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NO. 65432-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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COURT OF APPEALS
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STATE OF WASHINGTON,

Respondent,

v.

David Elliot Jefferson,

Appellant.

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

The Honorable James E. Rogers, Judge

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

MR. JEFFERSON'S CONVICTION MUST BE REVERSED BECAUSE HE WAS PREJUDICED BY THE TRIAL COURT'S ERRONEOUS ADMISSION OF HIS SELF-INCRIMINATORY STATEMENT MADE TO LAW ENFORCEMENT OFFICERS DURING A CUSTODIAL INTERROGATION WITHOUT THE BENEFIT OF *MIRANDA* WARNINGS.

1. The State Does Not Contest That Mr. Jefferson Was Interrogated.

In his Opening Brief, Mr. Jefferson argued his statement to Deputy Escobar was the product of interrogation because the police officer questioned him with the intention to elicit an incriminating response. Standing "easily within 10 feet" of Mr. Jefferson on the side of the marked, non-pedestrian area, Deputy Escobar told Mr. Jefferson he was trespassing in a dangerous, restricted area and asked him, "what are you doing here?"

2/17/10RP 8. The question constitutes express questioning designed to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 300-302 & n.8, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); State v. Shuffelen, 150 Wn. App. 244, 257, 208 P.3d 1167 (2009) ("The relationship of the question asked to the crime suspected is highly relevant."); State v. Willis, 64 Wn. App. 634, 825 P.2d 357 (1992).

Presumably because there is no basis to do so, the State does not contest that the questioning constitutes interrogation.

2. Mr. Jefferson Was in Custody Because His Liberty Was Restrained to a Degree Associated With Formal Arrest.

The only argument presented in the State's Response Brief is that Mr. Jefferson was not in custody at the time he made the incriminating statement to police. An individual is considered to be in custody and warnings are required when the suspect is "in custody at the station *or otherwise deprived of his freedom of action in any significant way.*" Orozco v. Texas, 394 U.S. 324, 327, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969) (quoting Miranda v. Arizona, 384 U.S. 436, 477, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)) (emphasis in original); accord State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004); Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); State v. Short, 113 Wn.2d 35, 40, 775 P.2d 458 (1988) (recognizing Washington's adoption of Berkemer test). Reviewing the totality of the circumstances de novo, this Court must find Mr. Jefferson was in custody if a reasonable person would "have felt he or she was not at liberty to terminate the interrogation and leave." United States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008) (citing Thompson v. Keohane, 516 U.S.

99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)). In other words, the question is “whether a reasonable person in [Mr. Jefferson’s] position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation.” Id. Indeed, at the Criminal Rule 3.5 hearing, Deputy Escobar testified that Mr. Jefferson was in fact not free to leave. 2/17/10RP 10-11.

Contrary to the State’s argument, Mr. Jefferson was deprived of his freedom of action to a more significant degree than a typical “Terry investigatory detention.” Resp. Br. at 5; cf. State v. Heritage, 152 Wn.2d 210, 218-19, 95 P.3d 345 (2004) (questioning of defendant (1) together with her friends (2) by park security guards (3) who “immediately made clear they did not have the authority to arrest” and (4) did not physically detain (5) or search the group in non-custodial setting analogous to Terry stop). Moreover, custody is not limited to situations where the police “draw [their] weapon, search or handcuff [the suspect], order him to the ground, or place [the suspect] in [the police] patrol vehicle prior to speaking with him.” Resp. Br. at 8.

Unlike in the Marshall case relied upon by the State, Mr. Jefferson’s detention crossed the line from a brief, non-coercive

investigatory detention to custody. Resp. Br. at 6-7 (relying on State v. Marshall, 47 Wn. App. 322, 737 P.2d 265 (1987)). Mr. Jefferson was approached by two uniformed police officers and corralled to the side of a narrow choke point in an area restricted from public access. 2/17/10RP 7-8, 55; see, e.g., Berkemer, 468 U.S. at 438 (lack of public presence relevant). Deputy Escobar seized Mr. Jefferson's identification, which prevented him from leaving and in turn increased the aura of custody. Id. at 7-8. Deputy Escobar remained "very close to" Mr. Jefferson while the police officer questioned him about the criminal activity he was suspected of committing. Id. at 7-8. Deputy Escobar focused on him as he told him "You are trespassing" and questioned his basis for being in the area. 2/17/10RP 8.

The totality of the circumstances shows a reasonable person in Mr. Jefferson's situation—where two uniformed police officers had cornered him in a narrow area, alleged he had committed a crime, held onto his identification and questioned him about his presence—would not have felt free to cease the questioning and voluntarily leave.

3. Mr. Jefferson's Conviction Must Be Reversed Because the Error in Admitting the Statement Was Not Harmless Beyond a Reasonable Doubt.

As Mr. Jefferson argued in his Opening Brief, the State bears the burden of proving that the admission of a statement obtained in violation of Miranda was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (state required to show that the admitted statement did not contribute to the conviction); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In response, the State has presented no evidence or argument that the error was harmless. The State, accordingly, fails to meet its burden. Moreover, because in the erroneously admitted statement Mr. Jefferson confessed contact with the person protected by the no contact order, the trial was tainted by its admission. See Fulminante, 499 U.S. at 296. Thus, the trial court's admission of Mr. Jefferson's statement to Deputy Escobar was not harmless error.

B. CONCLUSION

This Court should reverse Mr. Jefferson's conviction because the trial court erroneously admitted Mr. Jefferson's

statement, which was the result of custodial interrogation absent any warnings, and the error was not harmless.

DATED this 4th day of February, 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Marla L. Zink", written over a horizontal line.

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65432-2-I
v.)	
)	
DAVID JEFFERSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2011, 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:

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<input checked="" type="checkbox"/> DAVID JEFFERSON 895765 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF FEBRUARY, 2011.

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