. We did not discuss the appeal.

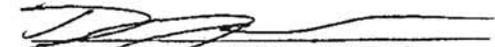
13 8. On December 22nd, 2014, I received an email from Ms. Boyum indicating that Mr. Ahmed had
14 given her permission to sign the proposed findings on his behalf.

15 8. On December 23rd, 2014, I presented these findings and conclusions to the trial judge, the
16 Honorable Carol Schapira. The findings were signed by the State and Mr. Ahmed (through Ms.
17 Boyum). The court signed the findings and they were entered.

18 9. I have not reviewed the appellate file or any documents related thereto in the above captioned
19 case. I have not spoken with anyone regarding the appellate issues being raised in the above
20 captioned case. I have no knowledge of any appellate issue being raised in this matter.

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Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 23rd day of December, 2014, at Kent, Washington.


Daniel Carew WSBA #45726
Deputy Prosecuting Attorney

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FILED
KING COUNTY, WASHINGTON
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SUPERIOR COURT CLERK
BY NICHOLAS REYNOLDS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 13-1-12377-7 SEA
Plaintiff,)	
)	
vs.)	
)	WRITTEN FINDINGS OF FACT AND
MOHAMED A. AHMED,)	CONCLUSIONS OF LAW ON CrR 3.5
)	AND CrR 3.6
Defendant.)	
)	
)	

This matter came before the Court on the defendant's Motion to Suppress. The Court reviewed the Defendant's Motions to Suppress, the State's Responses to the Defendant's Motions to Suppress, and the authorities cited by the parties. The Court held a CrR 3.6 hearing on the admissibility of physical, oral, or identification evidence on January 28-29, 2014, before the Honorable Judge Carol Schapira. The Court additionally considered whether statements made by the defendant to Seattle Police Officers Leenstra and Harris were admissible pursuant to CrR 3.5.

The Court considered the testimony of Seattle Police Officers Leenstra and Harris. The Court then informed Mr. Ahmed that: (1) he may, but need not, testify at the hearing on the circumstances surrounding any statement; (2) if he does testify at the hearing, he will be subject

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION - 1

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1 to cross examination with respect to the circumstances surrounding any statement and with
2 respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive
3 his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact
4 nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning any
5 statement at trial. After being so advised, Mr. Ahmed elected to testify at the hearing, and the
6 Court has taken his testimony into consideration.

7 After considering the evidence submitted by the parties and hearing argument on the
8 motions, the court makes the following findings of fact and conclusions of law as required by
9 CrR 3.5 and 3.6:

10 A. FINDINGS OF FACT

11 1. On August 21, 2013, at around 9:45 pm, Seattle Police Department Officers
12 were dispatched in response to a 911 call from the 7-Eleven store located at 2009
13 Rainier Avenue South in Seattle. The victim, a store clerk, reported that a male had
14 stolen some alcohol and threatened him with a knife.

15 2. The description of the suspect provided was of a bald, heavy set, black male
16 who was wearing a white shirt with a black undershirt and jeans. Within minutes of
17 the 911 call, Officer Harris located an individual (Mr. Ahmed) in the parking lot of
18 the bowling alley located approximately 100 yards away from the 7-Eleven who
19 matched the description exactly.

20 3. Officer Harris contacted Mr. Ahmed and asked for his identification. Mr.
21 Ahmed was uncooperative and refused to provide Officer Harris with his
22 identification. Officer Leenstra arrived to back Officer Harris, and upon his arrival,
23 Mr. Ahmed was placed into handcuffs.

24 4. After placing Mr. Ahmed in handcuffs, Officers Harris and Leenstra frisked
him for weapons. During the frisk they felt hard, cylindrical objects in his pockets
that were cold to the touch. These objects were then identified as wine bottles and
matched the description of the stolen property provided by the victim at 7-Eleven.

5. Once the wine bottles were located, Officers Leenstra and Harris arrested Mr.
Ahmed and Officer Leenstra read him his Miranda rights. Mr. Ahmed was asked if he
understood his rights twice and did not reply. Instead he proceeded to ask the officers
questions.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION - 2

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6. At the time of his arrest Mr. Ahmed objectively manifested that he was intoxicated. He smelled of alcohol and his speech was affected though not clearly slurred. He was not completely steady on his feet but was not falling down or stumbling. He was tracking the conversation with the officers and appeared to comprehend the circumstances.

7. After Mr. Ahmed was placed under arrest and searched, a show-up identification was conducted and the victim identified Mr. Ahmed as the person that had taken the wine bottles and threatened him.

B. CONCLUSIONS OF LAW REGARDING THE MOTIONS TO SUPPRESS

a. Motion to Suppress Based on the Privacy Act:

- 1. The Court finds the testimony of the State's witnesses to be credible.
- 2. Under RCW 9.73.090(1)(c) law enforcement officers are required to inform any person being recorded that they are being recorded and the statement so informing the person must be included in the sound recording.
- 3. In this case, both of those requirements were met. The officer informed Mr. Ahmed that he was being recorded in full voice and Mr. Ahmed was in a position to hear the advisement. Neither the statute nor case law requires law enforcement officers to inquire as to whether the person being recorded understood the advisement.
- 4. The Court finds that the State has proven by a preponderance of the evidence both the fact of the advisement that it was being recorded, and the fact that it was on the recording.

b. Motion to Suppress Based on Lack of Probable Cause to Arrest

- 5. Based on their training and experience Officers Leenstra and Harris had a reasonable, articulable suspicion that Mr. Ahmed may have committed a crime. As such, they were justified in making the initial stop.
- 6. Mr. Ahmed matched the description provided in four specific details, to include: the color of his shirt, his having a bald head, his race, and his proximity to the location of the crime.
- 7. After the initial stop, the court finds that Mr. Ahmed was uncooperative in terms of producing identification or talking to the officer who had legally detained him. The court further finds that the officers were justified in placing him in handcuffs and frisking him.
- 8. It was reasonable for the officers to frisk him because, based on the information that they had received, they had good reason to think that he

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION - 3

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might be armed. Once the wine bottles were discovered in Mr. Ahmed's pockets during the frisk, officers had probable cause to arrest.

9. At the time of Mr. Ahmed's arrest, the officers had probable cause to believe that Mr. Ahmed had committed a felony. This probable cause was based on the fact that he was contacted very soon after the alleged crime; he was contacted very close to the location of the crime; he matched the description of the suspect; and he had the same kind of merchandise (wine bottles) that was stolen.

10. All evidence obtained from Mr. Ahmed is admissible in the State's case-in-chief.

C. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENTS

- 1. The Court finds the testimony of the State's witnesses to be credible.
- 2. Mr. Ahmed was in custody and was read his Miranda rights. He was in a position to hear Officer Leenstra read him his rights. While there was some level of apparent intoxication, Mr. Ahmed was tracking what the officers were saying and responded to the parts that he found were important. The officers' conduct in advising the defendant of his rights was appropriate
- 3. Mr. Ahmed did not ask any questions about his Miranda rights, did not show any confusion, and did not indicate that he did not want to speak to the officers.
- 4. Although there was no express waiver, the defendant knowingly, intelligently and voluntarily waived his Miranda rights by freely speaking with the officers and answering their questions.
- 5. The Court finds that the defendant's statements to Officers Leenstra and Harris are admissible pursuant to an understanding and waiver of the defendant's Miranda rights

Signed this 23rd day of December, 2014



Judge Schapira

Presented by:

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION - 4

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~~[Signature]~~

~~Dan Carew, WSBA #45726
Deputy Prosecuting Attorney~~

Approved as to form:

Mr Ahmed agrees to
~~Counsel for Defendant~~
findings via email.
Khan
standby counsel

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION - 5

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Richard Lechich, the attorney for the appellant, at Washington Appellate Project, 1511 3rd AVE, Suite 701, SEATTLE, WA, 98101, containing a copy of the Brief of Respondent in State v. Mohamed A. Ahmed, Cause No. 71608-5, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 6th day of January, 2015.

W Brame
Name
Done in Seattle, Washington