

72024-4

72024-4

NO. 72024-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

SANDRA J. HIMMELMAN

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Where the record supports the trial court's conclusion that the defendant was not in custody at the time she was questioned by the police, did the trial court err in admitting the defendant's statements into evidence?

2. If the trial court erred in admitting the defendant's statements into evidence was that error harmless?

II. STATEMENT OF THE CASE

A. THE CRIME.

In the spring/summer of 2012, the defendant hired Derryn VanSickle to complete a remodel of her house. With the defendant's permission, Mr. VanSickle moved some of his tools into a shed on the defendant's property to have them available to work on the project. To protect his tools, Mr. VanSickle purchased a padlock and placed it on the door to the shed. The defendant did not have any tools in the shed. The defendant was living at the residence during the remodel. 4/14/14 RP 83-85.

On August 23, 2012, Mr. VanSickle arrived at the worksite. He found the shed door had been ripped off the hinges and his tools were missing. After speaking with a few people, Mr. VanSickle telephoned the defendant. In the course of the

conversation, the defendant explained to Mr. VanSickle that she had needed the tools to get a friend out of jail, for bail money. Mr. VanSickle told the defendant to give him the pawn slips so he could get his tools back. Two days later, Mr. VanSickle confronted the defendant at her house and again demanded the pawn slips. The defendant gave Mr. VanSickle three pawn slips for his stolen tools. Mr. VanSickle called the police and gave them the pawn slips. The pawn slips showed the items had been pawned at different pawn shops and on different days. The police were able to retrieve Mr. VanSickle's tools and returned them to him. 4/14/14 RP 85-86, 94-95, 100.

At trial, Officer Bridgman of the Mill Creek Police Department testified that he responded to the defendant's house. He spoke with Mr. VanSickle who provided him with the pawn slips signed by the defendant. Officer Bridgman took photos of the damaged shed. The pawn slips and photographs of the damaged shed were admitted into evidence. Officer Bridgman testified that he then went to the front door of the house and knocked. The defendant answered the door and invited Officer Bridgman and another officer into the house. Officer Bridgman testified that the defendant initially told him she believed the tools belonged to her boyfriend, Ryan

Ronstadt. Officer Bridgman was familiar with Mr. Ronstadt and pointed out that this was not likely as they both knew Mr. Ronstadt had never been employed in any way. Officer Bridgman testified that he placed the defendant under arrest and advised her of her constitutional rights and transported her to the police station. 4/15/14 RP 53, 57-61, 63.

Officer Bridgman testified at the police station the defendant provided a recorded statement. In her recorded statement the defendant claimed she thought the tools belonged to "Derrick", a person she had known for about a year. She didn't know his last name, his cell phone number or where he lived. Officer Bridgman testified the defendant explained that she makes it a habit not to learn the last names of her friends. She prefers not to know a lot of information about the people she associates with, it's just safer for her. 4/15/14 RP 53, 57-61, 63.

B. FACTS RELEVANT TO THE CRR 3.5 HEARING.

On September 19, 2013, a hearing pursuant to CrR 3.5 was held on this matter. The court heard testimony from Officer Bridgman of the Mill Creek Police Department. Officer Bringman testified that he had seven years of experience in law enforcement. On August 25, 2012, he responded to a theft complaint at the

defendant's residence. When he arrived at the location he contacted Mr. VanSickle first. After speaking with Mr. VanSickle by the shed, Officer Bridgman knocked on the defendant's front door and the defendant let him in. Officer Bridgman only came about three to six feet into the house. He could not remember if the door was open or closed. He explained why he was there and began asking the defendant questions. Officer Bridgman explained that he was about an arm's length away from the defendant and there was another officer present inside the door nearby. Officer Bridgman denied using any force while questioning the defendant or asking the defendant to do anything physically. At no time did the defendant decline to answer questions or ask for an attorney. 9/19/13 RP 3-6.

After questioning the defendant, Officer Bridgman placed the defendant under arrest, placed her in handcuffs and read her Miranda rights to her from a pre-printed form. The defendant waived her rights. Officer Bridgman transported the defendant to the police department and placed her in an interview room. The defendant agreed to provide a recorded statement and was re-advised of her constitutional rights in writing and orally at the

beginning of the recording. No other witnesses testified at the hearing. 9/19/13 RP 21-22.

On September 26, 2013, the court entered written findings of fact and conclusions of law with regard to the CrR 3.5 hearing. The defendant does not take exception to the admissibility of the defendant's recorded statement. The defendant does take exception to the following Conclusions of Law:

4(a). The defendant was neither in custody nor were her movements restricted to a degree associated with formal arrest until the police actually arrested here. There were no facts to show that the defendant was in custody. There were no facts to show that a reasonable person in a same or similar situation to the defendant would feel that they were in custody.

4(e). The initial statements of the defendant and the statements after she was advised of her Miranda rights were freely, intelligently, and voluntarily made. As a result the statements are admissible pursuant to CrR 3.5.

CP 74-77; Appellant's Brief 1-2.

III. ARGUMENT

A. THE DEFENDANT'S STATEMENTS WERE PROPERLY RULED ADMISSIBLE INTO EVIDENCE.

The Fifth Amendment privilege against self-incrimination generally must be asserted by the person holding that privilege. State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). A

person who is not in custody and who does not assert his Fifth Amendment right to remain silent is considered to have acted voluntarily if he chooses to respond to questions which could reasonably be expected to elicit incriminating evidence. Minnesota v. Murphy, 465 U.S. 420, 429, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). The presumption of voluntariness dissipates once the person is taken into custody. Id. at 429-430. In that case before the defendant's statements are admitted into evidence the State must show that the defendant knowingly, voluntarily, and intelligently waived his Miranda rights by a preponderance of the evidence. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). "But outside the context of custodial interrogation, Miranda does not apply." State v. S.J.W., 149 Wn. App. 912, 927-28, 206 P.3d 355, 363 (2009) aff'd on other grounds, 170 Wn.2d 92, 239 P.3d 568 (2010).

"Our courts determine whether an interrogation is custodial using an objective standard, which is whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." Id. "The fact

that a suspect is not 'free to leave' during the course of a Terry¹ stop does not make the stop comparable to a formal arrest for purposes of Miranda." State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624, 625 (1992). A suspect is in custody once his "freedom of action is curtailed to a degree associated with formal arrest." Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984). Whether a defendant is in custody for purposes of Miranda is a mixed question of fact and law. State v. Solomon, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025, 72 P.3d 763 (2003). The factual question concerns the circumstances surrounding the interrogation. Id. The legal question determines whether a reasonable person would have felt he was not at liberty to terminate the interrogation and leave. Id. at 788. The Court employs an objective test to resolve that question. Id.

The Fifth Amendment right to Miranda warnings attaches only when a custodial interrogation begins. State v. Templeton, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). The circumstances to establish a reasonable belief the person was in police custody must

¹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

be more than the police indicating a desire to speak with the person. The court has held that a potential suspect who was handcuffed for 45 minutes prior to a police show up was not in custody for purposes of Miranda. See State v. Cunningham, 116 Wn. App. 219, 229, 65 P.3d 325, 329 (2003) (Mr. Cunningham asserts Officer Meyer should not have left him in handcuffs for approximately 45 minutes. He claims this action proves the investigation was more than a limited Terry stop. We disagree.)

In the present case, the defendant was free to refuse the officers entry into her home. The officers stepped only a few feet inside the doorway and told the defendant why they were there. There is no evidence her movement was curtailed in any way. A reasonable person in the defendant's position would not believe she was in police custody to a degree associated with formal arrest

1. The Trial Court's Conclusions Regarding Disputed Facts Are Supported By Substantial Evidence.

Prior to trial the court conducted a CrR 3.5 hearing to determine the admissibility at trial of the defendant's statements to law enforcement. The only testimony provided to the court was from Officer Bridgman. After hearing from Officer Bridgman, the court found the defendant's statements to him admissible. The

court reasoned that under the facts the defendant was not in custody for the first statement she provided and before her subsequent recorded statement she had been properly advised of her constitutional rights and made a knowing, intelligent, and voluntary waiver of those rights.

The trial court entered a certificate pursuant to CrR 3.5 approximately a week after the hearing. The defendant now assigns error to the court's conclusions the defendant was not in custody for purposes of the initial statement provided to law enforcement in her home.

When the defendant challenges findings of fact they are upheld if substantial evidence supports them. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person that the finding is true. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are treated as verities. Broadaway, 132 Wn.2d at 131. Conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

A conclusion of law is a determination that a term which carries legal implications has been established. Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717,

review denied, 109 Wn.2d 1003 (1987). A finding of fact is a determination from the evidence offered by the parties. Id. The Court treats each for what it really is, regardless of the label applied by the parties. Id. The court's credibility determinations are not subject to review. Hill, 123 Wn.2d at 646, State v. Burgess, 71 Wn.2d 617, 619, 430 P.2d 185 (1967).

2. Under The Totality Of The Circumstances The Defendant Was Not In Custody When She Agreed To Talk To The Officer.

To determine whether the defendant was in custody the court considers how a reasonable person in the same circumstances would have perceived the situation. State v. Cunningham, 116 Wn. App. 219, 228, 65 P.3d 325 (2003). The determination is made considering all of the circumstances surrounding the interrogation. Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). In circumstances similar to those presented in this case the Court has concluded the defendant was not in custody for the purposes of Miranda.

Although Officer Bridgman testified he intended to arrest the defendant at the end of the interview, there was no evidence the defendant was ever told that. An officer's unarticulated plan to

arrest the defendant has no bearing on the whether the suspect was in custody at the time of questioning. Berkemer, 468 U.S. at 442. Nor is a defendant in custody at the time of questioning because police suspect him of a crime. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

Here the court correctly concluded the defendant was not in custody at the time she was questioned by Officer Bridgman. The defendant invited the officer into her home. The officers only entered the home by 3 to 6 feet. The defendant was told why the officers were there, but was not told that she was under arrest. She was not restrained in any way when she spoke with the officer. Because the defendant was not in custody at the time she spoke to the detective her statements were necessarily voluntary and appropriately admissible.

The defendant argues the evidence showed she was in custody at the time of questioning because the officer was armed with a firearm and intended to arrest her at the end of the interview. The firearm was holstered. There was no evidence Officer Bridgman in any way used it to indicate to the defendant that she was not free to leave. A suspect is not seized simply because the

officer who questions him is visibly armed with a firearm. State v. Smith, 154 Wn. App. 695, 700, 226 P.3d 195 (2010).

The defendant's cited authority involves very different facts from the ones presented here. They do not support her argument that she was in custody. In Orozco law enforcement testified the defendant was under arrest from the time they entered the defendant's bedroom and began questioning him. Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). "Orozco's analysis did not focus on the issue of arrest. In particular, the Court did not face the question whether the defendant would reasonably have felt free to leave or to ask the officers to leave, but relied on officers' testimony that the defendant was under arrest and not free to leave." United States v. Mejia, 953 F.2d 461, 467 (9th Cir. 1991), as amended (Feb. 19, 1992), as amended (Mar. 25, 1992)(abrogated on other grounds United States v. Caperna, 251 F.3d 827 (9th Cir. 2001). In Mejia, the Court held the presence of two officers in the defendant's bedroom did not amount to formal arrest. The officers did not draw guns or use coercion. "A reasonable person in Mejia's position would have felt free to leave, or, more reasonably, to have asked the officers to leave the bedroom or to leave the house. Mejia did none of these things. The

officers' presence in Mejia's bedroom did not constitute an arrest.” Mejia, 953 F.2d at 467. In the present case, the officers did not draw their guns or coerce the defendant. A reasonable person in her position would have felt free to ask the officers to leave.

The defendant asserts the facts in the present case are similar to those in State v. Dennis, 16 Wn. App. 417, 421-22, 558 P.2d 297 (1976). In Dennis the officer questioning the defendants in their home specifically told them that (1) they could not leave and (2) that a warrant had been obtained and was en route to the apartment in order to be served. Dennis, 16 Wn. App. at 421-22. In the present case, the defendant had not been told that she was under arrest or that she could not leave.

3. If There Was An Error In Admission Of The Defendant's Statements It Was Harmless.

Officer Bridgman testified that when he spoke to the defendant, she consistently told him she believed the tools she pawned belonged to someone else. In the initial statement she claimed she believed they belonged to her boyfriend, Ryan Ronstadt. In her post-Miranda statement, she stated she believed the tools belonged to a friend named “Derrick”. When asked, she denied knowing Derrick's last name. The defendant explained that

she made it a habit not to know her friend's last names. In her statement, the defendant offered no explanation for why she pawned the items at three different pawn shops on the same day. If the trial court erred in permitting this evidence it was harmless.

Error involving constitutional right is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To assess whether a constitutional error is harmless the court will look to the untainted evidence to determine if that evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

Here any error in admission of the defendant's statements was harmless because the evidence overwhelmingly led to the defendant's guilt. It is unlikely a reasonable juror would have been persuaded the defendant thought the tools belonged to a friend she only knew by Derrick. The tools had been used on the remodel of her home while she was living there. Mr. VanSickle had specifically asked for permission to store the tools in her shed. The defendant admitted to Mr. VanSickle that she needed the tools to bail a friend

out of jail and provided Mr. VanSickle with the pawn slips when she was confronted by him. The defendant had pawned the tools at three different pawn shops on different days.

Even if the court had excluded the defendant's initial statement it would not have impacted the outcome of the case. It is reasonable to believe the jury's assessment of the evidence and credibility of the witnesses would have been the same even without hearing the defendant's initial claim to have thought the tools were Ryan Ronstadt's.

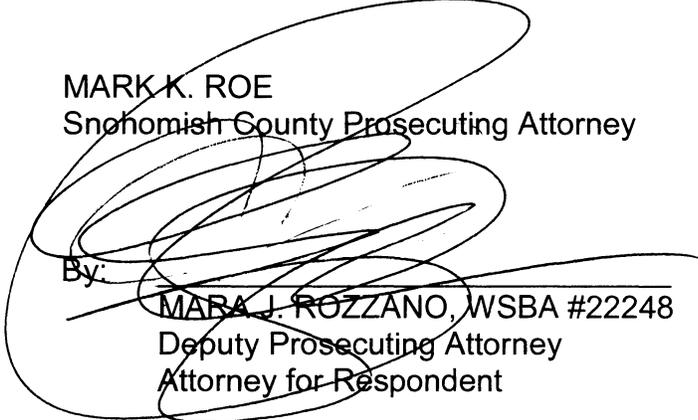
IV. CONCLUSION

For the forgoing reasons the State requests the Court affirm the defendant's conviction.

Respectfully submitted on March 13, 2015.

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