

FILED

MAY 11 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 29067-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

CODY MILLER,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Jessica Cafferty, WSBA #38102
Deputy Prosecuting Attorney
Attorney for Respondent**

**PO BOX 37
EPHRATA WA 98823
(509)754-2011**

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney's Office, is the Respondent in this matter.

III. ISSUES

- a. Whether the Court erred in finding Mr. Miller was properly advised of his Miranda Rights?
- b. Whether the Court erred in finding that Mr. Miller had voluntarily waived his Miranda Rights?
- c. Whether failure to suppress Mr. Miller's statements amounts to harmless error?
- d. Whether the Court erred in failing to enter written findings of fact and conclusions of law?

IV. STATEMENT OF THE CASE

Veronica Moreno was working the night shift by herself at the Tiger Pause Convenience Store on November 25, 2010. 4/8/10 RP 174. While she was cleaning up, a young male came into the store to purchase a soda fountain drink. 4/8/10 RP 176. While this young male was attempting to buy the soda, another person entered the front door of the

store with a bag and gun and demanded money to which Ms. Moreno complied. 4/8/10 RP 179-180.

A surveillance video from the Tiger Pause recorded this robbery. 4/8/10 RP 187. This video was admitted into evidence at trial. 4/8/10 RP 187.

Andrew Zastrow was with his friend, Cody Miller on the night of November 25, 2010. 4/8/10 RP 196-197. Mr. Zastrow and Mr. Miller were driving around in Mr. Miller's car and Mr. Miller was talking about robbing a convenience store. 4/8/10 RP 199. Mr. Miller parked his car in the back corner lot of the Best Western next to the Tiger Pause. 4/8/10 RP 201-04.

While Mr. Zastrow was in the Tiger Pause buying a soda fountain drink, Mr. Miller entered the store with a gun. 4/8/10 RP 209. After seeing Mr. Miller, Mr. Zastrow left the store and ran back to Mr. Miller's car. 4/8/10 RP 210. Mr. Zastrow traveled to the store from Mr. Miller's car on foot. 4/8/10 RP 212. A map with Mr. Zastrow's notations and route of travel was admitted as evidence. 4/8/10 RP 212.

Officer Mario Martinez of the Ephrata Police Department found footprints while investigating the robbery at the Tiger Pause. 4/9/10 RP 346. He found two sets of footprints that traveled from the northeast corner of the Tiger Pause to the northeast corner of the Best Western.

4/9/10 RP 355-56. Both sets approached the Tiger Pause and then fled from the Tiger Pause. 4/9/10 RP 356.

According to Mr. Zastrow, after Mr. Miller returned to the car he and Mr. Miller drove away in Mr. Miller's car. 4/8/10 RP 212.

A video recording from the surveillance camera at the Best Western from the night of the robbery shows Mr. Miller's car enter the parking lot and leave the parking lot. 4/9/10 RP 247-249. This video was admitted as evidence. 4/9/10 RP 246.

Officer Huffman of the Ephrata Police Department interviewed Mr. Zastrow on the night of the robbery. 4/9/10 RP 335. After the interview, Officer Huffman gave Mr. Zastrow a ride home and saw Mr. Miller outside Mr. Zastrow's home wearing clothing that was similar to the gunman from the Tiger Pause video surveillance. 4/9/10 RP 339.

Officer Huffman asked to speak with Mr. Miller and Mr. Miller agreed to be interviewed at the Ephrata Police Department. 4/9/10 RP 339.

Mr. Miller arrived at the Ephrata Police Department and was interviewed by Corporal Koch. 4/7/10 RP 11. Mr. Miller and Corporal Koch spoke in an interview room. 4/7/10 RP 11. No one else was present. 4/7/10 11.

Corporal Koch began the interview by informing Mr. Miller of his Miranda rights. 4/7/10 RP 12. The rights provided included,

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire an attorney – or a lawyer, one will be appointed to represent you before questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statement. Do you understand these rights I have explained to you? And having these rights in mind, do you wish to talk to us now?

4/7/10 RP 13-14.

Corporal Koch did not advise Mr. Miller of the additional juvenile admonishments, which include,

If you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if you are to be tried as an adult.

4/7/10 RP 22-23. Corporal Koch believed Mr. Miller to be over the age of 18 and had dealt with him before in the past. 4/7/10 RP 25. Mr. Miller however was seventeen years old at the time of the questioning. 4/7/10 RP 22.

After receiving his Miranda rights, Mr. Miller answered affirmatively that he understood his rights and that he would speak with Corporal Koch. 4/7/10 RP 14-15. Mr. Miller did not ask any questions regarding his rights nor did he appear to be confused. 4/7/10 RP 15, 19.

Corporal Koch asked Mr. Miller what he had done that night, who he had been with, if he had any knowledge of a robbery and if he committed a robbery. 4/7/10 RP 15. Mr. Miller told Corporal Koch that he had been with Andrew Zastrow and that they drove to the Best Western so that Mr. Miller could use the computer. 4/7/10 RP 15. Mr. Miller said that Mr. Zastrow went into the Tiger Pause to get a soda while Mr. Miller was using the computer however the next time Mr. Miller saw Mr. Zastrow he did not have a soda and was acting strangely. 4/7/10 RP 15-16. Mr. Miller denied any knowledge of the robbery at the Tiger Pause and denied that he had committed the robbery. 4/7/10 RP 17.

After leaving the Best Western, Mr. Miller told Corporal Koch that he drove around in his car with Mr. Zastrow and that they eventually went to Wal-Mart. 4/7/10 RP 17. Mr. Miller stated that Mr. Zastrow received a phone call from an officer while they were in Wal-Mart and that the officer wanted to talk with Mr. Zastrow. 4/7/10 RP 17. According to Mr. Miller, he and Mr. Zastrow parted ways at that time. 4/7/10 RP 17.

During this interview, Mr. Miller answered Corporal Koch's questions without hesitation. 4/7/10 RP 17. Corporal Koch did not make any threats or promises to Mr. Miller. 4/7/10 RP 18. Mr. Miller did not appear intoxicated. 4/7/10 RP 19. Mr. Miller never informed Corporal Koch that he no longer wanted to be interviewed. 4/7/10 RP 18. Mr. Miller never informed Corporal Koch that he wanted to speak with an attorney. 4/7/10 RP 18, 19.

Mr. Miller was charged with Robbery in the First Degree CP 39-40.

At a 3.5 hearing the trial judge found that Mr. Miller was in custody, that he was adequately and accurately warned of his Miranda rights by law, and that his statements were voluntary in regards to the interview with Corporal Koch. 4/7/10 RP 17. Specifically, the trial court held, "The defense has cited no authority for the proposition that the warnings should be expanded now beyond Miranda to require the juvenile warning. And I think that's because there is no authority to that effect." 4/7/10 RP 41. As such, the trial court held that the statements made by Mr. Miller were admissible. 4/7/10 RP 43.

At a jury trial, Mr. Miller was found guilty of Robbery in the First Degree. CP 50.

Following the trial, the State filed Proposed Findings of Fact and Conclusion of Law on May 4, 2010. CP 51-53. The trial court entered Findings of Fact and Conclusions of Law on April 11, 2011. CP 157-159.

V. ARGUMENT

a. It was not Error for the Court to Find Mr. Miller's Statements Admissible as Mr. Miller was Adequately Advised of his Miranda Rights.

Mr. Miller was adequately advised of his Miranda Rights by Corporal Koch prior to a custodial interrogation, as such, admission of Mr. Miller's statements was proper.

According to Miranda, a person in custody "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." Arizona v. Miranda, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). These rights were extended to juveniles in the decision of In re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967).

"Advisement of Miranda rights need not follow precise language word for word, but must inform a defendant of his rights 'in a way which conveys their full import.'" State v. Schatmeier, 72 Wn. App. 711, 717,

866 P.2d 51 (1994), citing, State v. Rupe, 101 Wn.2d 664, 677, 683 P.2d 571 (1984).

Aside from these above warnings, the Appellant argues that additional juvenile warnings are required under State v. Prater, 77 Wn.2d 526, 463 P.2d 640 (1970). The Appellant argues, “In State v. Prater, the Supreme Court found Miranda warnings alone were insufficient when considering the admission of a custodial statement of a juvenile.” App. Br. 4. In a close reading of this case, there is no such statement found. Quite to the contrary, the admissibility of the defendant’s statements in Prater is affirmed. Prater, 77 Wn. 2d at 534.

As stated by the trial judge in this Mr. Miller’s case, there appears to be no authority for the proposition that juveniles should be afforded warnings that extend beyond those provided in Miranda. 4/7/10 RP 41

RCW 13.40.140(8) supports this concept that juveniles receive the same treatment as adults. It provides in part, “A juvenile shall be accorded the same privilege against self-incrimination as an adult. An extrajudicial statement which would be constitutionally inadmissible in a criminal proceeding may not be received in evidence at an adjudicatory hearing over objection.” RCW 13.40.140(8) (1981).

In this case, Mr. Miller was provided the following warnings by Corporal Koch prior to a custodial interrogation,

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire an attorney – or a lawyer, one will be appointed to represent you before questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statement. Do you understand these rights I have explained to you? And having these rights in mind, do you wish to talk to us now?

4/7/10 RP 13-14.

These warnings conveyed the full import of Miranda. As such, Mr. Miller was adequately informed of his rights and admission of his statements was proper.

b. It was not Error for the Court to Find Mr. Miller's Statements Admissible as Mr. Miller Voluntarily Waived his Rights.

After Mr. Miller was adequately advised of his Miranda rights, he voluntarily waived those rights, as such, admission of his statements was proper.

“If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his

privilege against self-incrimination and the right to retained or appointed counsel.” Miranda, 384 U.S. 436, 475.

In determining whether a person has waived Miranda rights, the Supreme Court discusses considering the totality of the circumstances surrounding the interrogation;

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.

Miranda, 384 U.S. at 476.

This approach has also been applied to cases with juvenile defendants; “This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved.” Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979). “This includes evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether

he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”

Id.

In this case, the facts before the court included:

1. Mr. Miller was seventeen years old. 4/7/10 RP 25.
2. Corporal Koch had dealt with Mr. Miller before in the past. 4/7/10 RP 25.
3. Mr. Miller was questioned in an interview room at the Ephrata Police Department. 4/7/10 RP 11.
4. After receiving his Miranda warnings, Mr. Miller stated that he understood his rights and that he would speak with Corporal Koch. 4/7/10 RP 14, 15.
5. Mr. Miller did not ask any questions regarding his rights nor did he appear to be confused. 4/7/10 RP 15, 19.
6. Mr. Miller answered Corporal Koch’s questions without hesitation 4/7/10 RP 17.
7. Corporal Koch did not make any threats or promises to Mr. Miller. 4/7/10 RP 18.
8. Mr. Miller did not appear intoxicated. 4/7/10 RP 19.
9. Mr. Miller never informed Corporal Koch that he no longer wanted to be interviewed. 4/7/10 RP 18.

10. Mr. Miller never informed Corporal Koch that he wanted to speak with an attorney. 4/7/10 RP 18, 19.

These facts were before the trial judge during the suppression hearing. They provide a basis for the totality of the circumstance approach discussed in both Miranda and Michael C. As such, this was not the case of a long, drawn-out interrogation or a threatened, tricked or cajoled suspect nor was this the case of young naïve juvenile that appears confused regarding the warnings, his rights or the consequences of his waiver.

The Appellant argues that the trial court did not apply a voluntariness analysis. The Appellant argues that, “The trial court’s oral findings are silent on the relevant factors of which Michael C mandates consideration. App. Br. 7. This argument assumes that a voluntariness analysis must be done on the record and that all factors specified in Michael C must be considered however there is no case law cited for these propositions.

Nonetheless, the trial court in this case did articulate factors that take into consideration the totality of the circumstances. The trial judge discussed that Mr. Miller was not in shackles or a jail cell and that he was in an interview room with a uniformed police officer. 4/7/10 RP 40. Additionally, there was discussion that Mr. Miller did not hesitate,

question, misunderstand or inquire as to his warnings. 4/7/10 RP 43.

Lastly, the trial judge stated that there was no evidence of confusion or of compulsion. 4/7/10 RP 43.

As such, there were facts before the court from which the trial judge could make an evaluation of the totality of the circumstances. Some of these facts were specifically articulated by the judge during his oral decision. Based on these facts, the judge properly found that Mr. Miller had voluntarily waived his Miranda rights. Therefore, admission of Mr. Miller's statements was proper.

c. Should this Court find that the Trial Court Erroneously Admitted Mr. Miller's Statement, this Court Should not Reverse his Conviction as the Error was Harmless.

If the trial court improperly admitted Mr. Miller's statements, this Court should not reverse his conviction since any error was harmless. Aside from Mr. Miller's statement, there was more than ample evidence from which the jury could reach a guilty conviction.

It is well established that constitutional errors may be so insignificant as to be harmless. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.

Constitutional error is presumed to be prejudicial and the State bears the

burden of proving that the error was harmless.” Id., citing, State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The applicable test is the “overwhelming untainted evidence” test. Id. “Under the ‘overwhelming untainted evidence’ test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” Id. This test “allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” Id.

In this case the untainted evidence included:

Veronica Moreno testified that she was working the night shift by herself at the Tiger Pause on November 25-26, 2010. 4/8/10 RP 174. While she was cleaning up, a young male came into the store to purchase a soda fountain drink. 4/8/10 RP 176. While this young male was attempting to buy the soda, another person entered the front door of the store with a bag and gun and demanded money to which Ms. Moreno complied. 4/8/10 RP 179-180.

During Ms. Moreno’s testimony, a video of the robbery was admitted into evidence. 4/8/10 RP 187.

Andrew Zastrow also testified at trial. 4/8/10 RP 194-306. Mr. Zastrow testified that he was friends with Mr. Miller and that he was with Mr. Miller on the night of November 25, 2010. 4/8/10 RP 196-197. He stated he and Mr. Miller were driving around in Mr. Miller's car on that particular night and Mr. Miller was talking about robbing a convenience store. 4/8/10 RP 199. Mr. Zastrow stated that Mr. Miller parked his car in the back corner lot of the Best Western next to the Tiger Pause. 4/8/10 RP 201-04.

While Mr. Zastrow was in the Tiger Pause buying a soda fountain drink, Mr. Zastrow stated that Mr. Miller entered the store with a gun. 4/8/10 RP 209. After seeing Mr. Miller, Mr. Zastrow testified that he left the store and ran back to Mr. Miller's car. 4/8/10 RP 210.

Through his testimony, Mr. Zastrow identified his route of travel to the store from Mr. Miller's car and visa versa. 4/8/10 RP 212. He made notations on a map that was admitted as evidence. 4/8/10 RP 212.

Officer Mario Martinez of the Ephrata Police Department provided testimony at the trial. 4/9/10 RP 344-400. Officer Martinez testified that he found footprints while investigating the robbery at the Tiger Pause. 4/9/10 RP 346. He stated he found two sets of footprints that traveled from the northeast corner of the Tiger Pause to the northeast corner of the Best Western. 4/9/10 RP 355-56. Both sets approached the Tiger Pause

and then fled from the Tiger Pause. 4/9/10 RP 356. This route of travel as described by Officer Martinez is consistent with Mr. Zastrow's testimony regarding his route of travel and the location of Mr. Miller's car at the Best Western.

Mr. Zastrow testified that after Mr. Miller returned to the car following the robbery, they both left in Mr. Miller's car. 4/8/10 RP 212. Mr. Zastrow also identified Mr. Miller's car on a video recording from the surveillance camera at the Best Western from the night of the incident. 4/9/10 RP 247-249. This video was admitted as evidence. 4/9/10 RP 246.

Officer Huffman of the Ephrata Police Department provided testimony at the trial. 4/9/10 RP 326-343. He stated that on the night of the robbery, he interviewed Mr. Zastrow. 4/9/10 RP 335. Officer Huffman testified that when he drove Mr. Zastrow home, he saw Mr. Miller outside of Mr. Zastrow's house wearing clothing that was similar to the gunman from the Tiger Pause video surveillance. 4/9/10 RP 339.

Here, there was an overwhelming amount of the properly admitted evidence. As such, the exclusion of Mr. Miller's statements which only denied knowledge of the robbery would not have resulted in a different verdict. Therefore, any error as to the admission of Mr. Miller's statements was harmless and his conviction should not be reversed.

d. The Court Entered Findings of Fact and Conclusions of Law therefore Mr. Miller's Conviction should not be Reversed.

The trial court has entered Findings of Fact and Conclusions of Law. On May 4, 2010, the State submitted Proposed Findings of Fact and Conclusions of Law. CP 51-53. On April 11, 2011, the trial court entered Findings of Fact and Conclusions of Law. CP 157-159. The findings and conclusions signed by the trial judge are the same as the State's proposed findings and conclusions from May 2010 with the exception of one additional finding of fact; "2.16 Mr. Miller was seventeen years old at the time of the interview." CP 159.

As the trial court has entered Findings of Fact and Conclusions of Law, reversal of Mr. Miller's conviction is not proper.

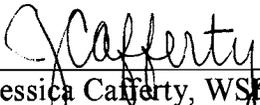
VI. CONCLUSION

Based upon the foregoing analysis, the State respectfully requests that the Court uphold the Appellant's conviction.

DATED: May 10, 2011.

Respectfully submitted:

D. ANGUS LEE,
Prosecuting Attorney



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