70419-2

70419-2

NO. 70419-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUAN CRUZ-GRIJALVA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A criminal defendant who is dissatisfied with his court-appointed counsel must show good cause to warrant substitution, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. Cruz-Grijalva was dissatisfied with his court-appointed counsel and on two separate occasions, including the first day of trial, requested a new attorney without articulating the existence of a conflict or a breakdown in communication. Did both superior court judges properly exercise their discretion in denying Cruz-Grijalva's motion for a new attorney?

2. For purposes of Miranda, a person is not in custody simply because he has been detained and questioned by police. Instead, a suspect is in custody when his freedom of action is curtailed to a degree associated with formal arrest. An officer may ask a moderate number of questions without creating a custodial situation. Officer Nicholson had a brief conversation with Cruz-Grijalva while he was detained, during which time Officer Luckie was investigating the robbery by searching the area for evidence. Did the trial court properly admit Cruz-Grijalva's pre-arrest statements to Officer Nicholson?

3. An express statement is not required for an effective waiver of the right to remain silent. A suspect who indicates he understands his right against self-incrimination, and answers questions freely and voluntarily, is deemed to have waived such right. Officer Luckie read Cruz-Grijalva his Miranda and juvenile warnings; Cruz-Grijalva indicated that he understood, Cruz-Grijalva voluntarily answered a few questions, and then unambiguously exercised his right to remain silent by stating that he did not wish to speak any more. Did the trial court properly admit Cruz-Grijalva's post-arrest statements to Officer Luckie?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Juan Cruz-Grijalva, with first degree robbery. CP 7-8. The State further alleged that at the time of the robbery, Cruz-Grijalva was armed with a deadly weapon, a knife. CP 7-8. A jury trial was held in March of 2013 before the Honorable Lori Smith. At the conclusion of the trial, the jury convicted Cruz-Grijalva of first degree robbery as charged.

CP 22; 6RP 61.[1] The jury also found that Cruz-Grijalva was armed with a deadly weapon during the commission of the robbery. CP 23; 6RP 61. The trial court imposed a standard range sentence. CP 54-61; 6RP 101-04. Cruz-Grijalva now appeals.

2. SUBSTANTIVE FACTS

Linda Geer, a 56-year-old woman, lives in West Seattle and works in the Lower Queen Anne neighborhood in Seattle. 3RP 20-21. Geer commutes by bus. 3RP 22. On January 6, 2012, at about 5:30 p.m., Geer got off the bus at the corner of 35th Ave. SW and SW 106th St. 3RP 24-26. The bus stop is in a residential area, which does not have a lot of foot traffic. 3RP 27. As Geer was walking to her house, she noticed a man, later identified as Cruz-Grijalva, walking slightly behind and parallel to her. 3RP 25, 28. Geer did not know where Cruz-Grijalva was coming from but was concerned because he was about seven feet away from her and was trying to keep up with her pace. 3RP 29. Geer slowed down and so did Cruz-Grijalva. 3RP 29-30.

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[1] The Verbatim Report of this record consists of six volumes as follows: 1RP (November 21, 2012 – motion to substitute counsel); 2RP (March 18, 2013 – trial); 3RP (March 20 and March 21, 2013 – trial); 4RP (March 25, 2013 – trial); 5RP (March 26, 2013 – trial); 6RP (March 27, April 8, April 18, and May 15, 2013 – trial and sentencing hearing).

Cruz-Grijalva then asked Geer for the time. 3RP 31. Geer looked at her iPhone and as she looked up, she saw Cruz-Grijalva directly in front of her. 3RP 31-32. Geer replied that it was about 5:30 and Cruz-Grijalva said, "Give me your iPhone." 3RP 31-32. Geer saw that Cruz-Grijalva had a knife in his hand. 3RP 33. Geer remembered the blade being metallic, shiny and pointy. 3RP 38. Geer told Cruz-Grijalva that she had some personal information on her phone and would like to delete it. 3RP 33. Cruz-Grijalva said, "Go ahead" and Geer deleted the phone information. 3RP 34.

Geer was very frightened as Cruz-Grijalva stood in front of her with the knife. 3RP 34-35. Although Geer was focused on the blade, she was able to see Cruz-Grijalva's clothing and facial features, given that the area was bright enough to see those details. 3RP 30, 34. After Geer removed her data from the phone, which took a couple of minutes, she handed the phone to Cruz-Grijalva. 3RP 34-36. Cruz-Grijalva was in front of Geer, within arm's reach. 3RP 32, 36. At that point Cruz-Grijalva also said, "I need the money," and Geer, who was "freaked out," gave him her Orca card, but Cruz-Grijalva did not want it. 3RP 36.

Cruz-Grijalva took Geer's phone and walked away in the same direction they had come from. 3RP 34-35. Geer walked

home and looked behind a few times to make sure that Cruz-Grijalva was not following her. 3RP 37. About ten minutes later, Geer called 911 from her house. 3RP 37-38. Geer provided the operator with Cruz-Grijalva's clothing description and stature. 3RP 41-42. Geer indicated the person who robbed her was a short – about 5-foot tall – young Hispanic male, in his late teens or early 20's, wearing a light green jacket with a hood, a dark baseball cap with the New York Yankees or "NY" insignia on it. 3RP 40, 42, 57, 81-82; 4RP 55. Geer was able to take a good look at Cruz-Grijalva. 3RP 41, 63. Geer could also tell that Cruz-Grijalva was of small stature because she is 5'1" and the person who robbed her was pretty close in height to her. 3RP 42.

About three to five minutes later, Seattle Police Department (SPD) Officer Luckie responded to the call. 3RP 80, 83. As Officer Luckie was driving south on 35th Ave. SW heading to SW 106th, where the robbery had taken place, he saw Cruz-Grijalva, who matched the description provided by dispatch. 3RP 83-84. Officer Luckie noticed that Cruz-Grijalva had the hood from the jacket pulled on top of the baseball hat with the "NY" insignia. 3RP 84. Nobody else was on the street. 3RP 85. Officer Luckie made a U-turn to contact Cruz-Grijalva, but as he did so, Cruz-Grijalva was

no longer in sight. 3RP 85-86. Officer Luckie continued driving slowly, turned on his lights, made another U-turn, and at that point saw Cruz-Grijalva stepping out of a yard. 3RP 86-87. The street remained unoccupied as Officer Luckie was looking for Cruz-Grijalva. 3RP 86. When Officer Luckie saw Cruz-Grijalva the second time, he had the hood pulled down and was no longer wearing the baseball hat. 3RP 87. Officer Luckie detained Cruz-Grijalva and frisked him for weapons.[2] 3RP 88-89. Officer Nicholson also arrived at the scene and spoke briefly with Cruz-Grijalva.[3] 4RP 55. Cruz-Grijalva's sister and mother arrived at the scene and spoke with the officers. 4RP 60, 62-64.

After other officers arrived to assist, Officers Luckie and Nicholson searched the area and yard where Cruz-Grijalva had hidden himself. 3RP 90; 4RP 60. Officer Luckie found a black New York Yankees baseball hat in one yard and a pair of black knit gloves in the neighboring yard. 3RP 92; 4RP 61. Cruz-Grijalva admitted to Officer Luckie that the baseball cap was his. 3RP 100, 112.

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[2] Cruz-Grijalva's statements and interactions with Officer Luckie are discussed fully in section C.2 of this brief, infra.

[3] Cruz-Grijalva's statements and interaction with Officer Nicholson are discussed fully in section C.2 of this brief, infra.

The following day, Officer Luckie returned to the scene to conduct a search during daylight. 3RP 100. Officer Luckie recovered a steak knife in the bushes of a house near the yard where he had found Cruz-Grijalva's baseball hat. 3RP 101-02; 4RP 21-22.

Geer positively, and without a doubt, twice identified Cruz-Grijalva as the person who robbed her at knifepoint – immediately after the incident, and in court. 3RP 25, 41, 42-44, 54, 63, 99, 151.

3. SUBSTITUTION OF COUNSEL REQUEST

One week prior to Cruz-Grijalva's omnibus hearing, and two weeks prior to the initial trial date, Cruz-Grijalva set a motion before Judge Roberts to request substitution of his court-appointed lawyer.[4] 1RP 3-4. Cruz-Grijalva indicated that his attorney was ineffective and that there was a conflict of interest. 1RP 4. Cruz-Grijalva did not provide any specific information as to what the conflict of interest was other than to say, "He's not handling my case in an effective manner to prove my innocence." 1RP 4.

[4] Cruz-Grijalva made his first request on November 21, with a scheduled trial date of December 3, 2012. 1RP 4. The trial was subsequently continued to March.

Judge Roberts inquired as to what the specific problem was with counsel, and Cruz-Grijalva responded that the attorney was not visiting him and was not answering the phone: "I call him and he doesn't pick up sometimes." 1RP 5. Judge Roberts explained to Cruz-Grijalva that it is not unusual for attorneys to not answer the phone because they are typically in court all day long. 1RP 5. Cruz-Grijalva then said the attorney had not been talking with him about the case, and he complained about the multiple continuances. 1RP 5.

Defense counsel stated that he had been preparing the case for trial. 1RP 5. The prosecutor informed the court that things were progressing in the usual course and that the reason for the "fairly lengthy period" in the case was the fact that Cruz-Grijalva had a similar case in juvenile court.[5] 1RP 6. The prosecutor also indicated that negotiations had been exhausted and that, since the parties were moving forward to trial, defense counsel had been conducting interviews. 1RP 6.

[5] Cruz-Grijalva pled guilty in juvenile court in a separate case to the charge of first-degree theft, which was amended down from robbery, and for which he was sentenced on March 15, 2013. CP 60; 5RP 88. The juvenile incident took place while Cruz-Grijalva was on release in the robbery charge that is the subject of this appeal. 5RP 88.

Judge Roberts denied Cruz-Grijalva's request. 1RP 6. The court did so based on the general understanding of Cruz-Grijalva's cases, including his case in juvenile court, as well as her knowledge of defense counsel's approach to the cases, and the fact that the case was getting ready to go to trial. 1RP 6.

On the day of trial, Cruz-Grijalva renewed his motion for a new attorney before Judge Smith. 2RP 6. Cruz-Grijalva again said there was a conflict without articulating the basis for the conflict. 2RP 6. Cruz-Grijalva simply stated that defense counsel was not explaining the strategy to him and that there was a lack of communication. 2RP 6. When the trial court asked if this motion had been made before, Cruz-Grijalva acknowledged that he had made a previous request but, "I guess I didn't give a good reason." 2RP 6-7. This last statement was followed by Cruz-Grijalva saying he had just received discovery the previous month and "I found out that he [defense counsel] actually withheld evidence from me." 2RP 7. Cruz-Grijalva never elaborated as to what evidence he believed defense counsel had withheld.

Cruz-Grijalva said that he would like time to get a paid attorney, although he did not know if he was going to be able to get a new attorney because funds were limited. 2RP 8, 11.

Cruz-Grijalva clarified that he wanted an attorney who could get him the best deal possible, and if he proceeded to trial, he would want good assistance. 2RP 8. The trial court said that Cruz-Grijalva had not provided any new reasons for his motion to substitute counsel, at which time he replied again, that he did not know really what to say before, and that he had just found out that defense counsel had withheld evidence. 2RP 12. Cruz-Grijalva claimed that he had lost faith in his lawyer. 2RP 12-13.

C. ARGUMENT

1. BOTH JUDGES PROPERLY DENIED CRUZ-GRIJALVA'S REQUESTS TO SUBSTITUTE COUNSEL.

Cruz-Grijalva contends that two superior court judges abused their discretion in denying his requests to substitute counsel. Cruz-Grijalva's claim fails. The record shows that Cruz-Grijalva never provided a sufficient reason requiring substitution of counsel. Thus, both judges properly exercised their discretion in denying the requests.

A criminal defendant does not have an absolute Sixth Amendment right to a choice of court-appointed counsel. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied,

523 U.S. 1008 (1998). Nor does the Sixth Amendment guarantee a "meaningful relationship" between a defendant and his attorney. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). In fact, many times the relationship between counsel and his or her client can be quite acrimonious. See State v. Fualaau, 155 Wn. App. 347, 228 P.3d 771 (2010). Only when the "relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel." Stenson, 132 Wn.2d at 722. Moreover, there is a difference between a complete collapse and mere lack of accord. Slappy, 461 U.S. at 13-14; State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

When reviewing a trial court's refusal to appoint new counsel, this Court considers (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. Cross, 156 Wn.2d at 607. Whether an indigent defendant's dissatisfaction with appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the sound discretion of the trial court. Stenson, 132 Wn.2d at 733.

a. Extent Of The Conflict.

A criminal defendant who is dissatisfied with appointed counsel "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." Stenson, 132 Wn.2d at 734. Cruz-Grijalva cannot show there was a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication.

"Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." State v. Thompson 169 Wn. App. 436, 457-58, 290 P.3d 996 (2012); State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007), rev. denied, 164 Wn.2d 1015 (2008). Nothing in the record supports a finding that a conflict existed. While Cruz-Grijalva insisted that he had a conflict of interest with his attorney, he never expressed the nature of the alleged conflict.

Upon inquiry by Judge Roberts as to the conflict, Cruz-Grijalva simply stated, "He's not handling my case in an effective manner to prove my innocence." 1RP 4. Cruz-Grijalva's "general discomfort" with counsel's representation does not

constitute a "valid reason to replace appointed counsel." State v. Sinclair, 46 Wn. App. 433, 436, 730 P.2d 742 (1986). Simply stated, general dissatisfaction with appointed counsel is not a conflict of interest. See Cross, 156 Wn.2d at 607 ("[A] conflict over strategy is not the same thing as a conflict of interest."). Cf. State v. James, 48 Wn. App. 353, 739 P.2d 1161 (1987) (conflict existed in representation of co-defendants); State v. White, 80 Wn. App. 406, 907 P.2d 310 (1995) (a conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant).

Furthermore, Cruz-Grijalva did not allege, nor is there evidence in the record to support a finding, that there was anything that came close to a complete collapse of the attorney-client relationship. Notably, Cruz-Grijalva did not tell the court that there was a breakdown in communication. Rather, he complained about his attorney not visiting him in the jail and not answering the phone when he called. 1RP 5. Only when there is a complete breakdown in communication between the attorney and the defendant is the court required to appoint substitute counsel. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); Stenson, 132 Wn.2d at 734.

During Cruz-Grijalva's second request, he complained to Judge Smith that defense counsel was not explaining the trial strategy to him. 2RP 6. Strategy decisions are in the hands of defense counsel, not the client. Cross, 156 Wn.2d at 606. These general complaints do not support a basis for substitution of counsel.

Cruz-Grijalva claims that his dissatisfaction with counsel was serious because he had lost faith in his public defender. Generally, a defendant's loss of confidence or trust in his counsel is not a sufficient reason to appoint new counsel. Varga, 151 Wn.2d at 200. Cruz-Grijalva further argues that his attorney "withheld evidence" from him. However, nothing in the record supports this contention. Cruz-Grijalva never indicated to the trial court what evidence he believed his attorney was withholding. Unsupported general allegations of deficient representation are inadequate to support a motion to substitute, particularly when the motion to substitute is brought shortly before or during trial. State v. Staten, 60 Wn. App. 163, 170, 802 P.2d 1384 (1991).

In short, Cruz-Grijalva cannot make a showing here that there was a conflict or a complete breakdown in communication. Both judges properly denied his request.

b. Adequacy Of The Trial Court's Inquiry.

A court learning of a conflict between a defendant and counsel has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction. Thompson, 169 Wn. App. at 462. Such an inquiry must "provide a sufficient basis for reaching an informed decision." Id. (citing United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001)). In conducting such an evaluation, the court may need to evaluate the depth of any conflict between defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to prepare, and any delay or inconvenience that may result from substitution. Thompson, 169 Wn. App. at 462.

Cruz-Grijalva argues that neither superior court judge made an inquiry into the reasons for his dissatisfaction with his attorney. However, the record demonstrates that Judge Roberts asked him specifically what the conflict of interest was. 1RP 4. Cruz-Grijalva did not have an answer other than, "He's not handling my case in an effective manner to prove my innocence." 1RP 4. Judge Roberts followed up by asking, "Is there something in particular that's going wrong between Mr. Beattie and you?" 1RP 4. To this

specific question, Cruz-Grijalva simply replied that his attorney was not visiting him. 1RP 5.

To further his argument, Cruz-Grijalva claims that Judge Roberts only asked two open-ended questions. Although accurate, the court asked two very pointed questions. Given that the two specific questions did not evoke responses that would support appointment of new counsel, it is unlikely any further questioning would have revealed anything other than Cruz-Grijalva repeating that he wanted a new lawyer who would provide good representation.

Likewise, Cruz-Grijalva failed to provide a valid reason the second time he made a request before Judge Smith. While acknowledging that he had not provided a good reason and did not know what to say the first time, Cruz-Grijalva complained that he had only received his discovery a month prior. 2RP 6-7, 12. This is not a valid reason to discharge counsel. Cruz-Grijalva then said that he had "realized" that his attorney had withheld information from him. 2RP 6-7, 12. Yet, he never provided any specific examples as to what information defense counsel withheld from him and how he had just "realized" it.

Both trial judges made the proper inquiry, and Cruz-Grijalva was unable to provide satisfactory answers. It is unlikely that further questioning by either judge would have revealed any valid or sufficient reasons for his request.

c. The Timeliness Of The Motion.

Courts have held that a motion to substitute counsel made two weeks before trial is timely. In re Stenson, 142 Wn.2d 710, 731-32, 16 P.3d 1, 13 (2001) (citing United States v. Moore, 159 F.3d 1154, 1158 n.3 (9th Cir. 1998)). On the other hand, where the request for change of counsel comes during the trial or on the eve of trial, the court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request. In re Stenson, 142 Wn.2d at 731-32.

The first request for substitution of counsel before Judge Roberts, made on November 21, 2012, was timely. However, the requests made before Judge Smith on the first day of trial and prior to jury selection were untimely.

Cruz-Grijalva argues that the second request raised an important new issue – that his attorney was withholding evidence. However, Cruz-Grijalva did not explain what evidence his attorney

was withholding. As already stated, unsupported allegations are inadequate, particularly when the motion is brought before or during trial. Staten, 60 Wn. App. at 163. Moreover, Cruz-Grijalva made this unsupported claim once he realized that he had not provided a good reason the first time he requested a new attorney because he "didn't even know what to say." 2RP 7, 12. Therefore, Judge Smith correctly denied his request, finding that he had not raised a new issue for the trial court to consider.

2. THE TRIAL COURT PROPERLY ADMITTED CRUZ-GRIJALVA'S STATEMENTS TO THE POLICE.

Cruz-Grijalva challenges the trial court's refusal to suppress the pre-arrest statements he made to Officer Nicholson, and the post-Miranda[6] statements he made to Officer Luckie. As to his pre-arrest statements, Cruz-Grijalva claims that the court erred by concluding that a reasonable person in Cruz-Grijalva's position would not believe that he was in custody when he was being questioned by Officer Nicholson. And as to his post-arrest statements, Cruz-Grijalva argues that his statement to Officer Luckie was admitted without proof that he made a knowing,

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

intelligent and voluntary waiver of his rights, in part because Officer Luckie did not ask Cruz-Grijalva if he wished to waive his rights and give a statement. To support both arguments, Cruz-Grijalva contends that the trial court failed to consider his youth.

The State disagrees. Officer Nicholson had a brief conversation with Cruz-Grijalva while officers continued to investigate the robbery. Cruz-Grijalva was detained, but was not in custody. Officer Nicholson was not required to read Cruz-Grijalva his Miranda warnings. Thus, the trial court properly admitted the pre-arrest statements Cruz-Grijalva made to Officer Nicholson.

Once Officer Luckie determined that Cruz-Grijalva was the robbery suspect, he placed Cruz-Grijalva under arrest. Officer Luckie then read Cruz-Grijalva his Miranda rights and juvenile warnings. Cruz-Grijalva said that he understood his rights. Cruz-Grijalva knowingly and voluntarily waived his rights, answered Officer Luckie's questions, and provided a statement. Cruz-Grijalva then unequivocally invoked his right to remain silent, and the interrogation terminated. Therefore, the trial court properly admitted the statements to Officer Luckie. This Court should reject Cruz-Grijalva's claims.

a. Relevant Facts.

After Officer Luckie responded to the robbery scene, he saw Cruz-Grijalva and directed him to move over to the hood of his patrol car. 2RP 24. Cruz-Grijalva complied. 2RP 24. Once Cruz-Grijalva was at the front of the patrol car, Officer Luckie frisked him for weapons because the officer knew there was a knife involved. 2RP 25; CP 70 (Undisputed Finding of Fact 13).[7] After the frisk, Cruz-Grijalva was allowed to stand freely in front of the patrol car, but was not free to leave. 2RP 25. Other officers, including Officer Nicholson, arrived to assist in the investigation. 2RP 26, 56; CP 70 (Undisputed Finding of Fact 14). Officer Luckie left to search the nearby yards for the baseball hat, and other officers stayed with Cruz-Grijalva. 2RP 26. As officers continued to investigate the robbery, Cruz-Grijalva was detained but was not under arrest or handcuffed. 2RP 26, 56-57; CP 70 (Undisputed Finding of Fact 13).

Officer Nicholson then started a short conversation with Cruz-Grijalva. 2RP 57. Officer Nicholson did not know if Cruz-Grijalva had been advised of his Miranda rights. 2RP 58; CP

[7] The trial court entered its written findings of fact and conclusions of law on CrR 3.5 on May 14, 2014. CP 68-74. The trial court's written findings are consistent with the court's oral findings and ruling. 2RP 81-83.

70 (Undisputed Finding of Fact 15). Officer Nicholson asked Cruz-Grijalva where he had been before being stopped. 2RP 58; CP 70 (Undisputed Finding of Fact 15). Cruz-Grijalva indicated he had been on the #54 bus earlier and had gotten off at a stop farther south on 35th Ave. SW. 2RP 58 CP 70 (Undisputed Finding of Fact 15). Cruz-Grijalva also said he had gone to Safeway, which is located about half a mile from where Cruz-Grijalva had been detained. 2RP 58; CP 70 (Undisputed Finding of Fact 16). Officer Nicholson told Cruz-Grijalva he was being detained because he matched the description of someone the police was looking for. 2RP 59; CP 70 (Undisputed Finding of Fact 17). This encounter lasted a couple of minutes. 2RP 60.

Officer Nicholson then joined Officer Luckie in searching for evidence. 2RP 61. Officer Luckie found the New York Yankees baseball hat and black knit gloves in one of the yards; he went back to his patrol car where Cruz-Grijalva was located. 2RP 29. Officer Luckie placed Cruz-Grijalva in handcuffs and read him his Miranda rights from his police department reference book. 2RP 29-31; CP 71 (Undisputed Finding of Fact 22); Pretrial Ex. 2. Officer Luckie properly included the extra juvenile warning from the Miranda rights

form. 2RP 33; CP 71 (Undisputed Finding of Fact 22); Pretrial Ex. 2.

Officer Luckie finished reading the Miranda rights form with the question, "Do you understand each of these rights I have explained to you." 2RP 33; CP 71 (Undisputed Finding of Fact 23). Cruz-Grijalva indicated that he did. 2RP 34; CP 71 (Undisputed Finding of Fact 23). Cruz-Grijalva appeared to be alert and to be paying attention. 2RP 33. Cruz-Grijalva did not appear to have any trouble understanding the officer. 2RP 34. Cruz-Grijalva did not appear to have been under the influence of any alcohol or any controlled substances. 2RP 34. Officer Luckie testified that when a person does not appear to understand, he will try to figure out what it is that the person does not understand. 2RP 35. Officer Luckie did not have any concerns with Cruz-Grijalva. 2RP 35.

The SPD form calls for the officer to ask the defendant the question, "Having these rights in mind, do you wish to talk to us now?" 2RP 46; Ex. 2; CP 71 (Undisputed Finding of Fact 24). Officer Luckie did not ask this last question. 2RP 46. Instead, once Cruz-Grijalva indicated that he understood his rights, the officer asked Cruz-Grijalva a question about the incident. 2RP 35, 46; CP 71 (Undisputed Finding of Fact 24). Given that Cruz-Grijalva

answered, Officer Luckie concluded that Cruz-Grijalva was willing to talk to him about it. 2RP 46; CP 71 (Undisputed Finding of Fact 24). Cruz-Grijalva was neither hesitant nor reluctant to speak with Officer Luckie. CP 72 (Undisputed Finding of Fact 28).

Officer Luckie asked Cruz-Grijalva where he was going, where he was coming from, and what he was doing. 2RP 35; CP 71 (Undisputed Finding of Fact 25). Cruz-Grijalva's answers did not make sense to Officer Luckie. 2RP 36; CP 71 (Undisputed Finding of Fact 25). Cruz-Grijalva said he was trying to go to his mother's house for her birthday but also said he was looking for a friend's house. 2RP 36. Cruz-Grijalva was unable to provide the actual location for his friend's house and the explanation of where the house was located changed over time. 2RP 36-37. When Officer Luckie expressed this to Cruz-Grijalva, Cruz-Grijalva changed his story. 2RP 36-37; CP 71 (Undisputed Finding of Fact 25). In light of Officer Luckie's belief that Cruz-Grijalva was not telling the truth, he stopped asking questions about Cruz-Grijalva's whereabouts. 2RP 37; CP 71-72 (Undisputed Finding of Fact 26).

Officer Luckie then moved to a new topic of questioning. Officer Luckie asked Cruz-Grijalva why he had "ditched" his baseball hat in the yard. 2RP 38; 3RP 97; CP 71-72 (Undisputed

Findings of Fact 26). Cruz-Grijalva answered that he did it because, if Officer Luckie would have seen him wearing the hat, the officer would have thought that Cruz-Grijalva had stolen it. 2RP 38; CP 71-72 (Undisputed Finding of Fact 26). This answer did not make any sense to Officer Luckie either. 2RP 38. When Officer Luckie inquired further, Cruz-Grijalva said there had been an incident earlier where someone accused him of stealing a hat. 2RP 39; CP 71-72 (Undisputed Finding of Fact 26). Officer Luckie questioned Cruz-Grijalva further about this alleged incident, but Cruz-Grijalva declined to provide any further information. 2RP 39; CP 71-72 (Undisputed Finding of Fact 26).

Officer Luckie testified that when Cruz-Grijalva said that he would not answer any more questions, Officer Luckie did not further question or engage Cruz-Grijalva in any further conversations about the case. 2RP 39; CP 72 (Undisputed Finding of Fact 27).

As to the disputed facts, the trial court found that Cruz-Grijalva was detained but not in custody during his conversation with Officer Nicholson. 2RP 82; CP 73 (Findings And Conclusions As To The Areas Of Dispute 2). The trial court further found that Officer Luckie's interrogation took place after Cruz-Grijalva was properly advised of his constitutional rights.

2RP 81; CP 73 (Findings And Conclusions As To The Areas Of Dispute 3). The trial court noted that it would be best practice for the officer to ask, "Having these rights in mind, do you wish to talk to us now?" but the caselaw does not require this, and Cruz-Grijalva certainly indicated that he understood his rights. 2RP 81.

The trial court also found that there was nothing in the communication between Cruz-Grijalva and Officer Luckie that would lead the officer to believe that Cruz-Grijalva did not understand. 2RP 81. The trial court found that Cruz-Grijalva was not under duress or under the influence when he indicated that he understood his rights. 2RP 82. In making the findings and conclusions as to the areas of dispute, the trial court found that Cruz-Grijalva did not present any evidence to dispute the facts as testified to by Officer Nicholson and Officer Luckie. CP 73 (Areas Of Dispute 1(a)(i), 2(a)(i), and 2(b)(i)).

The trial court then concluded that the statements to Officer Nicholson were admissible because Cruz-Grijalva was not in custody. Therefore, the officer was not required to inform Cruz-Grijalva of his constitutional rights prior to asking him questions. 2RP 82; CP 73 (Conclusion of Law 2). The trial court

also found that the statements to Officer Luckie were admissible because he was properly advised of, and waived, his constitutional rights prior to being questioned. 2RP 81; CP 73 (Conclusion of Law 3).

b. Standard Of Review.

Both the federal and state constitutions guarantee that no person shall be compelled to give evidence against himself. U.S. Const. amend. V, XIV; Wash. Const. art. I, § 9. This privilege against self-incrimination precludes the use of any involuntary statement against an accused in a criminal trial. Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Miranda warnings were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940 (1987). As such, Miranda warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State. State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988) (citing Miranda, 384 U.S. at 444). Without Miranda warnings, a suspect's statements during

custodial interrogation are presumed involuntary. Sargent, 111 Wn.2d at 647-48. However, Miranda warnings are only required when all three factors are present. State v. Post, 118 Wn.2d 596, 605-06, 826 P.2d 172 (1992).

This Court will review the trial court's conclusions of law at a suppression hearing de novo. State v. Shuffelen, 150 Wn. App. 244, 252, 208 P.3d 1167 (2009). Challenged findings of fact are reviewed for substantial evidence, which is enough evidence to persuade a fair-minded, rational person of the truth of the finding. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. Id. The reviewing court treats unchallenged findings as verities on appeal. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The findings must support the conclusions of law. Vickers, 148 Wn.2d at 116. This Court will apply de novo review to the issue of whether an interrogation was custodial. Shuffelen, 150 Wn. App. at 252.

c. Statements To Officer Nicholson.

For purposes of Miranda, a person is not in custody simply because he has been detained and questioned by police. Instead,

a suspect is in "custody" when his or her "freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (citing California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)); see also State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). The question of "custody" is objective and focuses purely on whether a reasonable person in the suspect's position would conclude that he was in custody. State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.2d 133 (2004). In other words, not every contact between a police officer and a subject that leads to a limitation of the subject's freedom of movement constitutes a "custodial" situation.

Courts have recognized that, although an investigatory detention involves a degree of restraint, it will usually not rise to the level of "custody" for Miranda purposes. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004); see also State v. Walton, 68 Wn. App. 127, 129-30, 834 P.2d 624 (1992); Berkemer, 468 U.S. at 439-40. Such detentions are generally brief, lack the coercive power of intimidation inherent in police interrogations, and do not easily lend themselves to the sort of deceptive interrogation tactics contemplated by Miranda. Walton, 68 Wn. App. at 131. Therefore,

an officer may allay his or her suspicions by asking a "moderate number of questions" without creating a custodial situation for the purposes of Miranda. Heritage, 152 Wn.2d at 218.

Here, Officer Nicholson did not create a custodial situation. It was a brief conversation that lasted only a couple of minutes, and which consisted of Officer Nicholson asking Cruz-Grijalva where he had been prior to being stopped. 2RP 58, 60. After this momentary encounter, Officer Nicholson joined Officer Luckie in continuing to investigate the crime by searching for evidence. 2RP 57-58, 61. During this time, Cruz-Grijalva was detained, but was not under arrest because the officers did not know if Cruz-Grijalva was in fact the robbery suspect or just someone walking down the street. 2RP 26, 57.

Cruz-Grijalva argues that he was in custody because a reasonable 16-year-old in his position would have believed so. However, age is not dispositive. Rather, courts examine the totality of the circumstances to determine whether a suspect was in custody. State v. Rosas-Miranda, 176 Wn. App. 773, 779, 309 P.3d 728 (2013) (citing United States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008)). Here, although the trial court did not specifically address Cruz-Grijalva's age, the court was aware that

he was a juvenile. CP 71 (Undisputed Finding of Fact 20). The trial court articulated some of the factors that it considered to determine whether or not Cruz-Grijalva was in custody. In recognizing that there is not a bright-line rule delineating the time when a detention becomes "custody" for purposes of Miranda, the trial court noted that at the time when Officer Nicholson was speaking with Cruz-Grijalva, the defendant was still outside of the patrol car, he had not been handcuffed, and the investigation was still ongoing. 2RP 82.

Therefore, this Court should hold that the trial court did not err in admitting Cruz-Grijalva's statements to Officer Nicholson because he was not in custody at that time.

d. Statements To Officer Luckie.

For the purposes of Miranda, "interrogation" occurs whenever the police engage a suspect in express questioning or its functional equivalent. Sargent, 111 Wn.2d at 650 (citing Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). This includes words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Id. Under Miranda, a

custodial statement is voluntary, and therefore admissible, if made after the defendant has been advised of his rights, including the right to remain silent, and he then knowingly, voluntarily, and intelligently waives those rights. Miranda, 384 U.S. at 444; State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

A waiver is voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). The test for voluntariness is whether the defendant made the free and unconstrained choice to confess. State v. Thompson, 73 Wn. App. 122, 131, 867 P.2d 691 (1994) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). The Supreme Court recently stated that:

> As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.

Berghuis v. Thompkins, 560 U.S. 370, 385, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

An express statement is not required for an effective waiver. State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). A waiver may be implied "where the record reveals that a defendant

understood his rights and volunteered information after reaching such understanding." Id. Waiver has also been inferred where the record shows that a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights. Id. at 646-47.

The record contains substantial evidence to support the trial court's determination that Cruz-Grijalva knowingly and voluntarily relinquished his right to remain silent and freely chose to answer Officer Luckie's questions.

First, there is no contention that Cruz-Grijalva did not understand his rights. It is undisputed that Cruz-Grijalva was advised of his Miranda rights, including the additional juvenile warnings, and that he said that he understood his rights. 2RP 32-34, 81; CP 71 (Undisputed Findings of Fact 22 and 23). Officer Luckie testified that if he had any concerns about Cruz-Grijalva not understanding his rights, he would have asked further questions. 2RP 34-35. Officer Luckie also testified, and the court found, that Cruz-Grijalva was not under the influence of any substance, and there was no evidence to the contrary. 2RP 34, 82. Based on Officer Luckie's testimony, which was not disputed by

Cruz-Grijalva, there was ample evidence in the record to conclude that Cruz-Grijalva understood his Miranda rights.

Second, if Cruz-Grijalva had wanted to remain silent, he could have unambiguously invoked his right to remain silent. Indeed, Officer Luckie stopped questioning Cruz-Grijalva when Cruz-Grijalva unequivocally invoked his right to remain silent by stating he did not want to answer any more questions. 2RP 39.

Third, there is no evidence that Cruz-Grijalva's statement was coerced. The evidence established that Officer Luckie did not make any threats or promises to Cruz-Grijalva. 2RP 40. And the trial court found that Cruz-Grijalva was not under duress. 2RP 81.

Nonetheless, Cruz-Grijalva argues that the trial court erred in admitting his post-Miranda statements because Officer Luckie did nothing to confirm that Cruz-Grijalva understood his rights, given that Officer Luckie did not ask Cruz-Grijalva if he wished to waive his constitutional rights. Although the invocation must be unequivocal, an accused "need not rely on talismanic phrases or 'any special combination of words'" in order to invoke his or her rights. State v. Piatnitsky, 170 Wn. App. 195, 215, 282 P.3d 1184 (2012), aff'd, 87904-4, 2014 WL 1848366 (May 8, 2014). Thus, because no such "magic words" are required in order to invoke

one's rights—and because a purported invocation is analyzed from the point of view of a reasonable police officer in the circumstances—a trial court "should examine the entire context in which the claimant spoke to determine if the right to remain silent has been invoked." Piatnitsky, 170 Wn. App. at 215; Bradley v. Meachum, 918 F.2d 338, 342 (2d Cir. 1990) (quoting United States v. Goodwin, 470 F.2d 893, 902 (5th Cir.1972)).

Here, although Officer Luckie did not ask Cruz-Grijalva if he wished to waive his rights, in looking at the entirety of the circumstances, his invocation was unequivocal. Cruz-Grijalva did not hesitate, did not appear to be reluctant, and voluntarily answered Officer Luckie's questions. Cruz-Grijalva argues that there is scant evidence that he understood his rights. However, the fact that Cruz-Grijalva chose to invoke his right to remain silent and unambiguously stated that he did not want to answer any further questions, is indicative that he understood his rights and eventually chose to exercise them by choosing to terminate the interrogation.

Cruz-Grijalva also argues that the trial court failed to take his age into account in deciding that he had validly waived his constitutional rights. Presumably, Cruz-Grijalva makes this

argument because the trial court did not specifically articulate that it found he had waived his rights in light of his young age.

In determining whether a juvenile's confession is voluntary, a court must consider the totality of the circumstances, including the juvenile's age, experience, education, background, intelligence and capacity to understand the warnings given, the nature of those rights, and the consequence of waiving those rights. State v. Harrell, 83 Wn. App. 393, 401, 923 P.2d 698, 702 (1996). In recognizing that studies indicate that juveniles often may not understand the full import of the exercise of waiver of their rights, our Supreme Court has held that if a juvenile understands that he has a right to remain silent, after he is told that he has that right, and that his statements can be used against him in a court, the constitutional requirement is met. Dutil v. State, 93 Wn.2d 84, 90, 606 P.2d 269 (1980). This is because the test is whether a person knew he had the right to remain silent, and that anything he said could be used against him in a court of law, not whether he understood the precise legal effect of his admissions. State v. Aiken, 72 Wn.2d 306, 434 P.2d 10 (1967).

The constitutional test is met here. Cruz-Grijalva knew he had the right to remain silent and he knew that anything he would

say would be used against him. It is undisputed that Officer Luckie read Cruz-Grijalva the standard Miranda warnings and the additional juvenile warnings. CP 71 (Undisputed Finding of Fact 22).

State v. Ellison[8] is instructive. In Ellison, this Court held that a waiver of Miranda rights may be inferred when a juvenile defendant voluntarily discusses the charged crime with police officers and indicates an understanding of his rights. 36 Wn. App. at 571. Ellison, a juvenile who had an eleventh grade education, was in a special education program, and had difficulties with reading and comprehension, was charged with first degree murder. Id. at 566, 571. At issue on appeal was whether his post-arrest statement denying involvement in the murder was admissible. Id. at 571. After Ellison was arrested and read his Miranda warnings, he stated he knew nothing about the killing, he did not know what the police were talking about, and when confronted with evidence that his fingerprints had been recovered in the victim's car, he replied "very interesting." Id. at 566. Ellison did not sign a waiver form, and the police never specifically asked him if he wished to waive his rights to counsel and to remain silent. Id. at 571.

[8] 36 Wn. App. 564, 676 P.2d 531, rev. denied, 101 Wn.2d 1010 (1984).

This Court found that, notwithstanding Ellison's educational deficits, his statements were admissible because Ellison acknowledged that he understood his rights, no coercion was employed, and he seemed to have no trouble understanding his rights. Ellison, 36 Wn. App. at 571-72.

Here, similar to Ellison, Officer Luckie did not ask Cruz-Grijalva if he wished to waive his rights and speak with the officer, but did ask if he understood his rights. And just as in Ellison, Cruz-Grijalva unequivocally said that he understood his rights. Likewise, there was no coercion employed, and Cruz-Grijalva did not seem to have any difficulty understanding his rights. 2RP 34-35.

In conclusion, under these circumstances, the trial court properly concluded that Cruz-Grijalva knowingly and voluntarily waived his right to remain silent when he made a statement to Officer Luckie. His statements were properly admitted.

e. Even If Cruz-Grijalva's Statements Were Inadmissible, Any Error Was Harmless.

Finally, even if the trial court erred by admitting Cruz-Grijalva's statements into evidence, the error was harmless.

Where a voluntary confession is improperly admitted into evidence, its admission may constitute harmless error. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). "A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error." State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

Here, even without Cruz-Grijalva's statements, the same result would have been reached. Cruz-Grijalva did not admit he had robbed Geer at knifepoint. His statements were not incriminating. Even though the State argued in closing arguments that his inconsistent statements were proof of guilt, the evidence consisted of much more than his statements.

First, Geer positively identified Cruz-Grijalva as the person who robbed her at knifepoint. Geer identified Cruz-Grijalva shortly after the robbery, and in court. 3RP 25, 41, 43-44, 54, 63, 99, 151. Geer testified that she had no doubt in her mind that Cruz-Grijalva was the person who pulled out a knife and stole her iPhone on January 6, 2012. 3RP 54.

Second, Cruz-Grijalva was the only person on foot in the area when the police responded minutes after the robbery.

According to Officer Luckie and Geer, there was not much foot traffic in the area of the robbery. 3RP 27, 85. When Officer Luckie responded to the scene, shortly after the robbery, the only person he saw walking in the same block where the robbery took place was Cruz-Grijalva. 3RP 85. Cruz-Grijalva matched the description provided by dispatch in every way – ethnicity, height, young age, and his clothing, including wearing a "NY" baseball hat. There was nothing about the description that Geer provided to dispatch that was inaccurate.

Third, Cruz-Grijalva's actions of hiding upon seeing the police are indicative of a guilty conscience. Officer Luckie testified that as soon as Cruz-Grijalva saw the police, he hid in one of the yards. 3RP 85-87. Cruz-Grijalva then removed the baseball hat that Officer Luckie had seen him wear, and that Geer had described, presumably in an attempt to disguise his appearance.

Lastly, the robbery weapon was recovered in the vicinity. The very next day, Officer Luckie recovered the knife that Cruz-Grijalva used to commit the robbery near the yard where Cruz-Grijalva had disposed of his baseball hat. 3RP 100-02.

Hence, beyond a reasonable doubt, the outcome of the trial would have been the same without the alleged error.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Cruz-Grijalva's conviction.

DATED this 3rd day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine L. Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JUAN CRUZ-GRIJALVA, Cause No. 70419-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of June, 2014

Name
Done in Seattle, Washington