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NO. 90846-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

NICHOLAS KEITH MAYER, Appellant

FROM THE COURT OF APPEALS DIVISION II, NO. 44232-9-II
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00311-4

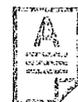
SUPPLEMENTAL BRIEF OF RESPONDENT

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A. **IDENTITY OF RESPONDENT**

The State of Washington is the respondent in this matter.

B. **STATEMENT OF THE CASE**

In addition to the factual summary set forth in the State's Response at the Court of Appeals, the State submits these additional facts for this Court's consideration:

Emily Mayer was fired from her job at KC Teriyaki for allegedly stealing from the till. 4B RP at 762. She had worked there and had inside knowledge that the owner of the restaurant removed money from the safe every evening to deposit at the bank at a certain time. 4B RP at 766. She conveyed this information to her brother, the Appellant, Nicholas Mayer (hereafter 'Mayer') and together they planned to rob the restaurant. *Id.* Together and with Emily Mayer's boyfriend, Emily Mayer and Mayer planned an armed robbery. 4B RP at 766-67. On February 9, 2012, the owner of KC Teriyaki, a restaurant in Vancouver, Clark County, Washington, followed his usual closing procedure and put the money from the day's sales into a bank bag. 3A RP at 297-98. He set the bag on the counter while he went behind to prepare an order for a late customer. 3A RP at 300-01. The second worker went to the side door to leave the restaurant and when he opened the side door, two young men wearing

hoodies and bandanas over their faces and holding guns pushed open the door and entered the restaurant demanding money. 2 RP at 272-75. The men grabbed the bank bag on the stool and left through the side door and fled the area. *Id.*

At trial, both Emily Mayer and John Taylor (AKA “JT”) testified against Mayer and described his involvement in the robbery. 4B RP at 762-76; 5A RP at 897-915. Mayer’s girlfriend, Sarah Baker also testified and reluctantly described Mayer’s confession to her regarding his involvement in the robbery. 3A RP at 419-22. Ms. Baker testified that Mayer told her he robbed a Chinese or teriyaki restaurant and that he used a gun to take money. *Id.*

Mayer also spoke to police. Prior to questioning him, the police officer read Mayer the *Miranda* warnings from his department-issued card. Mayer indicated he understood the warnings and wished to speak. 1 RP at 75-76. The officer then started a tape recording and read Mayer the *Miranda* warnings a second time. This time Mayer asked a clarifying question and the conversation ensued as follows:

DEPUTY DENNISON: Okay. Do I have your permission to record this statement?

MR. MAYER: Yes.

DEPUTY DENNISON: Okay. So you (inaudible). I read you your *Miranda* prior to it, but now that we're on—on

recording, I'm going to read it to you again, okay? 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 are being questioned. If you cannot afford to hire 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 statements. Do you understand each of these rights as I've explained them to you?

MR. MAYER: Yes. Um, If I wanted an attorney and I can't afford one, what—what would—?

DEPUTY DENNISON: If you wanted an attorney—you know, if you were charged with a crime and arrested, if you wanted an attorney and couldn't afford one, the Court would be willing to appoint you one. Do you want me to go over that with you again?

MR. MAYER: Yeah, but how would that work? Will you be—how it—how I—

DEPUTY DENNISON: You're not under arrest at this point, right?

MR. MAYER: Oh, okay. Okay.

DEPUTY DENNISON: So, if you were, then you would be taken to jail and then you'd go before a judge and then he would ask you whatever at that point, if you were being charged, you would be afforded an attorney if you couldn't hi—you know, if you weren't able to afford one.

MR. MAYER: All right. I understand.

DEPUTY DENNISON: Understand?

MR. MAYER: Yeah.

DEPUTY DENNISON: Okay. So you do understand your rights?

MR. MAYER: Yes.

DEPUTY DENNISON: Keep your rights in mind. Do you want to explain to us or talk to us about—all right, you know, I told you why you're here. There was a robbery at the—at KC Teriyaki and your name has come up. So, keeping your rights in mind, do you want to talk to us about it?

MR. MAYER: Okay.

1 RP at 78–80.

The trial court admitted Mayer's statements to police at trial. The jury convicted on all charges submitted. The Court of Appeals affirmed.

C. SUPPLEMENTAL ARGUMENT

The Respondent, State of Washington, submits this supplemental brief for the Court's consideration of the Appellant's Petition for Review which was granted solely on the *Miranda* issue. The State requests this Court affirm the Court of Appeals' unpublished opinion below in *State v. Mayer*, 183 Wn.App. 1016 (2014).

I. THE COURT OF APPEALS PROPERLY APPLIED DUCKWORTH v. EAGEN AND FOUND MAYER'S STATEMENTS WERE PROPERLY ADMITTED

This Court has granted review of this case as it pertains to the *Miranda* issues only. Mayer frames the issue as whether he made an

unequivocal request for an attorney and whether the police had an obligation to cease questioning. However this Court has stated the issue as one of whether the police officer undermined the *Miranda* warnings by telling Mayer how he would get an attorney appointed to his case. The State submits this brief addressing this Court's framing of the issue and submits that the officer properly and adequately informed Mayer of his constitutional rights under *Miranda* and the discussion reasonably conveyed the rights to Mayer.

In *Duckworth v. Eagan*, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), the Supreme Court of the United States addressed the very issue before this Court in Mr. Mayer's case: informing a suspect that an attorney would be appointed for him "if and when you go to court" does not render *Miranda* warnings inadequate. *Duckworth*, 492 U.S. at 197. There, the defendant, prior to being charged with any crime, went to police headquarters to be questioned by police. *Id.* at 197. At that time, police read the defendant an advice of rights and waiver form which told him, in part, "You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court..." *Id.* at 198.

The defendant submitted to questioning and did not admit to involvement in the stabbing. Twenty-nine hours later, police questioned him again, this time reading him a different waiver form that included his right to remain silent and the right to consult with an attorney before saying anything, and that an attorney may be present while he speaks to police and that he could stop the questioning and request an attorney at any time or terminate the conversation. *Id.* at 199. During this questioning, the defendant confessed to stabbing the woman. *Id.* The defendant's statements to police were admitted into evidence at trial.

The issue on appeal in *Duckworth* was whether the statements were properly admitted, and whether the police officer's warnings to the defendant were adequate under *Miranda*, and specifically, whether the language about an attorney being appointed "if and when you go to court" was constitutionally defective. The United States Supreme Court granted certiorari to decide the issue of whether informing a suspect that an attorney would be appointed only if and when he goes to court renders *Miranda* warnings inadequate. *Id.* at 200-01. The Supreme Court found such a warning does not render *Miranda* warnings inadequate. *Id.*

It has been clear that warnings given to a suspect prior to questioning need not be given in the exact form described in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). *Id.* at 202.

In fact, the Supreme Court previously held that “the ‘rigidity’ of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,” and further that “no talismanic incantation [is] required to satisfy its strictures.” *Id.* at 202-03 (quoting *California v. Prysock*, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L.Ed.2d 696 (1981)). It isn’t the exact wording of *Miranda* warnings that are constitutionally protected, but rather what is required are measures taken to insure that a suspect’s rights against compulsory self-incrimination are protected. *Id.* at 203 (citing *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974)). The proper inquiry is whether the warnings given “reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*.”” *Id.* (citing *Prysock*, 453 U.S. at 361).

The United States Supreme Court’s holding in *Duckworth* controls here. The facts are strikingly similar to the facts below, and the Supreme Court’s analysis was proper. Mayer may argue that his conversation with the deputy informed him that he only had a right to counsel after he submitted to police interrogation. This was the issue addressed in *California v. Prysock*, *supra*. However, in *Duckworth*, the Supreme Court found the issue in *Prysock* was significantly different than the issue presented in *Duckworth*, and the *Prysock* holding applies only when *Miranda* warnings did not apprise the suspect of his right to have an

attorney present if he chose to answer questions. *Duckworth*, 492 U.S. at 204-05. The *Duckworth* Court found that the warnings given to the defendant described his right to speak to counsel prior to police questioning and his right to stop answering at any time until he spoke with a lawyer. *Id.* at 205. The Court found this warning sufficient even though the suspect was also told he would get a court appointed attorney if and when he went to court. *Id.* *Miranda* does not require attorneys be producible on call for a suspect, but only that a suspect be informed that he has the right to have an attorney prior to and during questioning. *Id.* at 204. This is exactly what occurred in Mayer's case.

The facts in *Duckworth* are substantially similar to those here. Mayer was questioned at the police station, by police officers. The deputy read Mayer warnings which included that he has the "right at this time to talk to a lawyer and have him present with you while you are being questioned...." 1 RP at 78. Mayer was also told that he "can decide at any time to exercise these rights and not answer any questions or make any statements." 1 RP at 78. Just as in *Duckworth*, Mayer was informed of his right to talk to an attorney prior to being questioned and to refuse to talk at any time. This warning complied with *Miranda* and Mayer's constitutional rights.

In *In re Personal Restraint of Woods*, this Court cited, with approval, the United States Supreme Court's opinion in *Duckworth* for the proposition that telling a suspect that there is "no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court," was sufficient and proper under *Miranda*. *In re Personal Restraint of Woods*, 154 Wn.2d 400, 435, 114 P.3d 607 (2005) (quoting *Duckworth*, *supra* at 198). In *State v. Teller*, 72 Wn. App. 49, 863 P.2d 590 (1993), Division Three of our Court of Appeals addressed the issue of whether the *Miranda* warnings given to a suspect were sufficient when she was told she was entitled to have an attorney appointed for her "by the court." *Teller*, 72 Wn. App. at 51. In that case, the officer told the defendant, "You have the right at this time to an attorney of your own choosing and to have him or her present before or during questioning, or the making of any statements." *Id.* The defendant was also told, "If you cannot afford an attorney you are entitled to have one appointed for you by the court without cost to you and to have him or her present before or during questioning or the making of any statement." *Id.* Relying on *Duckworth*, the Court of Appeals found that the warnings given to Teller "reasonably conveyed her rights under *Miranda*." *Id.* at 52. The Court there reiterated that *Miranda* warnings do not have to be given in a

particular format, and that the warnings given to Teller reasonably conveyed the defendant's rights under *Miranda*. *Id.*

Another case which is similar factually to Mr. Mayer's is *U.S. v. Eubank*, 2015 WL 545748 (S.D. Georgia, Feb. 10, 2015). In that case, the suspect was properly informed of his *Miranda* warnings, and he then asked the police officer the following question:

"The thing is if I needed a lawyer, how am I going to be able to get one appointed to me that quickly?"

Eubank, at p. 1. The officer then responded,

"Well, the court could appoint one to you, um, honestly at that point we take you over to the Marshals Service and, and, and at that point you would be appointed counsel. The question is whether or not we can sit down with you here again. It would probably be back, once you get back to Georgia, before, before someone can talk to you."

Id. The Court in *Eubank* found this conversation did not undermine or render the *Miranda* warnings inadequate. *Id.* at 2. The Court found that the officer truthfully and accurately answered the suspect's question and that the suspect was in no way misled, nor was he intimidated to the point of rendering his subsequent statements involuntary. *Id.* at 2-3.

The *Eubanks* case is also substantially similar to Mayer's case. There, in response to the suspect's question about how he is going to get an attorney appointed, the officer told him he would get one by the court at a different time. In Mayer's case, the defendant asked a question about

the mechanics of how the process would work if he wanted an attorney. The officer responded about how the process worked. The defendant's question was clearly properly understood by the officer as Mayer did not re-ask the question or tell the officer that he meant something else, or otherwise clarify that he meant to ask something other than what the officer responded to.

Based on the foregoing case law and the specific facts of Mayer's case, the Court of Appeals properly applied *Duckworth* to the facts of this case and found that the warnings given to Mayer were adequate and they were not undermined by the officer's discussion with Mayer about when he would get an attorney.

Furthermore, Mayer's statements were voluntarily made given the totality of the circumstances.

"The determination of whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel."

Fare v. Michael C., 442 U.S.707, 724-25, 99 S. Ct. 2560, 61 L.Ed.2d 197 (1979); *Schneekloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973); *Miranda v. Arizona*, 384 U.S. 436, 475-77, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). Circumstances that are relevant in the

totality of the circumstances analysis include the “‘crucial element of police coercion;’ the length of the interrogation; its location; its continuity; the defendant’s maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation.” *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008) (quoting *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993)).

In Mayer’s case, considering the totality of the circumstances, it was clear he voluntarily waived his rights and voluntarily spoke to police. The police read Mayer his *Miranda* warnings one time and he promptly agreed to talk. 1 RP at 75-76. The police then started a recording and informed Mayer a second time of his *Miranda* warnings. 1 RP at 78-80. This is when Mayer asked for clarification on the process and then indicated he understood his rights and said he wanted to speak. 1 RP at 80. Mayer also has been extensively involved in criminal activity in the past and has previously had his *Miranda* warnings read to him multiple times. 1 RP at 154-57. Mayer had been arrested on at least nine prior occasions and each time *Miranda* warnings were given. 1 RP at 155-57. This shows Mayer was intimately familiar with his rights. Also, the officer’s interview of Mayer only lasted about half an hour, and no facts are in the record which show anything about the interview was coercive. 1 RP at 81.

Based on the totality of the circumstances, after having his rights reasonably conveyed to him, Mayer, experienced in the system and with *Miranda*, understanding his rights, chose to speak with police about the case. Mayer's statements were properly admitted at trial after he was advised of his rights. This Court should affirm the Court of Appeals below.

II. ANY ERROR WAS HARMLESS

If this Court finds the admission of Mayer's statements to police was erroneous, such error was harmless beyond a reasonable doubt. The State presented overwhelming untainted evidence of Mayer's guilt and any jury would have convicted him of the crimes even without the admission of his statements.

In *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985) this Court settled the question of whether the appellate courts of this State apply the "contribution" test or the "overwhelming untainted evidence" test in its analysis of whether constitutional error was harmless. *Guloy*, 104 Wn.2d at 426. The Supreme Court rejected the "contribution" test under which an appellate court looks to whether the tainted evidence could have contributed to the jury's determination of guilt. *Id.* Instead, the Supreme Court found the "overwhelming untainted evidence" test would better allow appellate courts to avoid reversal on technical or academic grounds.

Id. This test further insures that a conviction is reversed where there is a reasonable possibility that the use of the tainted evidence was necessary to find the defendant guilty. *Id.*

Especially in cases involving improperly admitted evidence, the “overwhelming untainted evidence” test better analyzes whether the error truly was harmless. In *Neder v. U.S.*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), the United States Supreme Court stated that in a case where the error was the admission of evidence in violation of the Fifth Amendment’s guarantee against self-incrimination, the proper harmless error test must be whether it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[.]” thus clearly rejecting the “contribution” test. *Neder*, 527 U.S. at 18.

Under the overwhelming untainted evidence test, the reviewing court must look “only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Guloy*, 104 Wn.2d at 426. In Mayer’s case, the State presented overwhelming untainted evidence of Mayer’s guilt.

In *In re Personal Restraint of Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014), this Court found the improper admission of a defendant’s statements to a police officer was harmless error. In *Cross*, applying the overwhelming untainted evidence test, this Court considered that the

evidence consisting of an eye witness and another properly admitted statement by the defendant was overwhelming. *Id.* at 689. Even without the tainted evidence, there was sufficient evidence that necessarily lead to the same outcome. *Id.* at 688.

Similarly, in Mayer's case, there was overwhelming evidence of his guilt presented to the jury. Even without Mayer's confession to police, the untainted evidence necessarily would lead to the same result. Mayer confessed to his involvement in the robbery to another witness, Ms. Baker, his girlfriend. 3A RP at 419-22. This confession is arguably more credible than his statements to the police as this person was clearly a reluctant witness who attempted to minimize Mayer's damaging statements until forced to admit the truth of what Mayer confessed to her. *Id.* Mayer's sister, and co-conspirator, Emily Mayer also testified to Mayer's involvement and her help in committing the robbery. 4B RP 766-74. The second co-conspirator, John Taylor (AKA "JT") also testified, identifying Mayer as the person he robbed the restaurant with. 5A RP at 897-915. Given the totality of the evidence against Mayer, even without his confession, overwhelming evidence supported his conviction and the jury would have convicted even without this evidence.

D. CONCLUSION

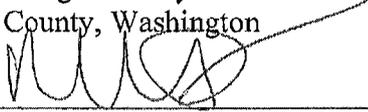
The officers properly informed Mayer of his *Miranda* warnings and did not undermine the advisement of those rights during the conversation which followed. The trial court properly admitted Mayer's statements to police. But even if the trial court erred in admitting his statements to police, this court should find this error was harmless beyond a reasonable doubt because overwhelming untainted evidence was admitted which would necessarily lead to a finding of guilt.

DATED this 3rd day of April, 2015.

Respectfully submitted:

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A copy of this email and attachment are being sent to appellant's counsel of record, Barbara Corey at Barbara@bcoreylaw.com. If you need anything further to process this request, please contact our office.

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