

NO. 44968-4-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

EUGENE ELKINS, JR.,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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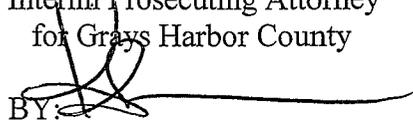
THE HONORABLE F. MARK MCCAULEY and GORDON L. GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## I. COUNTER STATEMENT OF THE CASE

The defendant and Kornelia Engelmann were living at a residence at 57 Clemons Road, Space #58, Montesano, Washington. RP at 115, 353. Kornelia Engelmann is identified as a white female, date of birth December 4, 1953. Brianne Slosson reported that on the morning of June 6, 2012, she had received a phone call from the defendant asking that she come over to the residence. RP at 117-118. The defendant told her that Kornelia was dead and she (Slosson) should keep her mouth shut. RP at 118. Then he stated he didn't know if she was dead, and Slosson needed to come check. RP at 118. Ms. Slosson is a Certified Nursing Assistant. RP at 248. Upon arrival, Slosson observed Engelmann's body on the floor of the bedroom, and rigor mortis had already set in. RP at 248.

The defendant had Slosson help him pack items into his car and asked her to give him a ten minute head start. RP II at 250. He subsequently left the scene in a motor vehicle registered to Ms. Engelmann.

A post-mortem examination of Engelmann was conducted by Dr. Emmanuel Lacsina. RP at 409. Dr. Lacsina observed numerous bruises on the head, neck, torso and extremities of Ms. Engelmann. RP at 410. Upon deflection of the scalp, numerous bruises and points of impact were seen on the skull of Ms. Engelmann. RP at 414. These were inflicted injuries.

RP at 414-415. Dr. Lacsina also found subdural bleeding in the cranial cavity. RP at 417. This was caused by blunt force trauma to the head. RP at 417-418.

Dr. Lacsina did not see signs of strangulation, but did see injury to Ms. Engelmann's neck consistent with blows to the neck. RP at 418. He also found several displaced and broken ribs, and bruising of the lung. Ms. Engelmann also sustained a laceration to her liver as a result of blunt force trauma. RP at 423. Dr. Lacsina determined that Ms. Engelmann died due to internal bleeding as a result of multiple blunt force injuries to the head, chest, and abdomen. RP at 432.

**Facts Established at 3.5 Hearing**

On June 6, 2012, the defendant was arrested without incident by the Yakima County Sheriff's Office. RP at 12. At approximately, 3:34 PM, Yakima Deputy Chad Michael read the defendant his Miranda warnings from a department issued card. RP at 13-14, 21. The defendant stated he understood these rights, but, when asked, stated that he did not wish to make a statement. RP at 14. The Yakima officers did not question him further. RP at 14, 21. The defendant did not request an attorney.

At approximately 8:35 PM, Grays Harbor Sheriff's Department Detective Peterson and Sergeant Kolilis made contact with the defendant

in an interview room in Yakima. RP at 22, 27-28, 66. Yakima Chief Graham informed the Grays Harbor officers that the defendant had been advised of his *Miranda* warnings. RP at 25, 27-28, 65. Detective Peterson confirmed with the defendant that he had been advised of his rights and that he understood they were still in effect. RP at 29, 66. The defendant agreed to speak with Peterson and Kolilis. RP at 29, 66. A videotaped statement was made, but was not used in the proceedings. No promises or threats were made to the defendant. RP at 31, 67. After speaking with the officers for a bit, the defendant stated that he needed an attorney and the interview was terminated. RP at 32, 67.

On June 7, 2012, Sergeant Kolilis transported the defendant from Yakima back to Grays Harbor County. RP at 32-33. Sergeant Kolilis and the defendant had some “small talk” during the trip. RP at 48. Sergeant Kolilis testified that there was a “pretty quiet” period from White Pass until they were almost at the destination. RP at 34. The defendant was then “mumbling in the back.” RP at 34. The defendant started asking Kolilis questions and wanted to know if he could share some information and not get in trouble for it. RP at 34. The defendant said he wanted to talk about where the guns were. RP at 35. Sergeant Kolilis did not ask about the homicide:

Q. And so did you ask Mr. Elkins any questions about the case while you were transporting him?

A. No.

Q. What did you tell him about his desire to make a statement?

A. I told him that it was his choice that - you know, that he needed to make his own decision. Like I said, I told him that I was biased and, of course, I would want him to but that's not what he should make his choice on.

Q. Did you - did you make a statement to him that he would have to be re-advised of his rights?

A. I did. I - I told him that, you know, as he was starting to give me this information at some point, I think we were probably at Oakville by then. You know, I told him that, you know, that we needed to kind of hold off, that I needed to advise him of his rights. I was driving so I wasn't going to pull a card out or pull over or anything like that. I told him that we needed to address it when we got to the sheriff's department.

Q. And what did he say to you?

A. He agreed with that.

Q. And did he make any statement regarding whether or not he was aware of his rights?

A. He did.

Q. What did he say to you?

A. He told me that he understood his rights and was okay with waiting until he got back to the sheriff's department.

RP at 35-37.

Upon arrival at the Grays Harbor Sheriff's Office, Peterson and Kolilis re-contacted the defendant at his request. RP at 37. Upon contact, the officers re-read the defendant his Miranda warnings and had him sign a written waiver of his rights. RP at 37-38, 69. The officers specifically verified that the defendant wish to speak with officers and withdraw his previous request for counsel. RP at 38-39, 69-70. The defendant stated he understood his rights and he wished to make a statement despite his earlier request. RP I at 39. The defendant then proceeded to make a statement. RP I at 39.

*Court's 3.5 Findings*

The trial court conducted an analysis under the totality of the circumstances and found that the defendant was fully advised of his *Miranda* rights immediately after being arrested. RP at 116-117. Also that he fully understood his rights, he stated so, and he in fact exercised his right to remain silent. RP at 117. The Court found that the Yakima officers immediately stopped questioning when the defendant asserted his right to remain silent. RP at 118. When the Grays Harbor officers made contact and re-affirmed his rights, and by his answers and by his acknowledgment that he agreed to talk, the appellant waived his *Miranda* rights and talked to the officers. RP at 118.

The trial court found as follows:

When I look at all of the factors together and all of the circumstances, I have no trouble finding that his statements were freely and voluntarily giving - given after waiving his right - his Miranda rights in this situation. And I think in - in our Washington Supreme Court cases I'm looking back here at an older case out of Grays Harbor County, *State versus Cole*. It was a 28 Wa.App 563, Division II case, 1981. And they talked about some different findings that should be made. I'm not sure if this is required in every case but I - the findings that they believe the Court should look at include that - the right to cut off questioning was scrupulously honored, which I think I've addressed pretty fully. At this point I believe it absolutely was.

That the police - number two, that the police engage in any no further interrogation to find - in *Rhode Island versus Ennus*, which is a 1980 case and in parenthesis, they said words or action by police reasonably likely to elicit incriminating responses. I think that's geared towards - when you're taking a guy back to jail and you make comments and you're - kind of that subtle interrogation where you trying to get them to state something by a little bit of trickery or bringing something up that they're just going to naturally respond to even though they have asserted their right to remain silent. I don't find that anything like that was done in this particular case.

And number three, that case pointed out that the police did not engage in tactics to coerce the defendant into changing his mind. And I - the only thing that I heard and I believe it is that they just took him into a room and - and went through what Detective Peterson said, you know, do you understand what your rights are, were given those rights. And he said yes and they're still in effect. Are you willing to talk to us, you know, now that they come over from Grays Harbor County. And he - he said he was and waived.

And that the subsequent waiver, Number 4 factor here, is that the subsequent waiver was knowing and voluntary. And I find that it was in this particular case.

RP at 120-122.

But I do believe I should comment on the car ride back. That during that car ride Sergeant Kolilis said the defendant mumbled something and started to say some things and they got into a discussion. And I find that Sergeant Kolilis was truthful and accurate in his representation of what took place. And, in fact, maybe unlike a lot of detectives or officers he - he was very straightforward and said I - I don't think we should talk about it right now. And that was I think in large part because at the end of the first interview on June 6th, when the defendant got a little bit upset with some questioning he asserted his right to counsel and that's a little different switch. And he - I believe at that point the law more or less says in order for a subsequent interrogation and questioning and - and confession to be voluntary, there has to be either counsel or if the defendant initiates, at least that seems to be the rule in Washington.

In this particular situation he [the appellant] was the one that initiated the conversation with Sergeant Kolilis in the car and indicated that he might be willing to talk some more and Sergeant Kolilis said I would like you to do that, but I want you to wait until we get back to Grays Harbor, you know, I don't want you to start talking to me right now in the car. And he said he was concerned about the weapons, but he certainly didn't pump him for information.

And as an investigating officer, probably takes a lot of will power to recognize that you need to get him back and fully advise him of his rights again if you're going to get around that request for counsel. And they did get him back to Grays Harbor, fully advised him of his rights, he waived his rights and particularly they discussed whether or not he was waiving his right to counsel since he had already mentioned he wanted counsel.

And there was testimony by at least one - I can't remember if it was Detective Peterson or Sergeant Kolilis, that they discussed that issue about counsel and he would go ahead and talk to him. So he initiated that second contact and - and agreed to it and, in fact, then went forward with a statement after - I think it was signing off on

the written waiver at that time and then gave a statement. And - in fact, that ended up, did it not, in a written form I believe at some point.

So through my research and analysis of what you submitted and what I found, I believe it – all statements are admissible at trial.

RP at 122-124

## II. RESPONSE TO ASSIGNMENTS OF ERROR

**The appellant's statements were properly admitted at trial.**

*Statement made to Grays Harbor Detectives in Yakima County.*

Once the appellant was placed under arrest he was immediately advised of his *Miranda* warnings by Yakima Deputy Michael. RP at 12-13. These warnings were properly administered and there has been no challenge to adequacy of the warnings. Once advised of his *Miranda* warnings, the appellant was asked if he understood, to which he responded that he did. RP at 13.

There is no requirement that there be a written waiver of *Miranda* rights. An individual who, having once been advised of his rights and acknowledged an understanding of the rights, will be found to have made an implied waiver when he begins speaking about the events or answering questions. *State v. Terrovona*, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). A valid waiver may be expressed or implied from the facts of a custodial interrogation.

The Supreme Court has found that no passage in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent. *Michigan v. Mosley*, 423 U.S. 96, 102-103, 96 S.Ct. 321, 326 (1975). The Court found that “the admissibility of statements obtained after the person in custody has decided to remain silent depends, under *Miranda*, on whether his “right to cut off questioning” was “scrupulously honored.” *Michigan v. Mosley*, 423 at 104. In this case, the Yakima officers immediately ceased questioning when the appellant expressed his desire to remain silent. RP at 14.

The *Robbins* decision cited by the appellant in the trial court is instructive. In *Robbins*, the appellant was arrested on a Friday and fully advised of her Miranda rights. She acknowledged and waived these rights, but refused to make a statement. On the following Monday, she was re-contacted by officers, re-advised of her rights and interrogated regarding the original investigation. *State v. Robbins*, 15 Wash.App. 108, 109-110, 547 P.2d 288 (1976). The *Robbins* court analyzed the issue as follows:

The Friday questioning session was immediately halted when Robbins indicated that she did not wish to make a statement. On Monday, she was

again advised of her rights before questioning began. Nothing in the record even suggests that the questioning sessions held on Friday and Monday constituted a situation in which Robbins was denied her right to remain silent because the police refused to take 'no' for an answer. We find no error in the procedure used.

*State v. Robbins*, 15 Wash.App. at 110 111; See *Michigan v. Mosley*, supra, at 104, 96 S.Ct. 321, 44 U.S.L.W. at 4018.

A more recent case, *State v. Brown*, provides additional guidance. In *Brown*, the appellant was arrested by Officer Lopez for possessing firearms and was advised of his *Miranda* rights. The appellant stated that he understood but did not want to talk about the firearms. Two hours after the arrest, Officer Ent re-advised the appellant of his rights and wanted to talk to the appellant in reference a vehicle prowl case. The appellant admitted that he had stolen firearms from a truck. *State v. Brown*, 158 Wash.App. 49, 53-54, 240 P.3d 1175 (2010).

The *Brown* court held that "Whether a appellant validly waives his previously asserted right to remain silent depends on: (1) whether the police scrupulously honored the appellant's right to cut off questioning, (2) whether the police continued interrogating the appellant before obtaining a waiver, (3) whether the police coerced the appellant to change his mind, and (4) whether the subsequent waiver was knowing and voluntary." *State*

v. *Brown*, 158 Wash.App. at 58; citing *State v. Wheeler*, 108 Wash.2d 230, 238, 737 P.2d 1005 (1987).

In this case, the Yakima officers scrupulously honored the appellant's right to cut off questioning by not interrogating him after he asserted his right to remain silent. The Grays Harbor officers made contact with the appellant approximately five hours and reaffirmed his rights and that he understood them. There was no coercion used to obtain a statement and the appellant's waiver was knowing and voluntary.

While the test in *Brown* is helpful, there is no bright line rule. The appellate courts have used the totality of the circumstances to determine whether or not a waiver is valid after a appellant has asserted his right to remain silent. The State asks the Court to affirm the trial court in this finding.

*Statements made by the appellant during transport from Yakima to Grays Harbor.*

Interrogation under the rule of *Miranda* refers to express questioning and to words or actions by the police that are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980). The trial court found that

Sergeant Kolilis made a point of not asking questions about the case at bar.

Volunteered statements, as made by the appellant herein, are not subject to *Miranda*. They are not the result of interrogation even if the officer, during the course of the appellant's statements, asks the appellant to explain or clarify a matter. *State v. Godsey*, 131 Wn.App. 278, 285, 127 P.3d 11 (2006).

*Statement taken by Grays Harbor detectives on June 7, 2012.*

The appellant was initially advised of his *Miranda* rights at the time of his arrest and acknowledged an understanding to Deputy Michael. The appellant re-acknowledged to Detective Peterson on June 6, 2012 that he had been advised of his rights by Deputy Michael and that he understood them. On June 7, 2012, there was no need to re-advise the appellant. Where a appellant has adequately and effectively been warned of his *Miranda* rights there is no requirement of repeated recitations of such warnings. *State v. Duhaime*, 29 Wn.App. 842, 851-52, 631 P.2d 964 (1981).

Nevertheless, the officers did re-advise the appellant and did obtain an express waiver of *Miranda* from the appellant. There were no threats or promises made to the appellant. The appellant did not, at any time

during this interview, ask for the presence of counsel or tell the detectives that he did not wish to speak to them. The trial court found that such statements were voluntary and taken after a knowing and intelligent waiver of rights under *Miranda*.

The most salient fact with this statement is that the contact was initiated by the appellant. In fact, during the transport, Sergeant Kolilis had to ask the appellant to wait until they arrived in Montesano so that the appellant could be formally re-advised of his rights.

In order to preserve an individual's right against compelled self-incrimination under the Fifth Amendment, the police must inform a suspect of his rights before custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). Arguing that this was not done properly on June 6, 2012, the appellant asks that the June 7, 2012 statement be suppressed as the "fruit of the poisonous tree." Brief of Appellant at 17; citing *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963).

However, the lack of a proper *Miranda* warning prior to an initial confession does not necessarily prohibit the use of a subsequent post-*Miranda* confession. In *Westover v. United States*, a case consolidated with *Miranda v. Arizona*, the U.S. Supreme Court stated that police are not

necessarily precluded from interrogating and giving *Miranda* warnings to an individual who has been previously questioned without appropriate warnings. *Westover*, 384 U.S. at 496, 86 S.Ct. at 1639. The court indicated that if the individual is removed in time and place from the original surroundings, a second confession would be admissible. *Westover*, 384 U.S. at 496, 86 S.Ct. at 1639. The Supreme Court has “never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.” *United States v. Bayer*, 331 U.S. 532, 540–41, 67 S.Ct. 1394, 1398, 91 L.Ed. 1654 (1947).

The U.S. Supreme Court has also added an additional distinction to this doctrine with respect to the nature of the initial confession. In *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Court held that “there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary.” (Footnote omitted.) *Elstad*, 470 U.S. at 318, 105 S.Ct. at 1297–98. The court held that if a suspect responds to unwarned, uncoercive questioning, he is not precluded from waiving his rights and confessing subsequent to appropriate *Miranda* warnings. *Elstad*, 470 U.S.

at 318, 105 S.Ct. at 1298. If the second post-*Miranda* confession was voluntary, the statements are admissible. *Elstad* recognized the inherent difference between coercion of a confession by physical violence or deliberate means and a voluntary statement made in technical violation of the *Miranda* rule, finding that the *Westover* requirement of a break in the proceedings is not applicable in the latter situation. *Elstad*, 470 U.S. at 310, 105 S.Ct. at 1293. See also *State v. Allenby*, 68 Wash.App. 657, 661, 847 P.2d 1 (1992), review denied, 121 Wash.2d 1033, 856 P.2d 382 (1993).

If the Court finds that the appellant's initial statement was taken in violation of *Miranda*, *Elstad* should apply, and the subsequent post *Miranda* statements are admissible, if voluntary. The inquiry of voluntariness is to be determined by taking into account the circumstances and course of conduct of police toward the suspect. "The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Elstad*, 470 U.S. at 318, 105 S.Ct. at 1298. Here, the testimony will show that the June 7th statement made by the appellant was at his own request.

**The trial court properly denied the defense motion for a mistrial.**

“In a criminal proceeding, a new trial is necessary only when the defendant ‘has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.’ ” *State v. Bourgeois*, 133 Wash.2d 389, 406, 945 P.2d 1120 (1997) (quoting *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994)). The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a clear abuse of discretion. *Id.* “An abuse of discretion occurs only ‘when no reasonable judge would have reached the same conclusion.’ ” *Id.* (quoting *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 667, 771 P.2d 711 (1989)).

In the case at bar, the appellant moved for a mistrial after Sergeant Kolilis testified that the defendant “said that he didn't want to speak with us any further at that point and didn't know if he should talk to his attorney or not”, terminating the June 6, 2012 interview. RP at 461. The trial court denied this motion and instructed the jury to disregard the comment. RP at 461.

The exercise of *Miranda* rights is not substantive evidence of guilt. *State v. Lewis*, 130 Wash.2d at 705, 927 P.2d 235. In fact, comments on a defendant's exercise of his or her *Miranda* rights violates due process, because it undermines the implicit assurance that the exercise of *Miranda*

carries no penalty. *State v. Easter*, 130 Wash.2d at 236, 922 P.2d 1285 (1996). An error infringing on a criminal defendant's constitutional rights is presumed to be prejudicial, and the State has the burden of proving the error was harmless. *State v. Nemitz*, 105 Wash. App. 205, 214-15, 19 P.3d 480, 485 (2001); see *State v. Miller*, 131 Wash.2d 78, 90, 929 P.2d 372 (1997); *State v. Caldwell*, 94 Wash.2d 614, 618–19, 618 P.2d 508 (1980).

In *Hager*, the defendant was charged in Pierce County Superior Court with first degree rape of a child. Prior to trial, the trial court granted a motion in limine prohibiting Detective Callas and Detective Dorr from testifying that Hager was “evasive” during questioning. The jury was unable to reach a verdict and, consequently, the trial court granted a motion for a mistrial. *State v. Hager*, 171 Wash. 2d 151, 154, 248 P.3d 512, 513 (2011).

The State elected to retry the case. Before the second trial, the trial court again granted Hager's motion in limine to prevent testimony that Hager was “evasive”, stating that it was adopting the reasoning of the judge in the first trial. In response to questioning at trial, the first detective indicated that Hager was jittery, avoided eye contact, spoke loudly and rapidly, and appeared to be under the influence of methamphetamine.

Later in the trial, when the deputy prosecutor asked a second detective, “What was Mr. Hager's demeanor like during the time that you had contact with him that day,” the detective answered, “He appeared to be angry. He was evasive.” Hager's attorney immediately moved for a mistrial. Outside the presence of the jury, the deputy prosecutor apologized to the court and said that he forgot to remind the detective to avoid using the word “evasive.” He acknowledged that the detective should not have used that word, but argued that a mistrial was not warranted as long as the jury was instructed to disregard the remark.

The trial court denied Hager's mistrial motion, concluding that the detective had not acted in bad faith and that the error could be cured with a jury instruction. After the jury was brought back into the courtroom, the trial judge instructed it to disregard the remark about Hager appearing evasive. *State v. Hager*, 171 Wash. 2d at 154-55.

On appeal, the Court found the detective's statement improper as it violated the pretrial ruling and expressed an opinion about Hager's credibility, thus invading the jury's province. However, it also found that “[t]he fact that a witness has invaded the province of the jury does not, however, always require a new trial. *State v. Demery*, 144 Wash.2d at 759, 30 P.3d 1278 (“Admitting impermissible opinion testimony ... *may* be

reversible error.” (Emphasis added)). As we said in *State v. Smith*, 144 Wash.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001), a remark ‘can touch on a constitutional right but still be curable by a proper instruction.’” *State v. Hager*, 171 Wash. at 159.

The appellant, as the defendant in *Hager* did, urges the Court to find this case more analogous to the fact of *State v. Easter*. Brief of Appellant at 21-22. But the Court’s decision in *Easter* is not, however, entirely on point. In *Easter* the prosecutor overtly characterized the DUI defendant as a “smart drunk” based on the fact that he remained silent, and emphasized this in closing argument. *Easter*, 130 Wash.2d at 233, 922 P.2d 1285. There, the officer used the word “evasive” to refer to the defendant’s *silence*, explaining that the defendant “ ‘was evasive, wouldn’t talk to me, wouldn’t look at me, wouldn’t get close enough for me to get good observations of his breath and eyes, I felt that he was trying to hide or cloak.’ ” *Easter* at 233, 922 P.2d 1285.

The officer testified further that the defendant “ ‘totally ignored’ ” him when he asked if he had been drinking and that, when he continued asking questions, the defendant looked down, “ ‘once again ignoring me, ignoring my questions.’ ” *Id.* at 232, 922 P.2d 1285. These comments by the officer clearly referred to the defendant’s silence. The Court properly

held that the right to silence applies prior to arrest and that this right may not be eroded by allowing the State to imply guilt by calling to the jury's attention the defendant's pre-arrest silence. *Id.* at 243, 922 P.2d 1285.

Here, as in Hager, the Court is confronted with an entirely different situation. The appellant, unlike Easter, did not exercise his right to remain silent. After initially invoking his right to remain silent, he chose to waive this right to speak to detectives. He then invoked his right to counsel, but later initiated conversation and he chose to talk to the detectives.

Looking at the entire context of the trial, Sergeant Kolilis's statement was improper; however, it does not rise to the level which would necessitate a mistrial. Any prejudice that might arise from a jury being informed that a suspect wanted an attorney was harmless under the facts of this case. Not only did the appellant later speak to the detectives, he initiated the contact. The court exercised proper discretion by using a curative instruction and denying the mistrial.

**Second degree felony murder is not unconstitutionally vague when the underlying felony is assault.**

The first step in any vagueness challenge "is to determine if the statute in question is to be examined as applied to the particular case or to be reviewed on its face." *Spokane v. Douglass*, 115 Wash.2d 171, 181-82,

795 P.2d 693 (1990). If the statute does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case. *Douglass*, at 182, 795 P.2d 693. Here, the challenged statute, RCW 9A.32.050(1)(b), does not implicate any First Amendment rights. Therefore, the defendant's vagueness challenge must be evaluated in light of how the statute has been applied in his individual case. *State v. Coria*, 120 Wash. 2d 156, 163, 839 P.2d 890, 894 (1992).

The fundamental principle underlying the vagueness doctrine is that the Fourteenth Amendment requires citizens be afforded fair warning of proscribed conduct. *Douglass*, at 178, 795 P.2d 693. A statute is presumed to be constitutional, and the person challenging a statute on vagueness grounds has the heavy burden of proving vagueness beyond a reasonable doubt. *Douglass*, at 178, 795 P.2d 693. The challenger must show, beyond a reasonable doubt, that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Douglass*, at 178, 795 P.2d 693.

The requirement of sufficient definiteness “protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited.” *Douglass*, at 178, 795 P.2d 693. Accordingly, a statute is unconstitutional if it “ ‘forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.’ ” *Douglass*, at 179, 795 P.2d 693 (quoting *Burien Bark Supply v. King Cy.*, 106 Wash.2d 868, 871, 725 P.2d 994 (1986)). This test does not demand “impossible standards of specificity or absolute agreement”, and permits some amount of imprecision in the language of a statute. *Douglass*, 115 Wash.2d at 179, 795 P.2d 693.

The second requirement under the vagueness doctrine, the requirement of ascertainable standards, is intended to protect against “arbitrary, erratic, and discriminatory enforcement.” *Douglass*, at 180, 795 P.2d 693. A statute should be held to supply adequate standards unless it “proscribes conduct by resort to ‘inherently subjective terms’ ” or by inviting an inordinate amount of police discretion. *Douglass*, at 181, 795 P.2d 693 (quoting *State v. Maciolek*, 101 Wash.2d 259, 267, 676 P.2d 996 (1984)).

Applying these principles, the Court should reject the appellant's contention that RCW 9A.32.050(b) is unconstitutionally vague. The language of the statute clearly gives notice of the conduct it proscribes.

The appellant cites to *In re Andress*, regarding the "in furtherance" language of RCW 9A.32.050(b). Specifically that, it "Makes no sense if applied where assault is the predicate felony," and that there is an "undue harshness of using assault as the predicate felony for second degree felony murder." Brief of Appellant at 25; *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 615-16, 56 P.3d 981(2002). In fact, *State v. Gordon*, has examined this issue and found the challenged statute constitutional. *State v. Gordon*, 153 Wash. App. 516, 528-29, 223 P.3d 519, 526-27 (2009) *rev'd on other grounds*, 172 Wash. 2d 671, 260 P.3d 884 (2011).

In *Gordon*, the defendant urged the Court to consider whether the 2003 amendment resolved the central problem the court in *Andress* noted. There, the court expressed concern that "[t]he 'in furtherance of' language is a strong indication that the legislature does not intend that assault should serve as a predicate felony for second degree felony murder." *Andress*, 147 Wash.2d at 611, 56 P.3d 981. The court in *Andress* focused its

analysis on the problem of the res gestae<sup>1</sup> dilemma created by circumstances where an assault is both the predicate felony and the act that causes the death:

It is nonsensical to speak of a criminal act—an assault—that results in death as being part of the res gestae of that same criminal act since the conduct constituting the assault and the homicide are the same. Consequently, in the case of assault there will never be a res gestae issue because the assault will always be directly linked to the homicide. Therefore, if assault were encompassed within the unenumerated felonies in [former] RCW 9A.32.050(1)(b), the ‘in furtherance of’ language would be meaningless as to that predicate felony. In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide. *Id.* at 610, 56 P.3d 981.

However, the *Gordon* court concluded the statute is not ambiguous. Especially looking at the legislative history of the statute, the res gestae issue is no longer problematic. The reasoning in *Andress* concerning res gestae involved statutory construction principles to derive the legislature's intent. The 2003 amendment in response to the holding in *Andress* and its accompanying statement of intent make it clear the legislature wants assault to be a predicate felony. See *State v. Gordon* at 528-29.

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<sup>1</sup> For purpose of felony murder, a homicide is deemed committed during the perpetration of a felony if the homicide is within the “res gestae” of the felony, i.e., if there was a close proximity in terms of time and distance between the felony and homicide. *Leech*, 114 Wash.2d at 706, 790 P.2d 160.

The appellant fails to offer any persuasive authority or analysis that persuades that this statute is unconstitutional. In fact, the *Gordon* court also looked at this issue, finding that this statute “achieves the legislature's express goal of punishing those who commit a homicide in the course of and in furtherance of a felony in the same manner as those who intend to kill.” *Gordon* at 527; *Armstrong*, 143 Wash.App. at 340, 178 P.3d 1048. Including assault as a predicate felony is rationally related to achieving that objective. *Id.*; *Manussier*, 129 Wash.2d at 673, 921 P.2d 473. “While this is certainly a harsh policy, and does vest immense discretionary power in the prosecutor, it is nevertheless a policy choice well within the province of the legislature.” *Id.*; *See Armstrong*, 143 Wash.App. at 340, 178 P.3d 1048.

### III. CONCLUSION

For all the reasons above, the State respectfully asks that the appeal be denied on all grounds, and that the Court affirm the verdict of the jury.

DATED this 3<sup>rd</sup> day of June, 2014.

Respectfully Submitted,

  
By \_\_\_\_\_

KATHERINE L. SVOBODA  
Chief Criminal Deputy  
WSBA# 34097

# GRAYS HARBOR COUNTY PROSECUTOR

**June 30, 2014 - 5:00 PM**

## Transmittal Letter

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Court of Appeals Case Number: 44968-4

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