



**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	2
C. STATEMENT OF THE CASE	
1. Factual History .....	3
2. Procedural History .....	5
D. ARGUMENT	
<b>I. THE TRIAL COURT VIOLATED THE DEFENDANT’S     RIGHT TO CONFRONTATION UNDER WASHINGTON     CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES     CONSTITUTION, SIXTH AMENDMENT, WHEN IT     ALLOWED THE STATE TO INTRODUCE THE     TESTIMONIAL STATEMENTS OF A NON-WITNESS .....</b>	<b>10</b>
<b>II. THE TRIAL COURT VIOLATED THE DEFENDANT’S     RIGHTS UNDER WASHINGTON CONSTITUTION,     ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION,     FIFTH AMENDMENT, WHEN IT ALLOWED THE STATE     TO INTRODUCE EVIDENCE THAT, WHEN ARRESTED,     THE DEFENDANT INVOKED HIS RIGHT TO SILENCE ..</b>	<b>19</b>
<b>III. THE TRIAL COURT VIOLATED CrR 3.5 WHEN IT     ALLOWED THE STATE TO INTRODUCE EVIDENCE OF     STATEMENTS THE DEFENDANT MADE TO THE POLICE     WITHOUT FIRST HOLDING A HEARING AND RULING     ON THE ADMISSIBILITY OF THOSE STATEMENTS .....</b>	<b>23</b>
E. CONCLUSION .....	30

F. APPENDIX

1. Washington Constitution, Article 1, § 9 .....	31
2. Washington Constitution, Article 1, § 22 .....	31
3. United States Constitution, Fifth Amendment .....	32
4. United States Constitution, Sixth Amendment .....	32
5. CrR 3.5 .....	33

**TABLE OF AUTHORITIES**

Page

*Federal Cases*

*Crawford v. Washington*,  
541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ..... 10, 12, 13

*Hoffman v. United States*,  
341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) ..... 19

*Miranda v. Arizona*,  
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ..... 23

*Ohio v. Roberts*,  
448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) ..... 11

*State Cases*

*State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997) ..... 16, 23

*State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991) ..... 19, 23

*State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996) ..... 19-21

*State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998) ..... 10

*State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979) ..... 19

*State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979) ..... 19

*State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983) ..... 24

*State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005) ..... 14

*State v. Nogueira*, 32 Wn.App. 954, 650 P.2d 1145 (1982) ..... 26

*State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995) ..... 16

*State v. Tim S.*, 41 Wn.App. 60, 701 P.2d 1120 (1985) ..... 25, 26

*State v. Walker*, 129 Wn.App. 258, 118 P.3d 935 (2005) ..... 14

***Constitutional Provisions***

Washington Constitution, Article 1, § 9 ..... 19, 20, 24, 30  
Washington Constitution, Article 1, § 22 ..... 10, 15  
United States Constitution, Fifth Amendment ..... 20, 24  
United States Constitution, Sixth Amendment ..... 10, 15

***Statutes and Court Rules***

CrR 3.5 ..... 24-29  
JuCr 1.4(b) ..... 25

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it allowed the state to introduce the testimonial statements of a non-witness. RP 5-16, 193-194.

2. The trial court violated the defendant's rights under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when it allowed the state to introduce evidence that, when arrested, the defendant invoked his right to silence. RP 110-118.

3. The trial court violated CrR 3.5 when it allowed the state to introduce evidence of statements the defendant made to the police without first holding a hearing and ruling on the admissibility of those statements. RP 110-132.

*Issues Pertaining to Assignment of Error*

1. Does a trial court violate a defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it allows the state to introduce the testimonial statements of a non-witness when the state cannot prove beyond a reasonable doubt that the error was harmless?

2. Does a trial court violate a defendant's rights under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if the court allows the state to introduce evidence that, when arrested, a defendant invoked his right to silence?

3. Does a trial court violate CrR 3.5 if, over the defendant's objection, it allows the state to introduce evidence of statements the defendant made to the police without first holding a hearing as required under CrR 3.5, without ruling on the admissibility of those statements, and without entering findings and conclusions on the admissibility of the statements?

## STATEMENT OF THE CASE

### *Factual History*

The defendant Matthew Schmidt, his wife Tracie, and their daughter Natasha live at 175 Lenora Avenue in Kelso. RP 201-202.<sup>1</sup> On New Years Eve of 2008, they invited Matthew's sister Tatiana Brown and Edward Paulsen over for the evening. RP 203-207. During that evening, some of them played pool in the basement and some spent time in the hot tub behind the house. *Id.* Everyone except Natasha drank a lot of alcohol, including Tracie. *Id.* Eventually, Tracie drank so much that she became ill and asked Matthew to take her up to their bedroom, which was located up a set of stairs from the main floor of the house. *Id.* He did so and then returned to his guests. *Id.*

After sleeping for a while, Tracie woke up and walked out back, where she found Matthew and their daughter sitting in the hot tub. RP 203-207. She became angry when she asked Matthew to get out of the hot tub and he refused. *Id.* Tracie then went looking for Matthew's sister and Edward Paulsen, whom she found having sex in bed in Natasha's bedroom. RP 207-208. Upon seeing this, she became enraged and ordered them out of Natasha's bedroom. *Id.* When Edward did not immediately move, Tracie

---

<sup>1</sup>The record in this case includes three volumes of continuously numbered verbatim reports, referred to herein as "RP [page #]."

attacked him as he lay in the bed. *Id.* As she was screaming and hitting him about his upper body, Matthew entered the bedroom and drug her off Ed and out into the living room. RP 209-210. He then went up to their bedroom and lay down on the floor. RP 214-215, 41-44. Now also enraged with Matthew, Tracie picked up the telephone, called 911, and claimed that both her husband Matthew and Edward Paulsen had beat her up. RP 219-222. While she was on the telephone, Edward Paulsen was heard in the background stating that she had attacked him, not the other way around. RP 16-25.

Within ten to fifteen minutes, a number of deputy sheriff's arrived and entered the house. RP 222-226. By this time, everything was quiet. RP 153-154. When they entered, Tracie told them that her husband had drug her into the living room from their daughter's bedroom and that he had hit her a number of times. RP 235-243. She also stated that she thought he might be in the basement as she had heard noises down there. RP 37-40, 85-87. The deputies then searched the bedroom, the main floor of the house, and the surrounding yard but did not find the defendant. RP 57-59. However, they did find and talk to both Tatiana Brown and Edward Paulsen. RP 155-159. A couple of the deputies then again went to speak with Tracie while she was in the front room. RP 85-91. As they did, one of them notice the closed door to the upstairs bedroom and realized that they had not searched it. RP 41-44, 106-107.

At this point, at least three of the deputies walked up the stairs, opened the bedroom door, and entered. RP 41-44, 64-66, 106-109, 165-173. As they did, they noticed that the room was dark. *Id.* Instead of turning on the light, they illuminated parts of the room with their flashlights, which they had with them. *Id.* As they did this, one of the deputies saw the defendant's feet as he lay on the floor, and informed the other officers of this fact. *Id.* At this point, the defendant got up and, according to the officers, ran at Deputy Shelton. *Id.* Deputy Shelton responded by raising his leg and foot and kicking the defendant backward. RP 46-48. The defendant fell back, and then came forward again, this time grappling with Deputy Shelton. *Id.* As the two of them fell to the floor, another Deputy took out his taser and shot the defendant, who offered no further physical resistance. RP 168-173. The defendant ended up bleeding from the inside of one of his ears, and had bruises on his right arm and one of his feet. RP 227-231. Of injuries, Deputy Shelton had none, although he did report that his glasses had been knocked off and his belt buckle broken. RP 49-52, 72-73.

### ***Procedural History***

By information filed January 3, 2008, the Cowlitz County Prosecutor charged the defendant Matthew Schmidt with one count of third degree assault against Deputy Shelton, and one count of Fourth Degree Assault against his wife Tracie. CP 1-2. The case later came on for trial before a jury

with the state calling four deputies as its only witnesses. RP 33, 82, 142, 188. The defense called two: Tracie Schmidt and Tatiana Brown. RP 201, 150. These witnesses testified to the facts contained in the preceding factual history. *See Factual History.*

During the state's case-in-chief, and over repeated defense objections of hearsay and a confrontation violation, the court allowed one of these deputies to testify to statements that the defendant's daughter Natasha Schmidt had made to him as he questioned her after the deputies arrived at the house that evening. RP 188-195. In fact, this evidence had also been the subject of an unsuccessful *motion in limine* by the defense. RP 5-31. This deputy told the jury that after he entered the house, he found the defendant's 12-year-old daughter sitting on the floor in the dining room with her back against one of the walls and with her arms wrapped around her legs, which were drawn up to her chest. RP 191-193. According to the Deputy, she looked terrified, and when asked what had happened, she said the following:

I was on the couch. Mom was trying to get Ed out of here. She called his Mom. I heard Dad throw the chairs and he grabbed my mom and started beating her. I threw things at my dad to try to get him off of her I followed them through the house and then he left. I stayed in the laundry room with the door closed. I waited until everything was quiet except my mom saying, "Oh my God, Oh, my God." Then she called the police.

RP 193-194.

At no point during the trial did the state attempt to call Natasha

Schmidt as a witness. RP 1-347. Neither does the record contain any claim by the state that it could not call her as a witness. *Id.*

In addition, prior to trial, the state indicated that it would not attempt to introduce into evidence any post-arrest statements the defendant might have made. RP 114-118. As a result, the court did not hold a hearing under CrR 3.5. *Id.* However, during the trial, the state did elicit the fact that when the deputies arrested him and read him his *Miranda* rights, the defendant responded that he understood his rights and chose to “squeeze them closed.” RP 110-111. When the deputy asked the defendant if he had said that he chose to “squeeze” his rights, the defendant responded that he did. RP Although an odd reply, the officer testified that the defendant was intoxicated and that he did also appear to be under the influence of some type of drug. RP 112-113, 112-124. At this point, the defense moved for a mistrial based upon the state eliciting the fact that the defendant had invoked his right to silence, and the court excused the jury to hear argument on the motion. RP 114-118. The defense also argued that the evidence was irrelevant because the state had indicated that it did not intend to introduce any post-arrest statements the defendant made. *Id.*

After excusing the jury, the court allowed the state to continue examining the officer in order to respond to the defendant’s motion for a mistrial and at the same time to examine the officer as part of a CrR 3.5

hearing. RP 118-132. During this examination, the officer testified that he understood the defendant's statement that he chose to "squeeze shut" his *Miranda* rights as in invocation of his right to silence. RP 122-124. Following cross-examination of this officer, the court informed the defendant of his right to testify under CrR 3.5. RP 127-132. After the defendant declined this right to testify, the court listened to argument by counsel, and then denied the defendant's motion for a mistrial. *Id.* However, the court did not make any findings or rule on the CrR 3.5 issues. *Id.* After the jury returned, the state continued its examination of the Officer who had read the *Miranda* rights to the defendant. RP 133-134. This officer told the jury that the defendant made a number of statements to them after being warned of his right to silence, including apologizing to them for "assaulting" Deputy Shelton. RP 113-118.

During her testimony for the defense, the defendant's wife stated that she had been very intoxicated during the evening, that neither her husband nor Mr. Paulsen had assaulted her, and that she had lied when she had called 911 because she had been angry with her husband and Mr. Paulsen. RP 201-232. On cross-examination, she admitted that she had given both an oral statement and a written statement to the police that was contrary to her testimony at trial. RP 234-243. Following her testimony, the defense called Tatiana Brown, who denied ever seeing the defendant strike his wife,

although she did see the defendant drag her off Mr. Paulsen as she was striking him. RP 251-257.

After the reception of evidence in this case, the court instructed the jury with the state taking exception to the court refusing to give one of its proposed instructions. RP 286-298. The defendant made no objections or exceptions. *Id.* Counsel then presented closing arguments, which included the following from the state:

What we have also, that is not in dispute, is that Deputy Bauman who was pretty much the last to arrive on the scene, after the defendant was arrested, cuffed, taken out, he finds Natasha. She's was the only person who didn't drink at the residence. What he saw was she was sitting in a corner in a fetal position, curled up with her arms across her chest and she was scared and frightened. She said these very words that he quoted and he read to you, "I was on the couch. Mom was trying to get Ed out of here. I heard Dad throw chairs and he grabbed my Mom and started beating her. I threw things at my Dad to try and get him out of -- or to get him off of her. I followed him through the house and then he left. I stayed in the laundry room with the doors -- with the door closed. I waited until everything went quiet except my mom saying, 'Oh my god. Oh my god.' Mom then called the police." And that's not disputed that she said that.

RP 301-302.

After deliberation, the jury returned verdicts of "guilty" on both counts. CP 40-41. The court later sentenced the defendant to 30 days on Count I, which was within the standard range, and 365 days with 335 suspended on Count II, to run concurrent with Count I. CP 44-56. The defendant thereafter filed timely notice of appeal. CP 58.

## ARGUMENT

### **I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ALLOWED THE STATE TO INTRODUCE THE TESTIMONIAL STATEMENTS OF A NON-WITNESS.**

The Sixth Amendment provides that a person accused of a crime has the right “to be confronted with witnesses against him.” Similarly Article 1, § 22 of the Washington State Constitution states that “[i]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face.” While case law indicates that analysis is similar under both clauses, five justices of our Supreme Court have concluded that Article 1, § 22 is more protective of a defendant’s confrontation rights than the Sixth Amendment. *State v. Foster*, 135 Wn.2d 441, 474-484, 957 P.2d 712 (1998) (*See* concurrence/dissent opinion of Alexander, J., at 474-481, dissenting opinion of Johnson, J. at 481-484).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court had occasion to reevaluate the scope of the confrontation clause in relation to the admission of a prior hearsay statement made by a witness who did not testify in the case. In this case, the state charged the defendant with assault after he confronted and stabbed the complaining witness during an argument about the defendant’s

wife, who was present during the incident. The defendant argued self-defense. In order to rebut this claim, the state attempted to call the defendant's wife. When the defendant successfully exercised his privilege to prevent her testimony, the state moved to admit her statements to the police after the incident under the argument that they undercut the claim of self-defense. The defense objected that such statements were inadmissible hearsay and violated the defendant's right to confrontation.

The state countered that the statements fell under the hearsay exceptions of statements against penal interest because, at the time the wife made the statements, she was also a suspect in the assault. The state further argued that the statements did not violate the defendant's confrontation rights because under the decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the statements bore "adequate 'indicia of reliability'".

The court granted the prosecutor's motion, ruling that the statements did qualify as "statements against penal interest," and that under *Ohio v. Roberts*, there was no confrontation violation because the statements bore sufficient indicia of reliability. The defendant was subsequently convicted, and he appealed. The Court of Appeals reversed, finding insufficient indicia of reliability, but the Washington Supreme Court disagreed and affirmed the conviction. The defendant thereafter obtained review before the United States Supreme Court.

In its opinion the Supreme Court first made an extensive review of origins of the legal principle of confrontation, noting that the “right to confront one’s accusers is a concept that dates back to Roman times.” The court then examined the common law origins of the right to confrontation, particularly in relation to the “infamous political trials” such as the treason trial of Sir Walter Raleigh in 1603 in which he was convicted largely upon the admission of an alleged co-conspirator’s statement, in spite of Sir Walter Raleigh’s call that he be confronted by his accuser. Based largely upon the abuses perceived in these trials, the common law courts recognized that in criminal trials a defendant should be afforded the right to confront and cross-examine the witnesses called against him.

In *Crawford*, the court noted that the one exception allowed under the common law involved the admission of prior testimony given by a witness under circumstances in which the defendant was afforded the right to confrontation at the prior hearing. In this one exception, the common law found no confrontation denial in admitting the prior testimony if the witness was no longer available.

In *Crawford*, the United States Supreme Court overturned its prior rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a “firmly rooted hearsay exception,” or was given under circumstances showing it to be trustworthy. 124 S.Ct. at 1364, 1369.

*Crawford* rejected decisional law that equated the confrontation clause analysis with admissibility under hearsay rules. *Id.* at 1370-71. The Court reasoned that the Sixth Amendment is not based on the reliability of evidence. “It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: By testing in the crucible of cross-examination.” *Id.* at 1370. Thus in *Crawford*, the court “reject[ed]” the view that the reliability-based framework of *Roberts* or the rules of evidence, govern the admissibility of out-of-court statements. The court held:

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: Confrontation.

124 S.Ct. at 1374.

In *Crawford* the Court did not definitively explain the scope of what “testimonial evidence” is. *Id.* at 1374 (“we leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”). However, the Court did set out a “core class of ‘testimonial’ statements,” the admission of which would violate the confrontation clause without the in court testimony of the proponent.” *Id.* at 1364. This “core class” of “testimonial statements” includes not only formal affidavits and confessions to police officers, but also “pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 1364. Thus, the “common nucleus” of the confrontation clause includes “statements that were made under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* This definition includes at its core statements elicited in response to police questioning during an investigation. *State v. Walker*, 129 Wn.App. 258, 268, 118 P.3d 935 (2005); *see also State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005) (Domestic violence victim’s statements in response to police questioning are testimonial for purposes of confrontation under the Sixth Amendment).

In the case at bar, the last witness the state called was Deputy Brad Bauman, one of the deputies who responded to the 911 call and entered the defendant’s home. Deputy Bauman told the jury that after he entered the house he found the defendant’s 12-year-old daughter Natasha sitting on the floor in the dining room with her back against one of the walls and with her arms wrapped around her legs, which were drawn up to her chest. RP 191-193. According to the Deputy, she looked terrified. *Id.* Over a defense objection<sup>2</sup>, the court also allowed deputy Bauman to tell the jury that when he asked Natasha what had happened, she made the following statement to

---

<sup>2</sup>The defense objected that this evidence was both inadmissible hearsay and constituted a violation of the defendant’s right to confrontation. However, even without these objections, the error could still be raised for the first time on appeal since it constitutes a manifest error of constitutional magnitude. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988).

him:

I was on the couch. Mom was trying to get Ed out of here. She called his Mom. I heard Dad throw the chairs and he grabbed my Mom and started beating her. I threw things at my Dad to try to get him off of her I followed them through the house and then he left. I stayed in the laundry room with the door closed. I waited until everything was quiet except my mom saying, "Oh my God, Oh, my God." Then she called the police.

RP 193-194.

At no point during the trial did the state attempt to call Natasha Schmidt as a witness. RP 1-347. Neither does the record contain any claim by the state that it could not call her as a witness. *Id.* As the previous discussion of the *Crawford* case reveals, these type of statements a witness makes in response to police questioning falls within the "core class" of "testimonial statements" the introduction of which violate a defendant's right to confrontation under United States Constitution, Sixth Amendment, unless the evidence is presented by the declarant who is then subject to confrontation. In the case at bar, the state did not present this "testimonial" evidence through the declarant Natasha Schmidt, who was never confronted concerning her alleged claims. Rather, the court allowed the state to present this evidence via the third party Deputy Bauman. Thus, the admission of these statements violated the defendant's right to confrontation under United States Constitution, Sixth Amendment and Washington Constitution, Article 1, § 22.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not “harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). In the case at bar, a review of the evidence at trial indicates that the state cannot meet this burden. The following presents this argument.

In the case at bar, the conflicting evidence presented at trial set out two dissimilar stories for the jury, one that the prosecution argued proved the defendant guilty of both crimes charged, and one that the defense argued indicated that the defendant had committed neither offense. In the state’s version of the evidence, the defendant, who was intoxicated, became enraged when his wife tried to force one of his guests to leave his home. As a result of this rage, he went into his daughter’s room, drug his wife into the living room, and proceeded to beat her about the face. He then hid up in his bedroom and, still in a rage, attacked one of the deputies who came to arrest him.

By contrast, under the defense scenario, it was the defendant’s wife

who became enraged and attacked Mr. Paulsen, while the defendant did everything he could do to stop that attack. While he did drag her off of Mr. Paulsen, he did not strike her in the process. Rather, once he got her into another room, he let her go and went to his bedroom to lay down. Fifteen or twenty minutes later he was startled by three strange men entering his dark bedroom and simply took the physical action necessary to get away from them and out of the bedroom. Under this version of the events, the defendant did not intentionally assault either his wife or the deputy.

Tracie Schmidt's 911 statement, her injuries, her statements at the scene, all support the state's scenario. However, the state's evidence was far from overwhelming. As the defense pointed out, Tracie's 911 statement contained the obvious lie that Mr. Paulsen had beat her. In addition, at trial, she flatly disavowed the veracity of her prior statements and admitted that she had lied. In addition, while the deputies state that the defendant ran at and grappled with deputy Shelton, the evidence did show that the defendant was in his bedroom, that it was dark, and that it was quiet when the deputies were at the house. Thus, the defendant might well have been disoriented and simply trying to get away from three intruders he did not recognize as police.

By far, the admission of Natasha Schmidt's statement to Officer Bauman was the most effective and compelling evidence at trial, and it fully supported the state's scenario for the events of the evening. By contrast, the

evidence strongly suggested that her mother had been intoxicated and enraged, and that she had ample motive to lie to harm her husband. This was not so with Natasha, who drank no alcohol and, in the eyes of the jury, had absolutely no motive to lie about what she saw. The importance of this evidence was not lost on the prosecutor, who made the following argument based upon it:

What we have also, that is not in dispute, is that Deputy Bauman who was pretty much the last to arrive on the scene, after the defendant was arrested, cuffed, taken out, he finds Natasha. She was the only person who didn't drink at the residence. What he saw was she was sitting in a corner in a fetal position, curled up with her arms across her chest and she was scared and frightened. She said these very words that he quoted and he read to you, "I was on the couch. Mom was trying to get Ed out of here. I heard Dad throw chairs and he grabbed my Mom and started beating her. I threw things at my Dad to try and get him out of -- or to get him off of her. I followed him through the house and then he left. I stayed in the laundry room with the doors -- with the door closed. I waited until everything went quiet except my Mom saying, 'Oh my god. Oh my god.' Mom then called the police." And that's not disputed that she said that.

RP 301-302.

Natasha's evidence undoubtedly led the jury to both convictions. Absent this evidence, the defense scenario becomes as plausible as the state's scenario, thus compelling verdicts of acquittal on both counts. At a minimum, the state cannot prove that erroneous admission of Natasha Schmidt's statements was harmless beyond a reasonable doubt in relation to either charge. Thus, the defendant is entitled to a new trial on both charges.

**II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHTS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN IT ALLOWED THE STATE TO INTRODUCE EVIDENCE THAT, WHEN ARRESTED, THE DEFENDANT INVOKED HIS RIGHT TO SILENCE.**

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls, supra*. The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or make closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls, supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the state charged the defendant with multiple counts of vehicular homicide. At trial the chief investigating officer testified that he found the

defendant in a gas station bathroom shortly after the accident and the defendant “totally ignored” him when he asked what happened. The police officer also testified that upon further questioning the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction the defendant appealed, arguing that this testimony violated his Fifth Amendment right to silence.

In addressing this issue the Washington Supreme Court first reviewed the rights protected under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, stating as follows:

The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. To enforce this principle, upon arrest, an accused must be advised he or she can remain silent.

At trial, the right against self incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” The purpose of this rule is plain. An accused’s Fifth Amendment right to silence can be circumvented by the State “just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.”

*State v. Easter*, 130 Wn.2d at 235-236 (citations omitted).

In *Easter*, the prosecution tried to take the statements admitted at trial out of Fifth Amendment analysis by arguing that they were “pre-arrest,” and

thus not constitutionally protected. The court noted: “[t]he State argues pre-arrest silence may be used to support the State’s case in chief because the Fifth Amendment is designed to deal only with ‘compelled’ testimony, and Easter was under no compulsion to speak at the accident scene prior to his arrest.” *Easter*, 130 Wn.2d at 237-38. The Court rejected this argument, holding as follows:

We decline to read the Fifth Amendment so narrowly as the State urges. An accused’s right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A “bell once rung cannot be unring.” The State’s theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant’s pre-arrest silence as evidence of guilt.

The State’s belief that the Fifth Amendment applies only to “compelled testimony” also implies that an accused acquires the right to silence only when advised of such right at the time of arrest. This is not so. No special set of words is necessary to invoke the right. In fact, an accused’s silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is “insolubly ambiguous” according to the *Doyle* Court, it is equally so before an arrest.

*State v. Easter*, 130 Wn.2d 238-239 (citations omitted).

Given this analysis, the Supreme Court reversed, finding an error of

constitutional magnitude, and insufficient proof by the state that the error was harmless beyond a reasonable doubt.

In the case at bar, there was little question that the defendant was in custody and under arrest at the time he invoked his rights under the Fifth Amendment. This happened directly after one of the officers shot the defendant with a taser and another officer had handcuffed the defendant and read him his *Miranda* rights. According to the deputy, when he read the defendant his rights under *Miranda* and asked if he understood them, the defendant replied that he chose to “squeeze them closed” or “squeeze them shut,” or simply “squeeze them.” Although an odd reply, the deputy testified that the defendant was intoxicated and that he did also appear to be under the influence of some type of drug. However, the deputy himself admitted that he understood the defendant’s statement to be an invocation of his right to silence. RP 122-124. This interpretation was more than reasonable given that the defendant, in his intoxicated state, was simply using somewhat odd words to state that he intended to “squeeze” or “embrace” his right to silence.

Indeed, if the deputy saw this statement as an invocation of the defendant’s right to silence, surely the jury also understood this to be an invocation of the defendant’s right to silence. One is then left to wonder why the state deliberately elicited both the fact that the Deputy read the defendant his *Miranda* rights and that the defendant then chose to invoke them. The

only relevance to this evidence is that the defendant must have been guilty, otherwise he would have freely spoken to the police. Given the equivocal nature of the state's evidence, particularly with Natasha's statement excised, it is likely that but for the introduction of this improper statement, the jury would have returned verdicts of acquittal. At a minimum, the error was not harmless beyond a reasonable doubt as it must be for this court to rule that a violation of the defendant's right to silence was harmless.

**III. THE TRIAL COURT VIOLATED CrR 3.5 WHEN IT ALLOWED THE STATE TO INTRODUCE EVIDENCE OF STATEMENTS THE DEFENDANT MADE TO THE POLICE WITHOUT FIRST HOLDING A HEARING AND RULING ON THE ADMISSIBILITY OF THOSE STATEMENTS.**

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a defendant's custodial statements may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*,

116 Wn.2d 364, 805 P.2d 211 (1991). If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

In order to implement the requirements the United States Supreme Court created in *Miranda*, and in order to give substance to the protections against self-incrimination found in Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of any statement by a defendant into evidence, regardless of how the police obtained the statements. This procedure is found in CrR 3.5, which states in part:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither

this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

### CrR 3.5.

As the plain language of the rule states, the court is required to hold a hearing to determine the admissibility of any statement the defendant makes, not just statements the prosecutor claims are the product of custodial interrogation. Even incriminating statements a defendant allegedly makes to a cellmate are subject to a CrR 3.5 hearing if the defendant claims they were not voluntary. *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983). In addition, where there had been no proper determination of voluntariness of defendant's alleged confession prior to its admission, a defendant is entitled to a proper collateral proceeding and if the court finds the statement was made voluntarily, a verdict of guilt will be upheld, but if involuntary then the defendant is entitled to new trial. *State v. Taplin*, 66 Wn.2d 687, 404 P.2d 469 (1965).

This rule is also applicable in juvenile criminal proceedings through JuCr 1.4(b) which states that “[t]he Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes.” *State v. Tim S.*, 41 Wn.App. 60, 701 P.2d 1120

(1985). The use of a CrR 3.5 hearing in both adult and juvenile proceedings is mandatory whether requested or not unless the defense waives the hearing.

*Id.* The Court of Appeals stated the following on this issue.

Furthermore, it does not appear from the record that a CrR 3.5 hearing was held, nor was one requested. A CrR 3.5 hearing is mandatory. The purpose of the hearing is to protect constitutional rights, by assuring a defendant of his right to have the voluntariness of the statement or confession determined prior to trial, and to allow the court to rule on its admissibility.

*State v. Tim S.*, 41 Wn.App. at 63 (citations omitted); *see also State v. Nogueira*, 32 Wn.App. 954, 650 P.2d 1145 (1982) (state bears the burden of calling a CrR 3.5 hearing and putting on sufficient evidence to meet the requirements of the rule; defense counsel's failure to ask for a hearing under CrR 3.5 is not a waiver of the rights protected in that rule).

In the case at bar, the trial court did not hold a CrR 3.5 hearing prior to the admission of statements the defendant made to the police. The reason is apparently that the state had indicated that it did not intend to introduce any statements the defendant made. Once the state did introduce these statements, the defense objected, arguing that the holding of a hearing under CrR 3.5 was mandatory absent a waiver, which did not exist in the case at bar. The prosecutor responded that a CrR 3.5 hearing was not necessary because the defendant's statements were not made as the result of "custodial interrogation." However, the existence of statements made as the result of

“custodial interrogation” is not the trigger to a CrR 3.5 hearing. Rather, as the rule itself states, the trigger to the hearing is the state’s decision to introduce into evidence any statements the defendant has made. The first subsection of CrR 3.5 states:

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.

CrR 3.5(a) (in part).

In the case at bar, the state did offer “a statement of the accused” into evidence. Thus, under CrR 3.5, absent a waiver, the court should have ordered a CrR 3.5 hearing. In addition, the determination of whether or not a defendant’s statement was made as the result of “custodial interrogation” is not dispositive. Rather, this fact is simply the trigger to the requirement under *Miranda* that the police inform a defendant of certain rights. The court in this case made an initial determination that a CrR 3.5 hearing was not necessary, apparently upon the state’s representation that it would not seek to enter any of the defendant’s statements into evidence. Once the state tried to elicit such a statement, the court should have immediately stopped the trial and held a hearing as is required under the rule to determine whether or not the defendant’s statements are “admissible.” The admissibility of a defendant’s statements includes more than a simple determination that the

police either did or didn't give the defendant *Miranda* warnings. It also includes the issue of voluntariness, and a question concerning a defendant's invocation of the right to silence or the right to counsel.

In the case at bar, the trial court first admitted the defendant's statements into evidence in front of the jury, and then sent the jury out for what at least bears the appearance of a CrR 3.5 hearing. In it, the deputy who testified to the statements testified that he did read the defendant his *Miranda* rights, and that the defendant then made certain admissions after choosing to "squeeze" his rights. However, the trial court failed to do what is logically mandatory for every hearing under CrR 3.5; the court failed to give its ruling concerning the facts relevant under the rule. This failure to give a ruling is fatal to the state's claims that the defendant's statements were properly admitted.

Although the state may claim that this error was harmless, the evidence presented at trial does not support such a contention. For example, in this case, the deputies testified that they all believed that the defendant was both drunk as well as under the influence of some type of drug. In addition, the deputies also commented upon the defendant's odd responses to their questions. Under these facts, it was well within the trial court's purview to rule that the defendant did not have the mental capacity at the time to either understand his rights or waive them. While the opposite is also true, it is not

for this court on appeal to resolve these factual questions that only the trial court may make. Thus, the trial court erred when it failed to give a ruling following the belated CrR 3.5 hearing. As a result, the trial court erred when it allowed the state to introduce into evidence statements the defendant made.

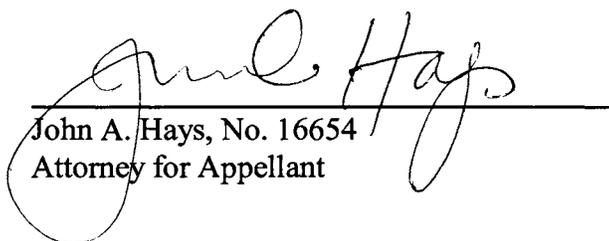
In the case at bar, the error in failing to properly hold the requisite hearing was not harmless because, absent the defendant's alleged admissions that he was sorry he had "assaulted" one of the deputies, the jury more likely than not have returned a verdict of acquittal in this case. Thus, this error caused prejudice and the defendant is entitled to a new trial.

## CONCLUSION

The defendant is entitled to a new trial based upon (1) the trial court's violation of the defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, that occurred through the admission of Natasha Schmidt's testimonial statement, (2) the violation of the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, that occurred when the state elicited testimony commenting on the defendant's invocation of his right to silence, and (3) the violation of CrR 3.5 that occurred through the admission of the defendant's confession without a ruling from the court under CrR 3.5.

DATED this 27<sup>th</sup> day of May, 2009.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### CrR 3.5

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

COURT OF APPEALS  
DIVISION II

09 MAY 29 PM 1:46

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
Respondent

vs.

SCHMIDT, Matthew A.  
Appellant

NO. 08-1-00002-5  
COURT OF APPEALS NO:  
38541-4-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON )  
County of Cowlitz ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On May 27<sup>th</sup>, 2009 , I personally placed in the mail the following documents

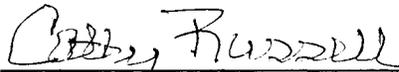
- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

to the following:

ARTHUR D. CURTIS  
CLARK COUNTY PROSECUTING ATTY  
1200 FRANKLIN ST.  
P.O. BOX 5000  
VANCOUVER, WA 98666-5000

MATTHEW A. SCHMIDT  
175 LENORA LANE  
KELSO, WA 98626

Dated this 27<sup>TH</sup> day of MAY, 2009 at LONGVIEW, Washington.

  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS