IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64017-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
FEISAL MOHAMED OMAR,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: October 18, 2010
	)	

Cox, J. – After the police arrested and booked Feisal Omar for felony violation of a no-contact order, the investigating detective went to the jail for the purpose of interviewing him. The detective had the jail personnel bring Omar from his holding cell to an adjacent hallway. Without first providing Miranda warnings, the detective asked Omar if he wanted to talk about the incident. Omar gave two incriminating responses. The trial court suppressed the second response, but denied Omar's motion to suppress his first response. We hold that the detective's question constituted express questioning under the standard established in Rhode Island v. Innis.[1] But the violation of the requirements of Miranda and Innis was harmless beyond a reasonable doubt. We affirm Omar's conviction.

The State properly concedes that the trial court lacked authority to impose certain community custody conditions. We accept the concession and remand so that the trial court may strike the invalid conditions.

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[1] 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

The relevant facts are undisputed. In 2008, a Kent Municipal Court judge entered two orders prohibiting Omar from contacting Hattie Lee. On January 23, 2009, Auburn Police Officer Jonathan Pearson responded to a reported disturbance at an Auburn apartment. He found both Omar and Lee. After speaking with Lee and identifying her as the subject of the orders, Officer Pearson arrested Omar.

After Omar's arrest and booking, Detective Michael Jordan went to the Auburn Municipal Jail for the purpose of interviewing him. The detective asked a jail officer to bring Omar from the holding cell to the booking area hallway. Detective Jordan introduced himself, told Omar he was investigating the case, and said, "I'd like to talk to you about this incident. Would you like to talk to me about this incident?" According to Detective Jordan, Omar responded, "there was nothing to talk about, there was a no-contact order in place and he was at the location."

Detective Jordan then informed Omar of the charge and explained, in response to Omar's question, why it was a felony. He again asked if Omar wanted to talk about the incident, and Omar repeated, "there was nothing to talk about, there was a no-contact order in place and he was at the location."

Omar moved to suppress his statements to Detective Jordan, arguing that they were made in response to custodial interrogation without the benefit of warnings required by Miranda v. Arizona.[2] The trial court denied the motion as to Omar's first response. Relying on State v. Wilson,[3] the court concluded that

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

the detective's initial question did not constitute interrogation for purposes of Miranda because it was not designed to elicit an incriminating response and was not one the officer should have known was reasonably likely to elicit an incriminating response.

The court suppressed all of Omar's subsequent statements, ruling that they were the product of interrogation.

At trial, Omar argued the State had failed to prove he knowingly violated no-contact orders because there was no Swahili interpreter present at the time the court entered the orders. The jury found Omar guilty as charged of domestic violence felony violation of a court order. The court imposed a 9-month term of confinement together with certain community custody conditions that are the subject of this appeal.

Omar appeals.

INTERROGATION

Miranda warnings are required when the examination or questioning of the accused is "(a) custodial (b) interrogation (c) by a state agent."[4] Omar contends that his statements were the product of interrogation and must therefore be excluded because Detective Jordan failed to provide Miranda warnings before questioning him. We agree.

We review the trial court's decision after a CrR 3.5 hearing to determine whether substantial evidence supports the findings of fact and whether those

[3] 144 Wn. App. 166, 181 P.3d 887 (2008).
[4] State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

findings support the conclusions of law.[5] The trial court's findings of fact here are undisputed and are therefore verities on appeal.[6] We review de novo the trial court's conclusion that Detective Jordan's question was not interrogation for purposes of requiring Miranda warnings.[7]

The United States Supreme Court addressed the "interrogation" necessary to trigger Miranda warnings in Rhode Island v. Innis.[8] Under Innis, not all custodial statements in response to police questioning are the products of interrogation. Rather,

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.[9]

Whether the police should know a question is reasonably likely to elicit an incriminating response is an objective standard.[10] "[T]he defendant's perception of an interrogation, not the questioner's intent, is determinative."[11]

Here, the threshold question is whether the exchange between the

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[5] State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997).
[6] Id. at 131.
[7] See State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002); Lorenz, 152 Wn.2d at 36; see also Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).
[8] 446 U.S. 291.
[9] Id. at 300-01 (footnotes omitted).
[10] State v. Sargent, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988).
[11] State v. Denney, 152 Wn. App. 665, 672, 218 P.3d 633 (2009).

detective and Omar constituted "express questioning" or "its functional equivalent" under Innis. The answer to this question was provided in State v. Sargent, where a similar exchange between police and a suspect occurred. In examining the question, the state supreme court stated:

> There is no question that Bloom's statements at the first interview amount to interrogation under the Innis standard. He asked Sargent "Did you do it?" Report of Proceedings vol. 1, at 19. This is not the functional equivalent of interrogation-it is interrogation.[12]

In this case, Detective Jordan asked Omar, "Would you like to talk to me about this incident?" As in Sargent, this is "express questioning," not "its functional equivalent."

The State contends that the detective's question did not constitute interrogation because it required only a "yes" or "no" response. Whether the question required such an answer is irrelevant. This is a case of express questioning, not its functional equivalent. Thus, we are not concerned here with whether any words or actions of the detective were of the kind that the detective should have known were reasonably likely to elicit an incriminating response. For this reason, the trial court's reliance on State v. Wilson was misplaced. In Wilson, the court concluded that the officer who notified the defendant that her stabbing victim had died "should have known that the death notification was reasonably likely to elicit an incriminating response."[13] The issue in Wilson was therefore not express questioning, but whether an officer's words constituted the "functional equivalent" of questioning.

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[12] 111 Wn.2d at 650.
[13] Wilson, 144 Wn. App. at 184.

The State's reliance on Matter of the Personal Restraint Petition of Blake Pirtle[14] is equally misplaced. In Pirtle, the arresting officer placed the defendant in custody and then immediately asked if the defendant knew why he was under arrest. Our supreme court concluded that the question did not amount to interrogation because it fell "into the background questioning category under which Miranda warnings are not applicable."[15] Here, the investigating officer approached Omar after he had been arrested, booked, and placed into a holding cell and then asked if he wanted to talk about the basis for that arrest. The State's suggestion that the officer's inquiry constituted "background questioning" is without merit.

Omar was in custody at the time of express questioning. Miranda warnings were required. Because warnings were not given, all of Omar's statements should have been suppressed.

The next question is whether this constitutional error was harmless beyond a reasonable doubt. We conclude that it was.

The erroneous admission of a statement in violation of Miranda is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.[16] In making this determination, the reviewing court focuses on the evidence that remains after excluding the tainted evidence.[17]

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[14] 136 Wn.2d 467, 965 P.2d 593 (1998).
[15] Id. at 486.
[16] State v. Ng, 110 Wn.2d 32, 38, 750 P.2d 632 (1988).
[17] State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204 (1986).

Here, the trial court admitted into evidence certified copies of both the June 23, 2008 court order prohibiting contact with Hattie Lee and the July 9, 2008 order continuing the prohibition and setting a termination date of June 26, 2010. Both orders were in English, and Omar signed the June 23 order, acknowledging that he "had read or had read to me, this order . . . [and] I understand the terms and conditions of this order and the 'Warnings to the Defendant' **ON THE BACK** of this order." Omar also signed and acknowledged reading and understanding the July 9 order. The evidence of Omar's signature on these documents was uncontroverted.

Omar argues that the admission of his statement was not harmless because it undermined the defense theory that he did not understand the provisions of the two prior no-contact orders and did not knowingly violate them. He relies solely on evidence that the no-contact orders were not translated at the time they were entered. But the record contains no evidence supporting the slightest inference that Omar had any difficulty reading or understanding English or undermining the validity of his signature on the no-contact orders. Under the circumstances, we are convinced beyond a reasonable doubt that the jury would have reached the same result without the admission of Omar's statement.[18]

SENTENCING

Relying primarily on State v. Jones,[19] Omar contends that the trial court

[18] See State v. France, 129 Wn. App. 907, 120 P.3d 654 (2005) (certified copy of signed no-contact order rendered harmless the improper admission of defendant's statement admitting knowledge).

[19] 118 Wn. App. 199, 76 P.3d 258 (2003).

exceeded its authority by imposing the following community custody conditions: (1) that he not consume any non-prescribed drugs; (2) that he obtain a substance abuse evaluation and comply with any treatment recommendations; and (3) that he enter and complete a state certified domestic violence batter's treatment program. The State properly concedes that the court lacked authority to impose these conditions. Based on the record before this court, we accept the State's concession and remand to permit the trial court to strike the invalid conditions.

We affirm Omar's conviction and remand only for correction of the judgment and sentence.

/s/ Cox, J.

WE CONCUR:

/s/ Appelwick, J.

/s/ Becker, J.