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Franklin Co. Sup. Ct. No. 15-1-50417-6
Court of Appeals No. 34694-5

NO. _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROGELIO NUÑEZ,

Respondent.

PETITION FOR REVIEW

BRIEF OF PETITIONER

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney

Teresa Chen

by: Teresa Chen, WSBA 31762
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I. IDENTITY OF PETITIONER

The State of Washington, represented by the Franklin County Prosecutor, is the Petitioner herein.

II. CITATION TO COURT OF APPEALS DECISION

The State seeks review of the Unpublished Opinion, filed July 13, 2017. A copy of the decision and Order Denying Reconsideration is appended to the petition.

III. ISSUES PRESENTED FOR REVIEW

1. Where the *Miranda* rule is intended to prevent coercive police conduct and where the individual evidences a belief that he is free to leave at the end of his statement, can an individual put himself in custody so as to trigger *Miranda* by his own admission of long-past bad acts, some of which were past the statute of limitations?

2. Did the courts err by failing to address the question of voluntariness presented at the voluntariness hearing and instead entertaining a suppression motion made in violation of CrR 3.6 while refusing the State an opportunity to provide evidence responsive to the motion?

IV. STATEMENT OF THE CASE

The State seeks review of a ruling suppressing the Defendant Rogelio Nuñez's confession corroborating in detail his two victims' childhood memories of molestation and rape that took place 8-24 years ago. CP 1.

The State scheduled a CrR 3.5 hearing to determine the voluntariness of the Defendant's confession. CP 17. The Defendant did not note or file any CrR 3.6 motion to suppress. Only two witnesses testified: Franklin County Sheriff's Deputy Ruben Bayona and Detective Jacinto Nuñez. CP 18, 37. Following the close of testimony, for the first time in oral argument, the Defendant made a motion to suppress the confession, not on voluntariness grounds, but for an alleged omission in the *Miranda* advisement. CP 53 ("They missed a major one. 'Anything you say can be used against you in a court of law.'"). There was no omission. CP 14.

Seated at counsel table, the detective requested permission to clarify any misunderstanding of his testimony. CP 7, 54. In fact, the detective had testified that, in providing the *Miranda* warnings, he had omitted the juvenile advisement only. CP 41. The exhibit demonstrated the same, showing a line striking out the juvenile

advisement only. CP 7, 14-15, 54-55; PE 1.

The superior court refused to permit any testimony responsive to the Defendant's motion and suppressed the confession. CP 55-57, 64.

The *Miranda* advisement is only required in situations of custodial interrogation. *Oregon v. Mathiason,* 429 U.S. 492,495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). The Defendant had not argued and the court had not found that the interview had been custodial. CP 53, 62-64. In a subsequent hearing, the judge supplemented his ruling with an oral finding that the location of the interview in a police station was sufficient for the court to find it was custodial. RP 15. The judge also justified his refusal to clarify the factual record under the finality principle. RP 14.

The Court of Appeals granted interlocutory review and reversed the suppression ruling in part. "[T]he fact that an interview is conducted at a police station is itself insufficient to establish that the suspect was in police custody." Unpub. Op. at 8-9. The Court of Appeals found that Mr. Nuñez was not in custody at the beginning of the interview at the police station. Unpub. Op. at 7.

The law enforcement witnesses testified that, after the

detective visited the Defendant at his home to request an interview on a case, the Defendant decided to drive to the sheriff's office of his own volition later in the day – choosing both the time and place of his statement. CP 20-21, 38. "Any concern that Mr. Nunez might have had concerning his freedom was allayed when the detective permitted him to work that day and discuss the allegations after work." Unpub. Op. at 10.

The witnesses testified that Mr. Nuñez was not under arrest, was not advised he was under arrest, was not restrained, and had no reason to believe he was being held. CP 21, 30-31, 38, 46-47. Although the Defendant speaks English, he requested that the interview take place in Spanish. CP 21, 29. Deputy Bayona was present at the start of the interview to make sure that there were no dialect difficulties and to assist in establishing rapport. CP 22, 34, 39-40. He was present for the *Miranda* advisement, which the detective read to the Defendant using a Spanish language form. CP 22-23, 27-28, 39; PE 1.

The detective's form broke the *Miranda* advisement into five numbered paragraphs. PE 1. After each section in the advisement form, the detective asked if the Defendant understood, and the

Defendant responded with a yes. CP 31. The detective testified that he drew a checkmark next to paragraphs 1, 3, 4, and 5 after he read them. CP 41. Beside paragraph 2, rather than a check mark, the detective wrote "47 yrs." CP 41; PE 1. This is because the second sentence of that paragraph is the juvenile advisement. CP 41 ("It's a warning to juveniles."); PE 1. When the Defendant gave his age, the detective wrote that age beside the paragraph, read the first sentence of paragraph 2 and crossed out the second. CP 14, 41; PE 1. The Defendant then signed the form in two places – first to acknowledge that he had been read his rights and then to waive them. CP 39, 43.

The Defendant did not request clarification of his rights, did request an attorney, and did not invoke his right to remain silent. CP 31. He had no trouble understanding the Spanish conversation. CP 29, 30-31. He did not appear to be tired or under the influence of any substance. CP 30. "One of the officers described Mr. Nunez as quite cheerful during this process." Unpub. Op. at 10.

Within minutes of his arrival and after receiving the *Miranda* warnings, the Defendant admitted sexually assaulting two of his

nieces many years[1] ago. CP 34-35 (the confession just spilled out of him), 50. The Defendant expressed remorse, saying he felt he needed help, but that he could get through what he considered "his problem with little girls" on his own. CP 49.

The Court of Appeals held that the interview became custodial part way through the interview.

> At the point in time when Mr. Nuñez confessed to the first crime, a reasonable person in his position would no longer believe he was free to leave the interview. It was at this time that the interview turned from noncustodial to custodial. ... all subsequent statements after his first confession must be suppressed.

Unpublished Opinion at 10-11 (emphasis added).

The State seeks review of an unprecedented opinion that would hold that a person can place himself in custody by admitting long past, bad acts.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. IT IS POLICE BEHAVIOR, NOT A SUSPECT'S CONFESSION TO LONG AGO BAD ACTS, WHICH RESULTS IN CUSTODIAL ARREST AND TRIGGERS *MIRANDA.*

This Opinion's enormous departure on fundamental criminal

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[1] Both child victims are now adults. The offenses against the older niece E.D.N. occurred 14-24 years ago and are beyond the statute of limitations. The allegations against J.A. would have occurred 8-13 years before the interview. CP 4-5, 19.

law satisfies every subsection of RAP 13.4(b). The Opinion conflicts with Washington and federal decisions so as to undermine convictions in almost every criminal case.[2] The fact that the opinion is unpublished does not lessen its impact and ability to disrupt long, established practice on which most investigations and convictions rely. *See State v. Pippin*, No. 48540-1-II, slip op. at 16-17 (Wash. App. Oct. 10, 2017) (relying on unpublished opinion to overturn precedent).

The *Miranda* advisement is a requirement under the federal constitution (Fifth and Fourteenth Amendments). *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). The state constitution does not provide additional protections.

> Our state constitution article I, section 9 is equivalent to the Fifth Amendment and 'should receive the same definition and interpretation as that which has been given to' the Fifth Amendment by the Supreme Court.

State v. Templeton, 148 Wn.2d 193, 207–08, 59 P.3d 632 (2002).

The *Miranda* advisement protects against coercive or deceptive police interrogation. *Heinemann v. Whitman Cty. of Wash., Dist.*

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[2] The ruling is also unenforceable. Unpub. Op. at 11 (suppressing "all subsequent statements after his first confession"). The parties cannot tell what divides a fluid conversation into first or second crimes or first or second confessions.

provide the *Miranda* advisement to an individual who is "in custody" and is subjected to "interrogation." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). A person is in custody if a reasonable person would feel one's freedom of action or movement "curtailed to a degree associated with formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed2d 317 (1984); *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986).

Whether a person is "in custody" is an objective inquiry in which the focus is and has always been on manifested police conduct and not unexpressed police intent. *Beckwith v. United States*, 425 U.S. 341, 346-48, 440, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976); *State v. Short*, 113 Wn.2d 35, 40-41, 775 P.2d 458 (1989) (whether the suspect is the focus of an investigation or whether the police have probable cause is not relevant to the court's determination of whether a suspect is in custody).

The focus is on police conduct prior to and during the interrogation only. *See, e.g., Slwooko v. State*, 139 P.3d 593, 600 (Alaska Ct. App. 2006) ("the fact that the police decide to arrest a person after the person has confessed to a serious crime is, of itself,

unremarkable."); *Roman v. State*, 475 So.2d 1228, 1231-32 (Florida 1985) (arrest after confession does not convert what theretofore had been a noncustodial situation into a custodial one).

An arrest occurs when police objectively manifest that they are restraining the person's movement and a reasonable person would have believed that he or she was not free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *State v. Lund*, 70 Wn. App. 437, 444, 853 P.2d 1379 (1993). The objective custody analysis is "designed to give clear guidance to the police." *Yarborough v. Alvarado*, 541 U.S. 652, 668, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

Therefore, courts analyze police behavior to determine whether there has been a custodial arrest. *State v. Lyons*, 85 Wn. App. 268, 270, 932 P.2d 188 (1997) (grabbing a person's arm and saying "you're under arrest" did not amount to custodial arrest); *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (asking a driver to exit a car not a custodial arrest); *State v. Belieu*, 112 Wn.2d 587, 598, 773 P.2d 46 (1989) (drawing a gun not a custodial arrest); *United States v. Wright*, 625 F.3d 583 (9th Cir. 2010) (searching a person's home not a custodial arrest); *United States v. Lee*, 699 F.2d 466, 467-

68 (9th Cir. 1982) (questioning someone in a closed FBI car for well over an hour while other investigators occupy the person's house not a custodial arrest). And it is police conduct which converts an investigative detention into a custodial arrest. *See e.g. Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed.2d 229 (1983) (transporting a person for interrogation while retaining his airline ticket and driver's license was an arrest); *State v. Gonzales*, 46 Wn. App. 388, 396, 731 P.2d 1101 (1986) (handcuffing and transporting a person to police station was an arrest).

The Unpublished Opinion would hold that custody is determined by an assessment of unexpressed police intent to arrest based on probable cause as established by a confession. This is a departure from the well-established nationwide standard.

> ... no Supreme Court case supports Locke's contention that admission to a crime transforms an interview by the police into a custodial interrogation. Therefore, there is no clearly established federal law on which to base a finding of unreasonableness. *See, e.g.,* [ ] *Stansbury,* 511 U.S. at 325, 114 S.Ct. 1526 ("Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.").

Locke v. Cattell, 476 F.3d 46, 53 (1st Cir.2007). *See United States v.*

Chee, 514 F.3d 1106 (10th Cir. 2008) (defendant not in custody when he voluntarily came to the police station, was taken into an interview room while his wife was asked to remain outside, and then confessed to rape).

In *Thomas v. State*, 55 A.3d 680, 682, 689-90 (Md. 2012), we have a case on all fours. The Thomas trial court suppressed the confession under the same rationale of the Unpublished Opinion. *Id.* at 688 (unreasonable to think a person could admit a rape in an interrogation room and then feel free to leave). The suppression ruling was reversed, because a confession does not place a person in custody. *Id.* at 683, 692.

> If confession is the trigger for custody, however, then each person who confesses in a police station must have been given *Miranda* warnings *per se,* **which is without basis in *Miranda* jurisprudence**. *See United States v. Chee,* 514 F.3d 1106, 1114 (10th Cir.2008) (stating, in the course of considering whether Chee's confession at a police station rendered him in custody, that "[n]o Supreme Court case supports [the] contention that admission to a crime transforms an interview by the police into a custodial interrogation" (internal quotation marks and citations omitted)); *see also Locke v. Cattell,* 476 F.3d 46, 53 (1st Cir.2007) (stating that a confession does not automatically turn an interview into a custodial interrogation, when considering whether Locke was in custody after he confessed to a robbery while being interviewed at the police station); *Commonwealth v. Hilton,* 443 Mass. 597, 823 N.E.2d 383, 397 (2005)

> (stating that the defendant, who had confessed while at a police station being interviewed, was not in custody thereafter, because there was no "fundamental transformation in the atmosphere" of the interview) (internal quotations and citations omitted); *State v. Oney,* 187 Vt. 56, 989 A.2d 995, 999-1000 (2009) ("A non-custodial situation does not become custodial automatically because the interviewee has confessed to a crime.... A confession is just one of the circumstances to consider in evaluating whether a reasonable person would feel free to leave.").

Id. at 689–90 (emphasis added). The flawed rationale for suppression conflicted with the United States Supreme Court. *Id.* at 693.

> Even assuming that Thomas's assumption was relevant, his belief was predicated upon uncommunicated thoughts, which cannot form the basis for requiring *Miranda* warnings, as the Supreme Court recognized in *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

Thomas v. State, 55 A.3d at 693. It also conflicts with Washington cases. *State v. Short*, *supra*; *State v. Solomon*, 114 Wn. App. 781, 790, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025 (2003) (A police officer's "unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time.").

In our case, the allegations regarded long-past bad acts. Therefore, according to this Opinion, a reasonable person would be

familiar with the rapidly changing law on the statute of limitations. This is not objectively reasonable. The statute of limitations on this type of crime is constantly in flux. Laws of 2013, ch. 17 § 1 (by the victim's 30 birthday); Laws of 2009, ch. 61 § 1 (by the victim's 28th birthday); Laws of 1989, Ch. 13 § 2 (21st birthday); Laws of 1988, ch. 145 § 14 (seven years); Laws of 1985, ch. 186 § 1; Laws of 1982, ch. 129 § 1 (five years); Laws of 1981, ch. 203 § 1 (3 years).

It is also not subjectively true that this particular Defendant believed he would be arrested. Defendant Nuñez's statement manifested that he believed he would be going home at the end of the interview to work through his issues "on his own." CP 49. And, in fact, he could not be charged for his crimes against E.D.N..

An individual's own confession does not curtail one's freedom of action or movement to a degree associated with formal arrest, because a reasonable person cannot know what police know (i.e. whether police have probable cause), who makes decisions to arrest, and how that discretion is exercised. Suspects frequently go home after such an interview. Some prosecutor's offices direct police not to arrest in such cases. The prosecutor may choose to call the defendant to court by means of a summons, not a warrant. In fact,

this is more commonly the case than not. CrR 3.2(a)(presumption of release absent a showing of likely danger to community or failure to appear). It is the discretionary decision of these professional parties, and not any suspect, which decides when and if an arrest takes place.

This departure from established law requires review.

B. THE COURT ERRED IN ENTERTAINING AN UN-NOTED, UNBRIEFED MOTION TO SUPPRESS IN VIOLATION OF CrR 3.6, WITHOUT OPPORTUNITY FOR THE STATE TO RESPOND TO FALSE ALLEGATIONS OF FACT.

The Defendant's confession has been suppressed without notice to the State or an opportunity to respond. This procedural error violates both court rules and procedural due process, thereby depriving the State, the victims, and the public of a fair hearing against an alleged sexual predator. CrR 3.5; CrR 3.6; U.S. Const. amend. 14; Wash. Const. art. I, § 3, 12. At its core[3], procedural due process is the right to be meaningfully, fairly heard. *State v. Lyons*, 199 Wn. App. 235, 240, 399 P.3d 557 (2017). Parties rely upon court rules which provide the mechanisms for a fair determination of justiciable matters. Disregard for these necessary, fair-play

[3] "Justice, though due to the accused, is due the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934) (Cardozo, J., dissenting).

justiciable matters. Disregard for these necessary, fair-play procedures conflicts with case law and constitution and undermines public confidence in the justice system. RAP 13.4(b); *State v. Templeton*, 148 Wn.2d at 212 (promulgation of state court rules creates procedural rights); *State v. Currie*, 200 Wash. 699, 707, 94 P.2d 754, 758 (1939) (the court has no power to except a particular individual from the operation of a rule or excuse its violation in a particular instance).

A CrR 3.5 hearing, also known as a voluntariness hearing, is for the purpose of determining only whether the Defendant's statements to police are voluntary. *State v. Myers*, 86 Wn.2d 419, 425, 545 P.2d 538 (1976). The state must present evidence that the police did not procure the confession by coercion or by overbearing the defendant's will. *State v. Tucker*, 32 Wn. App. 83, 85, 645 P.2d 711 (1982); *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

In this case, the prosecutor has repeatedly requested a ruling on the actual subject of a CrR 3.5 hearing, i.e. voluntariness. CP 11-12, 51-52; Appellant's Brief at 25-26. No court has ruled on this matter. Instead, the courts have been deliberating on the Defendant's

respond.

An allegation of a *Miranda* violation is separate and distinct from an allegation that the confession was involuntary. *Oregon v. Elstad*, 470 U.S. 298, 316, 105 S. Ct. 1285, 1297, 84 L. Ed. 2d 222 (1985); *State v. Thompson*, 73 Wn. App. 122, 131, 867 P.2d 691 (1994) (statement obtained in violation of *Miranda* is admissible for impeachment purposes). It must be made under the procedure in CrR 3.6. Under this rule, a criminal defendant seeking to suppress evidence for a constitutional violation "shall" prepare a motion "in writing supported by an affidavit," served upon the state with sufficient notice for the state to respond in writing.

SUPPRESSION HEARINGS--DUTY OF COURT

> (a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

> (b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

CrR 3.6. Such procedure gives the State notice of what evidence is at issue and an opportunity to prepare a proper responsive record.

The rule that a court has discretion to hear oral testimony at a CrR 3.6 hearing is premised on the understanding that affidavits have been filed or that oral testimony is accepted in lieu of affidavits. *State v. Green*, 43 Wn.2d 102, 105, 260 P.2d 343 (1953). Here the State had no opportunity to present any facts responsive to the defense motion whether by affidavit or oral testimony.

As the Unpublished Opinion notes, the State could not "have anticipated" the Defendant's motion prior to the hearing. Unpub. Op. at 6. And yet the Opinion suggests that the prosecutor may have been able to predict the Defendant's motion by listening more carefully to testimony. Unpub. Op. at 7. This is not reasonable. The Defendant's motion was premised on a bizarre misinterpretation of testimony. Appellant's Brief at 14. There is no authority for dispensing with the mandate in CrR 3.6, premised on a party's obligation to predict an erroneous interpretation of the evidence. The court rule is the Supreme Court's prescription for practice and

procedure in Washington. RCW 2.04.190. A court may not dispense with the rule at the cost of a party's rights. The Defendant was required to give the State notice in writing of any motion to suppress.

After the Defendant made a motion to suppress, the lower court refused to allow the State to provide a responsive record. The court justified its refusal under the "finality principle." The Court of Appeals agrees with the State that the lower court's reasoning could have had "nothing to do with the doctrines of res judicata or collateral estoppel." Unpub. Op. at 6. The opinion does not explain what lawful basis there was to prevent the State from responding to the motion. There was none. A ruling cannot be final until the parties have both had opportunities to present their case on the merits.

In this case, there is no factual basis for finding a *Miranda* violation. The Defendant was fully and properly advised.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court accept review, reverse suppression of any part of the confession, and find the Defendant's confession voluntary and admissible in the State's case in chief.

DATED: October 11, 2017.

Respectfully submitted:

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Prosecuting Attorney

Teresa Chen, WSBA# 31762
Deputy Prosecuting Attorney

Michelle Trombley trombleylaw@outlook.com	A copy of this Petition for Review was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 11, 2017, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34094-5-III
	)	
Petitioner,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROGELIO NUNEZ,	)	
	)	
Respondent.	)	

LAWRENCE-BERREY, A.C.J. — We granted the State of Washington's motion for discretionary review of the trial court's order suppressing Rogelio Nunez's confessions to multiple crimes. The trial court determined that Mr. Nunez was not properly advised of his *Miranda*[1] warnings, and that his confessions occurred while in custody.

The State argues the trial court erred by refusing to reopen testimony in a CrR 3.5 hearing after closing comments began but before the trial court issued its oral ruling. We conclude the trial court did not abuse its discretion when it refused to reopen testimony.

The State also argues the trial court erred by determining that Mr. Nunez was in

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

custody when he confessed to several crimes. We conclude that Mr. Nunez was not in custody until after he confessed to the first crime. For this reason, only those statements he made after his first confession should be suppressed. We therefore affirm in part, and reverse in part, the trial court's suppression order.

FACTS

The State charged Mr. Nunez with four counts of child molestation. The facts set forth below arise out of a CrR 3.5 hearing, where only two law enforcement officers testified.

On the morning of September 15, 2015, Detective Jacinto Nunez met with Mr. Nunez at his home to investigate allegations that Mr. Nunez had molested two young girls. Mr. Nunez said he was willing to speak with the detective, but preferred to work that day and then speak with the detective at the sheriff's office. Detective Nunez agreed to this. Mr. Nunez also said he preferred to discuss the topic in Spanish, his preferred language.

Detective Nunez then arranged to have Deputy Ruben Bayona present during the interview to help build rapport because Deputy Bayona had more experience with child sex cases and spoke better Spanish.

As promised, Mr. Nunez came to the sheriff's office after he finished work that day. One or both officers confirmed that Mr. Nunez drove himself to the sheriff's office, was not handcuffed before or during the interview, was not under arrest, and was free to leave whenever he wished.

The first part of the interview was not recorded because the officers were building rapport with Mr. Nunez. After about 10 minutes, Detective Nunez advised Mr. Nunez of his rights in Spanish by reading from a Spanish advisement of rights form. The form listed the rights numerically, in paragraphs one through five. Detective Nunez testified he read to Mr. Nunez the rights in paragraphs one, three, four, and five. He explained that the right in paragraph two was for juveniles only, and when Mr. Nunez answered he was 47 years old, he skipped that right. The first sentence in paragraph two contains the familiar warning that anything you say can be used against you in a court of law.[2]

Mr. Nunez initialed the form twice, once to confirm that the above rights were read to him and that he understood them, and once to waive his rights. Within two or three minutes, Mr. Nunez confessed. He first confessed to groping J.A over her clothes when

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[2] On the form, Detective Nunez crossed out only the second sentence of paragraph two. This created an issue of fact whether Detective Nunez read Mr. Nunez the familiar warning contained in the first sentence of that paragraph. Because the trial court found that the detective did not read that sentence to Mr. Nunez, and this finding is supported by substantial evidence, we present the facts in this manner.

she was a young girl. He then confessed to groping D.N. when she was young and having intercourse with her when she was older.

During cross-examination of Detective Nunez, Mr. Nunez asked whether the purpose of the interview was to coerce a confession. Detective Nunez answered, "Yes." Clerk's Papers (CP) at 51. Despite this answer, the testimony from one or both officers was that the interview was focused on building rapport, Mr. Nunez was "pretty cheerful," and Mr. Nunez's confession was almost immediate after he was advised of his rights. CP at 30.

Both sides gave brief closing arguments at the conclusion of the hearing. The State expressed surprise when Mr. Nunez argued the detective failed to advise him of one of his warnings, and the detective agreed the purpose of the interview was to coerce a confession. The State offered to recall Detective Nunez to clarify those issues, but the trial court exercised its discretion and ruled that the testimony was closed.

The trial court found that Mr. Nunez was not adequately advised of his warnings and that the purpose of the interview was to coerce a confession.[3] Based on these findings, the trial court ruled that Mr. Nunez's confession must be suppressed.

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[3] The detective's unexpressed purpose is of no relevance. *See State v. Solomon*, 114 Wn. App. 781, 790, 60 P.3d 1215 (2002) (An officer's unexpressed intentions are irrelevant to the question of whether the suspect was in custody.).

The State brought a motion for reconsideration. In its motion, the State attached a sworn statement from Detective Nunez. Among other arguments, the State argued that only custodial statements are subject to suppression under *Miranda*, and the evidence established as a matter of law that Mr. Nunez was not in custody. The trial court declined to consider the additional evidence, considered the State's custody argument, and found that because the confession was obtained in an interrogation room at the sheriff's office, Mr. Nunez's statement was custodial.[4] The trial court denied reconsideration of its earlier CrR 3.5 ruling. The State moved for discretionary review, and we granted the State's motion.

LAW AND ANALYSIS

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO REOPEN THE TESTIMONY

A trial court has discretion to decline to reopen a hearing, and reversal is warranted only on a showing of an abuse of discretion. *Estes v. Hopp*, 73 Wn.2d 263, 270, 483 P.2d 205 (1968). Discretion is abused when it is exercised on untenable grounds for untenable reasons. *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991). "Consideration

[4] Mr. Nunez argues that the State's failure to raise the argument that he was not in custody is a waiver of that argument. But the State made this argument in its reconsideration motion. Because the State made this argument and the trial court ruled on it, the State did not waive its argument that Mr. Nunez was not in custody.

should be given to whether the law on point at the time was unclear or ambiguous, as well as to whether new evidence came to light after the proceedings closed." *United States v. Coward*, 296 F.3d 176, 182 (3rd Cir. 2002).

Here, the law on the admissibility of confessions is clear, and the State did not have any new evidence that came to light after the hearing. The trial court explained its basis for refusing the State's request to reopen: "If we don't have finality, then the meaning of the hearing is that we continue to conduct it until the State wins. That's not the purpose of the hearing." Report of Proceedings (RP) at 15.

The State argues the trial court improperly applied the "finality principle" when it refused to reopen, and because this legal principle was improperly applied, our review is de novo. Appellant's Br. at 12. The State does not explain what this "finality principle" is, but cites cases to the effect that collateral estoppel and res judicata are inapplicable until a final judgment is entered. We reject the State's argument because the trial court's reasoning had nothing to do with the doctrines of res judicata or collateral estoppel.

The State also argues it was denied due process because it did not know that Mr. Nunez would argue that his advisement of rights was deficient or that his confession was coerced. We reject this argument because *neither* party could have anticipated these arguments until Detective Nunez testified to these points. The State was not denied due

process. Had it listened to Mr. Nunez's questions and its own witness's answers, it could have rectified these issues on redirect.

We conclude the trial court gave tenable reasons for not allowing the State to reopen. We find no abuse of discretion.

B. MR. NUNEZ WAS NOT IN CUSTODY UNTIL AFTER HE CONFESSED TO THE FIRST CRIME

1. *Standard of review*

When we review an order granting or denying suppression under CrR 3.5, we determine "whether substantial evidence supports the challenged findings of fact and whether the findings of fact support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is sufficient "'to persuade a fair-minded person of the truth of the stated premise.'" *Id.* (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Unchallenged findings of fact are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). This court reviews the trial court's conclusions of law from a suppression hearing de novo. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011).

2. *Custody, for* Miranda *purposes, is determined by considering the totality of the circumstances, and asking whether a reasonable person in the suspect's position would feel that his or her freedom is curtailed to the degree associated with a formal arrest*

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To counteract the inherent compulsion of custodial interrogation, police must administer *Miranda* warnings. *State v. I.B.*, 187 Wn. App. 315, 320, 348 P.3d 1250 (2015). *Miranda* requires that the defendant "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479. Police must give *Miranda* warnings when a suspect is subject to (1) custodial (2) interrogation (3) by an agent of the state. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Without *Miranda* warnings, this court presumes a suspect's statements during custodial interrogation are involuntary and are therefore inadmissible. *Id.*

The sole issue here is custody. With respect to custody, the facts support the trial court's finding that Mr. Nunez gave his confessions in an interrogation room at the sheriff's office. But such a finding does not necessarily support the legal conclusion that Mr. Nunez was in custody.

Interviews at police stations are subject to heightened scrutiny. *United States v. Jacobs*, 431 F.3d 99, 105 (3rd Cir. 2005). Nevertheless, the fact that an interview is

conducted at a police station is itself insufficient to establish that the suspect was in police custody.

> [P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *see also California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (statement not custodial where suspect was told he was not under arrest and voluntarily accompanied police to station to discuss murder).

When determining whether a suspect is in custody for purposes of *Miranda*, we look at the totality of the circumstances, and ask whether a reasonable person in the suspect's position would believe his or her freedom was curtailed to the degree associated with a formal arrest. *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). In the context of a police interview, a related inquiry asks whether a reasonable suspect would feel free to terminate the interview and leave. *State v. Lorenz*, 152 Wn.2d 22, 38, 93 P.3d 133 (2004); *see also State v. Grogan*, 147 Wn. App. 511, 518, 195 P.3d 1017 (2008) (hour-long polygraph and subsequent interview, both at police station, held

to be noncustodial largely because suspect was permitted to leave interview when he asked to leave), *review granted*, 168 Wn.2d 1039, 234 P.3d 169 (2010).

Here, Mr. Nunez was a suspect in a child molestation investigation. Detective Nunez asked to speak with Mr. Nunez about allegations made against him. Any concern that Mr. Nunez might have had concerning his freedom was allayed when the detective permitted him to work that day and discuss the allegations after work. After work, Mr. Nunez went to the sheriff's office, at the time he chose, to discuss the allegations. Once he arrived, he was not placed under arrest or handcuffed. Instead, he was led to a private room where the first 10 minutes were spent building rapport between him and two officers. One of the officers described Mr. Nunez as quite cheerful during this process. Once rapport was established, the officers determined it was time to ask questions concerning the allegations. But before asking these questions, the officers sought to advise Mr. Nunez of his *Miranda* warnings so to dispel the inherent compulsion of answering their questions. All but one of his rights were read to him. The reading of these rights was for Mr. Nunez's benefit and in no way caused the nature of his custody to change. He quickly began confessing to crimes.

At the point in time when Mr. Nunez confessed to the first crime, a reasonable suspect in his position no longer would believe he was free to leave the interview. It was

at this time that the interview turned from noncustodial to custodial. Because Mr. Nunez was not properly advised of his *Miranda* warnings before this time, all subsequent statements after his first confession must be suppressed. *State v. Daniels*, 160 Wn.2d 256, 267, 156 P.3d 905 (2007).

Affirmed in part, reversed in part, and remanded.

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.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Siddoway, J.

Pennell, J.

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WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 34094-5-III**
	)	
Petitioner,	)	
	)	**ORDER DENYING**
v.	)	**MOTION FOR**
	)	**RECONSIDERATION/**
ROGELIO NUNEZ,	)	**CLARIFICATION**
	)	
Respondent.	)	

The court has considered petitioner's motion for reconsideration/clarification and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration/clarification of this court's decision of July 13, 2017, is denied.

PANEL: Judges Lawrence-Berrey, Siddoway, and Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING
CHIEF JUDGE

October 11, 2017 - 5:47 PM

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