

FILED  
September 24, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 72943-8-1

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

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STATE OF WASHINGTON

Respondent

v.

MICHAEL DARE,

Appellant

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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## **I. ASSIGNMENT OF ERROR**

The court erred in multiple conclusions of law, which ultimately reduce to one basic issue to which the State assigns error. The court incorrectly held that the defendant was in custody for Miranda purposes before he was detained to the degree associated with formal arrest. This error is apparent in the following conclusions of law:

1. "In the present situation, law enforcement detention did not rise to a degree associated with a formal arrest until Trooper Cailoa formed the suspicion the vehicle was likely stolen, and formed the intent to detain the occupants of the vehicle, and not to allow them to leave the scene. At this point, the defendant was in custody such that Miranda warnings were required prior to any subsequent interrogation. This intent to arrest their movement elevated the detention to that of a custodial arrest. This is heightened by the Trooper's directives to the occupants to place their hands in front of them and remain still."1CP 28.

2. When the trooper asked why the defendant would say "I knew it," the defendant said he "knew the [sic] Satan to have stolen vehicles on prior occasions. This response is not admissible in the State's case-in-chief." CP 30.

## **II. ISSUES**

Did the trial court err in holding that the four occupants of the vehicle, including defendant, were in custody for purposes of Miranda at the moment the Trooper formed his subjective opinion that the car was likely stolen, then told the four occupants to keep their hands visible and remain in the car?

Did the Trooper interrogate the defendant by responding to the defendant's spontaneous inquiry about why he was being detained, that he suspected the car may be stolen?

Did the Trooper conduct an illegal two-step interrogation process rendering the defendant's post-Miranda statements inadmissible, when the initial round of pre-Miranda interrogation was a completely spontaneous product of the defendant's inquiries consisting of one question and one answer, and the Trooper had no intention of conducting a two-step interrogation?

## **III. STATEMENT OF THE CASE**

The State charged the defendant with Possession of a Stolen Vehicle based on the spontaneous investigation of veteran Washington State Patrol Trooper Chris Caiola, who first contacted the defendant on a traffic stop after observing him texting while driving. CP 63, 65. The facts were largely undisputed at trial, with

the sole exception whether the State could prove the defendant knew the car was stolen. 3RP<sup>1</sup> 126-127. On that critical issue the State offered (among other admissions) the defendant's exclamation, "I knew it!", when he learned that the trooper suspected the vehicle was stolen. 3RP 55. The defendant testified in his own defense, denied that he ever said "I knew it!", then asserted on cross-examination that what he really meant was that he knew he was in trouble. 3RP 95, 104. A jury returned a unanimous verdict of guilty, and the court imposed a standard range sentence of nine months. CP 34; 4RP 5.

**A. CrR 3.5 HEARING.**

The State moved for the admission of the defendant's statements made to Trooper Caiola, pursuant to CrR 3.5. CP 67-72. The court held a pretrial testimonial hearing on November 13, 2014, at which Trooper Caiola explained that his investigation began as a routine traffic stop for texting while driving. The defendant was driving an older model Honda containing three additional occupants; a female in the front passenger seat, and a male and female in the back seats. 1RP 4. The defendant was

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<sup>1</sup> The State will observe the same convention as the defendant in referencing the verbatim report of proceedings as follows: 1RP – 11/13/14; 2RP – 11/21/14; 3RP – 12/1/14, 12/2/14; 4RP – 1/6/15.

texting at a red light intersection when his car slowly rolled forward, almost striking the car in front of him. The defendant avoided the collision by suddenly applying the brakes after being warned by one of the vehicle's other occupants. 1RP 5. The trooper observed the defendant continue to text through the next two intersections, then activated his emergency lights intending to conduct a traffic stop. 1RP 6. The defendant did not pull over right away, but did so after the trooper used his PA system to issue instructions. 1RP 7.

The trooper approached the defendant's open driver-side window on foot after the defendant pulled into a church parking lot. Immediately the defendant displayed signs that the trooper recognized as high anxiety; fumbling with an unlit cigarette, hands shaking so much that he could barely write legibly. 1RP 9, 11, 12. The trooper told the defendant that the reason for the stop was his texting while driving and in the process asked for the defendant's license, registration, and proof of insurance. The defendant explained that he did not have a driver's license, so he wrote his name and partial Social Security number on a notepad provided by the trooper. When asked again for the registration and insurance the defendant said he didn't have those things, but the trooper found it odd that the defendant didn't look for them in the glove

compartment or anywhere else. The conversation then turned to the ownership of the vehicle, with the defendant indicating that his female friend known as "Satan" allowed him to use it. 1RP 10.

At this point the trooper developed "suspicions around the ownership of the car," and asked dispatch to provide the last five digits of the VIN number associated with the vehicle's license plate. He approached the front of the car and informed the occupants that he was going to check the VIN number, soon noticing that the VIN number did not match the number provided by dispatch. It was at this point that the trooper concluded, based on "years and years of encountering this same type of violation," that the car was stolen. 1RP 11-12.

The trooper's last investigative step to confirm the vehicle's stolen status was to relay the actual VIN number observed on the vehicle's front dashboard back to dispatch. It took approximately 60 to 90 seconds for dispatch to answer back that indeed the vehicle was a confirmed stolen, and it was during that 60 to 90 second time span that all of the legally-disputed statements in this case took place. During that time the trooper was initially standing next to the defendant's open driver's side window. 1RP 12-13. The trooper knew he was outnumbered four to one and that this type of traffic

stop can turn volatile very quickly. His assessment was that the potential threat had risen with his discovery of the car's stolen status, so he asked all four of the vehicle's occupants to keep their hands forward where he could see them, and remain still. 1RP 14-15. The trooper never drew his weapon, used handcuffs, or ordered anyone out of the car during this time. All of the vehicle's occupants complied with the trooper's directives. 1RP 15.

The female in the front passenger seat became agitated, prompting the defendant to ask the trooper, "What's going on?" The trooper answered, "I think the car might be stolen," to which the defendant exclaimed, "I knew it!". The trooper then asked the defendant what he meant by that comment, and the defendant replied that his friend Satan was known for stealing cars. 1RP 15.

After this brief interaction the trooper moved to a place of cover somewhat behind the defendant's vehicle. 1RP 13, 15. He was in this position when dispatch confirmed the vehicle was stolen. 1RP 13. The trooper then called for backup officers with the intent of conducting a high-risk felony stop procedure, which entails ordering each occupant out of the vehicle one by one at gunpoint. Four or five additional officers arrived on scene, allowing Trooper Caiola to conduct the high-risk stop. The defendant was the first

person ordered out of the vehicle and placed into handcuffs. 1RP 15-17.

Trooper Caiola then advised the defendant for the first time that he was under arrest and informed him of his Miranda rights from a pre-printed card. 1RP 17-18.<sup>2</sup> The defendant told the trooper that he understood his rights and freely agreed to continue speaking about the stolen vehicle. The defendant was handcuffed and seated beneath a tree as Trooper Caiola crouched next to him and discussed the investigation for about four or five minutes. The topic of conversation included more details about how the defendant came into possession of the vehicle, and his friend Satan. 1RP 19.<sup>3</sup> The interaction involved no threats, no weapons, and the defendant never asked for an attorney or expressed a desire to remain silent. 1RP 19-20. The trooper's testimony at the CrR 3.5 hearing was uncontroverted, as the defendant elected not to testify. 1RP 25.

The defendant had filed a Motion to Suppress Statements on the same day as the CrR 3.5 hearing, arguing that all of the

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<sup>2</sup> The defendant stipulated at the CrR 3.5 hearing that the Miranda warnings were correctly delivered. 1 RP 18. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 964 (1966).

<sup>3</sup> Although the testimony at the CrR 3.5 hearing contained no further elaboration on the exact statements the defendant made during this post-Miranda custodial interrogation, Trooper Caiola provided those details at trial. See infra at 10-11.

defendant's statements, whether before or after Miranda, were inadmissible due to a two-step interrogation prohibited by Missouri v. Siebert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). CP 57-60. The prosecutor was not prepared to address the untimely argument, and the court was unfamiliar with the factors relevant to a Siebert analysis. The defendant agreed it was appropriate for the court to invite additional briefing from both parties. 1RP 36, 39-40. Both the State and the defendant prepared supplemental briefing. CP 54-56; CP \_\_\_\_ (State's Supplemental Memorandum Re: CrR 3.5 Admissibility of Statements, docket sub # 35).

On November 21, 2014, the court delivered its oral ruling, addressing in turn the dual components of custodial interrogation. 2RP 3-13. Regarding custody, the court found the initial Terry stop evolved into a custodial arrest "when [the Trooper] found out the VIN and the license did not match." 2RP 7. In doing so, the court did not focus on the physical conditions affecting the defendant or what the defendant had been told; instead, the court focused heavily on the trooper's subjective intent to ultimately arrest the defendant. 2RP 7. The court stated:

“However, I do find and conclude in this case that this was a Terry stop but only to the point where the officer concluded the car was stolen when he found out the VIN and the license did not match. At that point, the defendant’s freedom was curtailed to the extent of a formal arrest. It is quite clear that even if the officer would not have been able to get confirmation because the car hadn’t been reported as stolen, he intended to take the defendant into custody believing the car was stolen.” 2RP 7.

Regarding interrogation, the court found that the trooper initially withheld his conclusion about the car being stolen due to officer safety concerns, but when the defendant pressed him directly about what was going on, it became “potentially necessary to answer the question, again, for officer safety as there was a potential the defendant might bolt or drive off or engage in some other behavior if the trooper simply wouldn’t respond.” 2RP 5. The trooper’s statement , “I think the car may be stolen,” was a direct response to the defendant’s question and it was not designed to elicit an incriminating response. Therefore, the court held, this initial exchange did not constitute a custodial interrogation requiring Miranda warnings. 2RP 7.

However, the court found that the very next exchange – with the Trooper asking why the defendant would say he “knew it” and the defendant replying that Satan was known for stealing cars -- did constitute a custodial interrogation requiring Miranda warnings.

As a result the court suppressed "that one single question and answer." 2RP 7.

The court then rejected the defense argument that all of the defendant's statements, even those made after a knowing and voluntary waiver of Miranda rights, should be suppressed pursuant to Missouri v. Siebert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). The court found that the trooper did not conduct a deliberate ploy to interrogate first and provide Miranda warnings second. 2RP 10. Instead, the trooper had a valid officer safety reason for delaying Miranda warnings, and the entire pre-Miranda interaction was instigated more by the defendant's inquiries rather than the trooper's desire to interrogate. 2RP 9-10. The court also held that "one of the factors that you want to look at is how extensive was this questioning. Here it's important, it was only one question." Id.

The court later signed written findings of fact and conclusions of law on December 13, 2014. CP 24-33.

## **B. THE TRIAL.**

The State agrees with the defendant's characterization of Trooper Caiola's trial testimony as largely tracking his testimony at the CrR 3.5 hearing. See Br. of App. at 8. Trooper Caiola did,

however, provide more detail at trial about the defendant's post-Miranda statements.

The defendant told the trooper that his friend Satan agreed to let him use the car in order to remove his belongings from the house he was being evicted from. On the date of his arrest Satan picked the defendant up and, along with the other occupants of the vehicle, drove around Seattle for a while before stopping at a house where Satan had "business." 3RP 58. The defendant grew tired of waiting for Satan to conduct her business, so he drove the vehicle away and left Satan behind. 3RP 58.

Later in the same conversation, the defendant told the trooper that the male backseat passenger was actually the one driving when they decided to leave Satan behind. 3RP 59. The defendant said he had been friends with Satan for about 3.5 years, and knew that she steals cars. 3RP 59-60. He explained that Satan was texting him threatening messages about taking her car. 3RP 60. Finally, when the trooper was transporting the defendant to jail he asked the defendant why he was so nervous throughout their contact. The defendant replied, "Why do you think?" 3RP 61.

The State also introduced evidence that the key inserted into the vehicle's ignition was stuck in that position, as the trooper tried

but failed to remove it after the defendant's arrest. The key was also sticking out of the ignition farther than a normal key would. 3RP 84.

The defendant testified at trial, stating that he did not know the vehicle was stolen. 3RP 95. He also confirmed that the pre-Miranda exchange started with his own question about "what was wrong," followed by the trooper telling him the car was stolen. 3RP 96. After hearing this the defendant "tried to explain," but his explanation "never really got into details." 3RP 96.

On cross examination the defendant was evasive regarding whether he ever told the trooper that he knew Satan steals cars. He would not deny saying it, only that he could not recall saying it. 3RP 101. He acknowledged being friends with Satan for three and a half years, and that he knew her to "be around people" who steal cars, but he insisted that he had never actually witnessed Satan steal a car. 3RP 100-101.

The jury convicted the defendant as charged. CP 34. The court imposed a sentence of nine months in jail. CP 16.

#### **IV. ARGUMENT ON CROSS APPEAL**

##### **A. STANDARD OF REVIEW.**

Appellate courts review a trial court's decision after a CrR 3.5 hearing by determining whether substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. State v. Broadaway, 133 Wn.2d 118, 130–31, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). Further, “the court must determine de novo whether the trial court ‘derived proper conclusions of law’ from its findings of fact.” Id. Appellate courts review de novo a trial court's determination whether an arrest is custodial. State v. Gering, 146 Wn. App. 564, 567, 192 P.3d 935 (2008).

##### **B. THE ENTIRE PRE-MIRANDA EXCHANGE OCCURRED DURING A NON-CUSTODIAL TERRY DETENTION. MIRANDA WAS NOT REQUIRED UNTIL THE DEFENDANT WAS ORDERED OUT OF THE VEHICLE AND PLACED IN HANDCUFFS.**

A person subjected to custodial interrogation by a state agent is entitled to the benefit of the procedural protections enunciated in Miranda. State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988) (citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.

1602 (1966)). "Custody" for Miranda purposes is established "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. at 1610).

There are many interactions between police officers and citizens that are not custodial for Miranda purposes, even though the citizen is not free to leave while being detained by the officer. Frequently these interactions occur during brief investigative detentions ("Terry" stops) when an officer has developed a "reasonable, articulable suspicion, based on specific, objective facts, that the person stopped has committed or is about to commit a crime or a civil traffic infraction." In re Nichols, 171 Wn.2d 370, 382, 256 P.3d 1131 (2011); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A person who is only subjected to a Terry routine investigative stop need not be given Miranda warnings prior to questioning. State v. Huynh, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), review denied, 109 Wn.2d 1024 (1988). The fact that a suspect is not "free to leave" during the course of a Terry or investigative stop does not make the encounter comparable to a formal arrest for Miranda purposes. State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). This is

because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less "police dominated," and the public location does not lend itself to deceptive interrogation tactics. Id. Thus, a detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect "in custody" for the purposes of Miranda. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345, 349 (2004).

The determination of when a Terry detention ripens into a full custodial arrest worthy of Miranda protection is an objective test focused on "whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." State v. Heritage, 152 Wn.2d at 218. Put another way, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). Because it is an objective test focused on the reasonable expectations of the suspect, the existence of probable cause is irrelevant to the inquiry. Id. Likewise, the analysis is unaffected by an officer's subjective belief in the

suspect's guilt, or that officer's unarticulated plan to conduct a custodial arrest later on. Id.

While the trooper in this case unquestionably detained the defendant and the three other occupants of the stolen vehicle when he told them to keep their hands visible and remain still inside the vehicle, this detention did not rise to the level of a custodial arrest. The law draws a clear distinction between "an arrest to detain for later charging and trial (a "custodial arrest", see, e.g., United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)), [and] an arrest for purposes of brief further investigation (a "Terry stop")...". State v. Lund, 70 Wn. App. 437, 444, 853 P.2d 1379, 1384 (1993).

For example, a full custodial arrest triggers the authority for police to fully search the arrestee's person without a warrant, while a Terry detention only authorizes the officer to conduct a protective frisk for weapons if safety concerns are manifest. Compare U.S. v. Robinson, 414 U.S. at 235, with Terry v. Ohio, 392 U.S. at 30-31.

An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of

movement, whether or not trial or conviction ultimately follows. U.S. v. Robinson, 414 U.S. at 228.

It is therefore a court's task, when determining custody status for Miranda purposes, to incorporate this very specific notion of custodial arrest into its objective analysis of "how a reasonable [person] in the suspect's position would have understood his [or her] situation." State v. Watkins, 53 Wn. App. 264, 274, 766 P.2d 484 (1989). In other words, as applied to the facts of this case, the proper test is to determine whether Mr. Dare reasonably thought that the trooper requiring him to remain still with his hands visible for 60 to 90 seconds represented the initiation of a potential criminal charge against him.

The trial court did not employ this test, instead focusing almost exclusively on the officer's undeclared intent to detain the defendant. CP 28 ("In the present situation, law enforcement detention did not rise to a degree associated with a formal arrest until Trooper Caiola *formed the suspicion* the vehicle was likely stolen, and *formed the intent* to detain the occupants of the vehicle, and not allow them to leave the scene. (*emphasis added*)). The trial court's adoption of the incorrect legal standard was error.

In this case the circumstances surrounding the trooper's brief detention of the four vehicle occupants, including the defendant, would not cause a reasonable person to assume they were being placed under custodial arrest. The trooper insisted that all four vehicle occupants comply with his safety directives, yet the non-driving occupants had no exposure to criminal liability for possessing the stolen vehicle. The trooper provided no indication during this time that he intended to treat the defendant any different than he was treating the other three passengers. Most significantly, the trooper provided none of the classic indicators that a reasonable person would associate with a formal arrest, such as ordering the defendant out of his vehicle, placing handcuffs on him, or informing him that he was under arrest. Instead the trooper simply insisted that the defendant remain seated together with his acquaintances for 60 to 90 seconds while the trooper waited for backup to arrive. Under these circumstances no reasonable person in the defendant's position would conclude that he had been arrested in the formal sense as discussed in cases like Berkemer and Lund. This Court should conclude that custodial arrest did not occur until the defendant was ordered out of his vehicle pursuant to the high-risk felony stop procedure, and that the exchange

occurring prior to that time was a Terry investigative stop not requiring Miranda warnings.

## **V. ARGUMENT AS RESPONDENT**

### **A. THE TRIAL COURT ADMITTED ONLY THOSE ADMISSIONS THAT WERE LEGALLY OBTAINED.**

If this Court grants the State's cross appeal on the issue discussed supra, § IV.A., by finding that the entire pre-Miranda exchange was noncustodial, it will not need to reach the allegedly intentional two-step interrogation procedure claimed by the defendant. See Br. of App. 21. Alternatively, the Court should first determine exactly how much of the pre-Miranda exchange involved custodial interrogation prior to addressing the two-step interrogation arguments. This is necessary because the two-step interrogation analysis requires multiple comparisons between the pre-Miranda and post-Miranda rounds of interrogation. See State v. Hickman, 157 Wn. App. at 775.

#### **1. The Trooper Did Not Interrogate The Defendant By Stating, "I think The Car Might Be Stolen," In Response To The Defendant's Question, "What's Going On?"**

Despite the undisputed temporal evidence to the contrary, the defendant argues that he "cannot fairly be said to have initiated the conversation" because the trooper "provoked" the defendant with a "psychological ploy of positing [his] guilt." Br. of App. 15-16.

This argument finds no support in the record, and the defendant provides no binding authority in which any court has suppressed statements because an officer posited the defendant's guilt prior to supplying Miranda warnings.

It is true that police statements need not come in the form of a question in order to constitute "interrogation" for the purposes of a Miranda analysis. The United States Supreme Court sees the functional equivalent of interrogation in "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). But "the standard for determining whether an officer's comments or actions constitute the 'functional equivalent' of interrogation is quite high...". U.S. v. Foster, 227 F.3d 1096, 1103 (9th Cir. 2000). "The Innis definition of interrogation is not so broad as to capture within Miranda's reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges." U.S. v. Payne, 954 F.2d 199, 202 (4th Cir. 1992).

Indeed, our nation's highest Court has rejected arguments post-Innis that an officer necessarily interrogates an in-custody suspect by merely describing the evidence against him. See Arizona v. Roberson, 486 U.S. 675, 687, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988)(in the context of a suspect who has already invoked his Fifth Amendment rights with respect to one investigation, police "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation").

The 9<sup>th</sup> Circuit Federal Court of Appeals relied on that precedent to hold that an FBI agent did not interrogate an in-custody defendant (who had already invoked his right to counsel) by telling him "they found a gun at your house." U.S. v. Payne, 954 F.2d at 201, 203. The defendant's unsolicited response, "I just had it for my protection," was admissible against him because the agent should not have known that the incriminating response was reasonably likely to follow. Id.

The trooper-suspect exchange in the present case is highly comparable to the facts in Payne, but the trooper's comment here was even more innocuous. The FBI agent in Payne was communicating with a suspect who was already under the

inherently coercive influence of custodial arrest, and who had already invoked his right to counsel, informing him with certainty that the police had located incriminating evidence in his home. In contrast, the trooper in the present case was communicating with someone who was not yet formally arrested, informing him of the trooper's unconfirmed suspicion that the car might be stolen. Any conclusion that Trooper Caiola should have predicted a reasonable likelihood of Mr. Dare blurting out "I knew it!" in response to his suspicions is inconsistent with Innis and its progeny. The trial court was correct in its conclusion that this first question and answer couplet<sup>4</sup> was not an interrogation, and therefore did not violate Miranda.

## **2. The Trial Court's Validation Of The Trooper's Safety Concerns Was Supported By Substantial Evidence.**

The defendant asserts that the court's findings of fact relating to Trooper Caiola's officer safety concerns were unsupported by substantial evidence. Br. of App. 19-20. The defendant also states that the analysis "has no role to play" in the objective analysis of whether an interrogation took place. Id. at 20.

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<sup>4</sup> The State concedes that the second couplet, with the trooper asking why the defendant would say "I knew it," followed by the defendant saying that Satan is known for stealing cars, does qualify as an interrogation for Miranda purposes. The State maintains that the defendant was not yet in custody at that time. See supra, §IV.A.

Because the test for custodial status is also objective, the trooper's safety concerns do not affect that analysis, either. Nonetheless, the trial court's findings in this area were directly tied to the trooper's testimony and founded on reasonable inferences therefrom. This becomes important when addressing whether any objective evidence supports the trial court's conclusion that the trooper was not deliberately employing a two-step interrogation to diminish the efficacy of Miranda warnings.

The trooper was outnumbered four to one, and testified that "these types of situations can turn volatile very quick." 1RP 14. The trooper described his "cop sense" causing the hairs on the back of his neck to stand up as he perceived the potential threat starting to rise. He needed to make sure the occupants of the vehicle were not going to reach for guns or weapons. Id. The trooper made multiple references to his strategy of keeping the interaction between himself and the occupants "low key" or "low profile," a strategy that necessarily would have affected the timing and nature of the information he relayed to the four occupants. See 1RP 8, 13.

The court acknowledged that its findings related to officer safety were not specifically stated during testimony, but was nonetheless "clear from the rest of the testimony." 2RP 5. The court

found that the officer safety dynamic influenced the trooper's choice to tell the defendant "I think the car may be stolen." Id. This is consistent with the trooper's desire to keep the interaction "low profile," and it was the trooper's best available alternative in light of the court's finding that "there was a potential the defendant might bolt or drive off or engage in some other behavior if the trooper simply wouldn't respond." Id. The trooper's testimony, along with reasonable inferences derived from his testimony, provided ample factual support underlying the findings the defendant now challenges. This court should not disturb the trial court's findings relating to officer safety.

With the trial court's officer safety findings undisturbed, there is an additional legal basis for upholding the trial court's admission of the defendant's "I knew it!" statement even if this Court classifies the exchange as the product of the functional equivalent of interrogation. Although not argued or addressed below, there is a recognized officer safety exception to Miranda justifying delayed provision of the warnings if legitimate officer safety concerns are paramount:

[I]t is not a violation of either the letter or spirit of Miranda for police to ask questions which are strictly limited to protecting the immediate physical safety of the police themselves and

which could not reasonably be delayed until after warnings are given.

State v. Lane, 77 Wn.2d 860, 863, 467 P.2d 304 (1970).

The propriety of applying this doctrine to the instant case rests not in the fact that the trooper asked any questions directly related to officer safety; he did not. Instead, it lies in the trooper's safety-motivated strategy of providing as little information as possible in the brief moments before backup arrived, while providing just enough information after the defendant demanded to know what was going on to ensure that he did not flee the scene and create an even more dangerous situation. The trial court's findings in this area justify a further legal conclusion that if the brief driver-side window interaction between the trooper and the defendant was an interrogation at all, the interaction did not violate Miranda principles due to the officer safety exception.

### **3. The Pre-Miranda Exchange Was Not Part Of A Deliberate Ploy To Diminish The Efficacy Of The Miranda Warnings.**

The defendant argued to the trial court, and again in this appeal, that if any of the pre-Miranda statements were illegally obtained, the defendant's post-Miranda voluntary statements must also be suppressed as part of a deliberate two-step interrogation technique. CP 54-60; Br. of App. 21-30. The trial court rejected

this claim, finding that Trooper Caiola "did not deliberately violate Miranda as a tactic to obtain a later post-Miranda confession." CP 31.

The traditional analysis of this issue has focused exclusively on the whether the initial unwarned round of questioning was voluntary or coerced. "[W]hen a prior unwarned statement is clearly voluntary, the proper administration of Miranda warnings renders the second warned confession an 'act of free will.' " State v. Allenby, 68 Wn. App. 657, 661, 847 P.2d 1, 3 (1992) (citing Oregon v. Elstad, 470 U.S. 298, 311, 105 S.Ct. 1285, 1294 (1985)).

However, this traditional analysis has been modified to some degree by the U.S. Supreme Court's plurality opinion in Missouri v. Siebert, 542 U.S. 600, 124 S.Ct. 2601 (2004). The Siebert opinion stresses the importance of determining whether the interrogating officer acted deliberately in withholding Miranda warnings. Id. at 614-617. In Siebert, the officer's deliberate tactical approach to interrogating his suspect with a "question first" strategy was the primary factor distinguishing the case from the earlier precedent established in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

The officer in Elstad had a brief un-Mirandized interaction with a young burglary suspect and his mother in their living room, then brought him to the stationhouse for a systematic and thorough post-Miranda interrogation which led to a full confession. Id. at 314-316. The initial interactions in the suspect's home had "none of the earmarks of coercion," and the failure to provide Miranda warnings at that time was deemed an "oversight" on the officer's part. Id. at 314-315.

In sharp contrast, the officer in Siebert withheld Miranda warnings intentionally with the specific purpose of obtaining a confession he may not have otherwise obtained:

At the suppression hearing, Officer Hanrahan testified that he made a "conscious decision" to withhold Miranda warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "until I get the answer that she's already provided once." Missouri v. Siebert, 542 U.S. at 605-606.

The Siebert court harshly condemned officers acting as "strategists dedicated to draining the substance out of Miranda" and suppressed the defendant's post-warning confession. Id. at 617. However, the non-majority opinion did not produce any readily identifiable rule or test to guide lower courts in subsequent cases.

Washington, like other jurisdictions, has struggled to define the holding in Siebert. In State v. Hickman, 157 Wn. App. 767, 238 P.3d 1240 (Div. 2, 2010), this court agreed with and adopted the 9<sup>th</sup> Circuit Court of Appeals' analysis of Siebert:

[[A] trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream Miranda warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights. Although the [Siebert] plurality would consider all two-stage interrogations eligible for a Seibert inquiry, Justice Kennedy's opinion narrowed the Seibert exception to those cases involving deliberate use of the two-step procedure to weaken Miranda's protections.... This narrower test—that excludes confessions made after a deliberate, objectively ineffective mid-stream warning—represents Seibert's holding. In situations where the two-step strategy was not deliberately employed, [Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)] continues to govern the admissibility of postwarning statements.

State v. Hickman, 157 Wn. App. at 774-75 (citing U.S. v. Williams, 435 F.3d 1148, 1157-58 (9<sup>th</sup> Cir. 2006)).

The question then becomes how to determine whether the officer was acting in a deliberate attempt to undermine Miranda's protections. In undertaking this effort, courts

consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning. Such objective evidence would include the timing, setting and completeness

of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.

State v. Hickman, 157 Wn. App. at 775 (citing U.S. v. Williams, 435 F.3d at 1158-59).

Here, the defendant concedes that the record does not reveal any subjective intent on Trooper Caiola's part to deliberately undermine Miranda with a two-step interrogation. Br. of App. 24. The trial court found that there was no such intent: "that the tactic here was not deliberate, whether you're applying either an objective or subjective test." 2RP 9.

The trial court found objective evidence supporting this finding in the brevity of the interaction and the fact that the trooper "did not ask any more than one single question" prior to Miranda warnings. CP 32. It was also significant that the entire contact originated as a traffic infraction stop, not a pre-arranged contact designed to allow interrogation about suspected criminal activity. CP 31-32. Even after the traffic infraction became a Terry stop involving a potentially stolen vehicle, the suspect was the one who initiated the exchange he now calls interrogation. CP 32. These objective indicators confirm that the trooper had no ulterior motive

to interrogate the defendant at all, much less trick him into an unwarned confession as the defendant suggests.

To the extent that the State must overcome an “inference of deliberateness” when any admission comes before Miranda warnings, such an inference is easily overcome by the actual facts as they unfolded. See Williams, 435 F.3d at 1160. In addition to the objective factors identified above, the court also had evidence of the trooper’s subjective intent to prioritize his own safety rather than engage in a protracted exchange with the defendant and his agitated companion. See 1RP 14-15. The court found that the trooper’s reason for delaying Miranda warnings was motivated by his desire to wait for backup, not to violate the defendant’s constitutional rights. CP 32.

Finally, with the issue of deliberateness decided in the State’s favor, the court correctly turned to the fundamental issue of voluntariness as directed by Elstad. Defendant does not appear to challenge the voluntariness of his pre-Miranda or post-Miranda statements. See Br. of App. 29-30. The court concluded that the pre-Miranda statements were voluntary. CP 29, ln. 15; CP 30, ln. 9, 21. The court also concluded that the post-Miranda statements were voluntary. CP 33. The totality of the circumstances as

contained in the record provides substantial support for those findings in that the defendant was never threatened, was never confused about his rights, and appeared to willingly engage the officer in conversation about his role in the suspected crime. The trial court correctly applied Siebert, as interpreted by Williams and Hickman, in determining that no deliberate two-step interrogation took place here, resulting in the proper admission of the defendant's voluntary post-Miranda statements.

**4. The Only Ruling With Any Potential To Change The Jury's Verdict Is Suppression Of All Of The Defendant's Statements About The Vehicle, Including "I Knew It!"**

When trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); accord State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011). "A constitutional error is harmless if the appellate 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. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). If the untainted evidence at trial was so overwhelming that it necessarily led to a finding of guilt, reversal is not required, because there is no "reasonable possibility

that the use of inadmissible evidence was necessary to reach a guilty verdict." Id. at 426.

In this case the parties appear to agree that the sole contested element of the charged crime was the defendant's knowledge that the vehicle was stolen. Br. of App. 4; 3RP 126-127. The State concedes that the defendant's statements were essential in proving this element of the crime beyond a reasonable doubt; this was not a case where the condition of the ignition or other observable characteristics on the vehicle itself would lead to an obvious conclusion that the vehicle was stolen. The key question is how few of the defendant's statements were necessary to achieve proof of his *mens rea* beyond a reasonable doubt.

The defendant's reaction when he learned that the trooper thought the car might be stolen was to exclaim, "I knew it!" 1RP 15. Although he would claim at trial that what he "knew" was simply that he was in trouble, this equivocation does not diminish the power of the admission considering he volunteered it in direct response to a comment about the vehicle being stolen. See 3RP 104. The defendant's three words are the most succinct and direct possible proof on the issue of the defendant's *mens rea*. As long as the State's admissible evidence continues to include this key

admission, the jury had compelling and overwhelming evidence of the only disputed issue in the case. Only depriving the jury of that key phrase would have a reasonable probability of leading to a different verdict. As argued above, this statement was voluntary, made when the defendant was not in custody, and was not in response to interrogation, so there is no legal basis to suppress it.

#### **VI. CONCLUSION**

For the reasons stated above, the State requests this Court affirm the conviction in this case. In the event the conviction is reversed, the State requests this Court grant the State's cross appeal and remand for further proceedings.

Respectfully submitted on September 24, 2015.

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By:

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

THE STATE OF WASHINGTON,

Respondent,

v.

MICHALE P. DARE,

Appellant.

No. 72943-8-1

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

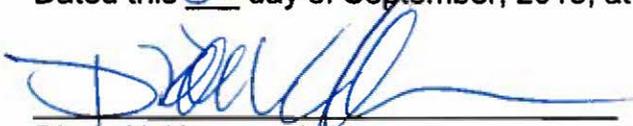
The undersigned certifies that on the 20<sup>th</sup> day of September, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT\CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Casey Grannis, Nielsen, Broman & Koch, [grannsic@nwattorney.net](mailto:grannsic@nwattorney.net) and [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net).

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20<sup>th</sup> day of September, 2015, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office