No. 38302-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA J. EDWARDS,

Appellant

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

The Honorable Patrick A. Monasmith

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

In typical drug cases involving possession of a controlled substance with intent to deliver, evidence of intent to deliver is in abundance. Scales, baggies, divided quantities of drugs, ledgers, and cash are usual pieces of evidence which accompany the prosecution of such cases. Not so in this case.

Joshua Edwards was found in possession of a large quantity of heroin. But no evidence other than his ill-begotten statement that he "just sell[s] drugs" supported a finding that he intended to deliver that heroin. Mr. Edwards' conviction for possession of a controlled substance (heroin) with intent to deliver should be reversed for the State's failure to prove corpus delicti existed showing intent to deliver. Further, the incriminating and generalized statement was attenuated in time, location, and nexus as to the bundle of heroin. The evidence was insufficient.

Moreover, the statement made by Mr. Edwards was inadmissible under *Miranda* standards. Mr. Edwards awaited

trial in the Stevens County Jail and was represented by court-appointed counsel when he attempted to negotiate leniency in the current case and without his lawyer's presence. The detective did not *Mirandize* Mr. Edwards before the interview began. The interview resulted in an incriminating statement by Mr. Edwards that he "just sell[s] drugs, [he's] not into rape." After a motion to suppress was denied, the statement was used against Mr. Edwards at trial. The trial court erred in finding the statement was admissible at trial. The case should be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Edwards guilty of possessing a controlled substance with intent to deliver where the evidence was insufficient.

2. The trial court erred in finding Mr. Edwards' statement that "No, I just sell drugs, I'm not into rape" was admissible at trial.

3. The trial court erred in entering the following written findings of fact:

    a. When Detective Coon met with the defendant, the defendant explicitly waived his right to counsel, indicating he did not want his attorney present because "he didn't trust him."

(FF[1] #4 at CP 218);

b. Detective Coon only communicated with the defendant regarding his current charges in so much as to ask him what he was being held on, to which he told the Detective he was charged with possession of a large sum of heroin.

(FF #5 at CP 218);

c. The defendant indicated that he did not want to work as an informant.

(FF #7 at CP 219).

4. The trial court erred in entering the following conclusions of law on the record:

a. The defendant was not subject to an interrogation for purposes of *Miranda*. Detective Coon asked no guilt seeking questions in regards to the case the defendant was being held on.

(CL[2] #1 at CP 219);

b. The defendant knowingly, intelligently, voluntarily, and explicitly waived his right to counsel.

(CL #2 at CP 219);

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[1] "FF" stands for "Findings of Fact."
[2] "CL" stands for "Conclusion of Law."

c. The defendant's statements made to Detective Coon while attempting to provide information in exchange for a reduced sentence, including his admission that he was charged with possessing a large sum of Heroin and the statement "No, all I do is sell drugs. I'm not into rape" are admissible at trial.

(CL #3 at CP 219).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Insufficient evidence existed to convict Mr. Edwards of possession of heroin with intent to deliver when: (a) no evidence independent of his nonspecific statement indicated an intent to deliver in violation of the corpus delicti doctrine, and (b) the nonspecific statement was not indicative of time, place, or nexus to the crime charged.

Issue 2: The trial court erred in admitting the statement of Mr. Edwards. He was never *Mirandized* while under custodial interrogation, the statement was made pursuant to plea negotiation under ER 410, and his waiver of his right to counsel was not knowing, voluntary and intelligent.

a. The trial court erred in holding Mr. Edwards' statement was not the result of an interrogation.

b. The trial court erred in admitting a statement when it was not admissible pursuant to ER 410 because it was made during plea negotiations.

c. The trial court erred in holding Mr. Edwards' statement was obtained pursuant to a knowing, voluntarily, and intelligent waiver of the right to counsel when he did not receive *Miranda* warnings first.

C. STATEMENT OF THE CASE

On November 25, 2019, law enforcement knocked on the door of Joshua Edwards' residence, located west of Chewelah. (RP[3] 165-166). When Mr. Edwards appeared he was placed under arrest for an outstanding DOC warrant. (RP 166-167). A search incident to arrest was conducted. (RP 167). Law enforcement found a baggie containing about 23 grams of heroin in Mr. Edwards' front pocket. (RP 167-169, 175, 189-190, 224, 227). A search of the trailer revealed no evidence indicative of intent to deliver drugs. (RP 170-171, 179-182). No scales, no cash, and no written notes or text or phone messages relating to drug activity were found. (RP 179-182). The baggie of heroine was not divided up nor individually

[3] Two volumes were transcribed in this case. "RP" refers to the largest volume (294 pages) transcribed by Amy Brittingham. "Supp. RP" refers to the smallest volume (17 pages) transcribed by Amy Brittingham.

wrapped—it was in the shape of a ball. (RP 179-182). At the time of his arrest, Mr. Edwards did not make any statements about dealing drugs. (RP 182).

The State initially charged Mr. Edwards with simple possession of a controlled substance. (CP 7-8).

Mr. Edwards was appointed counsel by the trial court and was assigned Golden Law Firm, of which John Gleason appeared. (CP 18, 29, 52-56; Supp. RP 3-5). Not long after, on December 31, 2019, Mr. Gleason's and his firm moved to withdraw from representation of Mr. Edwards, citing that the attorney/client relationship was irretrievably broken. (Supp. RP 1-17). Without going into detail, one of the firm's attorneys noted the attorney/client relationship had broken down in part due to "the communications with outside parties that we are not a party to…." (Supp. RP 4). Mr. Edwards indicated in open court he was hopeful the problem could be resolved. (Supp. RP 12-13). Ultimately, though, the trial court granted the motion to withdraw, noting it wished it had more information as to why

the relationship was irretrievably broken. (CP 49; Supp. RP 14).

The trial court then substituted Tim Trageser as defense counsel. (Supp. RP 14; CP 49).

A few days after the counsel substitution, Mr. Edwards filed a complaint regarding Mr. Gleason, indicating he did not want to cooperate with law enforcement in order to receive leniency as he thought it was too dangerous for his safety. (CP 53-56). Mr. Edwards' complaint stated that despite informing his attorney he would not participate, he was immediately "pulled out to speak with a detective anyway." (CP 55). Mr. Edwards's complaint reported he was threatened with new charges shortly thereafter. (CP 55).

CrR 3.5 Hearing

Prior to trial the court conducted a CrR 3.5 hearing to determine the admissibility of any statements Mr. Edwards had made to law enforcement during an interview on December 20,

2019. (RP 39-66, 69-74). This law enforcement interview was conducted shortly before Mr. Gleason's withdrawal as counsel.

During the CrR 3.5 hearing, Detective Mark Coon from the Stevens County Sheriff's Office testified that in December of 2019 he was advised by the prosecutor's office that Mr. Edwards wanted to meet with a detective. (RP 42-43). Specifically, Mr. Edwards' attorney "contacted the prosecutor's office and advised that his client was requesting to speak to the detective's office in exchange for credit on the current charge." (RP 46, 49, 50). Detective Coon maintained the interview was not for the purpose of discussing his drug dealing activities, though he knew from Mr. Edwards he was being held on possession of heroin. (RP 48, 50-51). The detective brought Mr. Edwards from the jail to the interview room in the sheriff's office. (RP 43). Mr. Edwards' defense attorney was not present nor involved in these discussions. (RP 43, 49). The detective did not discuss with Mr. Edwards why he was there or question him about the current charge, testifying the only

question he asked Mr. Edwards was about what his current charge was. (RP 43, 49-51). Mr. Edwards stated he did not want his attorney present during the interview because he did not trust him. (RP 43-44, 47, 51).

The detective never read Mr. Edwards his *Miranda*[4] warnings. (RP 44, 50).

During the 3.5 hearing, Detective Coon maintained he did not go into the interview room with the intention of questioning Mr. Edwards about his current case, but knew Mr. Edwards requested the interview "to see if he could get some leniency on a current charge he was on." (RP 44). Mr. Edwards made statements during the interview, mainly that he knew of drug-related sexual assaults. (RP 44-45). The State asked Detective Coon:

> [STATE]: Now, at this time when you're talking with him did you ask him any questions about the case that he was in custody on?

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R. 974 (1966).

> [DETECTIVE]: *I just wanted to know what his charge was to determine whether or not it was a workable charge or not.*
> [STATE]: Okay. So, I guess outside of finding out what he was held on, you didn't talk to him specifically about the instances that arose to that charge, right?
> [DETECTIVE]: No, I did not.
> [STATE]: Okay. Now, he had given you some information about drug related sexual assaults and you asked him if he had direct knowledge of these assaults. Is that correct?
> [DETECTIVE]: Yes.
> [STATE]: What was his response to that?
> [DETECTIVE]: *His response to me was all he does is sell drugs, he's not into rape.*

(RP 45) (emphasis added). The interview with the detective ended at that point. (RP 46).

The State argued the statement that Mr. Edwards sold drugs was admissible. (RP 52-53). The State claimed Mr. Edwards was not interrogated because he was not questioned about the circumstances of the current charge. (RP 52-53). Also, there was no need for Mr. Edwards' attorney to be present because Mr. Edwards specifically did not want his attorney

there. (RP 53). The State concluded its argument by stating *Miranda* warnings were therefore unnecessary. (RP 53).

Mr. Trageser argued against admission of the statement, stating "Judge, I think this notion by attorney Gleason of the plan was not well thought out and fully executed quite frankly by making a phone call and giving permission for his client to go and speak with law enforcement." (RP 54). Mr. Trageser pointed out the detective's report and testimony reflected the original defense counsel (Mr. Gleason) contacted the prosecutor's office in request to speak with a detective in hopes of receiving credit for his current charge. (CP 68; RP 46, 54).

The trial court expressed surprise at the situation. (RP 54-55). The judge stated he could

> have no understanding why for the most part a defense attorney would do that and/or if so, why wouldn't they be present at the time of the contact, nor is it entirely clear to me regardless of what the underlying technical requirements might be, why simply as a matter of policy a police officer wouldn't [M]irandize someone before he was gonna have a conversation of any kind.

(RP 55). The trial court discussed with the parties whether legal authorities allowed these instances to occur and for a statement to be admissible. (55-56). Mr. Trageser summarized the situation with prior counsel, stating:

> So, and [prior counsel] just leads this client into this room and he just good luck. And that's kind of how it seemed and I'm not trying to say this with flavor, it just seems to be that is a fair representation of what occurred. It seems, I don't like saying this, but it seems to be ineffective.

(RP 57). Mr. Trageser then urged the court to consider whether his client unequivocally wavied his right to counsel. (RP 57-58). He also pointed out it seemed like a stretch to claim the interview conducted by Detective Coon was not related to the current charges when Mr. Edwards was attempting to "work off his current charge." (RP 58). The trial court recognized "the motive for Mr. Edwards would have been some consideration on the charge for which he was in jail." (RP 59).

The trial court reserved ruling on the CrR 3.5 issue for a few days. (RP 61-62).

At the next hearing on the CrR 3.5 matter, the State offered testimony as to how the interview with Detective Coon came about. (RP 70-71). The prosecutor testified as follows:

> How this conversation played out with what led to Detective Coon is that it's accurate that Mr. Edwards' prior attorney, Mr. Gle[a]son, came into my office shortly prior to December 20th after he had been arraigned and told me that his client wished to give information in exchange for a leniency. And I asked specifically what the information was and Mr. Gle[a]son told me he's not going to tell me, he doesn't want me to know, he doesn't trust me. And I said, you can tell him I'm interested in setting up an interview, but only if it's in regards to a certain target. I gave the target name. And Mr. Gle[a]son said okay. He went downstairs, he came back up to my office and told me that Mr. Edwards isn't interested in cooperating on our target. And I said we don't have any—anything to discuss then.
>
> About a week later, I got a phone call from the jail indicating that Mr. Edwards was asking the staff to let the prosecutor know that he wanted to give—he wanted to talk to a detective and give his information. I said I'm not gonna come talk to him. I'll pass along to a detective, which I told Detective Coon hey, he is trying to work a deal. I gave him our target information. He wasn't interested, but he's still requesting to talk to you. I don't have a deal with him. I don't know what information he wants to give. He doesn't want his attorney to know either. And so, that's what

> precipitated Detective Coon going down, which dovetails with the fact that he specifically didn't want his attorney to know what information he was giving.

(RP 70-71). The trial court stated it did not find the prosecutor's statements to be particularly helpful. (RP 72).

But the trial court found the statements admissible and boiled the situation down to two issues. (RP 72-74). First, the trial court addressed whether *Miranda* warnings were required prior to the interview. (RP 72-73). The court reasoned that while Mr. Edwards was in custody, the interview was not an interrogation and thus *Miranda* warnings were unnecessary. (RP 72-73). Second, the trial court stated Mr. Edwards was clear he did not want his attorney present and thus his right to counsel was not violated. (RP 73-74). The trial court entered findings of fact and conclusions of law in support of its decision. (CP 218-219).

Jury Trial

After Detective Coon's interview with Mr. Edwards, the State amended the charge against Mr. Edwards to possession of a controlled substance with intent to deliver heroin. (CP 66-69, 72-74).

A jury trial was held, and witnesses testified consistent with the facts above. (CP 1-332; RP 162-233).

At trial Detective Coon testified 23 or 24 grams of heroin would be considered "bulk quantity" and would cost around $2,000-3,000 to purchase. (RP 198-201, 212). He testified this is not a common amount an everyday user carries around for personal use.[5] (RP 200, 213).

Detective Coon also told the jury about his meeting with Mr. Edwards in December of 2019. (RP 201-215). Detective Coon stated Mr. Edwards wanted to speak with him about "consideration for his current charge." (RP 202). Mr. Edwards

[5] Defense counsel objected to this testimony as improper opinion testimony, but the objection was overruled. (RP 213-214).

revealed to the detective he was arrested with a large amount of heroin. (RP 202). Mr. Edwards informed the detective he knew about female sexual assaults occurring in the local drug culture, though he did not have firsthand information about the incidents. (RP 203-204). Mr. Edwards stated he did not have personal knowledge about the sexual assaults, telling the detective that "No, all I do is sell drugs… I'm not into rape." (RP 204, 208-209). The detective thought this information meant Mr. Edwards was admitting to being a drug dealer. (RP 209). But Mr. Edwards never stated nor gave specifics indicating he was dealing on the date he had the heroin in his pocket. (RP 209-210). Detective Coon determined Mr. Edwards's information was unhelpful information for him and ended the interview. (RP 204).

Deputy Stearns testified consistent with the facts above. (RP 162-185). She stated the most common amount of drugs found on an arrested individual is between 1 and 10 grams. (RP 184). She admitted it was possible the amount of heroin could

be consumed by one person over the course of a week to 10 days. (RP 185).

The jury found Mr. Edwards guilty of possession of a controlled substance with intent to deliver. (CP 244; RP 261).

Mr. Edwards appealed. (Supp. CP).

D. ARGUMENT

Issue 1: Insufficient evidence existed to convict Mr. Edwards of possession of heroin with intent to deliver when: (a) no evidence independent of his nonspecific statement indicated an intent to deliver in violation of the corpus delicti doctrine, and (b) the nonspecific statement was not indicative of time, place, or nexus to the crime charged.

The trial court erred in finding Mr. Edwards possessed heroin with an intent to deliver where no independent evidence of intent to deliver was presented other than his nonspecific statement. The doctrine of corpus delicti requires at least one independent factor to support a logical and reasonable inference of intent to deliver and a large quantity of a controlled substance alone is not sufficient. The additional independent factor may not solely be derived from a defendant's statement.

Secondly, Mr. Edwards' statement that he "just sell[s] drugs" was devoid of time, location, and nexus to link him to the possession of the large quantity of heroin on November 25, 2019. For these reasons, insufficient evidence supports the conviction herein.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07,

567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *see also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "In rendering a guilty verdict, a trier of fact properly may rely on circumstantial evidence alone, even if it is also consistent with the hypothesis of innocence, so long as the evidence meets the *Green* standard." *State v. Kovac*, 50 Wn. App. 117, 119, 747 P.2d 484, 485 (1987); *see also Green*, 94 Wn.2d at 220-22 (setting forth the standard for reviewing sufficiency of the evidence: "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224, 1228 (2004) (citing *State v. King,* 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

To find Mr. Edwards guilty of possession of a controlled substance with intent to deliver, the jury had to find he possessed the heroin with intent to deliver. (CP 236-240); *see*

also RCW 69.50.401(1)(2)(a). Simply possessing a large quantity of a controlled substance is not enough to prove intent to deliver. *State v. Brown*, 68 Wn. App. 480, 483, 843 P.3d P.2d 1098 (1993); *State v. Campos*, 100 Wn. App. 218, 222, 998 P.2d 893 (2000). Some additional factor must be present to infer intent to deliver when the only evidence is possession of a large quantity of drugs. *Campos*, 100 Wn. App. at 222; *State v. Sprague*, 16 Wn. App. 2d 213, 229, 480 P.3d 471 (2021). Furthermore, "[a] police officer's opinion that a defendant possessed more drugs than normal for personal use is insufficient to establish intent to deliver." *Campos*, 100 Wn. App. at 222.

a. The State failed to establish corpus delicti for possession with intent to deliver.

"The doctrine of corpus delicti protects against convictions based on false confessions, requiring evidence of the body of the crime." *State v. Cardenas-Flores*, 189 Wn.2d 243, 247, 401 P.3d 19 (2017). The body of the crime typically consists of an

injury or loss and someone's criminal actions as the cause thereof. *Id*. at 252. The corpus delicti "must be proved by evidence sufficient to support the inference that a crime took place, and the defendant's confession alone is not sufficient to establish that a crime took place." *Id*. at 252 (internal quotation marks omitted). The State is required to present independent evidence that corroborates or confirms the crime to which a defendant confessed. *Id*. at 252, 258. Only prima facie evidence is needed to establish corpus delicti. *Id*. at 258.

Corpus delicti is primarily a rule of sufficiency of the evidence and may be raised for the first time on appeal. *Cardenas-Flores*, 189 Wn.2d at 253, 260, 263. "[A] defendant is entitled to an acquittal if the State fails to satisfy corpus delicti and offer proof of each element of the crime . . . [and] an appellate court must reverse and dismiss a conviction that rests solely on an uncorroborated confession, even if the confession would be sufficient to establish all the elements of the crime." *Id*. at 260.

There are three requirements for establishing corpus delicti in possession with intent cases. *Sprague*, 16 Wn. App.2d at 226. First, the evidence must independently corroborate or confirm a defendant's confession. *Id*. Second, the independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence: if it supports both the hypotheses of guilt or innocence, the independent evidence is insufficient to corroborate the statement. *Id*. at 226-227. And finally, the evidence must corroborate the exact crime with which the defendant was charged. *Id*. at 226.

As the *Sprague* court recognized,

> For charges of possession with intent to deliver, corpus delicti requires evidence of an intent to deliver in addition to evidence of possession. Mere possession, without more, does not raise an inference of the intent to deliver.

Sprague, 16 Wn. App.2d at 227 (internal quotations omitted).

In *State v. Sprague*, the Court of Appeals determined the presence of a scale and bundle of plastic grocery bags did not exclusively support the theory of intent to deliver. 16 Wn.

App.2d at 230. The defendant's scale, it reasoned, could be consistent with intent to deliver *and* personal drug use. *Id*. The same was true of the plastic grocery bags since the bags were not torn into pieces nor wrapped around the illicit substances, and one of the grocery bags was utilized as a garbage can liner. *Id*. at 230-231. This independent evidence was not exclusive evidence of guilt—the evidence supported either hypotheses of guilt or innocence. *Id*. 230-232. Therefore, the appellate court found the independent evidence was insufficient to establish corpus delicti. *Id*. at 232.

In this case Mr. Edwards was found with a large quantity of heroin on his person, but that was it. (RP 167-169, 175, 189-190, 224, 227). No scales, baggies, cash, ledger, or evidence of drug dealing transactions was presented to the jury. (RP 179-182). No useable evidence independent of Mr. Edwards' statement supports a theory of intent to deliver heroin. (RP 162-233).

Independent of Mr. Edwards' statement that he "just sell[s] drugs", only two bits of evidence presented at trial show a possible theory of intent to deliver heroin. First, the large quantity of heroin. But possession of large quantities of drugs is not sufficient to infer intent to deliver on its own. *Sprague*, 16 Wn. App.2d at 233; *Brown*, 68 Wn. App. at 483; *Campos*, 100 Wn. App. at 222. And possession of large quantities of drugs could be indicative of the dual hypotheses of guilt for intent to deliver *or* innocent personal use. *Sprague*, 16 Wn. App.2d at 226-227. Second, officer testimony at trial indicated the amount of heroin Mr. Edwards possessed was not a single user amount and was indicative of intent to deliver. (RP 200, 213). But again, officer opinion testimony is also not sufficient independent evidence to establish corpus delicti because the amount of heroin could have been for innocent personal use. *Campos*, 100 Wn. App. at 222; *Sprague*, 16 Wn. App.2d at 233-234 (officer opinion testimony that defendant possessed a drug quantity exceeding what is normal for personal use cannot

establish intent to deliver; there must be at least one more factor).

Mr. Edwards' statement that he only "sells drugs" should not have been admissible as no corpus delicti exists to show he intended to deliver the heroin.

i. Because the corpus delicti doctrine excludes evidence of Mr. Edwards' statement, the remaining evidence is insufficient evidence of possession with intent to deliver.

Without Mr. Edwards' statement, insufficient evidence exists to prove he intended to deliver the heroin. No scales, baggies, bundles of heroin, evidence of transactions, or ledgers were found. (RP 179-182). Possessing a large quantity of drugs is not enough evidence to prove intent to deliver. *Brown*, 68 Wn. App. at 483; *Campos*, 100 Wn. App. at 222. And an officer's opinion testimony that the defendant possessed more drugs than an ordinary drug user would have for personal use is also insufficient. *Campos*, 100 Wn. App. at 222. For the State to establish sufficient evidence, it needed one additional

factor— beyond a large quantity of drugs—to infer intent to deliver. *Campos*, 100 Wn. App. at 222; *Sprague*, 16 Wn. App. 2d at 229. That did not happen here, which is probably why the State initially chose to charge Mr. Edwards with simple possession of a controlled substance. (CP 7-8). At first, the State merely had a large quantity of drugs as its sole evidence against Mr. Edwards. (RP 167-169, 175, 189-190, 224, 227). It was not until Detective Coon interviewed Mr. Edwards in custody and obtained an incriminating statement that the State charged Mr. Edwards with possession of a controlled substance with intent to deliver. (CP 66-69, 72-74; RP 45).

The only evidence supporting the theory of intent to deliver was Mr. Edwards' attenuated statement that he only "sells drugs." (RP 204, 208-209). Because this statement is not admissible due to the corpus delicti doctrine, and no other factor supports the theory or inference of intent to deliver, insufficient evidence was presented at trial to prove the charged crime.

Without Mr. Edwards' statement, a rational trier of fact could not have found Mr. Edwards guilty beyond a reasonable doubt of possession of heroin with intent to deliver.

The case should be reversed.

b. Mr. Edwards' nonspecific statement was not indicative of time, place, or nexus to the crime charged.

Even if this Court determines Mr. Edwards' statement is still somehow admissible, the general statement that Mr. Edwards "sells drugs" did not have enough specificity to support the inference of intent to deliver heroin at the time and place with which he was charged.

The court cannot infer the specific point in time in which a crime was committed. *State v. Summers*, 45 Wn. App. 761, 764, 728 P.2d 613 (1986). For example, while testimony in *State v. Kolb* established the location of a bus stop, trial testimony did not establish *when* the bus stop existed. *State v. Kolb*, No. 46497-7-II, 192 Wn. App. 1067, 2016 WL 917830, *3 (2016) (unpublished) (GR 14.1(a) (authorizing citation to

unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). Failure to identify the point in time when the bus stop existed resulted in insufficient evidence to support the sentencing enhancement. *Id*.

Mr. Edwards' statement coupled with the possession of a large quantity of drugs is not sufficient to prove intent to deliver. (RP 204, 208-209). The statement was too attenuated and unlinked to any specific crime. Mr. Edwards admitted to selling drugs, but he did not admit to selling the heroin he possessed on the date in question, nor did he specify where he did this, nor what kind of drug he sold. (RP 204, 208-209). Without more, the only evidence the State had was the large quantity of heroin that was discovered, which is of course insufficient on its own to prove intent to deliver. *Campos*, 100 Wn. App. at 222.

Mr. Edwards' conviction should be reversed and the charge dismissed with prejudice. *Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: The trial court erred in admitting the statement of Mr. Edwards. He was never *Mirandized* while under custodial interrogation, the statement was made pursuant to plea negotiation under ER 410, and his waiver of his right to counsel was not knowing, voluntary and intelligent.

If this Court finds the arguments in *Issue 1* unpersuasive, Mr. Edwards requests this Court consider the following arguments in the alternative.

Detective Coon did not *Mirandize* Mr. Edwards before an in-custody interview pertaining to negotiations for leniency. The questioning resulted in a statement by Mr. Edwards that he "just sell[s] drugs" which the trial court deemed admissible after a motion to suppress was denied. The trial court erred by admitting the statement when it was the result of interrogation, it was made during the course of a plea negotiation, and the statement was not obtained by a valid waiver of the right to counsel. (CL #3 at 219). The case should be reversed and remanded for a new trial.

Findings of fact entered after a CrR 3.5 hearing are verities upon appeal if unchallenged. *State v. Piatnitsky*, 170

Wn. App. 195, 221, 282 P.3d 1184 (2012). If findings of fact are challenged they are still verities if supported by substantial evidence. *Id*. "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth to the finding." *Id*. "After reviewing whether the trial court's findings are supported by substantial evidence, [the appellate court] makes a de novo determination of whether the trial court derived proper conclusions of law from those findings." *Id*. (internal quotations omitted).

a. The trial court erred in holding Mr. Edwards' statement was not the result of an interrogation.

"*Miranda* warnings must be given before custodial interrogations by agents of the State; otherwise, the statements obtained are *presumed* to be involuntary." *State v. Willis*, 64 Wn. App. 634, 636, 825 P.2d 357 (1992) (emphasis in original). Here, there is little doubt Mr. Edwards was in custody as he

was being housed in jail. (RP 42-43). The real question was whether he was under interrogation. Interrogation

> refers not only to express questioning, but also to 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. *The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police*.

Willis, 84 Wn. App. at 637 (internal quotation marks omitted) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (emphasis added)). A *Miranda* interrogation is "not limited to express questioning." *State v. Mahoney*, 80 Wn. App. 495, 497, 909 P.2d 949 (1996). "A suspect's will is much more likely to be overcome in an atmosphere controlled by the police." *Id*.

A trial court's improper decision to allow admission of a statement is reversible error if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Wilson*, 144 Wn. App. 166, 178, 181 P.3d 887 (2008). The error is harmless if

the "evidence is of minor significance when compare with the evidence as a whole." *Id*.

Here, the trial court applied the wrong standard. The question at issue is not solely whether the detective asked "guilt seeking questions." (CL #1 at CP 219). The standard is whether the express questioning or words or actions on the part of the police are such that law enforcement "should know are reasonably likely to elicit an incriminating response." *Willis*, 84 Wn. App. at 637. This standard is much broader. *Id*. Thus, while the trial court found the detective did not ask guilt-seeking questions, it did not address the coercive environment in which Mr. Edwards was placed. (CL# 1 at CP 219). Placing Mr. Edwards in an interview room to negotiate leniency on a current charge is placing a defendant in a situation where the detective should have known the circumstances would be likely to bring forth an incriminating response. *Id*.; (CL #1 at CP 219). The trial court erred. *Willis*, 84 Wn. App. at 637.

Moreover, the findings of fact reflect that Mr. Edwards "requested to speak with Detectives about providing information in exchange for consideration or leniency of [ ] charges." (FF #3 at CP 218)[6]. Mr. Edwards' perception was that he was there to negotiate. *Willis*, 84 Wn. App. at 637. And why would he not think it was a negotiation, when his first defense attorney had been working on a negotiation prior to this one? (RP 46, 49, 50). Because this was a negotiation process, there was a high likelihood incriminating statements would also come out. *Willis*, 84 Wn. App. at 637.

The trial court erred in finding Mr. Edwards' statement was not due to an interrogation. (CL #1 at CP 219). The detective asked Mr. Edwards about his current charge, he was in custody in a highly coercive environment, and the detective's agreement to conduct an interview for negotiation of the current charge gave the reasonable impression any statements made

[6] Mr. Edwards does not assign error to this finding and thus it is a verity on appeal. (FF #3 at CP 218).

would be part of an interrogation process. *Willis*, 84 Wn. App. at 637. This was a custodial interrogation, and the detective should have *Mirandized* Mr. Edwards prior to any interview. His statement that he "just sell[s] drugs" should have been suppressed.

Without Mr. Edwards's statement, the only evidence of possession with intent to deliver was the quantity of drugs. The error in admitting the statement was not harmless and the outcome of the trial was materially affected. The case should be reversed.

b. The trial court erred in admitting a statement when it was not admissible pursuant to ER 410 because it was made during plea negotiations.

Moreover, pursuant to ER 410, the statement should not be admissible. ER 410 provides inculpatory statements made during plea negotiations are inadmissible at trial to prove guilt. ER 410(a). The purpose of ER 410 is to "encourage the disposition of criminal cases through plea bargaining by allowing an accused to participate candidly in plea discussions,

without the fear that his plea or plea-related statements will be used against him at trial." *State v. Hatch*, 165 Wn. App. 212, 217, 267 P.3d 473 (2011). Whether a defendant's statements are related to plea negotiations depends upon whether "the accused exhibited an actual subjective expectation to negotiate a plea at the time the statements were made and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." *Id*. at 217. "[T]he assessment is to be made from the perspective of an ordinary person, not a lawyer." *Id*. A formal agreement to engage in plea negotiations is not necessary for ER 410 to apply. *Id*. at 218. "The issue is whether the defendant sufficiently manifested his intent to negotiate before supplying the inculpatory statements to the State. *Id*. (citing *State v. Nowinski*, 124 Wn. App. 617, 627-628, 102 P.3d 840 (2004)).

When concluding whether plea negotiations occurred, a court is deciding a mixed question of law and fact, which is reviewed de novo. *State v. Nowinski*, 124 Wn. App. 617, 621,

102 P.3d 840 (2004); *see State v. Bratton*, No. 46885-9-II, 2016 WL 562776, 192 Wn. App. 1038 (2016) (whether the trial court's CrR 3.5 conclusions of law are supported by findings of fact is reviewed de novo); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

Here, Mr. Edwards wanted to exchange information to seek leniency on the current charge. (RP 44). The State knew what Mr. Edwards wanted and did not discourage him from engaging in such a conversation; in fact, it encouraged it by sending a detective to speak with him. (RP 44, 70-71). From the beginning Mr. Edwards' first defense attorney was in active negotiations with the State, and Mr. Edwards' desire to continue such negotiations exhibited his subjective expectation to negotiate a plea at the time he met with Detective Coon. *Hatch*, 165 Wn. App. at 217; (RP 45-46, 49, 50, 70-71). While the prosecutor testified she had no deal to offer Mr. Edwards since he could not provide information about a specific target,

her actions made Mr. Edwards' subjective expectation reasonable given the objective totality of the circumstances. *Id*. at 217. At the time Mr. Edwards met with Detective Coon, it had only been around a week since Mr. Gleason attempted to negotiate a deal. (RP 70). And, when Mr. Edwards initiated further independent contact with the State, the State entertained the idea of finding out what information Mr. Edwards had by complying with Mr. Edwards' request for an interview. (RP 70-71). Detective Coon admitted he was trying to determine whether Mr. Edwards had a "workable charge." (RP 45). The State's compliance with Mr. Edwards' request proves it was objectively reasonable for Mr. Edwards to believe negotiations were ongoing. *Hatch*, 165 Wn. App. at 217.

Because Mr. Edwards' statement was made pursuant to plea negotiation, ER 410 applies and the statement should have been deemed admissible pursuant to CrR 3.5 (confession procedure). The error was not harmless as the statement was

the only evidence the State presented that Mr. Edwards intended to deliver the heroin. *Wilson*, 144 Wn. App. at 178.

The case should be reversed.

c. The trial court erred in holding Mr. Edwards' statement was obtained pursuant to a knowing, voluntarily, and intelligent waiver of the right to counsel when he did not receive *Miranda* warnings first.

Failure to give *Miranda* warnings creates a presumption of compulsion. *State v. Lozano*, 76 Wn. App. 116, 118, 882 P.2d 1191 (1994). "[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." *Id*. at 119 (citing *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)); *State v. Gorham*, No. 79701-4-I, 9 Wn. App.2d 1039, *7 (2019); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority). In *Lozano*, the defendant removed heroin from her pocket at the request of her CCO and prior to *Miranda* warnings. *Lozano*, 76 Wn. App. At 119. On appeal,

the court noted the trial court correctly suppressed introduction of that act at trial as a non-*Mirandized* testimonial act. *Id*.

"The State bears the burden of showing a knowing, voluntary, and intelligent waiver of *Miranda* rights by a preponderance of the evidence." *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). The trial court must review the totality of the circumstances. *Id*. Appellate courts will "not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding." *Id*.

If an interrogation occurs without the presence of an attorney and a statement is taken, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *State v. Mayer*, 184 Wn.2d 548, 558, 362 P.3d 745 (2015) (internal quotations omitted). To be knowing and intelligent, a waiver must be

"made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id*. at 558 (internal quotations omitted).

While it is a bit unclear how exactly Mr. Edwards wound up in an interrogation room alone with a detective—and without the presence of his court-appointed attorney—one thing is clear: Mr. Edwards was never *Mirandized*. It is also evident that Mr. Edwards believed the purpose of the interview was to achieve or negotiate leniency for the charge in the current case, which Detective Coon knew at the time he met with the defendant; substantial evidence does not support the finding that he did not want to work as an informant. (RP 46, 49, 50); (FF #7 at CP 219)[7]. As the trial court opined, it is hard to understand why "simply as a matter of policy" a trained law enforcement officer would not *Mirandize* someone before

[7] While it is true Mr. Edwards chose not to work as an informant with regards to certain topics, he did offer to provide information or work as an informant on the sexual assaults occurring. Thus, Mr. Edwards assigned error. (RP 44-45); (FF #7 at CP 219); *cf*. (FF #3 at CP 218).

speaking with a suspect in custody. (RP 55). The failure to warn a suspect of his rights has many implications. The statements are presumed compelled when they are unwarned. *Lozano*, 76 Wn. App. at 118. And it brings forth the substantial risk that any statements made during an in-custody interview might be later deemed inadmissible. *Elstad*, 470 U.S. at 307. There is simply little plausible explanation for a police officer to fail to *Mirandize* a suspect in custody when engaging in an interview surrounding plea negotiation.

While the State has argued throughout that the interview was not an "interrogation" it belies the fact that both parties in the room knew Mr. Edwards' presence was for the purpose of negotiating the charge on his current case. (FF #3 at CP 218; RP 46, 49, 50). The meeting included more than just discussing Mr. Edwards' current charges and substantial evidence does not support such a finding. (FF #5 at CP 218); *cf*. (FF #3 at CP 218). The purpose of the meeting alone should have been reason for the detective to warn Mr. Edwards of his *Miranda*

rights due to the risk the interview would touch upon topics "likely to elicit an incriminating response." *Willis*, 84 Wn. App. at 637; (FF #5 at CP 218). The *Miranda* warnings should have been given to Mr. Edwards and failure to do so means Mr. Edwards' statement that he "just sell[s] drugs" should not have been admitted. (CL #1 & 3 at CP 219). Without the warnings, there is no way to know whether Mr. Edwards was fully aware of the possible consequences of freely and fully speaking with the detective, even if it was his choice to do so. *Mayer*, 184 Wn.2d at 558; (FF #4 at CP 218[8]; CL #2 at CP 219). The un-*Mirandized* statement by Mr. Edwards was not made pursuant to a knowing, intelligent, and voluntary waiver. (FF #4 at CP 218; CL #2 at CP 219).

The trial court erred in finding Mr. Edwards knowingly, voluntarily, and intelligently waived his right to counsel when he was not *Mirandized* first. (FF #4 at CP 218; CL #2 at 219.

[8] Mr. Edwards assigns error here only because he disputes whether the waiver to counsel was explicit when he was not *Mirandized* first. (FF #4 at CP 218).

The error was not harmless as the statement was the only evidence the State presented that Mr. Edwards intended to deliver the heroin. *Wilson*, 144 Wn. App. at 178.

The case should be reversed.

E. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Edwards guilty. This conviction should be reversed and the charge dismissed with prejudice.

In the alternative, Mr. Edwards' conviction should be reversed and remanded for a new trial because the trial court erred by admitting Mr. Edward's statement. A new trial without the admission of the statement is warranted.

I certify this document contains 7,676 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 2nd day of March, 2022.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent	)	COA No. 38302-4-III
vs.	)	Stevens County No. 19-1-00355-8
JOSHUA J. EDWARDS,	)	
	)	PROOF OF SERVICE
Defendant/Appellant	)	

I, Laura M. Chuang, of counsel to the assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 2, 2022, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Joshua J. Edwards, DOC No. 860244
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Having obtained prior permission, I also served a copy on the Respondent at prosecutor.appeals@stevenscountywa.gov using the Washington State Appellate Courts' Portal.

Dated this 2nd day of March, 2021.

/s/ Laura M. Chuang
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