

63936-6

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COA No. 63936-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

FILMON HABTEMARIAM,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Kenneth Cowser

REPLY BRIEF

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A. REPLY ARGUMENT

1. THE DEFENDANT'S REQUEST FOR AN ATTORNEY TO SPEAK TO WAS UNEQUIVOCAL.

(b).The Respondent has not provided any case analysis in response to appellant's cited cases regarding equivocality.

The Respondent has not disputed appellant's factual arguments in comparison to State v. Robtoy, 98 Wn.2d 30, 32, 653 P.2d 284 (1982); State v. Malicoat, 126 Wn. App. 612, 106 P.3d 813 (2005), or the other decisions discussed in this section of the Appellant's Opening Briefs. But on this question of whether certain language is an unequivocal request for counsel, these facts are important.

The particular language must be adjudged under the rule that "equivocality" exists when a suspect who has been informed of his rights expresses both a desire for counsel and a desire to continue the interview without the presence of counsel. United States v. Weston, 519 F. Supp. 565, 572 (W.D.N.Y.1981); see also Jurek v. Estelle, 623 F.2d 929, 939 (5th Cir.1980). This standard requires close examination of the language used, which will differ in each case. There are some formal rules, however:

(b). Mr. Habtemariam's request for counsel was unequivocal. When the defendant asked, "Is there an attorney I can talk to or something?" Detective Wells failed to honor that request and instead asked questions of the defendant which caused him to conclude the defendant was not requesting an attorney.

The gravamen of the Fifth Amendment and Miranda error in the case inheres in the fact that the defendant's question should have been met with a cessation of questioning by the detective, not questioning that was unnecessary, as Mr. Habtemariam's language was unequivocal.

The Respondent's brief describes the defendant's language in the context of other statements and confusion he exhibited during the time he spent in the police station, but none of these circumstances bear on, much less neutralize, the import of his specific words expressed above.

For example, the State suggests that the Appellant "attempts to isolate his first question . . . from his second question." Brief of Respondent, at p. 16. Of course appellant does. Interrogating officers may not "use the guise of clarification as a

subterfuge for eliciting a waiver of the previously asserted right to counsel." Robtoy, 98 Wn.2d at 39-40. The detective's request for clarification was not necessary, as no clarification was necessary. Police questioning needed to cease at that point. The fact that the detective then used what the Respondent asks this Court to view as a 'clarifying' question and received a contradictory question (why would I want a lawyer) in response from the confused defendant does not negate what went before. The detective's previous failure to honor the request for an attorney by ceasing questioning was a violation of Miranda case law in this area.

The defendant asked if there was an attorney he could speak to. Notably, the State cannot dispute that this statement is unequivocal (or simply chooses not to, see Part 1.a, supra), so instead it tries to use statements coming as a result of questioning improperly engaged in after the unequivocal request to suggest it was not unequivocal. But the prescribed timeline of the legal analysis does not permit such sleight-of-hand.

State v. Quillin, 49 Wn. App. 155, 159, 174 P.2d 589 (1987), review denied, 109 Wn.2d 1027 (1988), cited by the State, of course does not stand for the Respondent's cited proposition that

the defendant's response to an improper clarifying question can be used to work backwards and use it to show the original request for counsel was not, after all, unequivocal. Rather, Quillin involves a purely equivocal request for counsel, not an unequivocal request followed by further questioning. as here. Quillin, 49 Wn. App. at 159.

And State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008), does not stand for approval of the State's suggested analysis. In fact, Radcliffe involves a defendant who stated that "maybe" he should contact an attorney. Radcliffe, at 908. There was no "maybe" or other words of equivocality in Mr. Habtemariam's request to speak with an attorney.

In addition, Radcliffe points out why the State's fractured backward-looking analysis is not the law. The law in this highly factually diverse context requires a bright line rule that asks whether the language used to request to speak with a lawyer was explicit. Because of the numerous factual contexts in which the need for this assessment arises, courts have turned to the bright line rule that in order to invoke the right to counsel, there must be an explicit request for an attorney --"an equivocal request will not

do.” State v. Radcliffe, 164 Wn.2d at 908 (citing Davis v. United States, 512 U.S. 452, 456-459, 129 L.Ed.2d 362, 114 S.Ct. 2350 (1994)). The analysis focuses on the words used by the defendant, and the State cites no cases authorizing a reviewing court to engage in the maneuvering the State wishes it to – attacking the unequivocalness of the interrogee’s lawyer request by looking to contradictory statements elicited by police, thereafter, in improper post-request questioning. Here, under the legal examination that is appropriate, that ends the analysis.

Indeed it is clear that an accused’s responses to further interrogation following an initial request for counsel may not be used to cast retrospective doubt on the clarity of the initial request itself. Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984). Respondent utterly fails to respond to this aspect of appellant’s argument.

(c). The conviction must be reversed. “A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.’” Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting Bruton v. United

States, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting)). Here, although they were not directly confessions to the crime, the statements made by the defendant made him look as if he was dissembling as if to avoid admitting culpability. Although his explanations of unusual conduct were probably descriptions of the normal, haphazard ways of a drug dealer, to a lay jury of citizens they resounded with guilt. Under these circumstances, the State cannot demonstrate beyond a reasonable doubt the erroneous admission of his improperly obtained statements did not contribute to the verdict. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Reversal is required.

2. RESPONDENT CAN SHOW NO POSSIBLE TACTICAL REASON FOR THE DEFENSE ATTORNEY FAILING TO IMPEACH WITNESS JOSEPH COBBS, AND THE STATE'S CLAIM, THAT ELICITING THE FACT OF PROBATION WAS JUST AS GOOD AS ELICITING THE FACT OF A PRIOR FALSE STATEMENT CONVICTION, IS SPURIOUS.

The fact that the critical witness, Cobbs, was “on probation,” as was revealed in cross-examination by the defense attorney, has no credibility impact compared to the offense of making a false

statement. Such an offense goes to the heart of the witness' reliability in an official proceeding.

The defense attorney obtained leave from the trial court to impeach the State's star, and sole eyewitness, with this prior conviction but then failed to do so. State v. Bander, 150 Wn. App. 690, 720, 208 P.3d 1242, review denied, 167 Wn.2d 1009 (2009). does not stand for the proposition that an error of this sort is tactical and reasonable, rather, it just cites that general rule and has no bearing on the present case. See Brief of Respondent, at p. 22.

The State has no conceivable reasonable contention that there is any tactical explanation for this deficient performance. The harm of the error, given the witness involved, is plain, and undermines any possible confidence in the verdict.

3. NO EVIDENCE SUPPORTED THE PROSECUTOR'S INTERJECTION OF A DRUG-DEALING MOTIVE FOR THE MURDER, A THEORY AS TO WHICH THE TRIAL COURT HAD ALREADY RULED THERE WAS INADEQUATE EVIDENCE .

During cross-examination of Mr. Habtemariam, the prosecutor improperly inquired of the witness whether he had killed Tekelet because he believed the victim was dealing drugs and

taking away customers from the defendant. 6/9/09RP at 743-44. The defense immediately sought a mistrial, based on the conceded fact that the State had no admissible evidence with which to support this inquiry. 6/9/09RP at 744-47. The trial court had previously ruled that there was inadequate admissible evidence to place this theory of a drug-dealing dispute as a motive before the jury. 6/1/09RP at 13-18.

A court must grant a mistrial where an irregularity occurs and as a result the defendant's right to a fair trial is "so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986).

The Respondent's cited authorities stand for the proposition that this absence of evidence renders the interjection of the matter improper, and grounds for a mistrial.

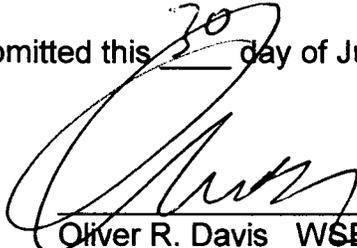
And where a mistrial motion is made for an irregularity, the court must determine whether the irregularity prejudiced the defendant's right to a fair trial. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). Here, a balance of all these factors shows that this non-cumulative, improper inquiry deprived the defendant

of a fair trial because it provided, in the jury's mind, a motive for this apparently senseless crime which Mr. Habtemariam defended was not committed by him. For a jury seeking to make sense of the offense, and having been asked to issue a verdict finding the defendant to be the perpetrator, the prosecutor's inquiry was incurable.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Habtemariam respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this ³⁰ day of July, 2010.



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] THOMAS CURTIS, DPA
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SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF JULY, 2010.

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