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Court of Appeals  
Division I  
State of Washington

NO. 72967-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JUSTICE WHITE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

IAN ITH  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>CROSS-ASSIGNMENT OF ERROR</u> .....	1
B. <u>ISSUES PRESENTED</u> .....	1
C. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
D. <u>ARGUMENT</u> .....	7
1. WHITE'S CONFESSION WAS ADMISSIBLE BECAUSE SHE WAS NEITHER IN CUSTODY NOR INTERROGATED .....	7
a. Standard Of Review .....	8
b. Additional Relevant Facts .....	9
c. The Trial Court's Findings Of Fact Were Sound.....	10
d. White Was Not In Custody To The Degree Associated With Formal Arrest.....	11
e. Officer Hurley's Statement Was Not Interrogation.....	15
f. Any Error Was Harmless.....	22
E. <u>CONCLUSION</u> .....	25

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Berkemer v. McCarty, 468 U.S. 420,  
104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) ..... 12

Illinois v. Perkins, 496 U.S. 292,  
110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) ..... 17

J.D.B. v. North Carolina, — U.S. —,  
131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) ..... 12, 13

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602,  
16 L. Ed. 2d 694 (1966) ..... 1, 2, 6, 11, 12, 15-17, 19, 22

Rhode Island v. Innis, 446 U.S. 291,  
100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) ..... 16, 17, 18

Terry v. Ohio, 392 U.S. 1,  
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ..... 11, 12, 15

United States v. Crisco, 725 F.2d 1228 (9th Cir.),  
cert. denied, 466 U.S. 977 (1984) ..... 18

United States v. Moreno-Flores, 33 F.3d 1164  
(9th Cir. 1994) ..... 18, 19

United States v. Payne, 954 F.2d 199 (4th Cir.),  
cert. denied, 503 U.S. 988 (1992) ..... 18, 19

Washington State:

City of College Place v. Staudenmaier, 110 Wn. App. 841,  
43 P.3d 43 (2002) ..... 15

In re Pers. Restraint of Cross, 180 Wn.2d 664,  
327 P.3d 660 (2014) ..... 8, 16, 17, 19, 20

<u>In re Personal Restraint of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1998).....	17
<u>State v. Aronhalt</u> , 99 Wn. App. 302, 994 P.2d 248 (2000).....	8
<u>State v. Bockman</u> , 37 Wn. App. 474, 682 P.2d 925, <u>review denied</u> , 102 Wn.2d 1002 (1984).....	12
<u>State v. Bradley</u> , 105 Wn.2d 898, 719 P.2d 546 (1986).....	17
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	8
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	10, 11
<u>State v. Cunningham</u> , 116 Wn. App. 219, 65 P.3d 325 (2003).....	12
<u>State v. D.R.</u> , 84 Wn. App. 832, 930 P.2d 350 (1997).....	12, 13
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	23
<u>State v. Heritage</u> , 152 Wn.2d 210, 95 P.3d 345 (2004).....	12, 13
<u>State v. Kelley</u> , 64 Wn. App. 755, 828 P.2d 1106 (1992).....	8
<u>State v. Kindsvogel</u> , 149 Wn.2d 477, 69 P.3d 870 (2003).....	1
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	8, 16
<u>State v. Marshall</u> , 47 Wn. App. 322, 737 P.2d 265 (1987).....	11, 12

<u>State v. Ng</u> , 110 Wn.2d 32, 750 P.2d 632 (1988).....	22
<u>State v. Sadler</u> , 147 Wn. App. 97, 193 P.3d 1108 (2008), <u>review denied</u> , 176 Wn.2d 1032 (2013).....	17
<u>State v. Thamert</u> , 45 Wn. App. 143, 723 P.2d 1204 (1986).....	23
<u>State v. Thetford</u> , 109 Wn.2d 392, 745 P.2d 496 (1987).....	8, 11
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1994).....	8
<u>State v. Warner</u> , 125 Wn.2d 876, 889 P.2d 479 (1995).....	17
<u>State v. Wilson</u> , 144 Wn. App. 166, 181 P.3d 887 (2008).....	16, 20

Other Jurisdictions:

<u>Commonwealth v. Clark</u> , 59 Mass. App. Ct. 542 (2003) .....	21
---	----

Rules and Regulations

Washington State:

CrR 3.5.....	3, 8, 9
CrRLJ 3.1 .....	6
RAP 2.5.....	8

**A. CROSS-ASSIGNMENT OF ERROR**

1. The trial court erred in concluding that White was in custody for Miranda purposes when she confessed to a police officer. (Conclusion of Law No. 11).<sup>1</sup>

**B. ISSUES PRESENTED**

1. A suspect must be given Miranda warnings if she is subject to interrogation while in custody, which is defined as freedom curtailed to the degree associated with formal arrest, not merely a brief investigatory detention. When officers detained White and two of her friends without handcuffs at a picnic table in an open, public shopping center and asked some questions about shoplifting, and an officer commented that White could be arrested for possessing alcohol, she asked to speak with the officer in private. In this setting, was White merely detained rather than in custody to the degree associated with formal arrest?

2. Interrogation for Miranda purposes means questions or actions reasonably likely to elicit an incriminating response, not declaratory statements concerning the nature of the charges or the evidence. Within moments of arriving at a public picnic table where

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<sup>1</sup> Because the State does not request affirmative relief and only seeks to sustain the judgment of the court, it may assign error without filing a notice of cross-appeal. See State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003).

White was sitting with friends, an officer stated that White could be arrested for possessing alcohol. In its proper context, was this statement a declaration of White's pre-arrest detention status rather than a question designed to elicit an incriminating response?

3. Erroneous admission of statements in violation of Miranda is harmless if the State shows beyond a reasonable doubt that any reasonable factfinder would have found the respondent guilty absent the error. White was video-recorded participating in the theft of liquor and other items from a grocery store; a store manager saw her unpacking the stolen merchandise outside the store; police saw stolen liquor in her bag next to her; and the juvenile-court factfinder expressly concluded that White was guilty of theft beyond a reasonable doubt without considering her confession. If her confession was erroneously admitted, was the error harmless?

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Justice White was charged by Amended Information in King County juvenile court with Theft in the Third Degree and Minor in Possession of Liquor; the State alleged that on or about June 25, 2014, together with others, White wrongfully obtained food and

liquor from a Safeway grocery store in Redmond, Washington, and that she was under 21 years of age at the time she possessed the liquor. CP 27. During a combined CrR 3.5 hearing and adjudicatory hearing, the juvenile court held White's admissions to an officer admissible. CP 50-60; 1RP 86-93, 170-85.<sup>2</sup> The court dismissed the Minor in Possession charge for insufficient evidence of White's age. 2RP 23; CP 42, 53, 64. The court found White guilty of Theft in the Third Degree. 2RP 40-43; CP 41-43, 50-53, 61-64. The court imposed three months supervision and 10 hours of community service. CP 41-43.

White timely appealed.

## **2. SUBSTANTIVE FACTS**

On June 26, 2014, shortly before one in the afternoon, Justice White and two other young women were recorded on surveillance video as they entered a Safeway store at the Bear Creek shopping center in Redmond, King County, Washington. Ex. 9; 1RP 121-22. White had a big, black purse or tote bag that she placed in a shopping cart. Ex. 9; 1RP 121. White and one of her companions, each with a cart, traveled together to the liquor

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<sup>2</sup> The State has numbered the verbatim record of proceedings as follows: 1RP (October 28, 2014; December 2, 2014; December 9, 2014); 2RP (December 12, 2014; December 18, 2014).

aisle, where both of them took bottles of liquor off the shelves and placed them in their carts. Ex. 9; 1RP 122-23. The pair then went together to the seafood and meat departments and selected items. Ex. 9; 1RP 123-25. About 11 minutes after entering the store, White left without a cart, but carrying the large bag over her shoulder. Ex. 9; 1RP 125. Her two companions left without carts, but carrying large tote bags, moments later. Ex. 9; 1RP 125-26. None of them went through a check-out stand or paid for anything. 1RP 135.

Store employees were suspicious, so store manager Kara Haugstad followed the three young women outside and called 911 on her cell phone as she observed them in the parking lot. 1RP 99, 104. Haugstad asked an assistant manager, Michael Reed, to review the surveillance video. 1RP 107. Haugstad saw White meet up with the two others and they walked away laughing. 1RP 104. Haugstad watched the trio sit together at a four-sided picnic table, and all three of them pulled merchandise out of their bags and piled it on the table. 1RP 105-06. Haugstad saw White herself pull items out of bags. 1RP 136-37. Haugstad provided detailed descriptions of all three young women to the 911 operator. 1RP 105; Ex. 8.

Redmond Police Officer Chris Shone arrived quickly and went directly to the picnic table Haugstad had described. 1RP 204. White and her two companions were seated at the table. Id. Shone saw bags and merchandise piled on the table. Id. The young women denied having been at Safeway. Id. White claimed she had been to a nearby drug store. 1RP 204-05. Shone remarked that one of the packages of meat on the table had a Safeway label, but the girls simply shrugged. 1RP 205. Shone asked the girls for their names and ages. 1RP 206.

Officer Matthew Hurley arrived as Officer Shone was taking the names and dates of birth. 1RP 41. Hurley noticed that White's date of birth made her underage. Id. Hurley observed that White was seated on a bench separate from the other two suspects, and immediately next to her was a large bag with several bottles of liquor in plain view inside. Id. Hurley asked White to repeat her date of birth. 1RP 43. Hurley then stated, "You do understand that you could be arrested for minor in possession." 1RP 43; CP 47. White then asked Hurley if she could step away from the table and speak to him. 1RP 43. The two stepped away from the table, where White told Hurley that she was homeless and living on the streets, and stealing alcohol to sell it to support herself. 1RP 44.

She was not handcuffed and Officer Hurley had not told her that she was under arrest. Id. After they spoke, White returned to the picnic table and sat down again. Id.

Officer Sandra English had arrived shortly after Officer Hurley, and heard White and Hurley talking, but she could not recall whether White asked Hurley if she could speak with him, or Hurley asked White if she wanted to speak. 1RP 29. English did not hear the subsequent conversation. Id.

After White spoke to Officer Hurley and returned to the table, everyone waited in silence for 15 to 20 minutes until Officer Aliyyah Barnes returned from speaking to the Safeway managers. 1RP 45. Barnes directed the other officers to arrest White and her companions. 1RP 48, 156. Officer Hurley then handcuffed White, told her she was under arrest, and placed her in a patrol car. 1RP 48. Officer Hurley read White a "3.1 rule" warning, but not a full Miranda<sup>3</sup> warning.<sup>4</sup> Id.

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>4</sup> Officer Hurley testified that a "3.1 Rule" advises a suspect of a right to an attorney and that one may be appointed if the suspect cannot afford one. This is drawn from CrRLJ 3.1.

**D. ARGUMENT**

**1. WHITE'S CONFESSION WAS ADMISSIBLE  
BECAUSE SHE WAS NEITHER IN CUSTODY NOR  
INTERROGATED.**

White contends that her admission to Officer Hurley — that she was stealing alcohol to sell to support herself — was inadmissible because she was in custody akin to formal arrest and Officer Hurley should have known that his statement — that White could be arrested for possessing alcohol — was reasonably likely to elicit an incriminating response. White also contends the trial court lacked sufficient evidence to make certain findings of fact.

On the contrary, the factual findings were based on sworn testimony that the trial court found credible. Given the timing and totality of the circumstances here, White was not in custody to the degree associated with formal arrest but was merely being detained for investigation at the time she gave her confession. Further, Hurley's statement, in its proper context, was not interrogation or its functional equivalent because it was a declaration of White's pre-arrest detention status. White's confession was properly admitted. In any event, any error was harmless beyond a reasonable doubt.

a. Standard Of Review.

A trial court's CrR 3.5 findings of fact are verities on appeal if substantial evidence supports the findings. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the stated premise. State v. Thetford, 109 Wn.2d 392, 396, 745 P.2d 496 (1987). "The legal conclusions flowing from the facts are questions of law," which are reviewed de novo. State v. Aronhalt, 99 Wn. App. 302, 307, 994 P.2d 248 (2000). A trial court's determination as to custody is a legal conclusion that is reviewed de novo. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). A trial court's determination of "interrogation" is also a legal conclusion that is reviewed de novo. In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014).<sup>5</sup> An appellate court may affirm a trial court on any basis supported by the record and the law, and is not limited to the reasons articulated by the trial court. State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992); see RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the

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<sup>5</sup> In re Cross abrogated State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1994), which held that the issue of interrogation is factual, subject to the clearly erroneous standard. In re Cross, 180 Wn.2d at 681 n.8.

record has been sufficiently developed to fairly consider the ground.”).

b. Additional Relevant Facts.

During the combined CrR 3.5 and adjudicatory hearing, the juvenile court found as matters of undisputed fact that Officer Hurley saw the bag of alcohol bottles and asked White her age immediately after White told Shone her name and date of birth. CP 46. After White told Hurley that she was homeless and intended to steal the alcohol to help her survive, White and the officers then waited 15-20 minutes for Officer Barnes to return. Id. “White was not free to leave at that time.” Id.

As to the disputed facts, the court found Hurley credible when he testified that he did not ask White to speak with him. CP 47. The court found that Officer English was unsure whether it was Officer Hurley or White who asked the other to talk. Id. The court found that White asked Hurley if she could speak with him. Id. The court found that the sentence, “You do understand that you could be arrested for minor in possession,” was a statement, not a question. CP 46-47. The court concluded (Conclusion of Law No. 11) that White was in custody based on her age along with the fact that Officer Hurley stated that he had probable cause to arrest her,

and that White was detained “for what a juvenile may have been considered an extended period of time.” CP 48.

In its oral ruling, the court clarified that the “extended period of time” was the 15 to 20 minutes. 1RP 92. The court said that it was “very marginal” that White was in custody and that it could have found “just as likely that it was not custodial for a number of reasons,” but the “tipping point” was the fact that White was a juvenile. 1RP 175. The court concluded, however, that Hurley’s statement to White was “not the type of statement that is coercive or would be regarded by the officer as reasonably likely to elicit an incriminating response,” and thus was not interrogation. CP 48.

c. The Trial Court’s Findings Of Fact Were Sound.

White claims, without elaboration, that the trial court lacked substantial evidence to support its findings of fact that (1) Officer Hurley did not ask White to speak about the incident and (2) White asked Officer Hurley if she could speak with him. The trial court’s factual determinations were based on Officer Hurley’s sworn testimony, and the court found him credible. CP 47. The trial court decides issues of fact and makes credibility determinations that will not be disturbed on appeal. State v. Camarillo, 115 Wn.2d 60, 71,

794 P.2d 850 (1990). Those factual findings are verities on appeal if the evidence is "sufficient to persuade a fair-minded person."

Thetford, 109 Wn.2d at 396. White has offered no reason why the officer's credible testimony was insufficient to establish the above facts. They should be considered the truth here.

d. White Was Not In Custody To The Degree Associated With Formal Arrest.

Though the trial court concluded otherwise, the facts in the record show that Miranda warnings were not required because White was not in custody to the degree of formal arrest. Her conversation with Officer Hurley happened at the same time as the other Terry-stop events, in a setting no reasonable person, including a 16-year-old, would associate with formal arrest.

Statements obtained during a custodial interrogation without first advising the defendant of his constitutional rights are inadmissible. Miranda, 384 U.S. at 444. Custodial interrogation occurs when police question an individual who has been "taken into custody or otherwise deprived of his freedom of action in any significant way." Id. A detention becomes custodial when a suspect's freedom is limited to the degree associated with formal arrest. State v. Marshall, 47 Wn. App. 322, 324-25, 737 P.2d 265

(1987) (quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

A suspect may be asked to identify herself or to explain her activities without first receiving a Miranda warning. State v. Bockman, 37 Wn. App. 474, 480, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984). An investigatory Terry stop is not “custody” for Miranda purposes, even though a suspect may not be free to leave when an officer asks questions and statements are made. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). That is because an investigative encounter is not inherently coercive in that the detention is presumptively temporary and brief and relatively less “police dominated.” State v. Cunningham, 116 Wn. App. 219, 228, 65 P.3d 325 (2003).

Where a child suspect is involved, the child’s age is an appropriate consideration in the custody analysis. J.D.B. v. North Carolina, — U.S. —, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310 (2011). See also State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997). However, “[t]his is not to say that a child’s age will be a determinative, or even a significant, factor in every case.” J.D.B., 131 S. Ct. at 2406.

For comparison, in J.D.B., a 13-year-old seventh-grader was taken by a uniformed officer and school administrators into a closed-door conference room and questioned for 30 to 45 minutes. Id. at 2399. The Supreme Court held that age should be a factor in deciding whether the boy was in custody, but remanded the case to the trial court for the ultimate determination. Id. at 2408. In D.R., a 14-year-old eighth-grader was summoned alone to the principal's office, where he was interrogated at length by a police detective about child molestation. 84 Wn. App. at 834. The Court of Appeals held that the boy was in custody because of his youth and the "naturally coercive environment" of the school principal's office and the "obviously accusatory nature of the interrogation." Id. at 838.

A more comparable case is Heritage, where a 16-year-old defendant and her teenage friends were sitting in a park when park security detained them to ask them about a marijuana pipe. 152 Wn.2d at 210. Our Supreme Court held that even considering Heritage's age, she was not in custody to a degree analogous to arrest. Id. at 219. The Court considered the fact that the park guards told Heritage they couldn't arrest her, but it equally considered that (1) the questioning occurred in public and (2) Heritage was never isolated from her friends. Id.

Here, the exchange between White and Officer Hurley was part of the initial investigatory conversation that the officers had with White and her two friends in the first moments of arriving at the table. Officer Shone had only just arrived and asked a few brief questions before asking for White's name and age. It was then that Officer Hurley heard White's age and commented that she could be arrested for alcohol possession. Without any additional words spoken by Hurley, White initiated a private conversation a few feet away, then returned unrestrained to sit with her friends in the open, public shopping center. White was not isolated and never was asked accusatory questions. This occurred *before* the 15-20 minute wait for Officer Barnes to return from Safeway. While the trial court reasonably found that White initiated the conversation, its legal conclusion regarding custody was based on a misplaced emphasis on that waiting period, which occurred *after* White's admissions were made.

Moreover, the trial court's legal conclusion regarding custody relied on a misplaced emphasis on Officer Hurley's non-interrogatory statement to White, discussed more thoroughly in the next section. The trial court assumed that Officer Hurley's statement announced probable cause to arrest White, but the mere

existence of probable cause does not mean a formal arrest has been made. See City of College Place v. Staudenmaier, 110 Wn. App. 841, 850, 43 P.3d 43 (2002) (“[T]he presence of probable cause determines whether the arrest is *lawful*, not whether there was in fact an arrest.”) (emphasis in original). Officer Hurley’s statement – “you *could be* arrested” -- literally announced that White was not yet under arrest, but could be in the near future.

There is nothing in the record to suggest that White’s age — she was a 16-year-old who was fending for herself on the streets — was a factor in the reasonable understanding of her status. Her request to speak to the officer demonstrated that she knew she was not yet under arrest and was trying to avoid it.

At the time she made her admissions to Officer Hurley, White was lawfully detained for an investigatory Terry stop, but not in custody to the degree associated with formal arrest. Miranda warnings were not required before she confessed.

e. Officer Hurley’s Statement Was Not Interrogation.

Though White would like to inflate Officer Hurley’s statement into an emotionally evocative interrogation, its content and context

demonstrate that it was merely a declaration of White's pre-arrest detention status, not interrogation.

Miranda warnings are required when a suspect is not simply in custody but also being interrogated by a state agent. Lorenz, 152 Wn.2d at 36. Interrogation occurs "whenever a person in custody is subjected to either express questioning or its functional equivalent." State v. Wilson, 144 Wn. App. 166, 184, 181 P.3d 887 (2008) (quoting Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). The functional equivalent of express questioning means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301. The test for functional equivalency focuses primarily on the suspect's perceptions, rather than the officer's intent, because the goal is to protect suspects from police coercion. In re Cross, 180 Wn.2d at 685 (citing Innis, 446 U.S. at 301).

Thus, interrogation "must involve some degree of compulsion, because Miranda was concerned with protecting the privilege against self-incrimination during 'incommunicado interrogation of individuals in a police-dominated atmosphere.'"

State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995) (citing Illinois v. Perkins, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) (quoting Miranda, 384 U.S. at 445)). In the same vein, “incriminating statements that are not responsive to an officer’s remarks are not products of interrogation.” In re Cross, 180 Wn.2d at 685. And Miranda does not apply to “voluntary, spontaneous statements made outside the context of custodial interrogation.” State v. Sadler, 147 Wn. App. 97, 131, 193 P.3d 1108 (2008) (citing Miranda, 384 U.S. at 477-78), review denied, 176 Wn.2d 1032 (2013).

Furthermore, Innis excludes from the definition of interrogation words or actions “normally attendant to arrest and custody.” Innis, 446 U.S. at 301. Our Supreme Court has recognized this. See In re Personal Restraint of Pirtle, 136 Wn.2d 467, 486, 965 P.2d 593 (1998). In In re Pirtle, a deputy asked Pirtle, at the time of his arrest, whether he knew why he was being arrested. The Supreme Court said that the “expected response to Deputy Walker’s question was likely ‘yes’ or ‘no’, and falls into the background questioning category under which Miranda warnings are not applicable.” Id. See also State v. Bradley, 105 Wn.2d 898, 719 P.2d 546 (1986) (relying on several federal circuit-court

opinions to establish that questions related to arrest are not interrogation).

Federal appellate courts adhering to Innis have repeatedly found that when “an officer informs a defendant of circumstances [that] contribute to an intelligent exercise of his judgment, this information may be considered normally attendant to arrest and custody.” United States v. Crisco, 725 F.2d 1228, 1232 (9th Cir.) (telling arrested defendant about previously showing defendant \$60,000 of cocaine buy money was intended to inform defendant of circumstances, not elicit incriminating response), cert. denied, 466 U.S. 977 (1984). In United States v. Moreno-Flores, a federal agent told the in-custody Moreno-Flores that agents had seized about 600 pounds of cocaine and that Moreno-Flores was in serious trouble and was facing a lengthy prison term. 33 F.3d 1164, 1168 (9th Cir. 1994). The Ninth Circuit held that the agent’s statements were not interrogation because they did not call for an incriminating response. Id. at 1169. “The fact that they may have struck a responsive chord, or even that they may have constituted ‘subtle compulsion’ is insufficient to find that they were the functional equivalent of interrogation.” Id. at 1169-70. See also United States v. Payne, 954 F.2d 199, 202 (4th Cir.) (“[I]nterrogation

is not so broad as to capture within Miranda's reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges."), cert. denied, 503 U.S. 988 (1992).

The statement by Officer Hurley here fits squarely within this reasoning and is comparable to Moreno-Flores. The trial court here found that Officer Hurley's words were a statement, not a question, and White does not dispute that. The literal phrasing of the statement, "You do understand that you could be arrested for minor in possession," did no more than establish White's status in a pre-arrest investigatory detention. It is far and away less emotionally evocative than the agent's statement to the defendant in Moreno-Flores, where the suspect was told he was headed to prison because agents had found 600 pounds of cocaine. Also, and especially in comparison to Moreno-Flores, Hurley's statement to White contained no compulsion or coercion, a necessary ingredient for interrogation.

White offers comparison to two cases where the police statements were emotionally evocative to the extreme:

In In re Cross, the defendant was under arrest a few hours after he brutally murdered his wife and two of his three

stepdaughters. 180 Wn.2d at 678-79. A detective brought Cross a glass of water and said, "Sometimes we do things we normally wouldn't do, and we feel bad about it later." Id. at 679. Cross then erupted with several incriminating statements, including, "How can you feel good about doing something like this?" The court held that the detective's "evocative" comment took advantage of Cross's emotional state. Id. at 686. Moreover, Cross's "choice of replies to that comment were all potentially incriminating." Id. at 676.

In Wilson, a woman jailed for stabbing her estranged boyfriend, the father of her two children, collapsed and confessed after being told the man had died. 144 Wn. App. at 174, 184. The Court of Appeals held that the "death notification" was reasonably likely to elicit an incriminating response, though it did not elaborate. Id. at 184.

Here, White was unrestrained at a picnic table in broad daylight with two of her friends, and was told that she was being investigated for underage alcohol possession. There is no comparison to the play to a triple murderer's emotions in In re Cross, or the overwhelming emotional response that a "death notification" had on the suspect in Wilson. Officer Hurley's statement simply established White's status and was not

emotionally evocative at all. Hurley's statement did not create a Hobson's choice for White, and in fact was phrased such that no reasonable person would expect any answer at all.

White lastly points to a Massachusetts state-court opinion, Commonwealth v. Clark, where a police detective woke a sleeping juvenile to arrest him. 59 Mass. App. Ct. 542, 545 (2003). When the boy woke up, the policeman told him he had a warrant for the boy's arrest and told him to get up and come with him. Id. The juvenile responded by asking, "Did my grandmother turn me in?" Id. The officer then said, "You said you were going to turn yourself in yesterday when I spoke to you, you said you were going to turn yourself in at 8:00 in the morning." Id. The juvenile then admitted that he had made that promise, which corroborated that he was the one who had made previous confessions over the phone. Id.

White likens her case to the Massachusetts officer's badgering statements about the boy turning himself in. Actually, Clark supports the conclusion that Officer Hurley's statements here were *not* interrogation. In Clark, the court indeed found that when the officer repeatedly asked about the boy turning himself in, the officer was, consciously or not, seeking a specific evidentiary admission. But White omits the fact that the Clark court held that

the juvenile's *first* statement, asking whether his grandmother had turned him in, was admissible because it was *not* the product of interrogation. Id. The court found that the officer "did nothing to provoke the juvenile's question other than inform him that he was under arrest." Id. Such was White's situation, only less so -- she was actually told she was *not* yet under arrest.

Even if White was in custody to the degree of formal arrest during the first few minutes of the police encounter at the shopping-center picnic table, Officer Hurley's status-establishing statement was not interrogation. The trial court properly admitted White's subsequent confession.

f. Any Error Was Harmless.

If the admission of White's confession was erroneous, it was harmless beyond a reasonable doubt because of the other overwhelming evidence that she was an active participant in the shoplifting, as the trial court expressly concluded.

The erroneous admission of a statement in violation of Miranda is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable factfinder would have reached the same result in the absence of the error. State v. Ng, 110 Wn.2d 32, 38, 750 P.2d 632 (1988). In making this

determination, the reviewing court focuses on the evidence that remains after excluding the tainted evidence. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204 (1986). Circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Unlike with a jury trial, this Court need not wonder whether the factfinder would have convicted White of theft without the confession: The judge specifically – even strenuously -- clarified in his oral and written conclusions that it found White guilty as both a principal and accomplice to the theft “without considering the respondent’s confession as evidence.” 2RP 40-43; CP 50-53, 61-64.

The real issue, then, is whether the evidence reasonably supported that conclusion. It did:

- White was recorded on video wheeling a cart through the store and putting bottles of liquor into her shopping cart, in concert with her companion. Ex. 9; CP 50; 1RP 122-23.
- White was recorded on video with her companion in the meat and seafood departments, putting items in a cart. Ex. 9; 1RP 123-25.
- White was recorded on video leaving the store about 11 minutes after entering, without a cart but with a large tote bag over her shoulder. Ex. 9; CP 51; 1RP 125.

- The store manager, Haugstad, testified that neither White nor her companions went through a checkstand or paid for any items. 1RP 135; CP 51.
- Haugstad testified she watched White reunite with her two accomplices outside the store, and walk away laughing. 1RP 104.
- Haugstad testified she followed the group and saw them gather at the picnic table, where White helped pull merchandise out of bags. 1RP 105-06, 136-37; CP 51.
- When officers arrived, White denied ever being at Safeway. 1RP 204.
- Clearly marked Safeway merchandise was sitting on the table in front of White. 1RP 204; CP 51.
- Officer Hurley observed several bottles of liquor in the bag immediately next to White, who was seated at her own bench at the table. 1RP 41; CP 51.
- Haugstad specifically identified White as one of the people observed inside Safeway taking items off the shelves. 1RP 95; CP 52.

In short, White was seen taking items off the store shelves, did not pay for the merchandise, and was caught with it outside the store. She also acted as a teammate with her two friends. The trial court was correct: even without White's confession, there was more than enough evidence to conclude beyond a reasonable doubt that White committed Theft in the Third Degree. Even if this

Court were to find the confession was erroneously admitted, it should find the error harmless beyond a reasonable doubt.

**E. CONCLUSION**

For all the foregoing reasons, the State respectfully asks this Court to affirm White's conviction and disposition.

DATED this 31<sup>st</sup> day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: \_\_\_\_\_

  
IAN ITH, WSBA #45250  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, containing a copy of the Brief of Respondent, in STATE V. JUSTICE WHITE, Cause No. 72967-5-1, 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.

  
\_\_\_\_\_  
Name

Done in Seattle, Washington

*07-31-15*  
\_\_\_\_\_  
Date