321134

No. ~~32114-4-III~~

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

LUIS A. AVILA, Appellant.

BRIEF OF RESPONDENT

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PREFACE

The "Facts" of this case can be drawn from all of the pleadings in the trial court proceedings, the transcript of the trial, the pleadings on appeal, the transcript of the 3.5 hearing, and the documents filed by the parties in connection with that hearing. In addition the Respondent has moved the Court to allow supplementation of the record on appeal to include the Defense Proposed Findings of Fact, Conclusions of Law and Order on 3.5 Hearing. All of these sources yield a plethora of information for the reviewing Court to consider. The Court is not limited to those few facts which the Appellant provides in connection with the latest phase of the appellate process.

I. STATEMENT OF THE CASE

In January of 2011, as part of her investigation of a reported rape, Detective Jackie Nichols of the Asotin County Sheriff's Office contacted the Appellant, Luis A. Avila to try and arrange an interview. Record of Proceedings page 58 (*hereinafter* "RP 58").[1] This interview took place on June 16, 2011. RP 58 - 59.

Some time later, after lab results identified Mr. Avila as a source of semen found during a rape examination of the victim (RP 176 - 177, 183), a charge of Rape in the Second Degree was filed against the Appellant. Information (Clerk's Papers page 1, *hereinafter* CP 1). Because the Appellant had left the area and could not be located an Arrest Warrant was issued on May 15, 2012. Arrest Warrant (CP 4).

The Appellant was originally appointed Ms Jane Richards to represent him in the matter. Ms Richards filed her Omnibus Application with the trial court on June 18, 2012. Omnibus Application by Defendant and Order (CP 14). Trial Counsel did not request that the court conduct a hearing under the aegis of Criminal Rule 3.5 (*Hereinafter* "CrR 3.5"), *Id.* at page § 9. Later Ms Richards withdrew

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[1] A fairly comprehensive statement of the facts which led to the interview including the initial report to law enforcement as well as the investigation that led to identification of the Appellant as the suspect in the crime can be found in the Appellant's Brief on Appeal dated June 20, 2014, pages 2 - 6.

as trial counsel and the court appointed a second defense attorney, R. Victor Bottomly. Motion to Withdraw (CP 24 - 25), filed February 28, 2013. Mr. Bottomly made several requests for additional discovery and filed two supplemental responses to the prior omnibus application. Defendant's Supplemental Response to Omnibus Application and Order (CP 59), filed June 26, 2013, and Defendant's 2nd Supplemental Omnibus Application and Order (CP 78), filed October 4, 2013. At no time prior to trial did anyone challenge the admissibility of the statements made by the Appellant during the June 16, 2011 interview. Neither of the two defense attorneys requested that the trial court conduct a 3.5 hearing prior to the trial.

The matter proceeded to trial on October 8, 2013. Detective Jackie Nichols was called as the State's first witness. RP 42. After describing her preliminary investigation Detective Nichols was asked about the June 16, 2011 interview of the Appellant. RP 58. Detective Nichols testified at length about the interview but at no point did Defense Counsel object or request a hearing on the voluntariness of the statement. RP 58 - 60. When the time came for cross-examination of Detective Nichols, Defense Counsel went right to the subject of the interview. RP 67. No questions were asked bearing on the voluntariness during cross or even on re-direct, re-cross, recall or cross on the recall of Detective Nichols.

During the Defense case Sharee Kromrei was called by the Defense. She was not questioned about the interview despite the fact that she was present during the interview on June 16, 2011. In fact when the Appellant himself took the stand he was questioned about statements he made during the interview but no claim that those statements were involuntary was raised by counsel or the Appellant. RP 331, 333.

The Appellant was found guilty of Rape in the Second Degree on October 11, 2013 and sentenced on December 11, 2013. Judgment and Sentence (CP 67 - 78). He subsequently filed a timely appeal wherein, for the very first time he assailed the voluntariness of the statements he made during the interview. Appellant's Brief on Appeal, *generally*. In response the State requested that the matter be remanded back to the trial court level for a 3.5 Hearing.

On January 15, 2015, the court conducted a hearing on the voluntariness of the Appellant's statements from the June 16, 2011 interview. Findings of Fact, Conclusions of Law, and Order on 3.5 Hearing (CP 98 - 102). The Court found that based upon all of the information made available to the Court, including the entire contents of the file, the evidence presented at the hearing, the argument of counsel, and the agreed upon facts, the Court concluded that the statements made by Mr. Avila during the interview on June 16, 2011

were voluntary and admissible. The Appellant now challenges that conclusion.

It must be noted that some of the very facts which the Appellant now disputes are set forth in his own statement of facts therein. Specifically facts 1 through 5 now disputed, are set forth by the Appellant in that recitation. As for the remaining facts which the Appellant now disputes, those concerning the set up of the interview room were facts well known to the Prosecutor, the Defense Attorney, and the Judge based upon their knowledge and experience. Although it may not appear in the record, all parties involved in the 3.5 hearing in this matter were familiar with the area in question as the room is just downstairs in the very same small courthouse where the hearing (and for that matter the jury trial) was held. The facts set forth in number 16: "The Detective began the interview by telling Mr. AVILA about the accusations and asked him for his account of the evening in question" appears to be a very accurate statement of the trial testimony as found on page 59 of the Report of Proceedings.

The only remaining statement of fact which the Appellant now disputes is not readily supported by the evidence presented nor by the facts which the Appellant himself has previously provided to this very Court. This statement regarding the fact that the Appellant was told that he was not under arrest, was not restrained or searched or even asked if he was carrying a weapon does not appear in the

record of the trial or the 3.5 hearing. The particular provision in this statement regarding the Appellant having been advised he was free to leave not only appears in the prior record but appears in the Appellant's most recent brief at page 5.

It must be recalled that ALL of the facts which the Appellant now takes issue with, appear in the Defense Attorney below's own Proposed Findings of Fact, Conclusions of Law and Order on 3.5 Hearing (*the Respondent has moved the Court to supplement the record on review to include this document*) submitted to the trial court following the hearing.

Finally, the Appellant asserts in his brief that he has a "limited command of English[.]" Appellant's Supplemental Brief, page 15. This is contrary to all of the facts presented at every step of the proceedings and appears to based on presumption that since he is originally from Guatemala he must be less proficient in English. As the trial court noted, the Appellant's written and oral statements to the court - all of which were made in English - clearly demonstrate his familiarity with the legal system.

II. ISSUES

A. DO THE UNDISPUTED FACTS AGREED TO BY THE PARTIES, TOGETHER WITH THE DISPUTED FACTS AS FOUND BY THE COURT, SUPPORT THE COURT'S CONCLUSION AS TO THE INTERVIEW IN QUESTION?

B. DID THE TRIAL COURT ERR BY CONCLUDING THAT THE INTERVIEW WAS NOT CUSTODIAL?

III. ARGUMENT

A. THE FACTS AS AGREED TO BY THE PARTIES AND AS FOUND BY THE COURT SUPPORT THE CONCLUSION THAT THE INTERVIEW IN QUESTION WAS NOT CUSTODIAL INTERROGATION.

B. ALL OF THE EVIDENCE PRESENTED AT THE 3.5 HEARING, THE FACTS KNOWN TO ALL PARTIES, AND THE UNDISPUTED FACTS SUBMITTED BY THE APPELLANT AND THE STATE, SUPPORT THE COURT'S CONCLUSION THAT THE INTERVIEW WAS NOT CUSTODIAL.

DISCUSSION

A. THE FACTS AS AGREED TO BY THE PARTIES AND AS FOUND BY THE COURT SUPPORT THE CONCLUSION THAT THE INTERVIEW IN QUESTION WAS NOT CUSTODIAL INTERROGATION.

The Appellant's first assignment of error is that the Findings of Fact as entered by the trial court "are not supported by substantial evidence." In examining every single one of the "findings" challenged by the Appellant herein it is clear that the **COURT's** findings are not those with which he takes issue. Every single finding that he now

takes issue with: #1, 2, 3, 4, 5, 9, 13, and 16 (pages 2 - 3 of the Appellant's Supplemental Brief) are all "Undisputed Facts" which were proposed to the trial court by **the Appellant** and the State. As such, the Appellant should not be allowed to now argue that the very facts which he asserted below were "undisputed" should be subject to his challenge on review. If, as the law clearly provides "unchallenged findings of fact are verities on appeal,"[2] then the facts which the party affirmatively asserts below should be accepted as verities as well. It cannot escape notice that the Appellant does not challenge a single one of the trial court's conclusions as to any of the "disputed facts."

Beyond the "undisputed facts" which the Appellant offered below and now challenges here, the Appellant takes issue with the trial court's ultimate conclusions. In so doing the Appellant asserts as fact that Mr. Avila has "a somewhat limited command of English[.]" Appellant's Supplemental Brief, page 15. The Appellant never offers any proof to support this gratuitous and decidedly xenophobic statement. Other than the fact of his foreign birth, there is no evidence that Mr. Avila does not understand English. In fact, anyone who reads Mr. Avila's written statements or listens to him speak cannot help but note that his command of the spoken and written English language - and fairly complex legal and Constitutional

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[2] State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

precepts - is far from limited. The trial court, who did just that, listened to Mr. Avila, reviewed his *Pro se* pleadings and letters, and personally observed him during the proceedings, specifically noted that "based on his written correspondence, in English and containing complex language, which he read in court, his verbal statements" it was clear that he understood the proceedings. Findings of Fact, Conclusions as to Disputed Facts #5.

B. ALL OF THE EVIDENCE PRESENTED AT THE 3.5 HEARING, THE FACTS KNOWN TO ALL PARTIES, AND THE UNDISPUTED FACTS SUBMITTED BY THE APPELLANT AND THE STATE, SUPPORT THE COURT'S CONCLUSION THAT THE INTERVIEW WAS NOT CUSTODIAL.

The Appellant claims that trial court's conclusions, notably that the June 16, 2011 interview was not custodial[3] and that "a reasonable person would have felt that he or she was at liberty to terminate the interrogation and leave."[4] In asserting these points the Appellant glosses over the fact that the trial court found as FACT that Mr. Avila's "freedom to depart from the interview . . . was not restricted in any way." Findings of Fact, Conclusion as to Disputed Fact #3. Given that factually his freedom was not restricted in any way, the court's

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[3] Appellant's Supplemental Brief, at page 16.

[4] *Id.* at page 15.

conclusion, that a reasonable person would have felt that they were not restricted, is entirely appropriate.

The Appellant also tries to interject reason for doubt by straining at the words used. He seizes on the Detective's statement that she "asked" Mr. Avila to come to the sheriff's office as "ambiguous" and asserts that the request was in fact a command. Appellant's Supplemental Brief, page 17. The actual words of the **UNDISPUTED** facts offered by both the Appellant and the State in this regard are:

> ... at some point [the Detective] called Mr. Avila on the phone and asked if he would be willing to come in for an interview. Mr. Avila agreed to come in and together [t]hey arranged a time which would be mutually convenient.

Findings of Fact, Undisputed Facts #6 (*emphasis added*). If it is possible, as the Appellant urges, to find the word "asked" is ambiguous and could be "readily understood as stating a requirement,"[5] reading the word in the given context surely removes all doubt. One does not ask if a subject is "willing" to submit to a requirement. Further, a person "required" to do so will not "agree" to do so at a time that is "convenient." The Detective's request cannot possibly be construed as a command or a requirement.

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[5] Appellant's Supplemental Brief, page 17.

One final point on the trial court's conclusion that the interview was not a custodial interrogation; this entire episode, by all accounts, lasted "no more than twenty minutes" and at the conclusion the Appellant "walked out" and left. Findings of Fact, Undisputed Fact #21. The charges in this case were not even filed until eleven months after the interview. *Id.* #23. The trial court's conclusions are well supported by the UNDISPUTED facts and well founded in the law. The Appellant's assertion that the court erred is contrary to all of the facts and circumstances known to the finder of fact. The court did not err in finding that Mr. Avila's statements made during the June 16, 2011 interview were admissible.

Moving from the facts to the law, it must be noted that pursuant to well-settled case law, there can be no question that Detective Nichols' interview of the Appellant constituted "interrogation."[6] Rather, the point of contention is whether the setting was "custodial." The law provides that a person is in custody for purposes of Miranda[7] when

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[6] "Interrogation" for the purposes of the law has been defined as "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." Rhode Island v. Innis, 446 U.S. 291, 301-02, 64 L. Ed.2d 297, 307-08, 100 S. Ct. 1682, 1689-90 (1980); *see also*: State v. Collins, 30 Wn. App. 1, 10, 632 P.2d 68, 73 (Div. 111, 1981).

[7] Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966).

his or her freedom of action is curtailed to a degree associated with formal arrest. California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983). The factual aspect of the inquiry examines the circumstances surrounding the interrogation. Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

Turning to facts in the present case it is UNDISPUTED that the Appellant voluntarily came to the Sheriff's Office and freely left, some 20 minutes later, after the June 16, 2011 interview. Our Courts have held that in such cases a finding that the defendant was not in custody for the purposes of the law is appropriate. *See*: State v. Green, 91 Wn.2d 431, 437, 588 P.2d 1370 (1979); *see also*: State v. Lewis, 32 Wn. App. 13, 17, 645 P.2d 722 (Div. II, 1982). The Appellant emphasizes that Detective Nichols "was certainly aware of the allegations" when she questioned Mr. Avila, and that he was told that he had been accused of rape. Appellant's Supplemental Brief, page 15. This, he argues "strongly suggest" that the interview was custodial. *Id*. This is contrary to well-settled law. In Oregon v. Mathiason, 429 U.S. 492, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977) (*per curiam*), one of the first U.S. Supreme Court cases where the Miranda rule was applied, the Court held that circumstances strikingly like the present case would not support a finding of "custodial interrogation. In Mathiason the police officer arranged to meet the suspect at a

nearby police station, much like the present case. At the outset of the questioning, the officer told the suspect that he believed that he was involved in a burglary, but informed him that he was not under arrest. These circumstances mirror the present case. The interview in Mathiason lasted some thirty minutes (ten minutes longer than Mr. Avila's interview). At the conclusion, Mr. Mathiason (just like Mr. Avila) was freely allowed to leave. The Mathiason Court held that the questioning was not custodial because there was "no indication that the questioning took place in a context where the suspect's freedom to depart was restricted in any way." *Id.*, at 495, 50 L. Ed. 2d 714, 97 S. Ct. 711. Significant in the Court's analysis were the facts that the suspect had come voluntarily to the police station, he was informed that he was not under arrest, and he was allowed to leave at the end of the interview. *Id.* Later, in a subsequent case these very facts have led the Court to reach the same conclusion. *See:* Yarborough v. Alvarado, 541 U.S. 652, 661, 124 S. Ct. 2140, 2147-2148, 158 L. Ed. 2d 938, 949-950 (2004). As stated above, all of these facts are present in the case here on review and were weighed by the trial court in its determination that the interview was noncustodial.

Additional factors that were considered by the court below should be considered on appeal. These include the fact that the sole "law enforcement personnel" involved in the interview was Detective Jackie Nichols. As the trial court noted regarding her:

> The Court had the opportunity to personally observe Detective Nichols in full uniform at the time of the hearing on this issue, and to watch as she responded to direct and cross-examination. The Court finds that her manner and appearance, even in full uniform, is neither intimidating nor overbearing. The Court cannot conclude that her uniform or manner is such as would lead a reasonable person to believe that they were in custody based merely upon her appearance.

Findings of Fact, Conclusions of Law, and Order on 3.5 Hearing, Conclusions as to Disputed Facts #1." Further, It is UNDISPUTED that at no point during the interview was the Appellant physically restrained ***in any way***. Findings (*supra*) Undisputed Facts #13 (*emphasis added*). In fact, even the seating arrangement during the interview "was such that Mr. Avila and [his friend who accompanied him to the interview] were closer to the door and neither the Detective nor any other physical obstructions were between them and the door." *Id*. Undisputed Facts #12. Finally, it is UNDISPUTED that at the outset of the interview, prior to any questioning "Detective Nichols told Mr. Avila that he was not under arrest and that he was free to leave at any time." *Id*. Undisputed Facts #13. In a recent case our Court of Appeals held that these type of facts: the number of law enforcement personnel, whether the suspect was restrained at any point, whether the suspect was isolated, and whether the suspect was free to leave, should be considered in the determination of "custodial" setting. State v. Rosas-Miranda, 176 Wn. App. 773, 783, 309 P.3d 728, 732-733,

(Div. II, 2013). The trial court considered all of these and other factors, and found that clearly, the interview did not constitute custodial interrogation. Findings (*supra*), Conclusions of Law.

In closing this legal inquiry it should be noted that a trial court's determination as to whether an interview constitutes "custodial interrogation is subject to the "clearly erroneous standard" on review. State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633, 637 (Div. II, 2009). Under that standard a reviewing court can not overturn a finding of the lower court unless the appellate court is "left with a definite and firm conviction that a mistake has been committed." State v. Handley, 54 Wn. App. 377, 380, 773 P.2d 879 (Div. II, 1989). In the present case no such finding can be made. The trial court's determination that the June 16, 2011 interview was not custodial is well founded in the UNDISPUTED facts of this case and is well supported in the law.

IV. CONCLUSION

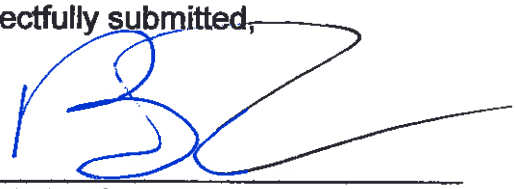
The June 16, 2011 interview of Luis A. Avila was not a custodial interrogation. The trial court properly relied on the facts presented at the 3.5 hearing by way of testimony as well as those facts which were proposed by the Appellant and the State as UNDISPUTED facts. Those facts amply support the trial court's conclusions of law. No reasonable person in the Appellant's position

could have felt that their freedom of action was significantly restrained during the brief interview by Detective Nichols. The trial court's conclusion to this effect is legally sound.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 23rd day of September, 2015.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. LUIS A. AVILA, Appellant.	Court of Appeals No: 321134 **DECLARATION OF SERVICE**

DECLARATION

On September 23, 2015 I electronically mailed, with prior approval from Ms. Gemberling, a copy of the , BRIEF OF RESPONDENT in this matter to:

JANET G. GEMBERLING
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I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on September 23, 2015.

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