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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37920-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ralph Grammont,

Appellant.

Clallam County Superior Court Cause No. 07-1-00285-4

The Honorable Judge Ken Williams

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT SHOULD HAVE EXCLUDED MR. GRAMMONT'S UNWARNED AND INVOLUNTARY CUSTODIAL STATEMENTS.

A. Mr. Grammont's unwarned custodial statements should have been excluded under *Miranda*.

The law presumes that a suspect's custodial statements are compelled in violation of the privilege against self-incrimination. U.S. Const. Amend. V; *State v. Corn*, 95 Wn. App. 41, 57, 975 P.2d 520 (1999). In this case, the trial court found that Mr. Grammont was "likely" in custody at the time he was questioned. RP (3/6/08) 36. In a footnote, Respondent disputes this characterization, but does not offer an alternate interpretation of the trial court's remarks. Brief of Respondent, p. 10, n. 3.

A person is in custody if, under the totality of the circumstances, a reasonable person would conclude after brief questioning that he would not be free to leave. *United States v. Brobst*, 558 F.3d 982, 995 (C.A.9, 2009). In this case, the undisputed testimony establishes that Mr. Grammont was in custody: he was told to sit on the couch, he was not free to leave, he assumed he was under arrest, he was questioned for 5-10 minutes by two officers, and he was confronted with evidence of his guilt.¹

¹ The prosecutor presented no testimony (or other evidence) to dispute Mr. Grammont's version of these events. RP (3/6/08) 14-19; Exhibit 15, CP.

RP (3/6/08) 21-23, 26. Under these circumstances, he was subjected to custodial interrogation. *See Brobst*, at 995 (outlining factors for consideration).

The cases cited by Respondent are easily distinguished. In *Heritage*, the questioning occurred in public, the suspects were not detained in any way, the park officers made clear they lacked authority to arrest, and the questioning was brief and limited. *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004). In *Lorenz*, the suspect was explicitly told she was not under arrest and that she was free to leave, and she acknowledge that she was not under arrest and was free to leave in her written statement. *State v. Lorenz*, 152 Wn.2d 22, 37-38, 93 P.3d 133 (2004). In *Ustimenko*, the police met the suspect in his own driveway, and asked him to sit down when they noticed he smelled of alcohol, appeared injured, and was swaying on his feet; they did not require him to obey. *State v. Ustimenko*, 137 Wn.App. 109, 116, 151 P.3d 256 (2007).

Here, by contrast, the police interrogation did not take place in public, Mr. Grammont was told (rather than asked) to sit on the couch, he was not told he was free to leave, the officers had the authority to arrest him, the officers asked more than the minimal questions necessary to determine his identity and confirm or dispel suspicions, and he was confronted with evidence of his guilt. RP (3/6/08) 21-23, 26.

A reasonable person in Mr. Grammont's circumstances would not have felt at liberty to stop the questioning and leave. Mr. Grammont was therefore in custody. *Brobst, supra*.

Respondent does not address the trial court's erroneous basis for admitting the evidence.² Brief of Respondent, pp. 10-22. Presumably, this failure is intended as a concession that Mr. Grammont was interrogated. See Appellant's Opening Brief, pp. 11-15 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Mr. Grammont was interrogated in custody, without benefit of *Miranda* warnings. Because of this, his statements should have been excluded. *Brobst, supra*. His conviction must be reversed and his case remanded to the trial court for a new trial.

² The trial court decided that Mr. Grammont was not interrogated because the officers' questions were not "designed to elicit incriminating information but rather questioning designed to determine what in fact had occurred that caused them to be called." RP (3/6/08) 36.

B. Mr. Grammont's statements should have been excluded because the prosecutor failed to prove they were the product of a rational intellect and a free will.

The constitutional prohibition against the use of involuntary statements is separate and distinct from the *Miranda* test. *See Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). The reason for this is clear: a suspect may be threatened, beaten, or administered drugs even after a proper *Miranda* waiver. Similarly, a person who is not in custody (and thus not subject to *Miranda*) may be coerced into confessing by threats, pain, or medication. Before a statement may be admitted, the prosecutor is required to prove that it is the product of a rational intellect and a free will. *Mincey v. Arizona*, at 398. *See also Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)).

Respondent's argument conflates the two tests and demonstrates a basic lack of understanding. Brief of Respondent, pp. 23-27. Mr. Grammont's voluntariness argument does not depend on whether or not he was in custody or subjected to interrogation.³ *See* Appellant's Opening

³ The prohibition against the use of involuntary statements does not depend on the applicability of *Miranda*.

Brief, pp. 15-16. Nor does Mr. Grammont suggest that “any level of intoxication should bar a criminal defendant’s statements from being admitted.” Brief of Respondent, p. 23.

Rather, Mr. Grammont argues that the prosecution bore the burden of proving that Mr. Grammont’s statements were voluntary. *See Gladden v. Unsworth*, 396 F.2d 373, 380-381 (1968). The state failed to produce any evidence rebutting Mr. Grammont’s description of how much alcohol he’d consumed and how intoxicated he was. RP (3/6/08) 26-27.

Accordingly, the state did not prove that Mr. Grammont’s statements were the product of a rational intellect and a free will.

Because the prosecutor failed to establish that Mr. Grammont’s statements were voluntary, his convictions must be reversed and the case remanded for a new trial, with instructions to exclude the statements.

Gladden v. Unsworth, supra.

II. PROSECUTORIAL MISCONDUCT VIOLATED MR. GRAMMONT’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Prosecutorial misconduct requires reversal whenever the prosecutor’s improper actions prejudice the accused person’s right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). In this case, the prosecutor committed misconduct by repeatedly expressing her personal opinion that Mr. Grammont was a liar. RP (6/11/08) 23, 25,

26, 27, 29. This misconduct requires reversal. *State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003); *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996).

The prosecutor also improperly shifted the burden of proof by suggesting that the jury could convict Mr. Grammont by simply weighing his testimony against that of Cole and Carroll. RP (6/11/08) 23, 25, 26, 27, 29. This violated Mr. Grammont's Fourteenth Amendment right to the presumption of innocence and proof beyond a reasonable doubt. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir., 2006). Accordingly, the conviction must be reversed and the case remanded for a new trial. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

III. MR. GRAMMONT WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Grammont rests on the argument set forth in his Opening Brief.

IV. RESPONDENT CONCEDES THAT THE MENTAL HEALTH EVALUATION SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

Respondent concedes that the trial judge failed to follow the required procedure for ordering a mental health evaluation. Brief of

Respondent, p. 43. Accordingly, the requirement must be stricken from the Judgment and Sentence.

V. THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD IN IMPOSING RESTITUTION.

The trial judge indicated that he felt bound by the Crime Victim's Compensation payment. RP (10/23/08) 10. This reflects a misunderstanding of the law. *See State v. Bunner*, 86 Wn.App. 158, 936 P.2d 419 (1997). The court's restitution order must be vacated and the case remanded to the trial court. *Bunner, supra*.

CONCLUSION

Mr. Grammont's conviction must be reversed and the case remanded for a new trial. If the conviction is not reversed, the Court must strike the requirement of a mental health evaluation and remand the case for a new restitution hearing.

Respectfully submitted on September 3, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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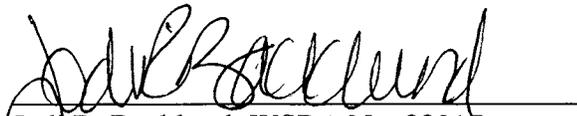
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 3, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 3, 2009.



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