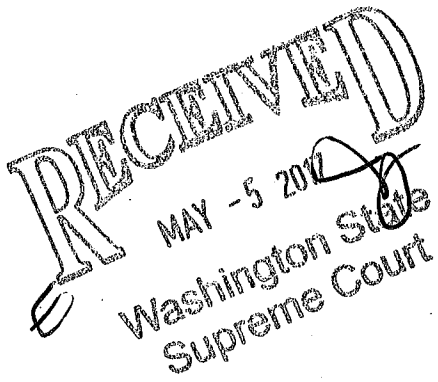

Supreme Court No. 94195-5
Court of Appeals No. 32113-4-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LUIS A. AVILA,

Appellant/Petitioner.

PETITION FOR REVIEW

LUIS A. AVILA, #369547
Airway Heights Corrections Center
P.O. Box 2049 (Unit N Tier A/11)
Airway Heights, WA 99001-2049

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

COURT RULES

I. IDENTITY OF PETITIONER

The Petitioner, Luis A. Avila, hereby requests review of the Court of Appeals decision designated in Section II below.

II. COURT OF APPEALS DECISION

The Petitioner, Luis A. Avila, seeks review of the Unpublished opinion in the Court of Appeals, Division III, case State v. Avila, No. 32113-4-III, filed on July 14, 2016. A motion for Reconsideration was filed in the Court of Appeals on December 20, 2106 and denied on January 24, 2017.

A copy of the unpublished opinion and the Order Denying Motion for Reconsideration are attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Washington 's Criminal Justice System provides no recognizable protection to non-English speaking persons outside of formal legal proceedings. This Petition presents fundamental questions concerned with the process due to Luis A. Avila, a non-English speaking individual. Public importance is implicated by the issues raised here because this Court needs to settle what protections our State will afford persons public policy has long considered to be impaired. RCW 2.42.110. Because the equal right to due process is guaranteed--irrespective of national origin--

under both state and federal constitution, the issues in this case are:

1. Was the Court of Appeals, Division III, constitutionally obligated to provide a complete review of the questions raised by Petitioner in his direct appeal? Did the Court of Appeals violate those principles when it conducted a truncated review after it narrowed the legal issues presented by the due process violation argued in the Court below? RAP 13.4(b)(1)-(4).

2. The Court of Appeals decision, in effect, holds that the fundamental principles enunciated in Miranda v. Arizona, 348 U.S. 436 (1966) are inapplicable to outside of custodial statements. Does the Court of Appeals decision warrant review because it constitutes error within the meaning of RAP 13.4(b)(1)-(4)?

3. Should this Court grant review and provide guidance on this unsettled question of significant public interest? RAP 13.4(3).

IV. STATEMENT OF THE CASE

As alleged in the Brief of Appellant, which sets out facts and law relevant to this Petition and are hereby incorporated by this reference, Avila was convicted of second degree rape. On appeal Avila argued, in part, that the trial Court violated his Fourteenth (14) Amendment right to due

process by admitting his statements which were involuntarily made. Division III, while agreeing that due process prohibits the admissions of involuntary statements, the Court found Avila's statements to be voluntary under the rationale that the principles of Miranda v. Arizona are inapplicable outside of a custodial setting. The Court ended its analysis there. As a consequence, the Court did not accomplish a complete review of the issues raised on appeal. Avila now seeks review.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED

As discussed below, the proceedings involving the Petitioner were fundamentally unfair. Mr. Avila is a Spanish Speaking Guatemalan immigrant with marginal education and who speaks in broken English. RP 301-302. He was put in the untenable position of being subjected to an interrogation that occurred in English. Law enforcement was aware of Avila's language barrier at the time of the interrogation. Yet, no party privy to the proceedings inquired whether Avila needed an interpreter nor was one provided. The Trial Court's ruling did not account for this disparity in spite of the Court finding Avila was in need of an advisor/mediator. RP 56-57; CP 98-100. Indeed, this same judge appointed Avila an interpreter for the trial and the CrR 3.5 hearing.

The central issue raised on appeal was whether Avila's

statements to Detective Nichols were voluntarily made. A Majority of the Court of Appeals, in effect, held that no due process violation will be found absent direct evidence of custody. In focussing exclusively on the custodial aspects of the statements the Court ignores the possibility that the statements may still be involuntary irrespective of their nature. In so ruling, the Court did not resolve the questions raised on appeal.

The Majority overlooked that non-custodial statements "must still be suppressed, even absent a Miranda violation, where the totality of the circumstances demonstrate that" they were involuntarily made. Deweaver v. Runnels, 556 F.3d 995, 1002-1003 (2009). Instead of evaluating the totality of the circumstances, the scope of review was limited to Mr. Avila's custodial status.

Additionally, in resolving the custodial aspects of this claim, the Majority did not take into account the impact Avila's language barrier and cultural differences had on his ability on his comprehension and perception. Instead, the Court resolved this matter as if Avila was a native born American cultured in American politics.

Petitioner respectfully submits that review should be accepted because the decision of the Court of Appeals is in conflict with other decisions of this Court, the U.S. Supreme

conflict with other decisions of this Court, the U.S. Supreme Court and the Court of Appeals. RAP 13.4(b)(1)-(2). This Petition also presents significant questions of constitutional law, inviting clarification and guidance from this Court to settle this question of significant public interest. RAP 13.4(b)(3)-(4).

A. THE COURT OF APPEALS APPLIED THE WRONG STANDARD TO ASSESS THE VOLUNTARINESS OF AVILA'S STATEMENTS

1. The Court of Appeals Applied the Wrong Test and Violated Avila's Constitutional Right to A Complete Review.

In its opinion, the Court of Appeals recognizes that due process protects the individual from involuntary and/or false confession but fails to apply that understanding in its review of this case. Instead, the majority reasoned that due process is not implicated absent direct evidence of custody. Opinion at 9-14. This rationale is contrary to the standard established by the Ninth Circuit and the United States Supreme Court which are the same standards found in Washington law.

In Preston, the Ninth Circuit explains that the test for determining voluntariness of "custodial" statements is the same test used to evaluate the voluntariness of non-

custodial statements. U.S. v. Preston, 751 F.3d 1008, 1015 n.11 (9th Cir. 2014). In other words, the voluntariness of a statement does not necessarily turn on the custodial status of the suspect. 751 F.3d at 1016; Beckwith v. United States, 425 U.S. 341, 348 (1970). Rather, such an inquiry must focus on the nature of the interrogation and the particular circumstances of the "suspect not in custody." 751 f.3d 1016, n.16; Dickerson v. United States, 530 U.S. 428, 434 (2000); see also Miranda v. Arizona, 384 U.S. 436 n.24 (1966).

In this case, the majority did not carefully scrutinize the facts to determine whether Avila's "outside of custodial" statements were the product of a "free and rational will." Doody v. Ryan, 649 F.3d 986, 1023 (9th Cir. 2011) (quoting Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Instead, the Court of Appeals found no due process violation because Avila failed to establish that the interrogation was custodial, which the Majority believed was dispositive to a voluntariness inquiry.

While the Court of Appeals finds Avila's statements were not custodial, the Court avoided complete review on whether the non-custodial statements were nonetheless involuntary. The Court's effort to assess out of custody statements under Miranda is the wrong legal standard. State v. Lamb, 163 Wn.App. 614, 625 (2011). This opinion does not resolve the

questions raised on appeal about whether Avila's statements were voluntary. As discussed above, the context in which the statements were made does not settle a 14th amendment violation of Avila's rights.

2. The Majority Reached the Wrong Decision By Incorrectly Deferring to the Trial Court's Findings of Fact

When the court applies the wrong legal standard, it has abused its discretion. State v. Rorich, 149 Wn.2d. 647, 654 (2003). Likewise, a Judge's findings that are based on a misapprehension and/or erroneous application of law, the findings are not entitled to deference. In re Marriage of Little Field, 133 Wn.2d 37, 47 (1997); State v. W.R., 181 Wn.2d 757, 770 (2014). A judge's findings are also not deferred to when they are not supported by evidence. 133 Wn.2d at 47.

On review, the majority affirmed the Trial Court's conclusions that Avila's statements were voluntary based on the trial Court's findings of fact. The trial Court's findings, however, had only minimal relevance to this issue because they neither addressed nor resolved whether Avila's out-of-custody statements should have been excluded as involuntary. The court misapplied the law when looking at the threshold question of law enforcement's obligation to obtain

statements voluntarily in spite of custodial status. Preston, 751 F.3d at 1015-101; Deweaver, 556 F.3d at 1020-1023; Dood, 649 F.3d at 1023; Dickerson, 530 U.S. at 413.

As previously discussed, the Trial Court applied the wrong legal standard to assess the voluntariness of Avila's out-of-custody statements. First, the Court found that Avila was out-of-custody and that law enforcement was under no obligation to Mirandize Avila. Opinion at 9-14. This ignores law enforcement's inescapable obligation to obtain statements voluntarily, irrespective of Miranda. The trial Court incorrectly viewed the question strictly as a Miranda violation, not whether the statements should be suppressed because the totality of the circumstances show that the statements were not voluntary under the established standards. Deweaver, 556 F.3d at 1002-1003.

Second, in only examining whether there was evidence of an actual Miranda violation, the Trial Court did not weigh Avila's language barrier, cultural differences, marginal education and his broken English (RP 25-43) against the college educated Detective Nichols who was trained in investigation techniques. RP 10, 19. The Trial Court did not enter any findings of fact on these factors. Consequently, the record was devoid of any factual basis from which to defer to in assessing whether this imbalance produced an

involuntary and/or false confession. Ryan, 649 F.3d at 1016 (court's must weigh, not list, relevant circumstances).

The Trial Court made no effort to assess Avila's vantage point in the context of his cultural background and language barrier. Instead, the Court only considered Detective Nichols perspective in evaluating the voluntariness of the statements. RP 56-58; CP 98-100. These findings do nothing to inform the record as to Avila's perspective because Detective Nichols is not Avila. The Trial Court's failure to carefully scrutinize Avila's circumstances removed from the record facts pertinent to a determination of whether law enforcement exploited Avila's impairments to advance a sequencing of questioning designed to confuse and elicit incriminating statements. see U.S. v.Bundy, 966 F.Supp.2d 1180, 1186 n.3 (2013).

Because culture and language were at issue in this case it was improper to focus exclusively on Detective Nichols's testimony to reconstruct the interrogation. As explained by the federal court in Bundy, "there are recognized problems with such testimony, including, 'problems associated with recollection, disparities in perception or preconceived biases,' and statements that have 'equivocal interpretation.' 'People, including officers and suspects, forget facts or reconstruct and interpret them differently." Even more so

"where, as here, the interrogators and suspects are from different cultures." Bundy, 966 F.Supp.2d at 1186 n.3 (quoting Revealing Incommunicado Electronic Recording or Police Interrogations, Vol. 75, No. 12 FBI Law Enforcement Bulletin 1 (dec. 2006)).

Avila's testimony confirms he spoke in monosyllable and that he did not speak in full sentences. RP 25-43. Bundy is applicable to the instant case and demonstrates why it was incumbent upon the Court to verify what the answers and questions were of the interrogation. Sans this, it is impossible to know what exactly Avila was agreeing to or disagreeing to from his perspective. The Court's findings were insufficient to evaluate whether Detective Nichols's conclusions accurately memorialize what Avila actually said, or whether they merely inferred as much from a series of confusing, contradictory and perhaps incomplete statements.

As previously discussed, Avila's conduct during the interrogation was relevant to a determination of whether the statements were voluntarily made. The record lacks sufficient findings to know whether Avila volunteered details of his experience, or whether he unwittingly acquiesced to a fact pattern embedded within questions as part of Detective Nichole's minimizing techniques. The Court's findings provide no insight on this question. Whether Avila answered the

questions directly or haltingly was imperative to understanding Avila's comprehension and confusion.

Finally, trial testimony confirms that the interrogation was conducted entirely in English. Detective Nichols testified that she was aware of Avila's language barrier and cultural differences prior to the interrogation. RP 17. Avila's testimony indicates that he did not understand that the interrogation was optional and the he would have preferred an attorney present but did not believe he--"an innocent person"--was entitled to one. RP 25-43. Avila stated unequivocally that he was in fear of being arrested due to his outstanding immigration warrant and his unlawfully employment. Id. The Trial Court discounted all of this on the basis of Detective Nichols's impressions and the Judge's opinion that Sharee Kromrei was Avila's advocate/mediator.

The Court of Appeals decision finds that "no information suggest" that Ms. Kromrei was "qualified" to assist Avila. Opinion at 13. Nevertheless, the Majority upholds the Trial Court's conclusions of voluntariness in spite of the fact that it was based, in part, on Ms. Kromrei acting as an advocate/mediator. RP 56-57; CP 98-100 (Finding of Fact No. 5); U.S. v. Ramo-Chaves, 681 F.3d 995, 960 (2012) (qualification is a question of fact). The trial Court did not enter any findings of fact with respect to Detective

Nichols's or Ms. Kromrei's level of comprehension of either the Spanish language or the Guatemalan culture. In this context, there is nothing to defer to and the ruling is factually incorrect. The Detective's perspective and Ms. Kromrei's presence is meaningless and speaks nothing to Avila's comprehension or confusion. 133 Wn.2d at 47.

Deference to the Trial Court's assessment of the voluntariness of Avila's statements would have been proper had the Court used the correct legal frame work and closely scrutinize the totality of the circumstances to make necessary findings. No deference was appropriate here because on remand the Court narrowed the CrR 3.5 hearing to actual custody, misapprehended the facts, and did not decide whether Avila's statements--irrespective of custody--were voluntary. Little Field, 133 Wn.2d at 47; W.R. 181 Wn.2d at 770; see also U.S. v. Thorton, 1 F.2d 149, 158-159 (1993).

Because the opinion defers to the Trial Court's findings it is also factually incorrect, based on the wrong legal standard and an erroneous view of the law; leaving unresolved the question raised on appeal.

3. The State Did Not Prove that Avila's Statements Were Voluntarily Made

Once Avila challenged the admissibility of his statements, the State had the burden to prove that its

elicitations comported with constitutional requirements. Lego v. Tomey, 404 U.S. 477, 485 (1992); U.S. v. Williams, 435 F.3d 1148, 1153 n.3 (9th Cir. 2003). As Such, the State was required to demonstrate that the totality of the circumstances prove the statements were not obtained by means of coercion or improper inducement such that Avila's will was overborne. Scheckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973).The State failed to meet its burden in this case.

In the context of language barriers and cultural differences, subtle details will bear significantly in determining voluntariness. Bundy, 966 F.Supp.2d at 1186; Preston, 751 F.3d at 1016. As discussed above, this is not a case of cultural parity wherein language was not at issue. Instead, Avila's particular circumstances left him without the tools to resist interrogation techniques. The Majority's opinion was not individualized. Instead, the Court relied solely on Detective Nichols's conclusions and memory of the interrogation in reaching its decision.

Even taking Detective Nichols at her word that she viewed her techniques as non-coercive, the record is still absent an objective basis to determine that the interrogation was not perceived as coercive by Avila, whose cultural differences, limited English speaking ability, marginal education and personal background collectively produced a

different experience. Detective Nichols made the conscious decision not to record the interrogation. As a consequence, the Trial Court's conclusion did not account for Avila's characteristics because the State did not provide evidence of the actual words, actions and context necessary to evaluate perception and experience. Doody, 649 F.3d at 1002.

While the state was not required to record the interrogation, it "bears the consequence in such cases as the present case where the " actual answers and questions of the interrogation are pertinent to a determination of voluntariness. Bundy, 966 F.2d at 1188. Detective Nichols's decision to remove objective evidence to Avila's voluntariness is within the "totality of the circumstances." Mills v. Vasquez, 868 F.2d 1116, 1119-1120 (1987).

It is important to emphasize that Avila is not disputing that "suppression is not warranted because the government fails to record the interview," U.S. v. Ramo-Chavez, 681 F.3d 955, 961 (9th Cir. 2012), this case was about whether the evidence presented was incomplete and perhaps subconsciously biased. Detective Nichols failed to use equipment that was at here disposal which would have accurately depicted the context and details necessary to assess Avila's perception and level of confusion.

Moreover, the conflicting testimony regarding the

interrogation supports the "larger inference that [Detective Nichols's] account did not accurately portray the circumstances surrounding [Mr. Avila's] statements." U.S. v. Wright, 625 F.3d 538, 684 n.16 (9th Cir. 2011); U.S. v. Yunis, 589 F.2d 753, 961 (1988). The Opening Brief and this Petition identified Detective Nichols's conduct that one could reasonable conclude was exploitive and/or coercive; the record supports the same.

Thus, the State has failed to demonstrate by a preponderance of the evidence the voluntariness of Avila Statements. Further, without a clear record it is impossible to ascertain exactly what Avila was agreeing or disagreeing to. In other words, whether Avila provided a false statement as a result of his confusion and perception of the questions.

4. This Court Should Grant Review

The Court of Appeals decision should be reviewed because it ignores the possibility that Avila's statement may still be involuntary irrespective of custodial status. The majority--like the Trial Court--required Avila to affirmatively prove that he was in custody at the time the statements were made in order to substantiate a violation of his Fourteenth Amendment right to due process. This decision is contrary to established standards.

This Court should grant review to resolve this conflict which plainly collides with controlling authority interpreting key constitutional principles essential to a fair trial. The error palpably undermines the practical and structural concerns underlying Miranda and its progeny.

Although the opinion is unpublished, it is likely to lead to confusion or other erroneous application of similar cases that will ultimately fall within Division III's purview. It may also embolden law enforcement--within Division III's jurisdiction--to take advantage of immigrants because the Majority's decision signals that non-English speaking persons are not protected outside of a legal proceeding. Such persons would never be entitled to reversal--irrespective of how egregious law enforcement acts--so long as they are not involved in a formal legal proceeding and can not prove custody.

It is difficult to conceive of any scenario under which such circumstances would not undermine the public's perception of fairness in Washington's Criminal Justice System.

B. THIS PETITION INVOLVES ISSUES OF SUBSTANTIAL PUBLIC INTEREST

Under RAP 13.4(b)(4), this Court will accept review "[i]f the petition involves an issue of substantial public

interest that should be determined by the Supreme Court." The issues presented in this petition are of substantial public interest because it involves the fundamental rights of undocumented individuals. Washington's public policy has long recognized language barriers as an impairment necessitating additional safeguards. RCW 2.42.010; RCW 2.43.010. The public importance implicated by the issues raised here are sweeping because it addresses what protections our system will afford this class of people.

Washington Courts that have addressed this issue have limited these protections to legal proceedings with limited exceptions. State v. Prok, 107 Wn.2d 153 (1986); State v. Morales, 173 Wn.2d 560 (2012). These exceptions have been limited to cases of mandatory blood draws. The underlying rationale of these decisions is that due process protections extend to the manner in which evidence is gathered and collected.

Mr. Avila is an impaired person within the meaning of RCW 2.42.110. Detective Nichols's did not make a good faith effort to secure Avila's rights before obtaining evidence that was used against him in a legal proceeding. The Court of Appeals decision stands for the proposition that impaired persons are only entitled to protections after the State has exploited their language barrier to elicit incriminating

statements. It is difficult to reconcile this proposition with constitutional principles and the public policy of this State.

In the same manner that Morales and Prok extends the protections found in RCW 2.42 et.seq to evidence that could potentially be used in a future legal proceeding, this Court should hold that those protections also extend to interrogations of non-English speaking individuals.

V. CONCLUSIONS

For the foregoing reasons, this Court should grant review.

DATED this 30 day of April, 2017

RESPECTFULLY SUBMITTED,

X _____

Luis A. Avila, #369547
Airway Heights Corrections Center
P.O. Box 2049 (Unit N Tier A/11)
Airway Heights, WA 99001-2049

I, Luis A. Avila, hereby declare under the penalty of perjury under the laws of the State of Washington, that on this 30 day of April, 2017, I deposited a true copy of the document to which this certificate is attached to into the United States Mail, postage pre-paid, as per GR 3.1, addressed to Benjamine Nichols, Prosecuting Attorney, P.O. Box 220, Asotin, WA 99402.

X _____
Luis A. Avila

APPENDIX A

FILED

JULY 14, 2016

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. LUIS A. AVILA, Appellant.	)	No. 32113-4-III UNPUBLISHED OPINION

SIDDOWAY, J. — Luis Avila was convicted of second degree rape. At trial, Detective Jackie Nichols testified about statements Mr. Avila made to her during an interview. No CrR 3.5 hearing had been conducted prior to trial to determine whether her statements were admissible. Mr. Avila appealed, and the case was remanded for a CrR 3.5 hearing, at which the trial court concluded the statements were voluntary and were properly admitted at trial. Mr. Avila again appeals, arguing that (1) nine of the findings of fact in the court's order lack substantial evidence in the CrR 3.5 hearing record, and (2) the trial court erred when it found the interview was not a custodial interrogation. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On June 13, 2011, Detective Jackie Nichols received a report that Bonnie Larson, an elderly woman residing at Sycamore Glen Family Home—an adult care facility—had

been raped at the facility by an employee later identified as Luis Avila.

Upon receiving this report, Detective Nichols called Mr. Avila and "asked if he would be willing to come in for an interview." Clerk's Papers (CP) at 99. Mr. Avila agreed, and together they "arranged a time which would be mutually convenient." *Id.* Sharee Kromrei, the owner of Sycamore Glen, and a friend of Mr. Avila's, then contacted Detective Nichols and asked to be present at the interview. Detective Nichols agreed.

On June 16, 2011, Ms. Kromrei drove Mr. Avila to the sheriff's office. Detective Nichols escorted them to the interview room, which is

> where we conduct all our interviews, victim interviews, child/victim interviews, adult interviews. So it's, the setting is conducive to being comfortable it's got upholstered chairs, pictures on the walls kind of a neutral tone to the paint, carpet, you know, it's like a throw rug type carpet on the floor.

Report of Proceedings (RP) (Jan. 15, 2015) at 9. Once in the interview room, Ms. Kromrei and Mr. Avila sat next to each other on the side of the table nearest to the door. Nothing blocked Mr. Avila's path to the door.

Detective Nichols, in full uniform, told Mr. Avila he was free to leave at any time. At no time was Mr. Avila handcuffed or physically restrained. Neither Ms. Kromrei nor Mr. Avila were searched. Detective Nichols did not inform Mr. Avila of his *Miranda*[1] rights before interviewing him.

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

During the interview, which lasted no more than 20 minutes, Mr. Avila appeared to understand the questions he was asked and the allegations at issue, never declined to answer any questions, never requested an interpreter or a lawyer, and never asked to leave. When the interview was over, Mr. Avila and Ms. Kromrei walked out of the sheriff's office together.

Nearly a year later, on May 15, 2012, the State charged Luis Avila with the second degree rape of Bonnie Larson. In preparation for trial, defense counsel did not request a CrR 3.5 hearing to determine whether Mr. Avila's statements to Detective Nichols had been made voluntarily. At trial, Detective Nichols testified about the statements Mr. Avila made during the interview. Mr. Avila also testified at trial in his own defense. The statements Detective Nichols attributed to Mr. Avila were inconsistent with Mr. Avila's trial testimony. At the conclusion of the trial, the jury found Mr. Avila guilty, and the court sentenced him to 90 months to life.

Mr. Avila appealed, challenging for the first time the voluntariness of the interview statements to which Detective Nichols testified. In response, the State requested the matter be remanded to the trial court for a CrR 3.5 hearing. A commissioner of this court granted the State's motion and issued an order remanding the case for a CrR 3.5 hearing.

The CrR 3.5 hearing occurred on January 15, 2015. The court entered an order concluding the interview was not a custodial interrogation and therefore Mr. Avila's statements were voluntary and admissible. The order contains the following findings of fact:

1. On June 12, 2011, Bonnie J. Larson, an elderly resident of the Sycamore Glen Family Home, a facility licensed by the state for long-term care, told various people at her church that she had been forcibly raped by an employee of the home the previous night.
2. On June 13, 2011 while at a local hospital for a routine appointment, Ms. Larson reported again that she had been raped at Sycamore Glen on June 11, 2011 by a caregiver named "Luis." She was given a rape examination but there were no overt signs of assault. The medical personnel collected "swabs" as part of a standard rape kit, which were sent to the Washington State Patrol Crime Lab for analysis.
3. The medical personnel contacted law enforcement and Detective Jackie Nichols of the Asotin County Sheriff's Office was assigned the case and responded to the hospital to investigate.
4. Detective Nichols interviewed Ms. Larson at the hospital and spoke with other potential witnesses.
5. The Detective contacted [Sharee] Kromrei, the Administrator of Sycamore Glen. Ms. Kromrei told Detective Nichols that the employee identified as "Luis" was LUIS A. AVILA. She indicated that she was a friend of Mr. AVILA's and that she had heard about the report but did not believe it. She told the Detective that she had already spoken with Mr. AVILA and that he had told her that the accusations were "completely false." Throughout the entire investigation Ms. Kromrei advocated for, and assisted Mr. AVILA.

. . . .

8. On June 16, 2011, during regular working hours, LUIS A. AVILA and Sharee Kromrei arrived at the Asotin County Sheriff's Office for the interview, having driven to that location in a private vehicle.

They were met by Detective Nichols in the lobby and escorted to the interview room inside of the Sheriff's Office.

9. The interview room is regularly used for non-custodial interviews of witnesses, victims (including child victims), and persons of interest. The room is decorated in a nonthreatening manner with "homey" decor which includes muted lighting, upholstered chairs, pictures on the walls, and small throw rug on the floor.

. . . .

13. Prior to asking any questions, Detective Nichols told Mr. AVILA that he was not under arrest and that he was free to leave at any time. At no time during the interview was Mr. AVILA handcuffed or physically restrained in any manner. Neither he nor Ms. Kromrei was searched nor were they even asked whether they were carrying any weapons.

16. The Detective began the interview by telling Mr. AVILA about the accusations and asked him for his account of the evening in question.

CP at 98-100.

ANALYSIS

Mr. Avila appeals, arguing that (1) insufficient evidence supports nine of the trial court's findings of fact, and (2) the trial court erred when it concluded the interview with Detective Nichols was not a custodial interrogation. Each argument is addressed in turn.

1. Because we may take judicial notice of the record in the case presently before us, substantial evidence supports the trial court's findings

Mr. Avila argues the court included numerous findings of fact in its order on the CrR 3.5 hearing that were not supported by any evidence in that hearing record.

This argument lacks merit. Judicial notice is allowed at any stage of the proceeding. ER 201(f). "We may take judicial notice of the record in the case presently before us or 'in proceedings engrafted, ancillary, or supplementary to it.'" *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (quoting *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952)). The CrR 3.5 hearing was conducted to determine whether certain evidence was admissible at trial and was part of the same case. Accordingly, we, like the trial court, may take judicial notice of the trial record. It contains substantial evidence for each of the challenged findings of fact. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

The record shows Ms. Larson was a resident at Sycamore Glen Family Home, which is a licensed adult care facility. Ms. Larson testified that she told "several people" at church that she had been raped. RP (Oct. 8, 2013) at 96. This report was made "the morning after" the rape, on June 12, 2011. *Id.* at 72. Substantial evidence supports finding of fact 1.

There was testimony that on June 13, 2011, Ms. Larson had a routine appointment with her counselor at a facility affiliated with St. Joseph's Hospital. The record shows that when Ms. Larson told her counselor she had been raped by a caregiver named "Luis"

at Sycamore Glen on June 11, 2011, he sent her to the emergency room for a sexual assault exam. Detective Nichols testified that the exam found no overt signs of sexual assault. The record reflects that the nurse at the hospital collected swabs as part of a sexual assault exam, and sent them to the Washington State Patrol Crime Lab for analysis. Substantial evidence supports finding of fact 2.

Detective Nichols testified that the medical personnel at "St. Joseph's Hospital or a medical facility affiliated with St. Joseph's" called the Asotin County Sheriff's Office to report the sexual assault. RP (Oct. 8, 2013) at 38. Detective Nichols stated she responded to the report and went to St. Joseph's to interview Ms. Larson. Detective Nichols also said she spoke with other potential witnesses. Substantial evidence supports findings of fact 3 and 4.

Detective Nichols testified she contacted Ms. Kromrei to ask her about Ms. Larson's report. The record does not reflect that Ms. Kromrei is the "administrator" of Sycamore Glen, but rather that she is the "owner" and "operator" of that facility. RP (Oct. 9, 2013) at 232. This difference is inconsequential. Detective Nichols testified that Ms. Kromrei identified herself as Mr. Avila's friend. The record reflects that upon receiving the report of the rape from one of her caregivers, Ms. Kromrei responded that "that couldn't have happened" because Mr. Avila was from her church and had just gotten married and had a baby. RP (Oct. 8, 2013) at 82. Testimony shows Ms. Kromrei

asked to attend Mr. Avila's interview with Detective Nichols, told Mr. Avila not to worry because she would be present and if he were arrested she would be able to help him, and then drove him to the interview. The evidence also shows that at the interview Mr. Avila consulted Ms. Kromrei about whether to allow Detective Nichols to record the interview. This is sufficient evidence to support a finding that Ms. Kromrei advocated for Mr. Avila throughout the investigation. Sufficient evidence supports finding of fact 5.

The record demonstrates that on June 16, 2011, Ms. Kromrei drove Mr. Avila to the Asotin County Sheriff's Office for an interview with Detective Nichols. Mr. Avila testified they were met by Detective Nichols, who led them to the interview room. There is no direct evidence that the interview occurred during "regular working hours," but the record shows that Detective Nichols and Ms. Kromrei arranged a time for the interview that was "mutually convenient," RP (Jan. 15, 2015) at 11, and that between 5 to 10 officers were present at the sheriff's office at the time of the interview, which provides substantial evidence for that finding. Substantial evidence supports finding of fact 8.

Detective Nichols testified that the interview room at the sheriff's office is used for all interviews, including victim, child victim, and adult interviews. She stated the room has upholstered chairs, pictures on the wall, and "a throw rug type carpet on the floor." RP (Jan. 15, 2015) at 12. She said the room was more like a home than a jail. The record does not reflect that the lighting is muted, but rather that the paint on the walls

is neutral in tone. Neither does the record reflect that the throw rug is "small." However, the remainder of the evidence supports the finding that the room is nonthreatening and comfortable. Substantial evidence supports finding of fact 9.

Before asking any questions in the interview, Detective Nichols testified she told Mr. Avila he was free to leave at any time. The record does not reflect that Detective Nichols told Mr. Avila that he was not under arrest. But the record shows Mr. Avila was not handcuffed or restrained in any manner, and neither he nor Ms. Kromrei were searched. The record contains no evidence whatsoever about whether they were asked if they had weapons. Though substantial evidence supports only part of finding of fact 13, the unsupported portions do not affect our ultimate conclusion and need not be stricken.

Detective Nichols testified she began the interview by telling Mr. Avila she knew he was aware of the allegations, and then asked him to tell her what happened on the night of June 11, 2011. The record does not reflect that Detective Nichols told Mr. Avila about the allegations, but it does reflect that Mr. Avila knew of the allegations. Again, though substantial evidence supports only part of finding of fact 16, this does not affect our ultimate conclusion and the unsupported portion need not be stricken.

2. The interview was not custodial

Mr. Avila argues the court should not have allowed Detective Nichols to testify at trial about the statements he made to her during the interview on June 16, 2011, because

the interview was a custodial interrogation and he was not informed of his *Miranda* rights.

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. To protect this right and to ensure a defendant's statements are voluntary, *Miranda* warnings are required whenever a defendant is subjected to a custodial interrogation by a state agent. *Miranda*, 384 U.S. at 439; *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). The failure to administer *Miranda* warnings when the defendant is in custodial interrogation renders the defendant's statements involuntary and inadmissible at trial. *State v. Lozano*, 76 Wn. App. 116, 118-19, 882 P.2d 1191 (1994) (citing *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985)). A trial court's custodial determination is reviewed de novo. *Lorenz*, 152 Wn.2d at 36.

"[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions . . . 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, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (footnote omitted); *State v. Sargent*, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).

The State concedes Detective Nichols's interview of Mr. Avila was an "interrogation." We, therefore, need only consider whether it was "custodial."

An interrogation is "custodial" if the defendant's freedom of movement is curtailed. *Sargent*, 111 Wn.2d at 649-50. "An objective test is used to determine whether a defendant was in custody—whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *Lorenz*, 152 Wn.2d at 36-37 (citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). The "freedom of movement, not the atmosphere or the psychological state of the defendant, is the determining factor in deciding whether an interview is 'custodial.'" *Sargent*, 111 Wn.2d at 649-50 (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)).

Mr. Avila makes a number of arguments as to why a person in his position would not believe he had a right to leave the interview with Detective Nichols. First, he argues he has limited English comprehension and nothing is known about his education. However, though Mr. Avila is Guatemalan, Detective Nichols testified he appeared to understand her questions and that his answers to the questions were appropriate. Moreover, Mr. Avila prepared a written statement that he read to the court at the CrR 3.5 hearing that demonstrated his high level of English proficiency. His ability to understand sophisticated legal concepts is also demonstrated by his first statement of additional grounds for review (SAG). There is strong evidence that Mr. Avila had a sufficient grasp of English to understand that his participation in the interview was not compulsory.

Moreover, his experience with the legal system is some evidence that he was aware of what a custodial law enforcement environment looks like. He was arrested twice in 2006, twice in 2007, and once in both 2008 and 2010. The trial court could reasonably consider whether, after six arrests, Mr. Avila had enough experience to understand that the interview with Detective Nichols was not a custodial interrogation.

Second, Mr. Avila argues he understood Detective Nichols's "asking" him to come to the sheriff's office as an order and not a request. The trial court's unchallenged findings weaken this argument. The court found that Detective Nichols "asked" Mr. Avila if he would be "willing" to come down for an interview, and that they agreed to a time that was "mutually convenient." CP at 99. Additionally, the court found that Ms. Kromrei drove Mr. Avila to the interview—he was not transported there by law enforcement. These facts are indicative of a request, rather than an order, to come to the interview.

Third, Mr. Avila argues he did not understand he could leave because the interview room was behind locked doors at the stationhouse, and Detective Nichols was in uniform when she questioned him. However, the court found that before beginning the interview, Detective Nichols told Mr. Avila he was free to leave at any time. The court also found that Mr. Avila was not searched, handcuffed, or restrained in any way, that he sat on the side of the table nearest the door, and that no obstacle blocked his path to the

door. Moreover, the interview only lasted 20 minutes and when it was over Mr. Avila simply walked out. A reasonable person in Mr. Avila's position would have known he was free to leave.

Fourth, Mr. Avila argues the court improperly placed great weight on the fact that Ms. Kromrei was present during the interview. Mr. Avila states he was never asked if he would allow Ms. Kromrei to be present, and that no information suggests she would be qualified to help him. Mr. Avila's own testimony at the hearing undercuts these arguments:

> When I agreed about the interview that was after talking to [Sharee] and I explain her what I was afraid of and she is the one that told me not to be afraid because she was going to talk to Det. Nichols and she asked if she could be with me during the interview and she said that if I would have been arrested then she would have been able to help me. That's the reason why [Sharee] was present during the interview.

RP (Jan. 15, 2015) at 27. This shows Mr. Avila knew Ms. Kromrei was going to be at the interview, and that he wanted her there. In addition, he conferred with her about whether to allow the interview to be recorded, which not only shows that she helped him, but that he knew he had the right to refuse. The simple fact of Ms. Kromrei's presence shows Mr. Avila was not isolated and indicates a noncustodial environment. *See Miranda*, 384 U.S. at 461 (noting that isolation may be used in a custodial interrogation to compel the witness to speak).

Fifth, Mr. Avila argues that his choice to attend the interview was constrained because he thought the interview might concern working for Ms. Kromrei "under the table," and because he knew he was suspected of raping Ms. Larson. Appellant's Supp. Br. at 14. This argument is not persuasive because Detective Nichols told him he was free to leave at any time. Mr. Avila's psychological state of mind does not show the interview was custodial in the absence of any indication that his freedom of movement was restricted.

Finally, Mr. Avila argues the trial court improperly took judicial notice of the setup of the interview room. As discussed above, sufficient evidence supports the court's finding about the environment of the interview room.

Nothing about the interview suggested a custodial interrogation. The record supports the trial court's finding that the interview was not a custodial interrogation. The court did not err in concluding Mr. Avila's statements in the interview were voluntary and admissible at trial.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In a pro se statement of additional grounds for review (SAG), as well as a supplemental SAG, Mr. Avila raises four grounds for review.

1. Expert Testimony on DNA[2]

Mr. Avila argues that the DNA expert's testimony about his genotype being unique in the population, and the testimony that under the "product rule" there was a 1 in 400 quadrillion chance that the DNA would match another person, was inadmissible.

Mr. Avila cites *State v. Cauthron*, 120 Wn.2d 879, 846 P.2d 502 (1993) and *State v. Buckner*, 125 Wn.2d 915, 890 P.2d 460 (1995) for support. However, the Supreme Court overruled *Cauthron*, and reversed *Buckner* in *State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997). There the court stated that the "product rule" is a generally accepted method of calculating statistical probabilities and that experts may give their opinion that a DNA profile is unique within the population. *Buckner*, 133 Wn.2d at 67. "Briefly restated, the product rule (or 'multiplication rule') . . . means that the probability of a genetic profile occurring in the population is the product of the probabilities of each individual allele's occurrence in the population." *State v. Copeland*, 130 Wn.2d 244, 264-65, 922 P.2d 1304 (1996).

The DNA expert described his application of the product rule, by which he concluded there was a 1 in 400 quadrillion chance that the DNA could have come from someone other than Mr. Avila:

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[2] Deoxyribonucleic acid.

> So, each number has what's called a probability or a chance that it is supposed to occur within the U.S. population. That program then takes each of those numbers I obtain and multiplies them together. And so since you have a lot of numbers, you get a very low probability because 1:400 quadrillion is actually a very small chance that it will happen again.

RP at 184. The expert's testimony was therefore proper.

Mr. Avila also objects to the DNA evidence in general, arguing it is susceptible to laboratory error, mishandling, mislabeling, and contamination.

> [O]nce DNA evidence is determined to be generally admissible, then both proponents and opponents of a particular test should be able to garner the necessary information to present both sides of the issue to the factfinder when there is a challenge to the validity of a given laboratory procedure.

State v. Kalakosky, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993). Only where laboratory error is so serious that the results will not be helpful to the jury can the trial court, in its discretion, rule the evidence inadmissible. *Id.* In Mr. Avila's case, defense counsel had an opportunity to cross-examine the expert, and the only issue about the validity of the tests was whether the results were compromised by the length of time (six months) that the sample sat in the laboratory before testing. The delay was due to backlogging and does not appear to have compromised the evidence. Accordingly, where Mr. Avila has failed to identify any evidence to suggest laboratory error in this specific case, the trial court did not abuse its discretion when it admitted the evidence. To the extent Mr. Avila

challenges the credibility of the evidence, it is the province of the jury to determine what weight to assign that evidence. *Copeland*, 130 Wn.2d at 270.

2. *Improper Closing Argument*

Mr. Avila claims the State improperly vouched for its witness's credibility when the prosecutor said during closing arguments: "She told the truth." SAG at 4. This is a slight misquote of the prosecutor's actual words, which were: "Old lady, told the truth every time." RP (Oct. 10, 2013) at 349.

"It is improper for a prosecutor personally to vouch for the credibility of a witness." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). "Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *Id.* (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). Where, as here, defense counsel did not object to the prosecutor's statements, reversal is required only if the "'misconduct is so flagrant that no instruction can cure it.'" *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), *aff'd*, 119 Wn.2d 711, 837 P.2d 599 (1992) (quoting *State v. Case*, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)).

In this case, it is clear from the context that the prosecutor did not offer a personal opinion, but instead summarized all of the evidence and made an inference from that evidence that Ms. Larson—who he also described as having "some bad mental problems"

and "get[ting] confused sometimes"—told the truth. RP (Oct. 10, 2013) at 348. Accordingly, the prosecutor's comment was not improper. *See State v. Jackson*, 150 Wn. App. 877, 884-85, 209 P.3d 553 (2009) (finding that the prosecutor did not vouch for a witness's credibility where he reminded the jury that it was the sole judge of credibility, outlined the evidence and the reasonable inferences from it, and concluded that the jury could find the witness credible).

Furthermore, the trial court instructed the jury that counsel's statements were not evidence and should be disregarded if not supported by the evidence. This instruction was sufficient to limit any prejudice. *See State v. Castro*, 32 Wn. App. 559, 567, 648 P.2d 485 (1982) (finding prosecutor's statement that a witness told the truth was not prejudicial error because the court told the jury to disregard any statements not supported by the evidence).

3. Ineffective Assistance of Counsel

Mr. Avila argues defense counsel provided ineffective assistance when he moved to dismiss charges rather than for a mistrial. Here, though, the record shows the court considered a motion for mistrial. The court first stated: "Your motion for mistrial is respectfully denied." RP (Oct. 9, 2013) at 228. The court then said: "And so for the record the motion to dismiss and/or mistrial are both denied." *Id.* Mr. Avila cannot complain that defense counsel did not move to dismiss when the court clearly understood

the motion was for dismissal or mistrial. Mr. Avila did not receive ineffective assistance of counsel.

4. Due Process

Mr. Avila argues the State violated his due process right to gather evidence in his own defense, alleging the State withheld evidence. Specifically, he alleges the State did not disclose that some of the DNA sample remained and could have been tested. *Id.* at 216. This claim fails. The record shows it was not the raw DNA sample that remained, but the DNA extract that was left over after the DNA had been tested. In addition, the defense was notified that this extract existed in the crime lab report of June 27, 2012. Where the prosecution did not withhold any evidence, there was no violation of the discovery rules and no violation of due process.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, J.

April 29, 2017

Ronald R. Carpenter, Clerk
Washington State Supreme Court
P.O. Box 400929
Olympia, WA 98504-0929

Re: State v. Avila, No. 94195-5

Dear Mr. Carpenter:

Enclosed please find the Petition for Review for filing in the above referenced case.

X

Luis A. Avila, #369547
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