IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW AARON SCHMIDT, Appellant.	No. 38541-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — On October 31, 2008, a jury found Matthew Schmidt guilty of third degree assault on Deputy Craig Shelton and fourth degree assault on his wife, Tracie Schmidt. On appeal, Matthew[1] challenges Deputy Danny O'Neill's testimony as a comment on his right to remain silent, the admission of statements in which he apologized for hitting Shelton and Tracie, and the admission of an out-of-court statement by his 12-year-old daughter, N.S., which Deputy Brad Bauman read at trial. We hold that (1) O'Neill did not impermissibly comment on Matthew's right to remain silent; (2) any CrR 3.5 hearing errors are harmless because Matthew voluntarily and spontaneously made the apologetic statements; and (3) in light of Matthew's confession, any confrontation clause errors are harmless. We affirm Matthew's

[1] The Schmidts' first names are used for the ease and clarity of the reader.

convictions.

FACTS

On December 31, 2007, Matthew and Tracie invited Tatiana Brown and Edward Paulsen to their home for a party. Everyone drank undetermined amounts of alcohol except for N.S. who was also home that night. Around 11:00 pm, Tracie felt ill from a combination of drinking and hot tubbing and Matthew put her to bed. Tracie woke up a short while later still drunk, found Matthew and N.S. in the hot tub and tried to persuade Matthew to get out of the hot tub, and then discovered Brown and Paulsen partially naked together in N.S.'s bed. Tracie began yelling and hitting Paulsen to get them out of N.S.'s bed.

Around 12:45 am, on January 1, 2008, Tracie called 911 and reported that "[m]y husband[, Matthew,] and my husband's best friend[, Paulsen,] just beat the shit out of me." 1 Report of Proceedings (RP) at 32. During the 911 call, Tracie stated that after she asked Paulsen to leave, her husband began beating her, dragging her across the house, and punching her. While Tracie reported that she did not know where Matthew was, she did hear sounds coming from downstairs and someone was "tearing it up." 2 RP at 271. Tracie repeatedly told the 911 operator that her daughter presently had locked herself in the laundry room.

Around 1:00 am, six members of the Cowlitz County Sheriff's Office responded to Tracie's 911 domestic violence call. Deputies O'Neill and Todd McDaniel documented Tracie's injuries. Tracie told Deputy Ryan Plank that Matthew had dragged her so hard across the house that her pants and underwear came off. O'Neill took photographs of Tracie's underwear which were on the floor between the kitchen and living room.

Meanwhile, Deputies Shelton and Plank, and Reserve Officer Tagliano searched for

Matthew. After searching downstairs, where Tracie had reported hearing noises, and outside, they entered a bedroom near the living room yelling, "Sheriff's Office. Come out." 1 RP at 45. The deputies did not turn on the bedroom lights, but they testified that ambient light from the living room sufficiently lit the room to the point where they "could see faces."[2] 1 RP at 43. Plank shouted "[t]here's a foot" after spotting Matthew on the bedroom floor. 1 RP at 166. Matthew stood up and aggressively approached Shelton, resulting in a fight between them. During the fight, Shelton defensively kicked Matthew in the abdomen, Matthew head-locked Shelton knocking Shelton's glasses off his face, and Matthew tugged at Shelton's belt near his weapon so hard that the belt buckle broke. The fight ended when Plank tased Matthew.

Deputy O'Neill arrested a still-intoxicated, half-naked Matthew and read him his *Miranda*[3] rights. When asked if Matthew understood his *Miranda* rights, Matthew replied, "I choose to squeeze them." 2 RP at 128. O'Neill responded, "You choose to 'squeeze them'?" to which Matthew replied, "Yes." 2 RP at 122. Then, because it was cold outside, O'Neill asked Matthew one more question—if he wanted his shoes and a shirt, which Matthew declined. Both before and after receiving his *Miranda* rights, Matthew spontaneously cried, yelled, and apologized for hitting his wife and Deputy Shelton.

Deputy Bauman arrived last on the scene about 15 minutes after Tracie's 911 call. Bauman searched outside the house for Matthew, went into the home when he heard his fellow officers tased someone, and saw someone he later identified as Matthew already in handcuffs. Bauman then saw N.S. in the kitchen/dining room area leaning against a wall in a fetal position.

[2] Deputy Plank testified that they also had flashlights in their hands.

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

Bauman asked N.S. to tell him what happened, and she responded:

> I was on the couch. Mom was trying to get [Paulsen] out of here. She called his mom. I heard dad throw the chairs and he grabbed my mom and started beating her. I threw things at my dad to try to get him off of her. I followed them through the house and then he left. I stayed in the laundry room with the door closed. I waited until everything went quiet except my mom saying, "Oh, my god. Oh, my god." Mom then called the police.

2 RP at 193-94. Bauman then let N.S. go to Tracie because N.S. was "obviously upset." 1 RP at 9.

On January 3, 2008, the Cowlitz County Prosecuting Attorney's office charged Matthew with one count of third degree assault (Officer Shelton) and one count of fourth degree assault–domestic violence (Tracie). A three-day trial commenced on October 29, 2008. The trial court admitted, and the State played, part of Tracie's 911 call. Tracie's testimony at trial conflicted with information that she gave during the 911 call and during the police investigation. For example, at trial, Tracie did not remember accusing Paulsen of the assault in her 911 call and admitted that Paulsen took no part in the assault. And Tracie could not explain how her underwear ended up on the floor after testifying at trial that her pajama pants never came off during the assault.

Both pretrial and during the trial, Matthew objected to Deputy Bauman's testimony where he read N.S.'s statement citing hearsay and confrontation clause violations. The trial court admitted Bauman's testimony of N.S.'s statement as an excited utterance.

During the trial, Matthew moved for a mistrial, claiming that Deputy O'Neill improperly commented on his right to remain silent when testifying that Matthew "squeezed" his constitutional rights. The trial court immediately conducted a CrR 3.5 hearing to determine

whether the statements were admissible. The trial court denied Matthew's motion to suppress the statements and found that "I choose to squeeze them" was a nonsense answer that did not clearly invoke lawyer or silence rights and, thus, O'Neill did not comment on Matthew's exercising of his Fifth Amendment rights.[4] 2 RP at 131.

On October 31, 2008, the jury found Matthew guilty as charged. On November 4, 2008, the trial court sentenced Matthew, a first-time offender, to 30 days confinement and imposed 24 months of community custody for the third degree assault conviction. The trial court also imposed a concurrent 365-day sentence for the fourth degree assault conviction but suspended 335 days for the 24-month probation period. Matthew filed a timely appeal in which he challenges his convictions.

ANALYSIS

Miranda Rights

Matthew asserts that Deputy O'Neill improperly commented on his right to remain silent by testifying that Matthew stated that he chose to "squeeze" his rights when asked if he understood his *Miranda* rights. The State argues that Matthew's statement of "I choose to squeeze them" is an equivocal statement that did not invoke his Fifth Amendment rights. Br. of Resp't at 18. Thus, the State argues, O'Neill's reference did not imply guilt and could not infringe on Matthew's Fifth Amendment rights. We discern no error from the admission of this equivocal statement.

[4] The trial court compared Matthew's response of "I choose to squeeze them" with a hypothetical response of "I support Ross Perot," finding that both statements would be nonsense responses to an officer's question of whether someone understands his/her *Miranda* rights and that both responses could be testified to at a trial. 2 RP at 131.

Matthew's right to remain silent is contained within the Fifth Amendment, applied to the states via the Fourteenth Amendment, and article I, section 9 of the Washington Constitution. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). The Fifth Amendment of the United States Constitution states, in part, that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, article I, section 9 of the Washington Constitution reads, "[n]o person shall be compelled in any criminal case to give evidence against himself." We give the same interpretation to both clauses and liberally construe the right against self-incrimination. *Easter*, 130 Wn.2d at 235-36.

When a defendant's challenge to the admission of his statements involves a question of whether he properly invoked his Fifth Amendment right to remain silent, we review the admission of any statements under an abuse of discretion standard. *See State v. Cross*, 156 Wn.2d 580, 619, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006); *see also State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (decision to admit evidence is reviewed for manifest abuse of discretion), *cert. denied*, 523 U.S. 1008 (1998). When an individual receives *Miranda* warnings, "the invocation of the right to remain silent must be clear and unequivocal (whether through silence or articulation) in order to be effectual." *State v. Walker*, 129 Wn. App. 258, 276, 118 P.3d 935 (2005), *review denied*, 157 Wn.2d 1014 (2006). When invoking the right to remain silent is not clear or unequivocal, the police are not required to ask clarifying questions and may even continue interviewing a suspect. *Walker*, 129 Wn. App. at 276.

Here, after being given his *Miranda* warnings, Matthew did not invoke his right to remain silent. Rather, when asked if he understood his *Miranda* rights, he made an ambiguous and equivocal response followed by numerous spontaneous statements and apologies for assaulting his

wife and Officer Shelton. It is undisputed that Matthew received his *Miranda* warnings and that when asked if he understood his *Miranda* rights, he responded, "I choose to squeeze them." 2 RP at 128. Even though Deputy O'Neill had no duty to clarify Matthew's response, he asked, "You choose to 'squeeze them'?" and Matthew responded, "Yes." 2 RP at 122.[5] Matthew's response of "I choose to squeeze them" is an ambiguous and equivocal statement insufficient to invoke his right to remain silent. Accordingly, O'Neill's testimony repeating the ambiguous statement was not an impermissible comment on Matthew's right to remain silent.

We also reject Matthew's argument that he must have invoked his *Miranda* rights simply because Deputy O'Neill did not question Matthew and decided to exercise caution and refrain from any actions that could impose on Matthew's Fifth Amendment rights.

CrR 3.5 Hearing Procedural Violations

Next, Matthew challenges the admission of statements that he made at the time of arrest, appearing to argue that the trial court failed to hold a CrR 3.5 hearing and failed to enter written findings of fact at the conclusion of a CrR 3.5 hearing. We hold that references to Matthew's post-*Miranda* statements were properly admitted.

CrR 3.5 governs generally the admissibility of "a statement of the accused." CrR 3.5(a);

[5] Matthew suggests on appeal that while "squeeze" was an odd word choice, that it showed his intent to "'embrace' his right to silence." Br. of Appellant at 22. Matthew provides no authority supporting his interpretation of the meaning of "squeeze." The most common definition of "squeeze" is "to exert pressure [especially] on opposite sides or parts of." *See* Webster's Third New International Dictionary 2216 (2002); *State v. Hatcheney*, 160 Wn.2d 503, 518, 158 P.3d 1152 (2007) (supporting use of dictionary definitions for terms otherwise undefined at law), *cert. denied*, 552 U.S. 1148 (2008). *Webster's Dictionary* does include 24 alternate definitions for the verb "squeeze" of which only one, "hug," remotely supports Matthew's position. *See* Webster's Third New International Dictionary 2216 (2002). "Hugging" one's rights is not the same as invoking or exercising them.

State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). A trial court is required to enter written findings and conclusions following a CrR 3.5 hearing. CrR 3.5(c).[6]

Matthew's arguments based on the premise that the trial court failed to hold a CrR 3.5 hearing are meritless. After Matthew objected to the State's initial questioning of Deputy O'Neill regarding his post-arrest statement, the State explained that it did not seek a pretrial CrR 3.5 hearing because it believed Matthew's statements were admissible as spontaneous statements. Because Matthew objected to the statements, the trial court held a CrR 3.5 hearing midtrial. A CrR 3.5 hearing must be held before the admission of a defendant's challenged statements, but it need not be held pretrial. *See State v. Thompson*, 73 Wn. App. 122, 128, 867 P.2d 691 (1994).

Failure to comply with CrR 3.5's writing requirement is an error, but the error may be harmless if the trial court's oral findings are sufficient to allow appellate review. *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008); *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023 (1999). We review a trial court's CrR 3.5 hearing decision to see if substantial evidence supports the trial court's findings of fact. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). We will not reverse for lack of written findings unless there is a showing of prejudice. *Thompson*, 73 Wn. App. at 130; *see State v. Haynes*, 16 Wn. App. 778, 788, 559 P.2d 583, *review denied*, 88 Wn.2d 1017 (1977).

Although the trial court did not enter written CrR 3.5 findings of fact, its oral ruling is sufficient to allow for our review and no prejudice exists. During the CrR 3.5 hearing, the trial court heard testimony that Deputy O'Neill read Matthew his *Miranda* rights as well as the

[6] CrR 3.5(c) states: "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."

exchange of words clarifying Matthew's response of "I choose to squeeze them." 2 RP at 128. O'Neill asked Matthew only one subsequent question concerning a need for clothing before taking him outside in the cold. The only other statements made the night of the incident were Matthew's repetitious emotional apologies for hitting his wife and a police officer. The trial court correctly found that Matthew's apologetic statements were spontaneous confessions and admissible. *See* ER 801(d)(2).

Confrontation Clause

Finally, Matthew argues that the State violated his Sixth Amendment and article 1, section 22 Washington Constitution confrontation rights when it presented Deputy Bauman's testimony regarding N.S.'s statement as an excited utterance. Matthew contends that N.S.'s response was a testimonial statement and inadmissible under *Crawford*.[7] We hold any error in the admitting of N.S.'s statement is harmless.

A. Standard of Review

We review alleged confrontation clause violations de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, 128 S. Ct. 2430 (2008). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). "If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless."[8]

[7] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[8] The United States Supreme Court developed a different test for determining whether violations of the confrontation clause are harmless. In *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), the Court said:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless

State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009).

Here, the State correctly asserts that any error in the admission of N.S.'s statements concerning the assault on her mother, Tracie, has no impact on Matthew's third degree assault conviction (Deputy Shelton). N.S.'s statements to Deputy Bauman exclusively recounted Matthew's assault on Tracie and the events that occurred prior to any police officers arriving at the Schmidts' home. Thus, N.S.'s out-of-court statements could not possibly have produced an error related to Matthew's third degree assault conviction.

Furthermore, the untainted evidence supporting Matthew's fourth degree assault conviction is overwhelming: (1) Tracie's 911 call names Matthew as one of her assailants, (2) photographs establish the nature and extent of Tracie's injuries, and (3) Matthew apologized for hitting his wife. Matthew asserts on appeal that Tracie's conflicting evidence in her trial testimony as compared to her statements in the admitted 911 call raise a reasonable doubt. But credibility determinations are for the trier of fact, here the jury, and are not subject to our review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). Moreover, to the extent that Matthew argues that "the

---

> in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Division One recently employed this test in *State v. Saunders*, 132 Wn. App. 592, 604, 132 P.3d 743 (2006), *review denied*, 159 Wn.2d 1017 (2007), and the *Washington Practice* series notes some uncertainty regarding which rule Washington courts use for confrontation clause violations. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.25 (5th ed. 2007). Our Supreme Court's 2009 decision in *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009), used the "overwhelming evidence" test without mentioning the *Van Arsdall* factors, and we apply that test here.

admission of [N.S.'s] statement to Officer Bauman was the most effective and compelling evidence at trial" supporting his fourth degree assault conviction, we disagree. Br. of Appellant at 17. Matthew's own spontaneous admission that he hit his wife is enough evidence to meet the overwhelming evidence test necessary to prove fourth degree assault. Accordingly, any confrontation clause error made in the admitting of N.S.'s out-of-court statements is harmless because the statement is cumulative evidence. Accordingly, we do not address whether N.S.'s statements are testimonial or nontestimonial.

Affirmed.

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.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

HUNT, J.