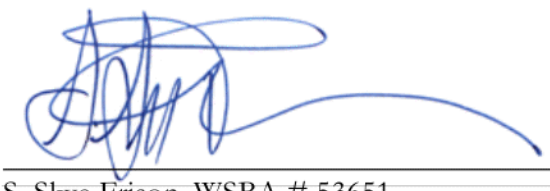
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

THE STATE OF WASHINGTON, Plaintiff, vs. SELENA URSA SMITH, Defendant.	NO. 21-1-00676-34 DEFENSE 3.5 BRIEF

COMES NOW Selena Smith, by and through his undersigned counsel, and respectfully submits this brief for consideration at the CrR 3.5 hearing scheduled on December 14, 2021 in the above-captioned matter.

DATED this 6th day of December, 2021.



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I. INTRODUCTION

The State charged Ms. Smith with one count Residential Burglary/Domestic Violence, three counts Assault in the 4th degree/Domestic Violence, and two counts Reckless Endangerment/Domestic Violence, on July 21, 2021. Trial is currently scheduled for January 10, 2022.

II. RELEVANT LAW

Under the Fifth and Fourteenth Amendments, police officers and other state agents must give *Miranda* warnings to persons held in custody prior to any interrogation. *Miranda* warnings include informing a person of the right to silence, the right to an attorney, and that anything he says can be used against him. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Article 1, § 9 of the Washington Constitution provides the same protections. *State v. Earls*, 116 Wn.2d 378, 805 P.2d 211 (1991). In general, *Miranda* requires that prior to custodial interrogation, the accused is warned that (1) he has the right to remain silent; (2) that any statement he does make can and will be used as evidence against him in a court of law; (3) that he has the right to consult with counsel before answering any questions; (4) that he has the right to have his counsel present during the interrogation; and (5) that if he cannot afford an attorney, one will be appointed for him without cost to him, prior to questioning, if he so desires. *State v. Creach,* 77 Wn.2d 194, 199 (1969) (Overruled on other grounds in *State v. Harris,* 106 Wn. 2d 794 (1986)).

The prosecution may not use statements stemming from custodial interrogation of the defendant unless the defendant received *Miranda* warnings. *Miranda*, 384 U.S. at 444. The State bears the burden of proving a defendant received *Miranda* warnings. Id. at 475. Violation of any of the *Miranda* requirements results in exclusion of any statements given by the suspect. *Oregon v. Elstad*, 470 U.S. 298, 306-08, 105 S.Ct. 1285, 1292, 84 L.Ed.2d 222 (1985).

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Statements a defendant makes while in custody are subject to the protections *Miranda* established. An individual is in custody when police or state agents have arrested that individual or otherwise deprived that person of liberty of action in a significant way. *Miranda*, 384 U.S. at 444. A person is in custody when a "reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *State v. Lorenz,* 152 Wn.2d 22, 37, 93 P.3d 133 (2004) (citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)) (a defendant is in custody when a reasonable person in the defendant's position would believe his or her freedom was curtailed to the degree associated with formal arrest).

The United States Supreme Court defined "interrogation" in *Rhode Island v. Innis*:

> [T]he term "interrogation" under *Miranda* 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.

446 U.S. 291, 299, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). The standard for determining interrogation is objective, focusing on what the officer knows, or ought to know, will be the result of his words or acts. *State v. Sargent*, 111 Wn.2d 641, 651 (1988). The subjective intentions of the officer are not at issue. *Id.*

Interrogation may be express questioning or its functional equivalent. *Innis*, 446 U.S. at 300-01. The functional equivalent of express questioning includes "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." *Id.* For example, in *State v. Wilson*, 144 Wn. App. 166, 184, 181 P.3d 887 (2008), the court held that delivering a death notification to the defendant was reasonably likely to elicit an incriminating response and therefore was interrogation: "The proper test is whether the words notifying Ms. Wilson that her 'husband' was dead were spoken by an officer when he should have known that the words were reasonably likely to elicit an incriminating response."

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A finding that the defendant was properly advised of their rights does not end the inquiry. The State must show that the defendant knowingly and voluntarily waived those rights. Under *Miranda*, a confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights. To be voluntary for due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made. Factors considered include a defendant's physical condition, age, mental abilities, physical experience, and police conduct. *State v. Rupe,* 101 Wn.2d 664, 679, 683 P.2d 571 (1984).

If a defendant is intoxicated to the point of "mania" at the time the defendant makes a statement, the statement is involuntary. *State v. Cuzzetto*, 76 Wash.2d 378, 383, 457 P.2d 204, 207 (1969). Mania means that a defendant is so drunk or drugged "as to be unconscious of the meaning of his words" or that it was "impossible for his intellect to comprehend what he was saying and doing." *Id.* at 385-86. Alternately, if a statement is entirely the result of a drug the defendant has consumed, it is not voluntary. *Townsend v. Sain*, 372 U.S. 293, 307-308, 83 S.Ct. 745, 754 (1963) (overruled on other grounds by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992))("It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum'").

Even if the ingestion of drugs or alcohol alone does not render a statement involuntary, the fact that a defendant was under the influence of drugs or alcohol is a factor in the totality of the circumstances test for voluntariness. See *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S.Ct. 2408, 2418 (1978) (statements defendant made while in hospital and sedated "were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness" and were not voluntary); *State v. Sergent*, 27 Wash.App. 947, 949, 621 P.2d 209, 211 (1980)

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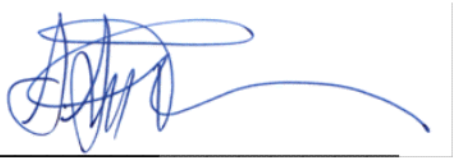
(statement involuntary when defendant, who was on anti-psychotic drugs to which he had a negative reaction, called prosecutor from psychiatric hospital).

III. CONCLUSION

In the above-captioned matter, to find Ms. Smith's custodial statements constitutionally admissible, the court must find Mr. Smith was advised of her *Miranda* rights and that any waiver was made knowingly, intelligently and voluntarily.

RESPECTFULLY SUBMITTED this 6th day of December, 2021.



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