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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.

2010 FEB 24 PM 4:52
COURT OF APPEALS
STATE OF WASHINGTON
FILED

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Kenneth Cowser

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and violated Mr. Habtemariam's right to be free from unlawful custodial interrogation when it denied his motion to exclude statements he made to law enforcement.

2. The trial court erred and violated Mr. Habtemariam's right to be free from unlawful custodial interrogation when it denied his motion to exclude statements he made to law enforcement during an interrogation absent compliance with CrR 3.1 regarding entitlement to counsel.

3. In the absence of substantial evidence, the trial court erroneously entered CrR 3.5 finding of fact 1ff to the extent the finding finds that Mr. Habtemariam did other than make an unequivocal request for legal counsel.

4. In the absence of substantial evidence, the trial court erroneously entered CrR 3.5 finding of fact 1gg to the extent the finding finds that Mr. Habtemariam did other than make an unequivocal request for legal counsel.

5. In the absence of substantial evidence, the trial court erroneously entered CrR 3.5 conclusion of law 4b to the extent it finds that Mr. Habtemariam did other than make an unequivocal

request for legal counsel.

6. Defense counsel provided ineffective assistance of counsel.

7. The trial court abused its discretion in denying the defendant's motion for a mistrial.

8. Cumulative error denied the defendant a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred and violated Mr. Habtemariam's right to be free from unlawful custodial interrogation when it denied his motion to exclude statements he made to law enforcement following an unequivocal request for counsel.

2. Whether the trial court erred and violated Mr. Habtemariam's right to be free from unlawful custodial interrogation when it denied his motion to exclude statements he made to law enforcement during an interrogation absent compliance with CrR 3.1 regarding entitlement to counsel.

3. Whether defense counsel provided ineffective assistance of counsel by failing to impeach the State's star witness, Joseph Cobbs, with his prior crime of dishonesty, which the trial court had ruled admissible pursuant to ER 609.

4. Whether the trial court abused its discretion in denying the defendant's motion for a mistrial.

5. Whether cumulative error denied the defendant a fair trial.

C. STATEMENT OF THE CASE

1. Procedural history. The Snohomish County Prosecuting Attorney alleged that Filmon Habtemariam shot and killed his cousin, Tekelet Habtemariam ("Tekelet"), as they and a mutual friend, Joseph Cobbs, were driving home from an evening spent at McCabe's Bar, in Everett, Washington. CP 232. The State alleged that Mr. Habtemariam had threatened Tekelet several weeks previously. 6/4/09RP at 332.

After Sheriff's Deputies converged on the scene of the shooting, near an apartment complex in Lynnwood, Mr. Habtemariam was seen walking in the area and was arrested. CP 234. He would later explain at trial that he was not even present in Tekelet's vehicle on the night in question. 6/9/09RP at 714-15.

He was, however, charged with the following counts, by amended information filed April 2, 2009:

Count 1 - First Degree Murder, pursuant to RCW 9A.32.030(9)(a), alleging that the defendant caused the death of Tekelet Habtemariam, with premeditated

intent, on or about the July 8, 2008; with the special allegation that he was armed with a firearm, pursuant to RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.602;
Count 2 - Possessing a Stolen Firearm, pursuant to RCW 9A.58.310;
Count 3 - Unlawful Possession of a Firearm in the Second Degree, pursuant to RCW 9.41.040(2); and
Count 4 - Tampering with a Witness, pursuant to RCW 9A.72.120.

CP 169-70.

The jury found Mr. Habtemariam guilty of first-degree murder as charged, rejecting a lesser-included offense instruction on second-degree murder. CP 105-09.

Mr. Habtemariam was sentenced within the standard range. 8/4/09RP at 1; 8/25/09RP at 1.

Mr. Habtemariam timely filed a notice of appeal. CP 6.

2. Facts. According to Joseph Cobbs, the State's "star" witness, late on the night of July 7, 2008, he and Tekelet Habtemariam went to McCabe's Bar in Everett. 6/2/09RP at 60-62. Tekelet, who was staying with Cobbs as a guest, and the defendant, were cousins. 6/2/09RP at 59-60. Tekelet drove Cobbs to the bar in Tekelet's grey Hyundai sedan. 6/2/09RP at 61. When they arrived, Filmon Habtemariam was there. 6/2/09RP at 62.

Filmon was wearing a light blue button-up shirt. 6/2/09RP at 69. Everyone seemed to get along amicably at the bar. 6/2/09RP at 64. Filmon was drinking alcohol, but Tekelet and Mr. Cobbs were not. 6/2/09RP at 64-65.

Allegedly, as closing time approached in the early morning hours of July 8th, the victim agreed to give the defendant a ride home to his apartment in the Tamaron Ranch Apartments in North Lynnwood. The victim went to the car and got into the driver's seat. 6/2/09RP at 65-68. The defendant got to the car next and sat in the backseat directly behind the victim. 6/2/09RP at 68. Mr. Cobbs arrived at the car last and sat in the front passenger seat of the sedan. 6/2/09RP at 68.

The group of three men drove towards Lynnwood, not making any stops. During the drive, they listened to loud music and there was some debate about what music should be listened to. 6/2/09RP at 69-70.

As the car approached the entrance to the Tamaron Ranch apartments, Mr. Habtemariam asked Tekelet and Cobbs if they wanted to join him for a drink. When Cobbs demurred, the defendant said to the victim, "you can drop me off here." 6/2/09RP

at 71-72. Mr. Cobbs then heard several gunshots, and he watched as the defendant jumped out of the still-moving car and “ran somewhere.” 6/2/09RP at 72-74. Cobbs saw a gun in the defendant’s hand as he exited the vehicle. 6/2/09RP at 72-73. Cobbs claimed that he saw the defendant shoot Tekelet with the gun in his right hand. 6/2/09RP at 9-92.

Cobbs grabbed the steering wheel of the car but it crashed into a fence near the apartment complex. 6/2/09RP at 75. Cobbs saw that Tekelet’s head was bloody. 6/2/09RP at 75-76. He got out of the car and knocked on the door of an apartment trying to get someone to call the paramedics or the police. 6/2/09RP at 76. Sheriff’s deputies later had Mr. Cobbs give them the clothes he was wearing, including his red jacket, and his jeans, which seemed to be decorated with “fake painted blood splatter.” 6/3/09RP at 282.

James Grubb, who lived in the Tamaron Ranch Apartments, heard the crash and looked out his window to see Tekelet Habtemariam’s car up against a fence. 6/3/09RP at 121-22. He saw a slender young black man staggering away from the area of the car into the apartment complex. 6/3/09RP at 122-23. Grubb

tried to get his attention by banging on his apartment window. 6/3/09RP at 122-24. He stated that the man was wearing a navy or royal blue short sleeve shirt, with a button-up collar. 6/3/09RP at 123-24, 137-38. Grubb went outside and as he called 911, he saw that the driver of the crashed car had blood coming out of the back of his head. 6/3/09RP at 126-27. A young black man approached the vehicle and was very upset, continuing to say, "My cousin, my cousin." 6/3/09RP at 129. A woman was trying to hold him back. 6/3/09RP at 129-30.

Other witnesses who heard or saw the crash and went outside the apartment building to see what was going on stated that Mr. Cobbs approached them outside the apartment building asking someone to call 911; he was very loud and agitated. 6/3/09RP at 145-47.

Snohomish County Sheriff's Deputies found Tekelet Habtemariam dead upon their arrival. 6/3/09RP at 215, 218-19. Mr. Cobbs provided a description of what the person he alleged shot his friend looked like and the defendant's first name. 6/3/09RP at 239-40. When police arrived on scene, Grubb also pointed in the direction that the first male he had seen had run.

6/3/09RP at 130, 160.

A K-9 deputy and his dog began tracking from the crashed car. 6/3/09RP at 245, 251-54. The dog tracked up into the apartment complex area and eventually sniffed around a small bush next to the building. 6/3/09RP at 251-52. Officers looked inside the bush and saw a small handgun. 6/3/09RP at 251, 6/4/09RP at 360-61.

Sheriff's Deputies surrounded the area of the Tamaron Ranch apartments. 6/4/09RP at 339-40. Approximately five or ten minutes later, Deputy Bryan Brittingham observed a black male walking "briskly" from behind some businesses located along Highway 99. 6/4/09RP at 340.

Brittingham testified that the male bore similarities to the description given to deputies of a black male in his 20's with a blue shirt and black pants. 6/4/09RP at 338, 340. The deputy contacted the male, who appeared intoxicated and was breathing hard. 6/4/09RP at 343. When the deputy heard on the radio that the shooting suspected went by the name of "Fil," the male, who was avoiding the deputies' questions, acknowledged his name was Filmon. 6/4/09RP at 343-44.

Joseph Cobbs was brought to the scene of the arrest and he identified the defendant as the person he claimed had done the shooting. 6/2/09RP at 80, 6/3/09RP at 220-21, 6/4/09RP at 344-45. Deputy Brittingham arrested Mr. Habtemariam, and told him he was being investigated in a homicide that had taken place. 6/4/09RP at 345.

After Mr. Habtemariam was brought to the Snohomish County Sheriff's Office South Precinct, Detective Scott Wells spoke with him at approximately 4:30 in the morning. 6/4/09RP at 419. The detective read the defendant his Miranda¹ warnings, and after agreeing to speak, Mr. Habtemariam first asked why he was being detained. Detective Wells stated that "later in our contact" he told the defendant he was being detained for a homicide. 6/4/09RP at 422-25. Wells also brought some food to the defendant, along with specific cigarettes he had requested, which were Newport brand, in a box. 6/4/09RP at 426.

Mr. Habtemariam told the detective that he had been with a good friend that night named Kevin, but he would not give Wells

¹See Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

any further information about how this person could be contacted, despite being pressed. 6/4/09RP at 427-28. When told that a witness named Cobbs had placed him at the scene of a murder, Mr. Habtemariam stated that he had not done anything, and also stated that he “didn’t even care.” 6/4/09RP at 428-29. Later, Mr. Habtemariam told Wells he had gone to the Lynnwood court the previous morning, and then spent the rest of the day at a “crack house.” 6/4/09RP at 447-48.

Another Snohomish County detective testified that during a break in questioning, Mr. Habtemariam made a crude comment about a female deputy, and also stated that he was “bored.” 6/4/09RP at 460.

A Snohomish County Sheriff’s Office fingerprint technician located the fingerprints of Tekelet Habtemariam and Joseph Cobbs on the grey Hyundai, comparing the prints to records in the Automated Fingerprint Identification System (AFIS), but no fingerprints of Filmon Habtemariam were located. 6/4/09RP at 356-59. Located near the vehicle was a pack of Newport brand cigarettes. 6/4/09RP at 464-65.

Deputy David Bilyeu noted at the scene that Mr. Cobbs’

jacket had a piece of what appeared to be human tissue on the left sleeve, near the shoulder. 6/3/09RP at 293-94. The Snohomish County Medical Examiner opined that the nature of Tekelet Habtemariam's wounds and the blood spatter evidence indicated that the deceased was shot from a gun positioned behind him and to the right, essentially over his right shoulder. 6/5/09RP at 573, 592. The examiner also stated that the person who fired the gun would have a mist-like blood spatter on his hand and wrist area. 6/5/09RP at 592. In addition, the shooter would very likely have shot the deceased with the gun held in his right hand. 6/5/09RP at 592-93.

When arrested, the defendant was not wearing the same clothes as he was when allegedly at the bar. 6/2/09RP at 80. No blue shirt or person wearing a blue shirt was ever located. 6/4/09RP at 314. Detective Bilyeu was permitted to testify, without objection, that it has happened in the past that suspects fleeing a crime scene have hid or destroyed the clothing they were wearing, "in an effort not to be apprehended." 6/4/09RP at 315. However, the evidence also showed that the clothes Mr. Habtemariam was wearing when he was arrested were clean, despite the fact that the

area he would have walked through if he had come from the scene of the crash was dirty with vegetation and mud. 6/4/09RP at 471.

No blood matter or other evidence was found on Mr.

Habtemariam's clothes or person. 6/4/09RP at 474-75.

Mr. Habtemariam testified. He stated that on the night of the shooting, he got a ride home from his friend Bob, who gives him rides in exchange for crack cocaine. 6/9/09RP at 711-13. Bob drove Mr. Habtemariam to his friend Randy Lopez's home, to pick up his drugs, and then went to a friend's home where Mr.

Habtemariam sells cocaine. 6/9/09RP at 714-15. He did not ride in Tekelet's car that night and did not shoot Tekelet Habtemariam. 6/9/09RP at 7

There was some evidence of prior interactions between the defendant and others, but this evidence did not necessarily implicate Mr. Habtemariam, or only him. Fetsum Habtemariam, the deceased's younger brother and the defendant's cousin, testified that a couple of weeks before the shooting in Lynnwood, the defendant, the victim and he were at Goldie's Bar, located in Shoreline. While they were all there, the defendant angrily told Fetsum that he was going to kill Tekelet, Fetsum, and David.

6/4/09RP at 331-33. Filmon stated that they were “a disgrace to the Habtemariams.” 6/4/09RP at 332. Fetsum stated that the threat was not a concern. 6/4/09RP at 333.

Mr. Cobbs later told a deputy that he was asked if there had been any problems between Filmon and Tekelet before the shooting, and Cobbs reported that there were none that he noticed. 6/3/09RP at 287. Cobbs also did not report that Filmon had ever threatened Tekelet. 6/3/09RP at 287-88.

On July 5, 2008, three days before Tekelet was shot, the defendant was arrested by the Lynnwood Police Department for driving with a suspended license, following a traffic stop. The arresting officer knew of the defendant and knew that he was reputed to be a drug dealer, so the officer notified Officer Koonce of his department that the defendant was now in custody. Officer Koonce met with the defendant at the Lynnwood jail, and offered the defendant the opportunity to become an informant. The defendant became very angry. Officer Koonce then told the defendant that others were informing on him, without naming any names. The visibly angry defendant then terminated the conversation. 6/9/09RP at 690.

There were also some odd and unexplained occurrences. The Snohomish County fingerprint technician testified that fingerprints from AFIS belonging to Joseph Cobbs' apparent twin brother, Jason Cobbs, were also located on the vehicle; however, the witness later explained that this result was a clerical error. 6/4/09RP at 366, 6/8/09RP at 651-52.

Sonya Foye, Mr. Cobbs' girlfriend, stated that she received a phone call from him around 2:30 am on July 8; Mr. Cobbs kept saying, "Fil shot Tek." 6/3/09RP at 167. Cobbs told Foye later that he and Tekelet had gone to McCabe's Bar because Tekelet wanted to pick up Mr. Habtemariam. 6/3/09RP at 169-70.

Sheriff's deputies contacted the defendant's roommate, Randolph Lopez, who was asleep in his apartment in the Tamaron Ranch Apartments at the time of the shooting. He told them that the defendant had knocked on the door of the apartment asking to be let in, and claiming that he did not have his keys with him. 6/3/09RP at 184. The defendant, who was wearing a white t-shirt and dark pants, then went into the apartment towards his bedroom and the bathroom, and Randolph Lopez went back to bed. 6/3/09RP at 185-87. Lopez did not know how long the defendant

stayed in the apartment or when he left. 6/3/09RP at 187-88.

Lopez also stated that on July 4 or 5, he had reported a theft of his "Hungary .308 [sic] semiautomatic" handgun, from the trunk of his car. 6/3/09RP at 175-77. Mr. Lopez had pawned the gun sometime in early 2008, but he retrieved the gun after paying off the loan. 6/3/09RP at 178. He identified State's exhibit 6 as his handgun, and claimed that Mr. Habtemariam had seen the gun in his possession. 6/3/09RP at 181.

Lopez testified that the gun was unloaded when it was stolen. 6/3/09RP at 189. Deputy Kevin Lynch revealed, however, that when Mr. Lopez reported the gun stolen, he admitted that he had left the door to his apartment unlocked the previous night. 6/4/09RP at 351-52.

Police located a box of .380 ammunition during a search of Lopez's apartment, with 14 rounds missing. 6/4/09RP at 318-21. A toolmark expert from the Washington State Patrol Crime Laboratory (WSPCL) told the jury that the three bullets and shell casings which had killed Tekelet Habtemariam had likely been fired from the handgun located in the bush by Sheriff's Deputies, which was actually a "9 x 18 Makarov." 6/8/09RP at 549-50. The gun

was also determined to be “functioning properly.” 6/8/09RP at 550.

Mr. Lopez identified several letters he claimed to have received from Mr. Habtemariam, from the Snohomish County Jail. 6/3/09RP at 189. The writing in the letters instructed Lopez to testify falsely that his gun was loaded with ammunition at the time that it was stolen, and discussed the clothes the defendant had been wearing. 6/3/09RP at 190-92; State’s exhibit 7. Lopez had previously told sheriff’s deputies that when Mr. Habtemariam arrived at the apartment on July 8, he was wearing a black hooded zipper-type jacket, black pants, and white shoes. 6/3/09RP at 199. Lopez explained that he had testified as he had because he had been abruptly awoken on the morning of the incident. 6/3/09RP at 200. He later said that he was describing what Mr. Habtemariam was wearing when he left the apartment on the evening of July 7. 6/3/09RP at 202-03.

Handwriting analyst Hannah McFarland testified that based on the letters Mr. Habtemariam wrote to Mr. Lopez, Mr. Habtemariam was in fact left-handed. 6/9/09RP at 699-703.

D. ARGUMENT

1. THE DEFENDANT'S STATEMENTS IN RESPONSE TO CUSTODIAL INTERROGATION WERE IMPROPERLY ADMITTED BECAUSE DETECTIVE WELLS VIOLATED MR. HABTEMARIAM'S FIFTH AMENDMENT RIGHTS UNDER MIRANDA AND FAILED TO FOLLOW THE REQUIREMENTS OF CrR 3.1(c)(1) AND CrR 3.2(c)(2).

(a) Mr. Habtemariam argued below that his request for counsel during interrogation was unequivocal and required cessation of questioning. Mr. Habtemariam's CrR 3.5 and CrR 3.1 hearing involved several different series of statements made by the defendant at various locations, from the site of his arrest to the scene of the offense, to the Sheriff's Office. CP 203-20; 12/9/08RP at 128-32, 139-41. A number of viable theories were advanced at the suppression hearing. With regard to the inadmissibility of Mr. Habtemariam's statements to several detectives once he was at the South Precinct, although Mr. Habtemariam's counsel initially relied primarily on an argument that any request for an attorney by the defendant was not subsequent to a valid waiver of Miranda rights, and therefore required cessation of interrogation "even if"

equivocal,² counsel clearly put forth to the trial court the argument that Mr. Habtemariam's request for a lawyer was unequivocal. CP 209; 12/9/08RP at 130.

The trial court, in its suppression ruling, focused primarily on the first theory, and effectively rejected the second. CP 161; 12/9/08RP at 146-48. The court also effectively denied the CrR 3.1 ruling by failing to rule on the matter in a detailed way. Mr. Habtemariam may appeal these aspects of the court's ruling. RAP 2.4(a). It was error.

(b). Facts found at Mr. Habtemariam's CrR 3.5 hearing.

The trial court, following testimony and argument at Mr. Habtemariam's CrR 3.5 hearing to determine the admissibility of his statements to law enforcement under Miranda and CrR 3.1, found as follows with regard to statements that were prejudicial at

²At the CrR 3.5 hearing it was established that Detective Wells warned Mr. Habtemariam using an advice-of-rights card that included advisement of each of the distinct protections required under Miranda. 12/9/08RP at 61-62; see State v. Erho, 77 Wn.2d 553, 560-61, 463 P.2d 779 (1970). In addition, although the Washington courts continue to hold that when police warn a suspect pursuant to Miranda, and then immediately commence questioning, the very fact of successfully extracting statements from the suspect constitutes a valid "implied" waiver of the right to silence, see State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986), in this case Mr. Habtemariam expressly waived his right to remain silent before the detective began questioning him. 12/9/08RP at 64.

trial:³

When Deputy Brittingham arrested Mr. Habtemariam, he appeared to have been drinking alcohol, but he was coherent when he spoke. The Deputy questioned Mr. Habtemariam in the absence of Miranda warnings. After driving the defendant to the scene of the homicide, the defendant was then advised of his Miranda rights by Deputy Brittingham from an advice of rights card. The defendant indicated that he understood his rights. The defendant was then driven to the South Precinct of the Sheriff's Office. CP 161 (Findings 1p, 1q, 1r, 1w, 1x).

Detective Wells and Detective Greg Sanders then arrived and met with the defendant at 4:30 am. Detective Wells advised the defendant of his Miranda rights from an advice of rights card. The defendant stated that he understood his rights and added that he did not understand why he was in custody. Detective Wells again clarified with the defendant that he understood his Miranda rights. The defendant was calm, articulate, and composed during

³Mr. Habtemariam made several inconsequential statements prior to his transport to the precinct which were addressed at the CrR 3.5 and CrR 3.1 hearing, but which are not the subject of the present argument. See CP 161-67; 12/9/08RP at 146-48.

this time. CP 161 (Findings 1aa - 1ee).

The defendant then asked, "Is there an attorney I can talk to or something?" Detective Wells then asked questions of the defendant which caused him to conclude the defendant was not requesting an attorney. The defendant had been requesting food and cigarettes, so the two detectives left the precinct to buy the defendant those items. While the detectives were gone, Deputy McFarland guarded the defendant. The defendant made voluntary unsolicited comments to Deputy McFarland. The detectives came back with food and cigarettes for the defendant. The detectives then interviewed the defendant regarding the homicide. At the end of the interview, the defendant invoked his Miranda rights and only then did the questioning of the defendant stop. The defendant was then put in telephone contact with a public defender. CP 161 (Findings 1ff - 1nn).

(c). The State must show that statements obtained from a defendant interrogated in custody accorded with the protections of *Miranda*. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const.

Amend. 5. The Washington Constitution, Article I, section 9, is equivalent to the Fifth Amendment and “should receive the same definition and interpretation as that which has been given to” the Fifth Amendment by the United States Supreme Court. City of Tacoma v. Heater, 67 Wn.2d 733, 736, 409 P.2d 867 (1966) (citing State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)); Wash. Const. Art. 1, § 9.

In Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966), the United States Supreme Court fashioned a practical rule to ensure the integrity of the privilege against self-incrimination under the Fifth Amendment:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Miranda v. Arizona, 384 U.S. at 444. To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, the Miranda Court held that a suspect interrogated while in police custody must be told that: he has a right to remain silent; anything he says may be used against him in court; he is

entitled to the presence of an attorney; and if he cannot afford an attorney one will be appointed for him prior to the interrogation if he desires. Miranda v. Arizona, 384 U.S. at 479. The Miranda warnings are a bright-line constitutional requirement independent of the requirement that custodial statements be "voluntary" under Due Process. Dickerson v. United States, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

The inherently coercive nature of custodial interrogation⁴ imposes a heavy burden on the State to show an accused person's waiver of his rights was "an intentional relinquishment or abandonment of a known right or privilege." State v. Jones, 19 Wn. App. 850, 853, 578 P.2d 71 (1978) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)); Miranda v. Arizona, 384 U.S. at 444, 455, 467.

⁴"[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). There is no dispute in the present case that Mr. Habtemariam's statements made subsequent to his inquiry whether he could speak to an attorney were the product of custodial interrogation. 12/9/08RP at 149.

(d). The invocation of the *Miranda* right to counsel, which plainly occurred here, requires that questioning by law enforcement must cease. The right to counsel granted by Miranda is not the same right to counsel guaranteed under the Sixth Amendment, but is a procedural protection meant to safeguard the Fifth Amendment privilege against compulsory self-incrimination. State v. Stewart, 113 Wn.2d 462, 780 P.2d 844 (1989). Yet the right to counsel recognized in Miranda is sufficiently important that it “requir[es] the special protection of the knowing and intelligent waiver standard.” Edwards v. Arizona, 451 U.S. 477, 483, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

Relatedly, in discussing this right to counsel, the Miranda Court stated that if the accused indicates a desire for an attorney “in any manner and at any stage” of custodial interrogation, officers must immediately stop the interrogation. (Emphasis added.) Miranda, 384 U.S. at 444-45. The motivation for the implementation of this prophylactic rule is a concern for the voluntariness of confessions procured via “interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.” Id. at 464-65.

The Court reasoned that a state's denial of an accused's request for counsel would undermine the ability to exercise the privilege:

The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

Id. at 466. Therefore, while an accused may knowingly, voluntarily and intelligently waive the Miranda right to counsel, once an accused has invoked that right, he or she will not be presumed to have subsequently waived the right merely because he or she responds to further questioning:

[T]he Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

Edwards, 451 U.S. at 484. Moreover, 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).

Under the rule of Edwards, from the point of the invocation of the right to counsel onward, the accused “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” Edwards, 451 U.S. at 484-85. The suspect’s invocation of his right not to proceed with questioning without an attorney must be “scrupulously honored.” State v. Robtoy, 98 Wn.2d 30, 36, 37 n.1, 653 P.2d 284 (1982). Should police continue or re-initiate interrogation despite the request for counsel, any statements subsequently obtained must be suppressed. Edwards, 451 U.S. at 485.

However, in Robtoy, *supra*, the Washington Supreme Court addressed the question whether a suspect being interrogated invokes his Fifth Amendment right to counsel, thus requiring police to cease interrogation, when his request for an attorney is equivocal in nature. An “equivocal” request for an attorney is one that expresses both a desire for counsel and a desire to continue the interview without counsel. State v. Quillin, 49 Wn. App. 155,

159, 741 P.2d 589 (1987) (citing Robtoy, 98 Wn.2d at 38-39).

The Robtoy Court held that when a suspect who has been informed of his rights expresses an equivocal desire for counsel, police need not cease interrogation altogether, but instead “it is permissible for the questioning official to make further inquiry to clarify the suspect’s wishes.” Robtoy, 98 Wn.2d at 38-39. Any inquiry following the equivocal request for counsel, however, must be “strictly confined to clarifying the suspect’s request.” Robtoy, 98 Wn.2d at 39. The Robtoy court concluded this was “the most reasonable approach to dealing with an equivocal request for counsel,” as such approach “gives a suspect the proper amount of protection to his rights without unduly burdening the police from taking voluntary statements.” Robtoy, 98 Wn.2d at 39.⁵

In the present case, Mr. Habtemariam’s request for an attorney was unequivocal, requiring cessation of questioning and,

⁵After Robtoy, the United States Supreme Court directly addressed equivocal requests for counsel in Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The Davis Court held, “if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.” (Emphasis added.) Davis v. United States, 512 U.S. at 459. Thus, assuming there has been a knowing and voluntary waiver of the Miranda rights, “law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.” Davis v. United States, 512 U.S. at 461.

since that did not occur, suppression.

In Robtoy, the defendant stated, "Maybe I should call my attorney." Robtoy, 98 Wn.2d at 32. The Supreme Court characterized Robtoy's request for counsel as "equivocal." Robtoy, 98 Wn.2d at 41. Mr. Habtemariam's request, in contrast, was unequivocal.

In State v. Grieb, 52 Wn. App. 573, 574, 761 P.2d 970 (1988), the defendant stated that "he did not want to waive his rights," and this statement was deemed an unequivocal invocation of same. In State v. Malicoat, 126 Wn. App. 612, 106 P.3d 813 (2005), the suspect stated, "If you are accusing me of murder, then maybe I should get an attorney." State v. Malicoat, 126 Wn. App. at 617. The Court of Appeals suggested by comparison to Grieb that this statement was equivocal -- however, the Court's actual analysis was that the police "honored Mr. Malicoat's rights and did not question him further until he reinitiated the conversation," thus permitting his subsequent statements to be admitted. Malicoat, at 617.

And in State v. Lewis, 32 Wn. App. 13, 645 P.2d 722 (1982), the defendant stated:

I believe gentlemen that if this is going to get into something deep where you're attempting to get me to incriminate myself then I should have an attorney present. If there is any questioning on that particular subject.

State v. Lewis, 32 Wn. App. at 20. The Court of Appeals concluded that this request for a lawyer was equivocal, because it did "not indicate whether Lewis wanted an attorney present at that time or was only reserving his right to terminate the interview and request counsel when he felt the questioning dictated it." State v. Lewis, 32 Wn. App. at 20.

As can be seen, "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); Jurek v. Estelle, 623 F.2d 929, 939 (5th Cir.1980).

Here, no such equivocality was present. There was no ambiguity, expressed by alternating wishes, or use of the word "maybe," or any contingency stated by use of the word "if," or otherwise, and only unequivocality is present in these words. The trial court's factual findings are reviewed for substantial evidence, State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002),

but the Court of Appeals reviews de novo questions whether the facts demonstrate statements taken in violation of Miranda and its protections. State v. Johnson, 94 Wn. App. 882, 897-98, 974 P.2d 855 (1999). Mr. Habtemariam clearly, if quite politely, essentially asked, "Might I have an attorney to speak with please."

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. In this case, any equivocality in Mr. Habtemariam's overall discussion of desiring counsel arises only by means of Detective Wells' subsequent – improper – "clarifying" questions. Mr. Habtemariam's statements were elicited following an unequivocal request for counsel, and should have been suppressed. Edwards, 451 U.S. at 485.

(e). In addition, CrR 3.1 was violated when Mr. Habtemariam was not informed of his right to a court-appointed attorney or provided access to counsel at the earliest opportunity. The Washington Supreme Court has inherent power to govern criminal process. State v. Templeton, 148 Wn.2d 193, 212, 217, 59 P.3d 632 (2002); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); State v. Smith, 84 Wn.2d

498, 501-02, 527 P.2d 674 (1974). Thus, that court has inherent authority to adopt rules of criminal procedure to protect the right against self-incrimination that go beyond the protections provided by Miranda and its progeny. For instance, in Templeton, the court held it had inherent authority to adopt former JCrR 2.11 (now CrRLJ 3.1), which requires police to inform a suspect of his right to a lawyer “as soon as practicable” after arrest, even though the rule plainly “goes beyond the requirements of the Constitution.”

Templeton, 148 Wn.2d at 211, 217. The Court explained, “the validity of a court rule need not stand solely on either constitutional or statutory grounds. A nexus between the rule and the court’s rule-making authority over procedural matters validates the court rule, despite possible discrepancies between the rule and legislation or the constitution.” Templeton, at 217.

CrR 3.1 creates a separate and distinct right to counsel, which attaches “as soon as feasible after the defendant is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.” CrR 3.1(b)(1). When a person is taken into custody, the person must “immediately be advised of the right to a lawyer” in easily

understood language. CrR 3.1(c)(1) (emphasis added). Further, the person must be advised expressly that if he is unable to pay for a lawyer, he is entitled to have one provided without charge. CrR 3.1(c)(1). One purpose of the rule is to “ensure that arrested persons are aware of their right to counsel before they provide evidence which might tend to incriminate them.” Templeton, 148 Wn.2d at 217 (citation omitted).

Additionally, CrR 3.1(c)(2) provides:

At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

This rule was designed to “provide a meaningful opportunity to contact a lawyer.” State v. Kirkpatrick, 89 Wn. App. 407, 413, 948 P.2d 882 (1997) (citation omitted). The rule goes beyond the requirements of Miranda, in that police must not only advise the arrestee of his right to counsel, but also must formally offer the assistance of counsel. Id. at 414. “Although the rule does not require the officers to actually connect the accused with an attorney, it does require reasonable efforts to do so.” Id.

An accused may waive his rights under CrR 3.1, but because of the mandatory language of the rule, a waiver requires knowing, intelligent and voluntary conduct. Kirkpatrick, 89 Wn. App. at 415. Here, Mr. Habtemariam did not knowingly waive his rights under CrR 3.1, because, as argued above, the record does not show police ever advised him of his right to court-appointed counsel under the rule.

Once an accused requests the assistance of counsel, the record must show police made efforts to put the accused in contact with an attorney at the “earliest opportunity.” Kirkpatrick, 89 Wn. App. at 415. Additionally, as the Washington Supreme Court has observed, the rule “goes beyond the requirements of the Constitution.” Templeton, 148 Wn.2d at 211. Thus the standard of equivocality must necessarily be higher.

In this case, Mr. Habtemariam made a request for counsel but the detective still made no attempt to connect him with an attorney. Once an accused requests an attorney, police must make “reasonable efforts” to connect him with one. Kirkpatrick, 89 Wn. App. at 414. In this modern age of cell phones, officers have the ability to place an accused in contact with counsel immediately

after arrest.

Despite the clear ability of the officers to contact counsel, here as in Kirkpatrick, the officers made absolutely no effort to place Mr. Habtemariam in contact with an attorney. Suppression is required. In Spokane v. Kruger, the Washington Supreme Court held that under the analogous rule JCrR 2.1 the proper remedy for a violation of the right to counsel is suppression of the tainted evidence. 116 Wn.2d 135, 146, 803 P.2d 305 (1991). Thus, the detective's violation of CrR 3.1 mandates suppression of all statements made after the defendant's request for counsel.

(f). 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)). The erroneous admission of a confession has great risk of prejudice, because the jury may be tempted "to rely upon that evidence alone in reaching its decision." Fulminante, 499 U.S. at 296.

Here, Mr. Habtemariam's custodial statements were admitted in the State's case-in-chief and the detectives testified about them. Although they were not directly confessions to the crime, the statements made the defendant 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 the 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. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO IMPEACH WITNESS JOSEPH COBBS.

(a). Counsel obtained leave from the trial court to introduce the false statement conviction of the State's prime witness to impeach his credibility. Mr. Habtemariam's counsel obtained leave from the trial court to impeach the State's star, and sole eyewitness, with his prior misdemeanor conviction for filing a false statement, which is a crime of dishonesty, admissible under

ER 609(a)(2).⁶ 6/2/09RP at 48-55; see State v. Gomez, 75 Wn. App. 648, 653 n. 3, 880 P.2d 65 (1994).

This prior conviction was plainly admissible. Indeed, under the plain language of the rule, the balancing test in ER 609(a)(1) does not apply. See State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001); Gomez, 75 Wn. App. at 653 n. 3.

However, counsel did not mention this conviction to impeach the witness during his trial testimony. Mr. Habtemariam regrettably must argue that the failure to do so was ineffective assistance.

(b). In the absence of a tactical justification for failing to impeach Mr. Cobbs' credibility, counsel's performance was deficient. To sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel's

⁶ER 609(a) allows the admission of prior crimes to impeach a witness, and reads:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); U.S. Const. amend. 6. A “reasonable probability” means “a probability sufficient to undermine confidence in the outcome.” Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The courts will not allow tactical decisions to be deemed ineffective assistance simply because they do not result in the desired outcome, but tactical decisions must be reasonable. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Here, given that Cobbs was the State’s star witness, it was unreasonable, even if tactical, to fail to impeach his credibility with his prior conviction.

(c). Counsel’s deficient performance undermines any confidence in the outcome of Mr. Habtemariam’s trial. Mr. Habtemariam’s trial would have likely resulted in acquittal if Cobbs could have been shown – with official evidence – to be an untrustworthy witness. Certain facts that were admitted would have allowed the jury to conclude, if he had been impeached, that his

accusation of Mr. Habtemariam could not be believed. Notably, Cobbs admitted that he had told Tekelet, when he asked him to go to McCabe's, that if the defendant was at the bar, and acted strange, he would "fuck him up." 6/2/09RP at 94. This showed some bias, at a minimum, toward the accused. One witness stated that she overheard Mr. Cobbs call 911, and during the call he said that he did not know who the shooter was. 6/3/09RP at 164. This is completely inconsistent with his accusation that the defendant shot the driver of the car that Cobbs was in, and that the shooter was the defendant, a person he knew.

The failure to impeach this witness undermines confidence in the verdict and Mr. Habtemariam's murder conviction must be reversed. Strickland v. Washington, 466 U.S. at 694.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL.

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 scurrilous inquiry. 6/9/09RP at 744-47. The court never granted a mistrial.

The court erred in denying the mistrial motion. The trial 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).

Thus, 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).

In assessing the degree of prejudice, a court should examine (1) the seriousness of the irregularity; (2) whether it was cumulative of properly admitted evidence; and (3) whether it could have been cured by an instruction. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987) (new trial warranted where assault complainant testified that the defendant "already has a

record and had stabbed someone"); State v. Weber, 99 Wn.2d at 165-66; see also State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998).

In addition, the inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. State v. Weber, 99 Wn.2d at 164.

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.

4. MR. HABTEMARIAM'S CONVICTIONS SHOULD BE REVERSED UNDER THE CUMULATIVE ERROR DOCTRINE.

In the event this Court concludes that none of the above errors warrant reversal individually, Mr. Habtemariam argues that reversal is still required because of the cumulative effect of the trial

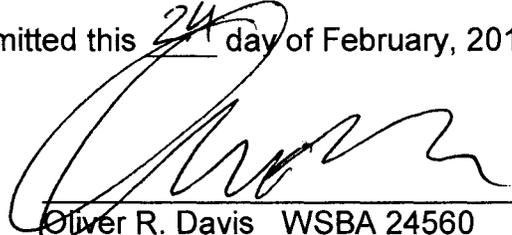
court errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

To determine whether cumulative error exists, the reviewing court examines the nature of the errors: constitutional error -- as shown in the present case in several instances -- is more likely to contribute to cumulative error than multiple non-constitutional errors. Russell, 125 Wn.2d at 94. This is a case where the prejudice from multiple errors went to the heart of the question of whether Mr. Habtemariam was involved in Tekelet's murder, and they require reversal. Russell, 125 Wn.2d at 93-94. This Court also has discretion under RAP 2.5(a)(3) to review all errors, preserved and inadequately preserved, as part of a cumulative error analysis to ensure that Mr. Habtemariam received a fundamentally fair trial. State v. Alexander, 64 Wn. App. at 150-51; U.S. Const. amend. 14. Mr. Habtemariam urges this Court to determine that he did not receive a fair trial.

E. CONCLUSION

Based on the foregoing, Mr. Habtemariam respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 24 day of February, 2010.



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63936-6-I
)	
FILMON HABTEMARIAM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING 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:

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STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON, THIS 24TH DAY OF FEBRUARY, 2010.

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