

TO BE ARGUED BY:
Terence L. Kindlon

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NEW YORK STATE SUPREME COURT
APPELLATE DIVISION * THIRD DEPARTMENT
* _____

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

ERICK WESTERVELT

Appellant,

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Appellant Erick Westervelt was charged in a two-count indictment returned on October 12, 2004 with Murder in the second degree under PL 125.25(1) and (2). This appeal is from the judgment of the Albany County Supreme Court (Teresi, J.), entered June 29, 2005, upon a verdict convicting Appellant of Count One of the indictment (Count Two had been dismissed after all the proof was presented).

On August 25, 2005 Appellant was sentenced to twenty-five years to life in prison. (R-1388, A-149)

In this case, where there was no physical evidence connecting Appellant to the scene of the crime, the Court erred in not suppressing a significant post-arraignment statement. After interrogating him for hours, and eventually eliciting a written statement, the detectives asked Appellant if he would write an apology letter to his former girlfriend. However, while he was writing the letter, he was interrupted and taken to be arraigned. The police then made sure, in an egregious violation of his right to counsel, that Appellant finished said letter - at least one third of the letter written after the arraignment.

Moreover, it is also submitted that Appellant's entire written statement was involuntary and should have been suppressed. Police interrogated Appellant for two days before eliciting said statement. Significantly, there were no alleged admissions until Appellant was taken to a place where no video record existed of the interrogation (much of which was videotaped), and began taking a polygraph exam, which he terminated in its early stages. The police lied to Appellant, telling him there was incriminating evidence which in fact did not exist - they also minimized the nature of the crime, and suggested to him that perhaps he had blacked out. Based on all the facts and circumstances of the interrogation, the Court should have suppressed Appellant's written

statement.

Further, it is submitted that Appellant was detained by police illegally after he terminated the polygraph examination - while police claim he made oral admissions at that time, that claim is not credible. Therefore, Appellant's written statement was the poisonous fruit of his unlawful arrest, and should be suppressed for that reason as well.

Finally, there were several instances of prosecutorial misconduct - during the summation the district attorney claimed that Appellant's mother was lying; bolstered the testimony of a prosecution witness with a reference to the Bible; asked the jury if they could imagine a worse way to die than that experienced by the victim in this case; and shifted the burden of proof by asking who would have wanted to kill the victim more than Appellant.

QUESTIONS PRESENTED

1. Should the conviction be reversed where the Court erroneously failed to suppress a crucial post-arraignment statement?
2. Should the conviction be reversed where the Court erroneously failed to suppress a written statement which was both involuntary and unreliable, and which was the fruit of Appellant's unlawful arrest?
3. Should the conviction be reversed based on prosecutorial misconduct where, *inter alia*, the prosecutor improperly disparaged a defense witness, improperly bolstered a prosecution witness' testimony, made a burden-shifting comment, and made inflammatory comments?

STATEMENT OF FACTS

Appellant Erick Westervelt was charged in a two-count indictment returned on October 12, 2004 with Murder in the second degree under PL 125.25(1) and (2). (R-4-5, A-3-4) This appeal is from the judgment of the Albany County Supreme Court (Teresi, J.), entered June 29, 2005, upon a verdict convicting Appellant of Count One of the indictment (Count Two had been dismissed after all the proof was presented). (R-1121, A-73a)

On August 25, 2005 Appellant was sentenced to twenty-five years to life in prison. (R-1388, A-149)

Suppression Hearing

At the Suppression Hearing on February 7, 2005, Bethlehem Police Detective Christopher Bowdish testified that an apology letter from Erick Westervelt to Jessica Domery was written *before* the arraignment. Detective Bowdish stated:

“...After he was booked and *we were waiting for the arraignment with the judge*, Erick had indicated to me that he felt bad about what had happened. So I suggest - asked him if he wanted to write an apology letter. He said yes. So I provided him with a piece of paper and a pen and he did so.” (R-77, A-7)

It is clear that Judge Herrick, at the time of the Suppression Hearing, and his subsequent Decision and Order, also believed that said letter was written before the arraignment. The Decision stated:

“Detectives Bowdish and Rudolph returned with the defendant to the Bethlehem police station. Again, defendant received Miranda and, again, waived his rights. He said that he felt badly about what happened. Detective Bowdish provided defendant with pen and paper and the defendant proceeded to write out an apology for the attack. The defendant was arrested and remanded to the Albany County Correctional Facility.” (R-157, A-10)

However, as discussed below, a significant portion of said letter was in fact written *after*

the arraignment.

Trial Evidence

Twenty-five different witnesses testified for the prosecution, including three neighbors of the victim, Timothy Gray; Jessica Domery (who was Tim's girlfriend and Erick's ex-girlfriend); Jessica's mother; Jessica's roommate; Tim's sister; Tim's friend; ten police officers; three medical personnel; two forensic scientists; one translator; and one jail guard.

The defense presented eight witnesses, including one of the police officers (who was recalled); Erick's mother and father; three of Erick's friends; an expert on false confessions, and Erick himself.

Despite the mountain of evidence presented by the prosecution, there was no physical evidence connecting Erick Westervelt to the crime scene. Therefore, the People's most important evidence was Erick's confession, and a great deal of the trial revolved around whether his written statement truly reflected what had occurred on the date of the crime, October 5, 2004, or whether the police had intimidated him to the point where he would say anything, and then fed him the information they wanted to hear.

As discussed below, after interrogating Erick Westervelt for about seven to eight hours on October 7, 2004, Bethlehem Police interrogated him for approximately eight hours on October 8. On October 8 they first took him to the Albany Police Department to conduct a polygraph examination. Then, after alleging that Erick orally admitted to the attack on Tim Gray, the police elicited a written statement, still at the Albany Police Department, where, in contrast to the Bethlehem station, there were no video cameras. After the written statement was complete, Erick was taken to the Bethlehem Police Department, where the police asked him to write a letter of

apology to Jessica Domery. Much of that letter was written after the arraignment.

Post-Arraignment Letter

The defense was not made aware until trial that certain alleged statements of Erick Westervelt, in particular a significant portion of an apology letter to Jessica Domery, actually occurred *after* Mr. Westervelt's arraignment.

A careful review of the videotape shows that much of the letter was written *after* the arraignment. Detective Bowdish suggested to Erick Westervelt that he write an apology letter to Jessica. (R-1355-1356, A-118-119) He then handed him a paper and pen. (R-1356, A-119) Mr. Westervelt then started writing the letter. However, the letter is one and one half pages long, and is written on the front and back of a single sheet of paper. (See videotape, Exhibit 48, approximately 9-10 minutes before the end) The tape shows that Erick was only writing for *two minutes and six seconds, and was only writing on one side of the paper, when the tape shut off.* (R-1300-1301, A-116-117) When the tape comes back on, it is clear that the arraignment has already occurred - at that point Erick finishes the letter, writing for approximately another one and a half minutes. (R-1300-1301, A-116-117) It can be seen from the tape that the police took Appellant's handcuffs off after the arraignment so that he could finish writing the letter. (R-1300-1301, A-116-117) It appears that at least one third of said letter was written after the arraignment. (R-1300-1301, A-116-117)

At the time of the Suppression Hearing, and Mr. Westervelt's subsequent suppression memorandum, the defense had no inkling that any portion of said letter had been written after arraignment. It was not until watching the interrogation videotape for the second or third time, while preparing for trial, that defense counsel began to wonder why there was a break in the tape

at a certain point.

Then, at trial, Detective Bowdish admitted that part of the letter was written after the arraignment. (R-488, A-39) The defense objected to the letter being received into evidence, arguing that it was a post-arraignment statement taken in violation of the right to counsel. (R-488, A-39) However, the Court overruled the objection and the letter was admitted. (R-488, A-39) It was not clear from the trial testimony how much of the letter was written after the arraignment but, as discussed above, a review of the videotape shows that at least a third of it was written after the arraignment. (R-1300-1301, A-116-117)

Appellant's Other Alleged Statements

Erick Westervelt was interrogated by Bethlehem Police for approximately seven-eight hours (R-441, A-31) on October 7, 2004, and then for at least six hours on October 8. (R-537-538, A-44-45)

On October 7, Bethlehem Police met Mr. Westervelt at the University at Albany at approximately 1:30 or 2pm and asked him to come to the Bethlehem Police Department to be interviewed about an incident which had occurred at Jessica Domery's residence. (R-397-398, A-11-12; R-441, A-31) Most of that interview was videotaped by Bethlehem Police. (R-441, A-31). Even though Detective Rudolph lied and told him that he had been seen at the scene of the crime the night of the attack, Mr. Westervelt consistently denied having had anything to do with any attack on Tim Gray. (R-401-403, A-13-15; R-480, A-37) Eventually, after he had agreed to return the next day to take a polygraph examination, the police drove Erick back to his car at the University. (R-403-405, A-15-17; R-480, A-37)

The next day, October 8, the police again met Erick at the University parking lot, at

approximately 1pm. (R-536-537, A-43-44) This time they took him to the Albany Police Department in order to conduct the polygraph examination. (R-405-406, A-17-18) In contrast to the Bethlehem interrogation, where Erick denied involvement in the crime, none of the Albany interrogation was videotaped. (R-454-455, A-35-36)

Albany Police Detective Dennis Simmons testified that he began administering the polygraph examination to Erick Westervelt, but that Mr. Westervelt terminated the exam. (R-713, A-46) While Detective Simmons was in the polygraph room with Erick, Bethlehem Detectives Bowdish and Rudolph were in the next room where they could hear at least part of what was said, according to Detective Bowdish' testimony at the Suppression hearing. (R-95, A-8) When Erick terminated the exam, Detective Simmons said that he left the room and went next door to tell the Bethlehem detectives that Mr. Westervelt wished to terminate the exam. (R-714, A-47)

Detective Simmons denied having told the Bethlehem detectives that they should go talk to Erick at that point. (R-714, A-47) However, Detective Bowdish testified, both at the Suppression Hearing, and at trial, that Detective Simmons had told him and Detective Rudolph that, "you should go interview him right now." (R-64, A-5; R-518, A-40) In any event, Detectives Bowdish and Rudolph did immediately go in the polygraph room with Erick. (R-519, A-41)

Alleged Oral Admission

Detective Bowdish told Erick that it was a good time for him to get it off his chest. (R-408, A-19; R-444, A-32) Detective Rudolph said it would be better for Appellant to tell his side of the story. (R-483, A-38) Both Detectives Bowdish and Rudolph claim that Erick then said "I

did it.” (R-409, A-20; R- 483, A-38) Detective Bowdish said at the Suppression hearing that that was the point when Erick was considered to be detained, and would not have been able to leave after that alleged admission. (R-98, A-9)

Detective Bowdish said that Erick’s alleged oral admission was made at 3:30 or 4:00PM. (R-520, A-42) Significantly, at the Suppression Hearing he testified that the same alleged oral admission was made “*a couple minutes* before the statement was started down at [Albany] South Station that he wrote himself.” (R-98, A-9) However, the written statement, which was introduced into evidence at trial as People’s Exhibit 46, was started at 5:10PM, *well over an hour after the alleged oral admission.* (R-68, A-6; R-537, A-44)

At trial Erick denied making the alleged oral admission, and he testified that after he terminated the polygraph at approximately 4pm, he was interrogated for over an hour before the initiation of the written statement. (R-1055, A-59) Erick said that during that time period the detectives lied to him, and told him that Tim had told them Erick had attacked him, and that Jessica’s friends had said that Tim was beating Jessica. (R-1055, A-59)

The Bethlehem detectives said that after the alleged oral admission, they took Erick to the room next door at began taking a written statement from him, which contained a Miranda portion at the top. (R-409-411, A-20-22) However, they did not explain the missing hour discussed above.

Written Statement

The written statement, which was read into evidence, starts with the sentence, “I’m making the following statement to Detective Bowdish of my own free will.” (R-416-419, A-26-29) Detective Bowdish testified that he told Erick to write that. (R-413-414, A-23-24)

The first section of the statement dealt with Erick's relationship with Jessica, and how in June, 2004, she had told Erick she could no longer see him after she had gotten back together with her previous boyfriend, Tim. (R-416, A-26) Then the statement discussed some phone calls and a shoving match between Tim and Erick in June, as well as some later text messages Erick had sent to Jessica. (R-417, A-27) Erick testified that at that point he thought he was done, and he wrote "5:25" on the top of first page (of what was at that time a two page statement) where there is a heading saying "TIME FINISHED." (R-1057, A-60) However, the "5:25" is crossed out and "6:51" is written in its place. (R-1068, A-71)

Erick testified that after he wrote the above portion of the statement he tried to leave, but the detectives told him Tim was saying he had assaulted him; that the polygraph indicated that was what had occurred; and that they had his fingerprints from the scene. (R-1057, A-60) Erick said the police suggested that he may have blacked out, that the incident was "no big deal," and that Tim deserved what had happened to him. (R-1057, A-60) Erick said he wanted to leave so bad that he thought he should just say that he did it at that point, and they would let him go. (R-1058, A-61)

Erick said that the police basically fed him the information in the next part of the statement, saying that he would have driven over, that he must have had gloves on because his hands weren't swollen, and that Tim must have gotten stuck when he fell or he would have gotten right back up. (R-1058-1060, A-61-63) Erick also testified that the police had told him he must have gotten rid of his clothes. (R-1061, A-64)

The next part of the statement says that Erick drove over to Jessica's house on October 5, and that Erick said "hey asshole" and then hit Tim as hard as he could, and that Erick had gloves

on since it was cold. (R-418, A-28) The statement says that Tim got pinned behind a picnic table and that Erick punched and kicked him a few times and then left, after putting the dog inside the house. (R-418, A-28) The statement says that Erick then drove back to Guilderland, put his clothes in a neighbor's trash bin, and went home. It then says, at the top of the third page, the name of the street where Erick dropped his clothes off. (R-418-419, A-28-29)

Erick testified that at this point the police had him initial the statement, and that he again believed that he was done - he said that the time was now approximately 5:45. (R-1061-1062, A-64-65) However, Erick said that when he got up to leave, Detective Bowdish pushed him back down and said he wasn't going anywhere. (R-1062, A-65) Erick then asked for a lawyer, and Detective Bowdish told him a lawyer wasn't going to help, that he needed to cooperate with the police. (R-1062, A-65)

Erick said that the police then told him to draw a diagram of Jessica's backyard, and that he did so. (R-1062-1064, A-65-67) He said he felt helpless and confused about why he was not allowed to leave. (R-1065, A-68).

After a break the detectives started questioning Erick about what he would have been wearing that night, and told Erick to write the next portion of the statement, which says that he was wearing a hooded sweatshirt, jeans, white basketball shoes, a blue bandana and football receiver gloves. (R-419, A-29; R-1065-1066, A-68-69)

Then one of the detectives told Erick that there must have been a weapon involved. (R-414, A-24) Erick said they told him that Tim had told them he had gotten hit on the head with something, and that if he didn't come up with something, they would go to his house and find something he could have used. (R-1066, A-69) Continuing to tell the police what they wanted to

hear, Erick said that he did have a little decorative wooden tomahawk or hatchet - the statement says that he hit Tim in the back of the head and face with it during the fight, and that it was dumped in the trash with the clothes. (R-419, A-29; R-1066-1067, A-69-70)

Detective Rudolph testified that he told Erick to write about the hatchet in the statement. (R-415, A-25) On cross examination, Detective Rudolph said prior to speaking with Erick that day, the police might have hypothesized that a hatchet had been involved. (R-451, A-33)

Erick testified that the police told him that the last thing Tim had said was that Erick had dropped a piece of paper before he left, a typed note written in Italian. (R-1067, A-70) They told Erick to put that in the statement, and he did, saying that he had left the Italian note at the scene to make it look like it wasn't him. (R-419, A-29; R-1067, A-70) The police also told Erick that he could have used a computer program to make the note, and so he said that he did that, and printed it out at the Guilderland Public Library. (R-419, A-29; R-1067-1068, A-70-71) . This was the last part of the statement.

Detective Rudolph said that by the time the police were interrogating Erick that evening, they knew that an Italian note had been left at the scene. (R-453, A-34)

Shortly after the statement was completed, the police took Erick to the Bethlehem Police Department. (R-423, A-30; R-1068, A-71) After arriving there, Erick said that while he was already upset and confused, he became very frightened, hopeless and sick to his stomach when the police, who had earlier only told him that Tim had a broken nose, told him Tim's condition was very serious and that he might not survive. (R-1069-1070, A-72-73)

Expert Testimony

Dr. Allison Redlich, a psychologist with Policy Research Associates and an expert on

false confessions, testified about several studies on the characteristics of interrogation in false confession cases. (R-953-954, A-48-49; R-959, A-50) While she didn't give an opinion in the instant case, Dr. Redlich said that these characteristics include isolation, confrontation and minimization. (R-961, A-51) Isolation refers to the suspect being placed in an uncomfortable, windowless room where he or she has no control over what happens. (R-961, A-51)

Confrontation refers to the point where the police tell the suspect they know he or she is guilty. (R-964, A-52) Finally, minimization is the process whereby the police try to shift blame away from the suspect, i.e., making it seem that what occurred was "no big deal," or that the victim somehow deserved what happened. (R-964-965, A-52-53) Dr. Redlich testified that under these circumstances it is much easier for a person to confess, even to something he or she did not do. (R-965, A-53)

Dr. Redlich also said that another tactic police use is to interrupt all denials by the suspect, so that he eventually feels that it is hopeless to assert his innocence. (R-965, A-53). She said that at that point it appears to the suspect that the only rational course of action is to falsely confess in order to remove himself from the situation. (R-965-966, A-53-54) Dr. Redlich indicated that in false confession cases the interrogations last much longer than the average of two hours or less. (R-966, A-54) In addition, Dr. Redlich said that the police generally will lie and tell the suspect that there is overwhelming evidence against him, such as DNA, or that there is an eyewitness, when none of that exists. (R-966, A-54) She said that sometimes when the person knows their DNA couldn't have been found at the scene, he will sometimes confess to end the interrogation, believing that the lack of DNA will exonerate him later. (R-967, A-55)

Dr. Redlich said that another aspect of false confessions are inconsistencies in the

“confessions” which do not match the facts of the crime. (R-969, A-56) She gave as an example the famous case of the Central Park jogger, where a suspect who falsely confessed said at first that he punched the victim in the head, but that wasn’t consistent with her injuries, so then he said he had hit her with a rock, and then a brick. (R-969, A-56) She said that in these cases, the information contained in the “confession” was already known to the police at the time the statement was written. (R-970-971, A-57-58)

Prosecutorial Misconduct

During his summation, the district attorney made several improper and prejudicial comments, including claiming that Appellant’s mother was lying; bolstering the testimony of a prosecution witness with a reference to the Bible; asking the jury if they could imagine a worse way to die than that experienced by the victim in this case; and shifting the burden of proof by asking who would have wanted to kill the victim more than Appellant.

The prosecutor twice told the jury that Wendy Westervelt, Appellant’s mother, was making up her testimony. He said, “She sat there and started filling in details, just making it up as she was going along.” (R-1181, A-74) Later he repeated that comment, saying, “She’s just making it up as she’s going along.” (R-1182, A-75)

Soon thereafter the district attorney bolstered the testimony of prosecution witness Elizabeth Ose, stating:

“...Is that woman coming in here, putting her hand on the Bible, and lying under oath? For what reason? She’s just telling what she saw, folks.” (R-1184, A-76)

Later the prosecutor made an inflammatory comment when he said to the jury, referring to the many of death of Tim Gray:

“Tim didn’t have a chance. He’s standing there in his flip flops and his sandals. Can you imagine a worse way to go? ...” (R-1196, A-77)

A little while later the following occurred:

“[MR ROSSI]: ...Now, what person wants to kill Tim and would know of anybody that was willing to do that more than the defendant?

MR. SPROTERRY: Objection, you Honor. That’s an improper shifting of the burden. We have no duty to come forward with any evidence of that nature.

MR. ROSSI: I can restate that, Judge.

THE COURT: All right. I’m going to strike the statement. The jury is instructed to disregard it.” (R-1198, A-78)

ARGUMENT

POINT I

APPELLANT'S CONVICTION SHOULD BE REVERSED WHERE THE COURT FAILED TO SUPPRESS A CRUCIAL POST-ARRAIGNMENT STATEMENT

The defense was not made aware until trial that certain alleged statements of Erick Westervelt, in particular a significant portion of an apology letter to Jessica Domery, actually occurred *after* Mr. Westervelt's arraignment.

At the Suppression Hearing on February 7, 2005, Bethlehem Police Detective Christopher Bowdish basically testified that the letter to Jessica was written *before* the arraignment. Detective Bowdish stated:

"...After he was booked and *we were waiting for the arraignment with the judge*, Erick had indicated to me that he felt bad about what had happened. So I suggest - asked him if he wanted to write an apology letter. He said yes. So I provided him with a piece of paper and a pen and he did so." (R-77, A-7),(emphasis supplied.)

It is clear that Judge Herrick, at the time of the Suppression Hearing, and his subsequent Decision and Order, also believed that said letter was written before the arraignment. The Decision stated:

"Detectives Bowdish and Rudolph returned with the defendant to the Bethlehem police station. Again, defendant received Miranda and, again, waived his rights. He said that he felt badly about what happened. Detective Bowdish provided defendant with pen and paper and the defendant proceeded to write out an apology for the attack. The defendant was arrested and remanded to the Albany County Correctional Facility." (R-157, A-10)

However, a review of the videotape shows that much of the letter was written *after* the arraignment. Detective Bowdish suggested to Erick Westervelt that he write an apology letter to Jessica. (R-1355, A-118) He then handed him a paper and pen. (R-1356, A-119) Mr. Westervelt

then started writing the letter. However, the letter is one and one half pages long, and is written on the front and back of a single sheet of paper. (R-1300, A-116) The tape shows that Erick was only writing for *two minutes and six seconds, and was only writing on one side of the paper, when the tape shut off*. When the tape comes back on, it is clear that the arraignment has already occurred - at that point Erick finishes the letter, writing for approximately another minute and a half.

At the time of the Suppression Hearing, and Mr. Westervelt's subsequent suppression memorandum, the defense had no inkling that any portion of said letter had been written after arraignment. It was not until watching the interrogation videotape for the second or third time, while preparing for trial, that defense counsel began to wonder why there was a break in the tape at a certain point.

Then, at trial, Detective Bowdish admitted that part of the letter was written after the arraignment. (R-488, A-39) The defense objected to the letter being received into evidence, arguing that it was a post-arraignment statement taken in violation of the right to counsel. (R-488, A-39) However, the Court overruled the objection and the letter was admitted. (Id)

The jury was out for approximately two days in this case, and it is impossible to say whether Erick Westervelt would have been convicted were it not for the introduction of the above letter, which clearly should not have been introduced into evidence.

In New York State the right to counsel indelibly attaches at the time of arraignment (if it has not already attached by that time). *People v. Ramos*, 99 NY2d 27 (2002); *People v. Ackerman*, 162 AD2d 793 (3rd Dep't 1990); *People v. Cotton*, 280 AD2d 188 (4th Dep't 2001); *People v. Samuels*, 49 NY2d 218.

Once the right to counsel attaches, the individual may not be questioned outside the presence of counsel, and may not waive the right to counsel outside the presence of said counsel. *People v. Cotton*, supra; *People v. Ramos*, 40 NY2d 610.

At times courts have allowed post-arraignment statements but only when said statements were held to be spontaneously given or blurted out by the suspect. See, ie., *People v. Maerling*, 46 NY2d 289. However, Erick Westervelt clearly did *not* spontaneously write the apology letter to Jessica Domery. Detective Bowdish asked him to do so, and gave him pen and paper. Under those circumstances, the letter cannot be said to be spontaneous. *People v. Paulman*, 5 NY3d 122 (2005) In *Paulman*, the Court of Appeals stated:

“...Trooper Oliver produced a notepad (which defendant had not requested) and told defendant to write down his ‘best recollection’ of what had occurred. These circumstances support the inference that the handwritten statement was not spontaneous but was induced by Trooper Oliver, who should have known that her actions were likely to elicit an incriminating response.”

While the right to counsel had not yet attached when Detective Bowdish first asked Appellant to write the letter, police should not have taken any further statements from him after the arraignment, when his right to counsel clearly attached.

It is submitted that the continuation of a statement previously elicited by police cannot be considered spontaneous, even if there is no further *questioning* after the right to counsel attaches. Once having set the train in motion, police cannot sit back and watch it cruise down the tracks - not after that crucial point is passed. In *People v. Grimaldi*, 52 NY2d 611 (1981), the Court of Appeals made clear that a statement is not considered spontaneous unless it is basically forced on the police. The *Grimaldi* court stated:

“...That a statement was volunteered or not made in direct response to

questioning, however, does not render it spontaneous. Rather, it must satisfy the test for a blurted out admission, a statement which is in effect forced upon the officer.” *Grimaldi*, supra, at 617, citations deleted.

Under the *Grimaldi* standard, it is clear that the continuation of the letter cannot by any stretch of the imagination be considered spontaneous, since it was clearly not forced on the police, such as a statement that was just blurted out - rather, they knew the statement was not finished and they basically made sure that he finished it after arraignment. It can be seen from the tape that the police took Appellant’s handcuffs off after the arraignment so that he could finish writing the letter. Clearly the police wanted him to keep writing the letter after his arraignment - significantly, Appellant never asked to finish the letter, but was directed to do so by the detectives. Because the letter thus represented a post-arraignment statement taken after Appellant’s right to counsel attached, it should have been suppressed.

Harmless Error Analysis

Although the introduction of the above post-arraignment apology letter was clearly erroneous, the conviction could still stand if it could be held that the error was “harmless.” Where, as here, an error is of constitutional dimension, the People have the burden to show that said error - the introduction of the post-arraignment statement - was harmless beyond a reasonable doubt. *People v. Goldstein*, 6 NY3d 119 (2005). In *Goldstein*, the Court of Appeals reversed the murder conviction, stating:

“Since the error [involving the Sixth Amendment] was a violation of defendant’s constitutional rights, the constitutional test applies: The People must show that any error was harmless beyond a reasonable doubt. In deciding whether the People have met this burden, we consider both the overall strength of the case against defendant and the importance to that case of the improperly admitted evidence.

The People’s case that defendant was sane when he killed Kendra Webdale was a strong one, but we cannot say it was so strong that no rational jury could have rejected it.

...

The People's case drew some significant support from the improperly admitted statements... It is true that these statements were by no means vital to the People's case on sanity, but they were not trivial either. ..." *Goldstein*, supra, at 129-130, citations deleted.

In addition to *Goldstein*, supra, there are several cases where erroneously admitted statements by the defendant were held not to be harmless, and the convictions were all reversed. *People v. Schaeffler*, 56 NY2d 448 (1982) (murder conviction reversed where part of defendant's confession should have been suppressed); *People v. Knapper*, 191 AD2d 207 (1st Dep't 1993) (manslaughter conviction reversed where defendant's privileged statements to his wife should have been suppressed); *People v. Gooljar*, 80 AD2d 860 (2nd Dep't 1981) (where defendant's statement was taken in violation of his right to counsel, the error was not harmless); *People v. Dugan*, 53 AD2d 507 (3rd Dep't 1976) (erroneous introduction of defendant's post-arraignment statement required reversal, especially given that the defendant testified at trial and denied any involvement with the crime); *People v. Hines*, 69 AD2d 23 (1st Dep't 1979) (erroneous introduction of defendant's post-arraignment statement required reversal).

In *Schaeffer*, supra, which, like the instant case, involved cumulative statements, the Court of Appeals discussed the harmless error standard, and held that when the erroneously introduced evidence involves a confession, the error is unlikely to be harmless. The court stated:

"The harmless error rule, as it relates to errors of constitutional dimension, is, simply stated, 'that there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt. While easily articulated, however, its application at times presents a considerable challenge.

Especially is this true when the flawed evidence, as here, is in the nature of a confession since, as pragmatic practitioners long ago learned, confessions of crime, supremely self-condemnatory acts, are almost sure to weigh most heavily with fact finders. ... In cumulative statement cases this [the harmless error analysis] invites caution.

Thus, reviewing courts should take into account the degree to which tainted statements are duplicative of untainted ones and, to the extent that they are not, the nature

and extent of the differences. *For, though the corroborative nature of an overlap between a statement whose admission is infected with error and one which is not may contribute to the weight a fact finder gives to one which was properly received, still the more they differ the greater the possibility that the additional matter supplied by the tainted one was a sine qua non of the production of the verdict. ...*" *Schaeffler*, supra, at 454-455, citations deleted and emphasis supplied.

In the instant case, much of the apology letter was written after the arraignment, and thus was admitted in violation of Erick Westervelt's constitutional right to counsel. Therefore, as discussed in *Goldstein* and *Schaeffler*, supra, the question is whether the erroneously admitted letter was harmless beyond a reasonable doubt. It was not. As in *Schaeffler*, there were cumulative statements, and the apology letter weakened Mr. Westervelt's argument that his prior written statement was a false confession, fed to him piece by piece by police.

As in *Dugan*, supra, the fact that Mr. Westervelt testified at trial and strongly denied having committed the crime makes the introduction of the tainted apology letter less likely to be harmless. Erick Westervelt testified that the previous written statement, elicited at the Albany Police Department, did not reflect what truly happened, but was written only in order to give the police what they wanted so he could go home. In addition, Dr. Allison Redlich, a psychologist, testified as an expert witness with regard to factors common to false confessions.

The apology letter, written hours later at the Bethlehem Police Department, after Mr. Westervelt went before the judge, and after he presumably knew that he would not be going home at least until there was a bail hearing several days later, weaken his claim that he only admitted to the attack in order to go home.

The jury may not have believed, beyond a reasonable doubt, that the previous written statement was voluntary, or that it reflected the truth. As in *Scaeffler*, the post-arraignment

