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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOVANY GAONA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY McCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES

1. A juvenile's statement made pursuant to custodial questioning is admissible if it is made knowingly, intelligently, and voluntarily. Gaona's statement to Deputy Hancock was made calmly after full advisement of his Miranda and Juvenile Rights. Did the trial court properly admit his statement?

2. The "missing witness" rule may be implicated when an officer who overheard Miranda fails to testify, without explanation, to corroborate this fact. The trial court found and evidence substantiates that no officers overheard the reading of Miranda, and the prosecutor explained why this was. Did the trial court properly exercise its discretion in not applying the "missing witness" rule?

B. STATEMENT OF THE CASE

Jovany Gaona was charged by information with Theft of a Motor Vehicle and Unlawful Possession of a Firearm in the Second Degree. CP 1-2. The State alleged that on October 26, 2008, together with another, Gaona stole a Toyota Camry and was also unlawfully, as a juvenile, possessing a handgun. Id. A fact finding

hearing was held before the Honorable Leroy McCullough from November 18-25, 2008. CP 16.

In the early morning hours on October 26, 2008, Gaona was riding in the front passenger seat of a stolen Toyota Camry. CP 28, 31. The car was speeding in the White Center area of King County. CP 28. Three other occupants were in the rear seats of the vehicle. Id.

King County Sheriff's Office Deputy Jeff Hancock was on patrol, saw the speeding car, which was also committing other traffic violations. Id. He attempted to perform a traffic stop with his emergency lights. Id. The car did not immediately stop. 1RP¹ 49-50. It continued to drive, eventually slowing on a residential road. 1RP 49-50, 53. While it was still rolling, Gaona opened his passenger door, appearing ready to exit. 1RP 53; CP 28.

Deputy Hancock, now concerned that the car might be stolen, directed Gaona to return to the car. 1RP 51; CP 28. Gaona complied. CP 28. Hancock contacted the front passenger side window of the car. Id. He could see that there was no key in the ignition, and it appeared to have been punched with a screwdriver.

¹ The Verbatim Report of Proceedings will be referred to in accordance with the system set out in the Brief of Appellant at p. 4, fn. 2: 1RP (11-17-08 and 11-18-08); 2RP (11-21-08 and 11-24-08); 3RP (11-25-8 and 12-03-08).

1RP 56-57; CP 3. Hancock told the driver, Jesse Marcias, to turn off the car. CP 29. The driver did so by turning the ignition with his pair of pliers. Id.

Hancock asked the occupants if there were any drugs or weapons in the car. CP 29. Hearing no response, Hancock again asked specifically if there was a gun in the car. 1RP 67-68; CP 29. The driver began avoiding eye contact with the officer and started to look forward, clenching the steering wheel. Id. Still hearing no response, the officer repeatedly asked if there was a gun in the car. Id.

Gaona's body language also changed during these questions. 1RP 69-70; CP 29. He canted his body away from the officer and his legs started to tremble and shake in response. Id. Believing there was a firearm in the stolen car, Deputy Hancock un-holstered his service weapon, stepped away from the vehicle, and directed the occupants at gunpoint to show their hands until back-up arrived. 1RP 72-74; CP 29. When back-up came, those in the car were directed to exit and were handcuffed. Id.

Deputy Curry came to the scene and searched the car. CP 31. He looked under the front edge of Gaona's passenger seat. 2RP 179-80, 187-89; CP 31, 34. There he found a loaded,

.25 caliber semiautomatic firearm nestled within a stocking cap. Id. The clean stocking cap had been recently placed under the dirty seat, since it was free of the surrounding debris. Id. Gaona, as the passenger, would have had easy access to the weapon. 2RP 188; CP 28.

Deputy Hancock met again with Gaona, who was very calm at this point. 1RP 194-95; CP 33. Deputy Corliss gave Hancock his Miranda Rights and Juvenile Warning card. CP 29. While at the scene of arrest, Hancock read from this card in full the Miranda and juvenile warnings to Gaona and the other juveniles, as a group. 1RP 79-81; CP 30. The court found that neither Deputy Corliss nor any other officer was close enough to have heard the advisement of these rights. CP 30. The defendant waived his rights and gave Hancock a statement that he and the driver had stolen the vehicle along Aurora Avenue North in Seattle. 2RP 295; CP 32. He also said that they both had handled the gun, but would not say where they got it. Id.

On November 25, 2008, Judge McCullough found Gaona guilty of the charges of Theft of a Motor Vehicle and Unlawful Possession of a Firearm in the Second Degree. CP 16. The trial court sentenced him at a disposition hearing on December 3, 2008,

to local sanctions. CP 20. Gaona now appeals his conviction. CP 26.

C. ARGUMENT

1. GAONA'S STATEMENT TO POLICE WAS MADE AFTER HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS

Gaona claims that the trial court erred in finding that his statement to police was knowingly, intelligently, and voluntarily made, because he testified that he did not understand why he would want a lawyer and how his statements could be used against him. Additionally, he claims, there is insufficient evidence in the record to support the trial court's finding that no officers were close enough to overhear the Miranda or juvenile warnings read to him, thereby requiring a "missing witness" inference of unfavorable testimony against the State on this issue.

Because the court considered the totality of credible testimony and concluded that Gaona intelligently and voluntarily waived his rights after being properly advised of his Miranda and juvenile warnings by Deputy Hancock, this claim fails. Also, since even the defendant testified that no other officers were with Deputy

Hancock during their arms-length interaction, the evidence substantiates the trial court's factual finding that no other officers overheard Miranda being given, invalidating the second claim.

a. Gaona Was Properly Advised Of His Rights And Voluntarily Waived Them.

Miranda requires that a waiver of one's constitutional rights be made "voluntarily, knowingly, and intelligently." United States v. Miranda, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed 694 (1966). The State bears the burden of establishing a knowing, voluntary and intelligent waiver of Miranda rights. State v. Vannoy, 25 Wn. App. 464, 610 P.2d 380 (1980); State v. Ellison, 36 Wn. App. 564, 571, 676 P.2d 531, *rev. denied*, 101 Wn.2d 1010 (1984). The voluntariness of a waiver need not be shown beyond a reasonable doubt but only by a preponderance of the evidence. State v. Wolfer, 39 Wn. App. 287, 290, 693 P.2d 154 (1984), *rev. denied*, 103 Wn.2d 1028 (1985); State v. Ellison, 36 Wn. App. 564, 571, 676 P.2d 531, *rev. denied*, 101 Wn.2d 1010 (1984). The test for a knowing and intelligent waiver is whether a person knew that 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. McDonald,
89 Wn.2d 256, 264, 571 P.2d 930 (1977).

Whether a waiver is valid “depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” State v. Earls, 116 Wn.2d 364, 379, 805 P.2d 211 (1991) (quoting Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). This Court reviews de novo whether the findings of fact support the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Gaona claims that the trial court erred in its legal conclusion that his waiver was made knowingly, intelligently, and voluntarily. The trial court's factual findings, however, do not support his premise. This is because, to support his claim, Gaona continues to hang on his testimony, which the trial court found in fact to be not credible. CP 30.

For example, Gaona testified that he was never read his Miranda rights that night and was never told that he had a right to an attorney or to be silent. Id. Accordingly, he continues to rely on related self-serving testimony that he did not know what his rights were, why having an attorney is helpful, and what a confession is.

2RP 237-38. This self-reported confusion is contrary to the court's factual findings. CP 30. The court found that these rights were read, and that there was no confusion. Id.

Further, Gaona incredibly testified that Deputy Hancock simply stood there without saying or asking anything for 30 seconds, and then proceeded to pull a gun on him. 2RP 223-25; CP 30. Gaona now claims he was thus unable to provide a knowing waiver in such chaotic circumstances. He also testified that after this arrest he was alone with a silent Deputy Hancock and that having other officers around the area made things "weird." 2RP 229, 234. The court found nothing weird about the situation. To the contrary, the court found that a measure of calm had been restored after the arrest. 1RP 194-95; CP 33.

Gaona was very calm prior to giving his statement. Id. The court also found that the defendant was read his full Miranda Rights and juvenile warnings. 1RP 79-81; CP 30. Deputy Hancock told Gaona that he had a right to remain silent and anything he said could be used against him in court. Id. He explained that Gaona had a right to talk to an attorney and have one present while being questioned. Id. He told Gaona that if he could not afford an attorney one would be appointed to him prior to any questioning.

Id. Hancock advised Gaona that he could exercise his rights at any time and not answer any questions or make any statements. Id. He also provided him his juvenile warnings. Id. After learning of these rights, Gaona expressly told Hancock that he wanted to talk with him. 1RP 79-81, 85-86; CP 30. Gaona then made his oral statement to Hancock. Id.

At no point was Gaona coerced for a statement. 1RP 82; CP 30. He was never made any promises or threatened in anyway. Id. He showed no sign of confusion and did not need anything repeated. 1RP 84; CP 30. There were not even any officers close by that would make Gaona feel threatened when Deputy Hancock read these rights. 1RP 82; 2RP 229; CP 30.

No credible testimony supports Gaona's claim that his statement was unknowing, unintelligent, or involuntary. The evidence as found by the trial court shows the opposite. Thus, the court properly found by a preponderance of the evidence that Gaona made a knowing, intelligent, and voluntary waiver of his rights. Accordingly, the statement was properly admitted.

b. The Trial Court Properly Found That The
"Missing Witness" Rule Did Not Apply.

Gaona claims that his statement to Deputy Hancock should be excluded because Hancock was the only State witness who testified regarding the advisement of Miranda. Specifically, he argues that the "missing witness" rule would apply to this case because Hancock testified that he remembered another officer two to three feet away from them when he was with Gaona. Id. Gaona claims that the trial court erred when, despite this testimony, it factually found that no officers were close enough to hear the giving of Miranda warnings. CP 30.

Since substantial evidence supports the trial court's factual finding, including Gaona's own testimony that he remembered no other officers around him and Deputy Hancock at that time, this claim fails. Additionally, since the prosecutor made an offer of proof that Deputy Hancock was the only officer to hear Gaona's statement, the "missing witness" rule is not permitted.

The "missing witness" rule as implicated by State v. Davis applies when the State, without explanation on the record, fails to provide corroborating testimony of a witness who could testify to material facts. 73 Wn.2d 271, 438 P.2d 185 (1968). In such a

situation, the trier of fact may draw the inference that this "missing witness" testimony would have been unfavorable to the State, since it is presumed that otherwise the State would have called the witness. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).

However, the trial court expressly concluded that Davis was not implicated in this case because "[n]either Deputy Corliss nor any of the other officers were close enough to overhear the Miranda and Juvenile Warnings being read" by Hancock to Gaona. CP 30, 33. Gaona contests this factual finding because Hancock testified, before reading the rights to Gaona, that he borrowed a Miranda Rights card from Deputy Corliss who he remembered being "off to the right" about two or three feet away from Gaona and himself during the reading of rights. 1RP 83, 109. This lone piece of testimony does not tell the full story.

Indeed, Deputy Hancock was extremely close to Gaona when he was reading Miranda, being within an "arms-length." 1RP 78. The trial court specifically found that the deputies were not clumped together and were instead stationed at different places. 3RP 299-300. Hancock clarified that he would only be assuming and could not speak to whether Deputy Corliss overheard anything

said to Gaona. 1RP 109. Even Gaona himself testified that during his interaction with Deputy Hancock he did not remember any other officers being around him. 2RP 229. His claim now, which is contrary to his earlier sworn testimony, is not supported by the evidence.

It makes sense given how close Deputy Hancock was to Gaona that their conversation could not be overheard by the officers on-scene, including Deputy Corliss. Obviously, the trial court agreed. This is especially true when Gaona asserted that he did not recall any other officers being around at this time. This evidence substantiates the factual finding made by the trial court. Substantial evidence will support a trial court's factual finding on appeal. State v. Broadway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Accordingly, as the court properly concluded, Davis and the "missing witness" rule do not apply.

Moreover, when a witness's absence can be satisfactorily explained, no unfavorable inference is permitted. Blair, 117 Wn.2d at 489. That is, a prosecutor is entitled to explain the witness's absence and avoid operation of the inference. Id. That appears to

have occurred in this case. An appellate court will not disturb a trial court's refusal to give the "missing witness" instruction absent a clear showing of abuse of discretion. State v. David, 118 Wn. App. 61, 67, 74 P.3d 686 (2003).

The court inquired of the prosecutor whether there would be additional testimony from other witnesses who might have been at the scene for CrR 3.5 purposes in order to get a total picture of what happened. 1RP 89. The trial prosecutor represented to the court through an offer of proof, when discussing the upcoming testimony, that Deputy Hancock was the only one who heard the statements from Gaona.² 1RP 89. This explanation to the court on the record further establishes that a "missing witness" inference was not appropriate in this CrR 3.5 hearing. The trial court's decision to not give a "missing witness" instruction should not be disturbed. Accordingly, Gaona's claim fails.

² The on-the-record conversation with the court was in the context of what else was going on at the scene, including any potential coercive impact of other officers present, and the scheduling of Deputy Curry's testimony. It was not specifically regarding a missing witness issue. 1RP 89-90.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Gaona's conviction for Theft of a Motor Vehicle and Unlawful Possession of a Firearm in the Second Degree.

DATED this 26 day of October, 2009.

Respectfully submitted,

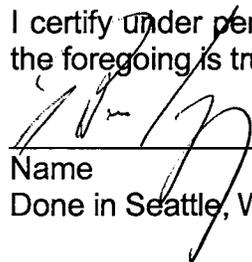
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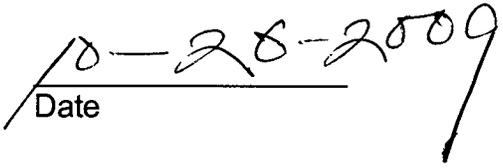
Certificate of Service by Mail

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. JOVANY GOANA, Cause No. 62822-4, 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.



Name
Done in Seattle, Washington



Date