IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RALPH RAYMOND GRAMMONT, Appellant.	No. 37920-1-II No. 38743-3-II (consolidated) UNPUBLISHED OPINION

Houghton, P.J. — Ralph Grammont appeals his conviction for second degree assault, arguing trial court evidentiary error, prosecutorial misconduct, ineffective assistance of counsel, and sentencing error. We affirm the conviction and the restitution order, but we vacate the sentencing condition requiring Grammont to undergo a mental health evaluation.

FACTS

On May 27, 2007, Grammont and Selma Cole invited Cole's adult daughter, Linda Carroll, over for dinner. After dinner and several alcoholic beverages, Grammont and Carroll went into the garage. When he began to masturbate in front of her, she left the garage and rejoined her mother in the house. After Grammont went back into the house, Carroll decided to leave despite Cole's urging her to stay because she had been drinking.

When Carroll attempted to leave, Grammont struck her in the face forcefully enough to knock her to the ground. When she got up and attempted to walk to the door, he tackled her,

kicking and punching her in the head. At Carroll's urging, Cole called 911.

Cole told the 911 dispatcher that Carroll was fighting with Grammont. During the call, the 911 dispatcher could hear him the commotion. When two police officers responded to the call, Grammont allowed them in. Because Cole left the phone off the hook, the 911 system recorded the questions that the officers posed to both her and Grammont.

The officers who responded to the scene did not know the specific details of the earlier portions of the 911 call in that they did not know who had allegedly assaulted whom. They told Grammont to sit on a couch.[1] The officers did not read him his *Miranda*[2] rights before questioning him.

One of the officers questioned Grammont for 5 to 10 minutes about the events at the residence, the presence of an injured female individual (Carroll) outside the residence, and the origin of the blood on Grammont's forehead. Grammont repeatedly maintained that he had fought with an absent, unidentified male and disclaimed Carroll's involvement.

During the contact, Grammont also loudly protested when one of the officers moved a knife out of reach; the officer responded by politely asking him to keep his voice down, to listen, and to talk normally. The officer asked Grammont if he and Cole were going to "be here for awhile." Ex. 17 at 11.

Shortly thereafter, the other officer stepped outside to speak with Carroll. The officer remaining inside spoke with Cole, who refuted the presence of an unidentified male at the

[1] Neither the 911 recording nor its transcript reflects this fact; only Grammont testified to it at the CrR 3.5 hearing.

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

residence. Grammont stated that was not true and again asserted Carroll's absence during the altercation. When the officer stated that he was "just trying to figure out and account for" why Carroll was outside and injured, Grammont clarified that she had attended dinner, but she had left "a long time ago." Ex. 17 at 17, 18.

The officer then went outside to speak with Carroll. Grammont proceeded to joke with an attending medic about a television show and to discuss his former employment as a nurse, his military service, his pet, and a hunting trophy. When the officer returned, he placed Grammont under arrest and read him his *Miranda* warnings.

The State charged Grammont with second degree assault. At a CrR 3.5 hearing, he moved to suppress the 911 recording containing his pre-*Miranda* responses to questioning. He argued that his statements were inadmissible because the officers did not read his *Miranda* rights before questioning him. He testified that he had fabricated the presence of an unknown male assailant because he "didn't want to go to jail" and believed "[the officers] would see that there was nothing going on and call it a night." Reporter's Transcript (RT) (Mar. 6, 2008) at 26.

In its oral ruling, the trial court found that, although the circumstances of the questioning "certainly approach[ed]" the point where a reasonable person would not feel free to leave, they did not rise to the level of an interrogation eliciting incriminating and involuntary responses. RT (Mar. 6, 2008) at 35. It ruled that his statements were both voluntary and admissible.

At trial, Carroll testified about the attack. Cole corroborated her testimony, identifying Grammont as the initial aggressor. A doctor also testified that Carroll's injuries were consistent with the attack she described. One of the responding officers testified about his observations of

the scene, Carroll's injuries, and his interactions with Grammont. The State also played the 911 recording for the jury.

Grammont offered a self-defense theory. When asked if he originally had claimed an unidentified male was responsible for the attack, Grammont testified that he had and that he had lied because he assumed "if [the male] wasn't there, there was nobody to arrest, it's all over and done with." Verbatim Report of Proceedings (VRP) (June 10, 2008) at 29. He again testified that he had lied in order to avoid going to jail.

During the State's rebuttal argument, defense counsel objected to statements that "[t]he evidence shows that someone is lying, but the evidence also shows that someone is telling the truth," and that Grammont was "someone who will lie to avoid trouble." RP (June 11, 2008) at 26, 29. The trial court overruled these objections. Defense counsel did not object to the State's repeated comments that the evidence showed that "someone is lying." VRP (June 11, 2008) at 23, 25.

The jury convicted Grammont of second degree assault. At sentencing, the trial court ordered him to undergo a mental health evaluation as part of his community placement. But the State never alleged that mental illness played a part in the crime charged, there was no pre-sentence report indicating a mental illness, and the trial court never made such a finding.

The trial court held a restitution hearing. The State presented an itemized report of the amounts that the Crime Victim's Compensation Fund (Fund) paid for Carroll's medical treatment and recovery. The State had provided the same report to defense counsel two months before the restitution hearing.

Additionally, the State called Carroll to testify about sums the Fund did not cover, and defense counsel cross-examined her about contested items on the Fund report. The trial court stated,

> There are 2 modes of proving restitution and one is that [the Fund] paid it to the victim, they're entitled to be reimbursed and we rely on them to get it right, so unless there's some indication they got it wrong, the Court's pretty much bound by that.

RT (Oct. 23, 2008) at 10. But it also stated that, in light of the testimony at trial, it expected the restitution sought to be higher and that it found the submitted bills directly related to Carroll's injuries from Grammont's attack. It ordered Grammont to pay $10,182.92 to the Fund and $349.42 to Carroll. Grammont appeals.

ANALYSIS

Necessity of *Miranda* Warnings

Grammont first contends that the trial court erred in admitting his pre-*Miranda* warnings statements because they were the product of a custodial interrogation. We disagree.

State agents must give *Miranda* warnings when a suspect is subject to custodial interrogation. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). We review whether a defendant was in custody for *Miranda* purposes de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). In determining this, we apply an objective test—whether a reasonable person in the suspect's position would have felt that state agents curtailed his or her freedom to the degree associated with a formal arrest. *Heritage*, 152 Wn.2d at 218. It is irrelevant to this inquiry whether the police had probable cause to arrest a suspect. *Lorenz*, 152 Wn.2d at 37.

Moreover, investigative detentions (*Terry* stops) are not custodial for *Miranda* purposes

because they are brief, occur in public, and are less police dominated. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Heritage*, 152 Wn.2d at 218. Thus, although a reasonable person might not feel free to leave, a law enforcement officer may ask a moderate number of questions during an investigative detention to determine the suspect's identity and confirm or dispel the officer's suspicions without reading *Miranda* warnings. *Heritage*, 152 Wn.2d at 218.

For example, in *State v. Hilliard*, 89 Wn.2d 430, 435, 573 P.2d 22 (1977), police officers told an otherwise unknown assault suspect that if they verified his story that he was only in the area to visit a married woman, he could leave. Our Supreme Court held that Hilliard was not in custody for *Miranda* purposes. *Hilliard*, 89 Wn.2d at 436.

In contrast, in *State v. France*, 129 Wn. App. 907, 909-11, 120 P.3d 654 (2005), we held that police questioning was custodial when officers responding to a domestic violence report (1) knew the defendant, (2) expressly told the defendant he could not leave until "the matter was cleared up," and (3) asked the defendant incriminating questions based on knowledge of a no contact order between the defendant and the victim.

This case is more like *Hilliard* than *France*. Like *Hilliard*, because the responding officers did not know the specific details of the 911 call, they did not have knowledge of the suspect before contacting Grammont. The officers' questions initially focused on establishing the identities of those on the scene; the identity and whereabouts of the alleged third male attacker; and, later, to confirm or dispel the officers' suspicion of Grammont's involvement with Carroll's condition. The officers questioned both Grammont and Cole in the residence and never secluded

him. The questioning lasted for only 5 to 10 minutes.

Furthermore, unlike both *Hilliard* and *France*, here the officers never expressly told Grammont he was not free to leave. In fact, Grammont allowed them inside the residence, and they asked if he was going to "be [at the residence] for awhile." Ex. 17 at 11. Grammont also had a casual conversation regarding several topics with the attending medics. Finally, he testified that he fabricated the presence of an unknown male assailant because he believed he could avoid arrest by doing so; this implies even he did not believe he was under arrest at the time he made the statements. The totality of the circumstances does not suggest that a reasonable person would have felt restrained to the degree of a formal arrest. The trial court did not err in admitting Grammont's statements from the investigatory detention.[3]

Voluntariness of Statements

Grammont next contends that his statements were inadmissible because he involuntarily made them while intoxicated. The State counters that his statements were admissible under the due process voluntariness test and that the *Miranda* voluntariness test does not apply. We agree with the State.

Because Grammont raises an error affecting his constitutional rights, we may consider this issue for the first time on appeal. RAP 2.5(a). We apply two tests to determine the voluntariness of statements: the due process test and the *Miranda* test. *State v. Reuben*, 62 Wn. App. 620,

[3] Grammont also cites five factors identified in *United States v. Brobst*, 558 F.3d 982, 995 (9th Cir. 2009), for support that he was in custody for *Miranda* purposes. But these factors are only part of the totality of the circumstances we already review in applying the same objective test. *Brobst*, 558 F.3d at 995. Thus, we do not analyze them separately.

624, 814 P.2d 1177 (1991). Under the due process test, a defendant makes a voluntary statement if the law enforcement officers' behavior did not overcome his will to resist, thereby coercing the statement. *Reuben*, 62 Wn. App. at 624. A defendant does not make involuntary statements because of intoxication unless the intoxication rises to the level of mania where the defendant could not comprehend what he was saying and doing. *State v. Cuzzetto*, 76 Wn.2d 378, 383, 386-87, 457 P.2d 204 (1969). Under the *Miranda* test, the State bears the heavy burden of demonstrating that law enforcement officers fully advised the defendant of his rights and that he understood them and knowingly and intelligently waived them. *Reuben*, 62 Wn. App. at 625.

First, under the due process test, Grammont made voluntary statements. Other than Grammont's testimony that the officers told him to sit on the couch, the officers did not engage in any coercive behavior.[4] Furthermore, the record reflects that, although Grammont was intoxicated to some degree, he comprehended what he said, including fabricating an unknown male assailant in hopes of avoiding arrest.

Second, because Grammont was not in custody for *Miranda* purposes when he made the statements, we do not consider the *Miranda* voluntariness test. Accordingly, Grammont's argument fails.

Prosecutorial Misconduct

[4] None of the cases to which Grammont cites for involuntary statements is analogous. *See Mincey v. Arizona*, 437 U.S. 385, 398-99, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (police questioned uncooperative, barely-conscious defendant in extreme pain in hospital bed); *Gladden v. Unsworth*, 396 F.2d 373, 379 (9th Cir. 1968) (police questioned intoxicated defendant who was unable to stand up alone and was "jabbering," "babbling," and "raving"); *Townsend v. Sain*, 372 U.S. 293, 307-08, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (police used truth serum in questioning).

Grammont further contends that the prosecutor's closing argument comments that Grammont was lying were prosecutorial misconduct because they were improper opinion comments on witness credibility. He also argues that the prosecutor committed misconduct by shifting the burden of proof with her comment that the evidence showed someone was lying and someone was telling the truth, thereby inviting the jury merely to weigh the testimony of witnesses in order to convict. We disagree.

A defendant claiming prosecutorial misconduct must show the prosecutor's improper conduct resulted in prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). During closing arguments, we accord the prosecutor wide latitude in making arguments and drawing reasonable inferences from the evidence. *Fisher*, 165 Wn.2d at 747. We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A prosecutor commits misconduct by misstating the law regarding the burden of proof. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). But a prosecutor does not commit misconduct by arguing that the evidence does not support the defense theory. *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). And a prosecutor does not commit misconduct by arguing that the evidence indicates a witness's truthfulness. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 730-31, 899 P.2d 1294 (1995).

Here, the prosecutor argued that the evidence did not support Grammont's self-defense

theory or credibility and supported Carroll's credibility. Grammont's argument fails.

Ineffective Assistance of Counsel

Grammont also contends that defense counsel's objection to some, but not all, of the prosecutor's closing argument comments that "the evidence shows that someone is lying" was ineffective assistance of counsel. Appellant's Br. at 23. Again, we disagree.

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). But the prosecutor properly argued that the evidence did not support Grammont's self-defense theory and supported Carroll's credibility. Defense counsel's lack of objection was not deficient performance and Grammont's argument fails.

Mental Health Evaluation Order

Grammont further contends the trial court erred in requiring him to undergo a mental health evaluation when the State never alleged that mental illness played a part in the crime charged, there was no presentence report indicating a mental illness, and the trial court never made such a finding. The State concedes this error.

A trial court may not order mental health treatment as a condition of community custody when the trial court has not obtained or considered a presentence report or mental status evaluation and has not made findings that the defendant was a person whose mental illness contributed to his crimes. *See* former RCW 9.94A.505(9) (2006); *State v. Jones*, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). Here, the trial court did not base its order on a presentence report or mental status evaluation nor did it make the required findings. We vacate this sentencing

condition requiring mental health treatment. *State v. Brooks*, 142 Wn. App. 842, 852, 176 P.3d 549 (2008); *Jones*, 118 Wn. App. at 212.

Restitution Order

Grammont finally contends that the trial court violated his due process rights by denying his request for information underlying the State's restitution claim and by basing its order solely on the Fund's itemized report. The State counters that it made the Fund report available to him two months before the restitution hearing, his counsel cross-examined Carroll regarding contested items in the Fund report, and the trial court based its order on testimony at trial and at the restitution hearing. We agree with the State.

RCW 9.94A.753(7) mandates that the trial court order restitution to a victim entitled under the Crime Victims' Compensation Act, chapter 7.68 RCW. But a trial court retains discretion to determine the restitution amount. *State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *Tobin*, 132 Wn. App. at 173.

RCW 9.94A.753(3) requires the trial court to base restitution orders on "easily ascertainable damages for injury" and "actual expenses incurred for treatment for injury to persons." "Easily ascertainable damages" are tangible damages sufficiently supported by evidence. *Tobin*, 132 Wn. App. at 173. Once the State establishes damage, it need not show the amount with mathematical certainty. *Tobin*, 132 Wn. App. at 173. The State must prove damages only by a preponderance of the evidence. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

First, the State provided the Fund report to Grammont two months before the restitution hearing, and defense counsel cross-examined Carroll regarding every contested item at the hearing. The trial court did not violate Grammont's due process rights by denying his motion for a more definite statement.

Second, Grammont cites *State v. Bunner*, 86 Wn. App. 158, 936 P.2d 419 (1997), to support his claim that the trial court abused its discretion in ordering restitution. But in *Bunner*, the trial court based its restitution order solely on a Department of Social and Health Services' itemized report and stated that it had "no idea" how the report alone proved that the billed medical services were actually provided or how the costs related to the crime. 86 Wn. App. at 159-60.

Here, the trial court heard Carroll's testimony regarding the Fund's itemized report and other bills and considered trial testimony in determining that the damages were easily ascertainable and related to the crime. Grammont presented no evidence to rebut the State's evidence. His argument fails.

We affirm the conviction and the restitution order. We vacate the sentencing condition that requires a mental health evaluation.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

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Hunt, J.

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Quinn-Brintnall, J.