NO. 51629-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RYAN ESTAVILLO,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court erred when it entered findings of fact (and conclusions of law which included factual findings) following a CrR 3.5 hearing that were unsupported by substantial evidence.

2. The trial court erred when it admitted statements into evidence the defendant made during custodial interrogation without proof that the interrogating officer adequately warned the defendant of his rights under *Miranda v. Arizona*.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. Does a trial court err under CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if it admits statements into evidence that a defendant made during custodial interrogation without proof that the interrogating officer adequately warned that defendant of his or her rights under *Miranda v. Arizona*?

STATEMENT OF THE CASE

Factual History

As of January 9, 2018, Abigail Baker had been staying for a number of weeks in the Motel 6 in Bremerton, initially in room 112 and later in room 323. RP 343-347[1]. She supported herself by working as a prostitute. *Id.* Her typical client would respond to a personal ad she had on a website called Backpage.com, she and her "trick" would speak or text a few times over the phone, and she would then direct them to her room at the Motel 6. RP 365. During this time Ms Baker used heroin daily. *Id.* Towards the end of 2017, Ms. Baker met the defendant Ryan Estavillo, who moved into her room with her a number of weeks after they met. RP 345-347. On four or five occasions after he moved in with her he took part of the money she received selling sex. *Id.*

On January 3rd or 4th, 2018, a man by the name of Griff Woodford arranged to meet with Ms. Baker and pay her for sex. RP 238. At about 6:00 pm he went up to room 323 of the Motel 6 after exchanging a number of texts with Ms, Baker. RP 241-243. Upon entering the room Ms. Baker

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[1]The record on appeal includes four continuously numbered volumes of pretrial and trial verbatim reports. They are referred to herein as "RP [page #]." The fifth and final volume covers the sentencing hearing held on March 23, 2018. It is referred to herein as "RP 3/23/18 [page #]."

asked him to take his clothes off to show her that he was not armed. *Id.* He followed her instructions. *Id.* She then went into the bathroom with her cell phone, texted the defendant and a short time later the defendant started pounding on the locked door to the motel room. *Id.* Ms. Baker then exited the bathroom and opened the door. RP 341-244. When she did the defendant entered, threatened Mr. Woodford with a knife and a stun gun, and ordered him to leave. RP 245-246.

At the time Mr. Woodford believed that the defendant was Ms Baker's irate boyfriend. RP 245-246. Mr. Woodford then gathered his clothes and left after leaving some cash on the television pursuant to the defendant's demand that he leave some money in return for the defendant not calling the police. *Id.* Shortly after Mr. Woodford left, Ms. Baker texted him and apologized for what had happened. *Id.* Mr. Woodford responded with "Well, you kind of robbed me but I guess I deserve it." *Id.* Mr. Woodford eventually talked with the police about what had happened and commented that the knife and the stun gun really didn't have anything to do with him leaving the money. *Id.*

On January 9, 2018, a person by the name of John Buckner contacted Ms. Baker over the phone concerning her Backpage.com advertisement. RP 221-222. After speaking for a while she agree to have

sex with him for $100.00 and instructed him to go to Room 323 of the Motel 6. RP 225-226; 351-353. Upon arriving at the motel room he knocked and she let him in, saying it "would be $100.00." *Id.* He responded by taking five twenty dollar bills out of his wallet and setting them down. *Id.* Ms. Baker picked up the money on her way into the bathroom. *Id.* Once she was in the bathroom she texted the defendant that Mr. Buckner was in the room and had paid his money. *Id.*

Following the text the defendant entered the room, pulled out a gun, hit Mr. Buckner in the head with it knocking him to the floor, and then pointed it at Mr. Buckner, threatening to kill him and demanding all of his money and possessions. RP 227-229; 351-356.. Mr. Buckner responded by pulling out his money, his buck knife, a "challenge" coin, a multi-tool, his driver's license and two bracelets and putting them down. *Id.* Ms. Baker then put the items in her purse. *Id.* At this point Mr. Buckner was able to grab his clothes and flee out of the room, yelling "He's got a gun, he's got a gun! He's going to shoot me!" RP 228-229. Once he made it down to the lobby a clerk called the police, who arrived shortly thereafter. RP 163-165.

As Mr. Buckner was running to the lobby he passed room 112, where a person by the name of Shawna Freitas was staying with her dog. RP 169-172. At the time her sister Kayla Hunt and Kayla's boyfriend were

in the room with Ms. Freitas. RP 169-172, 266-267. All three of them were acquainted with the defendant and Ms. Baker. *Id.* When Mr. Buckner ran by yelling something about a gun, Mr. Freitas opened the door to see what was happening. *Id.* As she did her dog ran out after Mr. Buckner. RP 170-172. Ms. Freitas then ran after her dog. *Id.*

According to Ms. Hunt, after Ms. Freitas ran out of the room the defendant and Ms. Baker entered, at which time the defendant tossed a gun to Ms. Hunt's boyfriend and told him to get rid of it as the cops were coming. RP 266-267. Once Ms. Freitas returned to the room Ms. Hunt left carrying some bags, which contained drugs belonging to her and Ms. Freitas. Ms. Hunt then called for a ride home. *Id.* Once she got home she opened the bags and discovered that the gun the defendant had tossed to her boyfriend was in with the other items. *Id.* Eventually Ms. Hunt's mother called the police and gave them the gun. RP 267-269. Mr. Buckner later identified it as the gun with which the defendant had hit him and then threatened him. RP 229-230.

Shortly after Ms. Hunt left the motel Bremerton police entered room 112, later getting a warrant to search for evidence of the robbery. RP 199-203. During execution of that warrant they found Ms. Baker's purse in the room. *Id.* It contained Mr. Buckner's "challenge" coin, as well as his

buck knife, his multi-tool, his silver Buckle and his two gold chains. *Id.* The police also found the defendant and Ms. Baker's cell phones, which had text messages they had exchanged stating that Mr. Buckner was in the room and had put his money down, and stating that the defendant intended to rob Mr. Buckner. RP 148-153. Ms. Baker later confirmed these texts and stated that the defendant had concocted the plan to rob Mr. Buckner and that she had texted the defendant to let him know that Mr. Buckner was in the room so the defendant could enter and rob him. RP 351-367.

Procedural History

By information filed on January 10, 2018, and later amended, the Kitsap County Prosecutor charged the defendant Ryan Estavillo with the following four felonies:

> I. First Degree Robbery with a firearm enhancement against John Buckner;
>
> II. First Degree Unlawful Possession of a Firearm;
>
> III. First Degree Theft with a firearm enhancement against Griff Woodford; and
>
> IV. Second Degree Promoting Prostitution.

CP1-6, 40-59.

Prior to trial the court called the case for a hearing under CrR 3.5, during which the state called Bremerton Police Office Steven Forbragd as

its only witness. RP 90-96. According to Officer Forbragd, on January 9, 2018, he was called out to the Motel 6 in Bremerton with a number of other officers on a report of a robbery with a firearm. RP 90. Once outside the motel office he saw the defendant, placed him in cuffs, frisked him, ordered him to sit on the curb, but told him he was not under arrest. RP 91-92. He then asked the defendant a number of questions. *Id.*

At that point the officer spoke with one of the complaining witnesses, returned to the defendant who was still sitting handcuffed on the curb, and told him he was now under arrest. RP 92-93. According to Officer Forbragd's testimony at the CrR 3.5 hearing, he then placed the defendant in the back of his patrol car and read him his *"Miranda"* rights from a "department issued card." *Id.* The officer then asked the defendant a new series of questions, which the defendant answered after stating that he understood his rights. *Id.* According to Officer Forbragd, this second interrogation was more "involved." RP 96.

Following argument on the motion, the trial court ruled that all of the defendant's pre and post-arrest statements were admissible into evidence. RP 106-107. The court later entered the following Findings of Fact and Conclusions of Law in support of its ruling.

FINDINGS OF FACT

1. That on January 9, 2018, officers arrived at the Bremerton, Washington Motel 6 to investigate a robbery with a firearm.

2. That officers contacted the defendant at the Motel 6.

3. That officers placed the defendant in hand restraints and sat him down on a nearby curb.

4. That Bremerton Police Officer Steven Forbragd asked the defendant what occurred.

5. That the defendant provided statements to Forbragd.

6. That the defendant was placed in an officer's patrol car.

7. That Forbragd investigated the incident and re-approached the defendant after 20-minutes.

8. That Forbragd read *Miranda* warnings to the defendant verbatim from his department issued *Miranda* warnings card.

9. That defendant understood the *Miranda* warnings and agreed to speak to Forbragd.

That the defendant provided additional statement to Forbragd.

CONCLUSIONS OF LAW

1. That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

2. That *Miranda* warnings are not required during a *Terry* seizure.

3. That during Officer Forbragd's first set of questions, defendant was seized under *Terry* based on reasonable suspicion he committed Robbery in the First degree. At this time, Officer

Forbragd was not required to read *Miranda* warnings to the defendant.

4. That Forbragd subjected the defendant to custodial interrogation during the second set of questioning. Before this set of questioning, Forbragd read *Miranda* warnings to the defendant who knowingly, voluntarily, and intelligently waived his *Miranda* rights.

5. That there is not evidence of coercive police activity.

6. That defendant's statements are admissible.

CP 98-100.

This case later came on for trial before a jury with the state calling 19 witnesses, including John Buckner, Griff Woodford, Shawna Freitas, Abigail Baker, and Officer Stephen Forbragd. RP 116-369. They testified to the facts included in the preceding factual history. *See* Factual History, *supra*. In addition, during his testimony, Officer Forbragd told the jury that he interrogated the defendant after arresting him. RP 157. These statements were that (1) the defendant claimed he walked into room 323 to find a male "buck-assed naked on top of his girlfriend", (2) that he told the man to get out of the room, and (3) that he pushed the man out of the room. RP 157. Officer Forbragd further told the jury that the defendant's statements following arrest were not consistent with the defendant's statement prior to arrest in which he admitted that he had grabbed and

detained the man. *Id.*

Following the close of the case the court instructed the jury on the charged offenses and enhancements with the defense taking exception to the court's refusal to give the defendant's proposed instruction on third degree theft as a lesser included offense to the first degree robbery charge. RP 392-297, 411-429; CP 107-131. The defense also objected to the trial court's decision to instruct on the "deadly weapon" alternative on the first degree robbery charge. RP 400-402; CP 129. Specifically, the defendant argued that the knife admitted into evidence did not qualify as a "deadly weapon" because it did not have a three inch blade. *Id.*

Following argument by counsel and deliberation, the jury returned verdicts of "guilty" on the charges of First Degree Robbery, First Degree Unlawful Possession of a Firearm, and First Degree Theft, and "not guilty" to the charge of Promoting Prostitution. CP 133-134. The jury also returned a special verdict that the state had proved beyond a reasonable doubt that the defendant was armed with a firearm when he committed the robbery. CP 135. The court later sentenced the defendant within the agreed standard range, after which the defendant filed timely notice of appeal. CP 5/23/18 1-14; CP 221-232, 233.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose for findings of fact and conclusions of law are to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews findings of fact under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain findings of fact "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar the trial court entered written findings of fact and conclusions of law in support of its ruling after the CrR 3.5 hearing that the defendant's post-arrest statements were admissible. The following quotes Findings of Fact 8 and 9, as well as Conclusion of Law 4 from that hearing. Appellant assigns error to these findings and conclusion.

FINDINGS OF FACT

8. That Forbragd read *Miranda* warnings to the defendant verbatim from his department issued *Miranda* warnings card.

9. That defendant understood the *Miranda* warnings and agreed to speak to Forbragd.

CONCLUSIONS OF LAW

4. That Forbragd subjected the defendant to custodial interrogation during the second set of questioning. Before this set of questioning, Forbragd read *Miranda* warnings to the defendant who knowingly, voluntarily, and intelligently waived his *Miranda* rights.

CP 98-100.

As will be set out in Argument II, the problem with these findings and the one conclusion is that the phrase "*Miranda* warnings" is a term of art that has a specific meaning. That meaning is that four discrete constitutional rights were communicated to the defendant. *See* Argument II, *infra*. In the case at bar there was no evidence presented at the CrR 3.5 hearing on just what was on the officer's "department issued *Miranda* warnings card." Thus, to the extent that these findings (and the factual assertion in conclusion 4) claim that the officer read the four specific rights required under *Miranda, infra,* and its progeny, the findings are unsupported by substantial evidence.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED STATEMENTS INTO EVIDENCE THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION WITHOUT PROOF THAT THE INTERROGATING OFFICER ADEQUATELY WARNED THE DEFENDANT OF HIS RIGHTS UNDER *MIRANDA v. ARIZONA*.

The United States Constitution, Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, Washington Constitution, Article 1, § 9 states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). In addition, under United States Constitution, Sixth Amendment, a defendant has the right to consult an attorney prior to answering any questions during custodial interrogation. This protection is also guaranteed under Washington Constitution, Article 1, § 22.

In order to effectuate these rights, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant's "custodial statements" may be admitted as substantive evidence, the state bears the burden of proving that prior to questioning the police informed the defendant that: " (1) he has the absolute right to remain silent, (2) anything that he says can be used against

him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him." *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly inform the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, *supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogation." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "'any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). At this point, the right to silence and counsel must be "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

In order to implement the requirements the Supreme Court in *Miranda* created, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of a defendant's custodial statements given in response to police interrogation. This procedure is found in CrR 3.5, which states in part:

> (a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.
>
> (b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the

> statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.
>
> (c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5.

In the case at bar the only evidence presented at the CrR 3.5 hearing concerning any advice of rights was the officer's claim that he read the defendant "his constitutional rights." At no point did the officer claim that he told the defendant that he had the "absolute right" to remain silent, that anything he said could be used against him, that he had the right to have counsel present before and during questioning, and that if he could not afford counsel, one would be appointed to him.

While there is no requirement under *Miranda* that an arresting officer use any specific language when informing a defendant of his or her rights prior to custodial interrogation, to be adequate, whatever language is used must convey that (1) a defendant need not speak to the police, (2)

that any statement made may be used against the defendant, (3) that a defendant has the right to an attorney, and (4) that an attorney will be appointed if the defendant cannot afford one. *See Duckworth v. Eagan*, 492 U.S. 195, 210–15, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989); *see also United States v. Hernandez*, 93 F.3d 1493, 1502 (10th Cir. 1996). Since there is no evidence in the record at the CrR 3.5 hearing in this case that the defendant was warned of any of his four specific *Miranda* rights the trial court erred when it admitted the defendant's statements into evidence over the defendant's objection.

A trial court's admission of a defendant's statement obtained in violation of *Miranda* is an error of constitutional magnitude and requires reversal unless the reviewing court finds it harmless beyond a reasonable doubt. *State v. Rhoden*, 189 Wn.App. 193, 202, 356 P.3d 242 (2015). To find a *Miranda* violation harmless beyond a reasonable doubt, the courts look only at the untainted evidence to determine if it 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). Under this standard, the state has the burden of demonstrating that the admission of the statement did not contribute to the final conviction. *Id.* Thus, the court will reverse if there is any reasonable chance that the use of the inadmissible evidence was necessary

to reach the guilty verdict. *Id.*

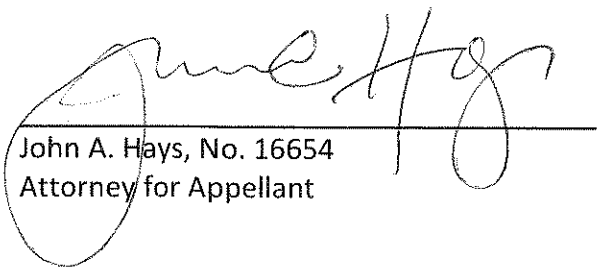
In the case at bar the untainted evidence of guilt presented in this case was fairly strong but did not raise to the level that it was "so overwhelming that it necessarily leads to a finding of guilt." Thus, in this case, the trial court's error in admitting the defendant's statements into evidence requires reversal and a remand for a new trial.

CONCLUSION

The trial court's error in admitting the defendant's statements into evidence requires reversal and remand to the trial court for a new trial.

DATED this 6th day of September, 2018.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **RYAN ESTAVILLO,** **Appellant.**	**NO. 51629-2-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 7th day of September, 2018, at Longview, WA.

Diane C. Hays