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STATE OF WASHINGTON  
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SUPREME COURT NO. 84660-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

YUSSUF ABDULLE,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbara Mack, Judge

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SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION AND SECOND SUPPLEMENTAL STATEMENT OF THE CASE<sup>1</sup>

During a pretrial CrR 3.5 hearing, the State called only one of two detectives who witnessed Respondent Yussuf Abdulle's alleged Miranda<sup>2</sup> waiver. The trial court found the statements admissible based upon a "swearing contest" between Abdulle and the one detective. Based on this Court's holdings in State v. Davis<sup>3</sup> and State v. Erho,<sup>4</sup> the Court of Appeals reversed, holding the issue of whether the statements were inadmissible could be raised on appeal.

The State sought review, claiming this Court's holdings in Davis and Erho misinterpret Miranda. The State raised a procedural claim in its supplemental brief, arguing the Court of Appeals erred by "reversing the trial court on a claim raised for the first time on appeal." The State did not raise the procedural claim in its petition for review.<sup>5</sup> Abdulle moved to

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<sup>1</sup> A detailed statement of facts is presented in the Brief of Appellant (BOA), at pages 3-12, and the Supplemental Brief of Respondent (SBOR) at pages 2-4.

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

<sup>3</sup> State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968).

<sup>4</sup> State v. Erho, 77 Wn.2d 553, 463 P.2d 779 (1970)

<sup>5</sup> The State's Petition stated, "The Court of Appeals decision implementing Davis and Erho compound the error of this prior misinterpretation of

strike the procedural claim from the Supplemental Brief of Petitioner (SBOP) as beyond the scope of the issue raised in the State's petition. The State responded and Abdulle replied. By order dated March 28, 2011, this Court passed that motion to the merits and granted Abdulle permission to brief the State's new procedural claim.

B. ISSUES PRESENTED IN SECOND SUPPLEMENTAL BRIEF

1. Under Davis and Erho, when the voluntariness of an alleged waiver is disputed, and independent evidence exists, the State has the burden to present it or explain its absence on the record. Abdulle objected to admission of his alleged statements and invoked his right to a CrR 3.5 hearing to determine the voluntariness of the statements. Did Abdulle preserve the issue for appeal when his objection put the State on notice of its burden to prove voluntariness under Davis and Erho?

2. Under RAP 2.5(a)(3) manifest constitutional errors may be raised for the first time on appeal. Where Abdulle's constitutional right to a fair hearing and a reliable determination on the issue of voluntariness was based upon a "swearing contest" between Abdulle and one detective despite the State's access to the second detective, is this case properly before this Court?

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Miranda, since it now appears the claim may be raised for the first time on appeal[.]” Petition at 9.

C. SECOND SUPPLEMENTAL ARGUMENT

THE COURT OF APPEALS PROPERLY HELD THIS ISSUE  
MAY BE RAISED ON APPEAL

Custodial confessions are presumptively coerced. The State bears the burden to prove the accused understood his rights, was afforded the opportunity to exercise them, and made a knowing and intelligent waiver of the Fifth Amendment right to remain silent. State v. Earls, 116 Wn.2d 364, 378-79, 805 P.2d 211 (1991); Davis, 73 Wn.2d at 271; Erho, 77 Wn.2d at 558. By attempting to establish a voluntary waiver based on a “swearing contest” between Abdulle and Detective Hoover despite access to potential corroborating evidence, the State failed to meet its burden under Miranda. . SBOR at 4-14; Erho, 77 Wn.2d at 558; Davis, 73 Wn.2d 271.

The State contends because “Abdulle never raised any aspect of this claim below” he is barred from raising it on appeal. SBOP at 19. This mischaracterizes the record. Abdulle preserved the issue by objecting to admission of his alleged statements and invoking his right to a hearing to determine the voluntariness of the alleged statements. Cf. State v. Campos-Cerna, 154 Wn. App. 702, 710, 226 P.3d 185 (2010) (“To preserve a Miranda waiver advisement issue for appeal, a defendant must

raise the issue at his CrR 3.5 hearing or the fact-finding portions of the proceedings.”), rev. denied, 169 Wn.2d 1021 (2010).

The Constitution and CrR 3.5, require that a determination of the voluntariness of statements be based upon “full knowledge of the facts and circumstances.” State v. Alexander, 55 Wn. App. 102, 105, 776 P.2d 984 (1989), rev. denied, 110 Wn.2d 1039 (1988). Under Davis and Erho, a “full knowledge of the facts and circumstances” requires the State to present existing independent evidence of an alleged waiver, or explain its absence on the record. Erho, 77 Wn.2d at 558; Davis, 73 Wn.2d 271.

The State appears to suggest that because Abdulle did not mention Newell’s absence at the CrR 3.5 hearing, the State was relieved of its burden to call Newell or explain his absence. SBOP at 19. The Court of Appeals correctly rejected this suggestion: “[I]t is the State’s burden to present available corroborating evidence or explain its absence. By failing to do either, the State failed to present sufficient evidence of a waiver.” Abdulle, 155 Wn. App. 1046 at \*6. The Court of Appeals properly recognized Abdulle is not required to prove the State’s case for the State, nor offer a second objection when the State fails to do so.

The Court of Appeals followed this Court’s lead in Erho. This Court found Erho’s objection and motion to suppress his alleged statements preserved the voluntariness on appeal. As here, the trial court

found Erho's alleged statements voluntary based on a "swearing contest" between Erho and one officer despite "four officers at the scene of the arrest and two officers accompanying appellant in the patrol car." Erho, 77 Wn.2d at 558. The Erho opinion does not suggest the Court required Erho to raise a second objection in addition to the voluntariness objection to preserve this issue for review. Erho, 77 Wn.2d at 556 ("none of the other officers present at that time or who accompanied appellant [Erho] to the Shaw automobile and the police station were called as witnesses.").

This Court instead concluded:

[W]here, as here, there appears to be adequate opportunity to obtain and present the corroborating testimony of other officers present at the scene of apprehension and custody, we are satisfied the state fails to meet the heavy Miranda burden of proof when, without explanation, it omits to supply such corroboration.

Erho, 77 Wn.2d at 559 (citing Davis, 73 Wn.2d at 283, 286).

Attorneys have a duty to research the law and are presumed to know applicable law favorable to his or her client. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). As in Erho, by objecting to admission of his alleged statements and invoking a CrR 3.5 hearing, Abdulle preserved the issue and put the State on notice of its burden to

prove voluntariness under Davis and Erho. Erho, 77 Wn.2d at 558-59; Davis, 73 Wn.2d at 283, 286. Abdulle's attorney is presumed to know this case law. The deputy prosecutor is presumed to know it too.

If Abdulle's opposition to the admission of his statements did not separately preserve the issue, manifest constitutional errors may be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); RAP 2.5(a)(3). Two factors guide the analysis: 1) whether the alleged error is a constitutional issue, and 2) whether the error is manifest, that is, whether it had practical and identifiable consequences. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007) (citing State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Abdulle's argument concerns a constitutional issue. An accused has a constitutional right to a "fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 1780, 12 L. Ed. 2d 908 (1964). At such hearing, the State has the burden of proving a waiver of the Fifth Amendment right to remain silent. North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); Miranda, 384 U.S. at 436; Davis, 73 Wn.2d at 271. See also Lynn, 67 Wn. App. at 342 ("admissions and confessions involve the Fifth and Sixth Amendments").

The State failed to explain why it did not call Newell, the only other witness to the interrogation and alleged waiver, nor did it explain his absence. The State contends because there are no findings as to Newell's involvement, this case does not involve independent evidence to support an application of the rule. SBOP at 19-20. The State cites no authority to support its idea that findings are required. As the Court of Appeals correctly recognized, "it is the State's burden to ensure that the record reflects that none of the other officers present heard the Miranda warnings or the defendant's waiver." Abdulle, 155 Wn. App. 1046 at \*6 (citing Erho, 77 Wn.2d at 558-59).

This constitutional error was also manifest. The record demonstrates Newell was a witness to Abdulle's interrogation and alleged waiver. The two officers transported Abdulle in a regular, unmarked sedan. 1RP 10-11. Hoover said it was not equipped with a "silent partner" nor any type of screening; Hoover did not say there was any barrier between the front and back seats. 1RP 10-11. Indeed, Abdulle said Hoover and Newell began talking to one another inside the car, but Abdulle was unable to focus on what was said because he was nervous and afraid he would be arrested and lose his job. 1RP 48, 59. Hoover said Newell drove toward the Bellevue Police Department to book, fingerprint and photograph Abdulle. 1RP 11. While Hoover alleged Newell went to

get Abdulle water and a cigarette at the Bellevue Police Department, Abdulle said Hoover gave him back a cigarette he had taken. 1RP 51-52.

Because the trial court relied exclusively on Hoover's alleged credibility in finding Abdulle's alleged statements voluntary – despite the State's failure to meet its burden under Davis, Erho and Miranda – Abdulle was deprived of his constitutional right to a fair and reliable determination of his alleged voluntary statements. 1RP 67, 74-75.

The error was also prejudicial. Constitutional error is presumed prejudicial. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); The State bears the burden to prove constitutional error harmless beyond a reasonable doubt. See Easter, 130 Wn.2d at 242 (stating general rule); State v. Wilson, 144 Wn. App. 166, 185, 181 P.3d 887 (2008) (state failed to meet its burden; court recognized an officer's testimony about an inculpatory statement "has significant impact on a jury"). The State does not dispute admission of Abdulle's alleged custodial statements was prejudicial. Where the prosecution emphasized Abdulle's statements on numerous occasions and the remainder of its case allowed rational jurors to have a reasonable doubt as to identity and other people's access and opportunity to take the property alleged in the theft charges, the error is prejudicial. BOA at 20-24; Wilson, 144 Wn. App. at 185.

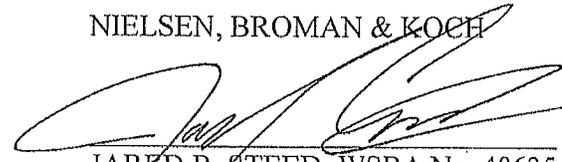
D. CONCLUSION

For the reasons above, and those discussed in the Supplemental Brief of Respondent, this Court should affirm the Court of Appeals.

DATED this 25<sup>th</sup> day of April, 2011.

Respectfully submitted,

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