

64849-7

64849-7

NO. 64849-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE ESCOBAR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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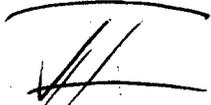


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A. ISSUES PRESENTED

1. A confession is involuntary if it is produced by coercive police actions. Escobar was an adult who was advised of his rights, acknowledged his understanding and waiver in writing three times, and testified that he understood them. No threats or promises were made to persuade Escobar to talk. Does the record support the trial court's finding that Escobar's statements were voluntary?

2. The State bears the burden of showing a voluntary, knowing and intelligent waiver of Miranda rights by a preponderance of the evidence, based on the totality of the circumstances. Escobar was advised of his constitutional rights three times and acknowledged understanding them each time. Each time he explicitly waived his rights. No threats or promises were made to induce Escobar to speak. Does substantial evidence support the trial court's finding that Escobar knowingly, intelligently and voluntarily waived his rights?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Jose Escobar, was charged with rape of a child in the first degree. CP 1-3. He was tried in King County Superior Court, the Honorable Helen Halpert presiding. 1RP 1.¹ A jury found Escobar guilty as charged. CP 17. The judge imposed a standard range indeterminate sentence for this sex offense. CP 36-45.

2. SUBSTANTIVE FACTS.

On January 6, 2009, the parents of four-year-old E.R. had overlapping work schedules. 3RP 11-12. They asked their friend, defendant Jose Escobar, if he would babysit E.R. and her younger brother for several hours that day. 3RP 13-15, 65, 69, 71-72. Escobar agreed. 3RP 16, 73; 5RP 119-23. Escobar was 49 years old at the time. 5RP 56.

E.R.'s father arrived home that afternoon, paid Escobar, and drove Escobar back home. 3RP 74. The children rode along and

¹ The Verbatim Record of Proceedings will be cited in this brief as follows: 1RP – 11/18/2009; 2RP – volume including 11/19/2009, 11/30/2009, and 12/1/2009; 3RP – 12/02/2009; 4RP – 12/03/2009; 5RP – 12/07/2009; 6RP – 12/08/2009; 7RP – 1/15/2010; 8RP – 1/21/2010.

after they dropped off Escobar, E.R.'s father took the children to their mother at her place of employment. 3RP 21-22, 74-75.

There, and during the ride home with her mother, E.R. told her mother that Escobar had licked her vagina that day. 3RP 22-24, 32-33. E.R. explained that she had climbed a chest of drawers so Escobar could not grab her, but could not get away. 3RP 24.

Escobar laid her on a bed, pulled down her pants and underpants, and licked her vagina. 3RP 24.

E.R.'s parents took her to Swedish Hospital for examination that evening, and responding police referred her to Harborview Medical Center for a sexual assault examination. 3RP 26; 4RP 86. The child described Escobar's assault to the examining nurse practitioner at Harborview, and reported that Escobar told her not to tell or he would not play with her any more. 3RP 108. The nurse practitioner found no physical injury to E.R. and no male DNA was found on swabs taken during that examination. 3RP 121-22; 5RP 32-37.

E.R. was interviewed on January 12, 2009, by a child interview specialist. 4RP 18-19; 5RP 46. The interview was video recorded and that recording was played at trial. 4RP 31, 34. E.R.

described the details of Escobar's assault again during this interview. 4RP 34-36.

On January 15, 2009, King County Sexual Assault Unit Detective Chris Knudsen arrested Escobar at his home. 5RP 55-61. Knudsen was accompanied by patrol officers who transported Escobar to the police precinct. 1RP 48-51. There, Knudsen conducted a videotaped interview of Escobar. 1RP 55. Knudsen advised Escobar of his constitutional rights. 1RP 56-58. Escobar acknowledged that he understood his rights and signed both an acknowledgement and a waiver of his rights. 1RP 57-58. Escobar denied that he had licked E.R.'s vagina. Pretrial Ex. 7 at 20. He did claim that the child had been dancing "like a stripper" and "was throwing herself on top of me." Pretrial Ex. 7 at 43. Escobar agreed to a polygraph examination. 1RP 64.

On January 16, 2009, after spending the night in jail, Escobar was taken to an office in the courthouse, where a polygraph examiner, Jason Brunson, again advised Escobar of his constitutional rights. 1RP 64-67, 98-105. Escobar again acknowledged understanding his rights and agreed to talk with Brunson. 1RP 66-67, 103-04. Brunson interviewed Escobar and administered a polygraph examination. 1RP 98. During the pre-

polygraph interview, Escobar repeated that E.R. had been dancing like a stripper but with her clothes on. 5RP 70. Brunson determined that the examination indicated deception by Escobar and confronted Escobar with that conclusion. 1RP 112-14. Escobar then admitted that he had licked the child's vagina. 1RP 114. There was no mention of the polygraph examination before the jury. Brunson testified that he was an interview specialist and described the interview without any reference to the polygraph examination or results. 4RP 50-77.

Knudsen had observed Brunson's interview of Escobar and after it was completed, Brunson left and Knudsen conducted another brief recorded interview of Escobar. 1 RP 66, 69; Pretrial Ex. 9. Knudsen again advised Escobar of his constitutional rights. 1RP 70-73. Escobar acknowledged understanding his rights and agreed to talk. 1 RP 72-73. Escobar repeatedly admitted to Knudsen that he had licked E.R.'s vagina, saying he did not intend to hurt her. Pretrial Ex. 9 at 3-5. Eventually, Escobar asked that Knudsen not ask him again about licking the child's vagina, and Knudsen agreed. Pretrial Ex. 9 at 6.

E.R. testified at trial. She was five years old by the time of trial, attending kindergarten. 3RP 38-39. E.R.'s testimony at trial

was consistent with her immediate disclosure of the assault. 3RP 46-53. She described Escobar's tongue inside her body, all the way in her vagina. 3RP 49-50, 61.

Escobar testified at trial that he had licked E.R.'s stomach but not her vagina. 5RP 129. He admitted telling both Knudsen and Brunson that he had licked E.R.'s vagina but said that he was forced to say it because of all the questions they asked. 5RP 126-28.

3. CrR 3.5 HEARING

A pretrial hearing pursuant to CrR 3.5 was held to determine the admissibility of Escobar's statements to Detective Knudsen and Jason Brunson.

Knudsen testified that when he first met Escobar at his home on January 15th, Escobar said that he spoke Spanish primarily, and after that Knudsen spoke to Escobar in Spanish. 1RP 49-50, 54, 56. Knudsen is fluent in Spanish. 1RP 44-47.

Knudsen conducted a videotaped interview with Escobar after Escobar arrived at the precinct. 1RP 54-55. Knudsen orally advised Escobar of his constitutional rights in Spanish. 1RP 56-57. That advice, along with the accuracy of the Spanish used, was

confirmed by the English translation of the advice of rights in the transcription admitted as Pretrial Exhibit 7. 1RP 59-60; Pretrial Ex. 7 at 3-4. Escobar signed the Spanish Advice of Rights form, first indicating his understanding of his rights, then indicating that he wished to speak to Knudsen. 1RP 58; 2RP 20-21; Pretrial Ex. 7 at 4; Pretrial Ex. 8.

Knudsen made no threats or promises to Escobar in order to persuade Escobar to speak. 1RP 59. This initial interview lasted just less than an hour. 6RP 18; Pretrial Ex. 7 at 2, 46 (time noted).

For the polygraph examination on January 16th, Knudsen arranged for a court-certified Spanish interpreter, who translated during the entire Brunson interview and during Knudsen's second interview afterward. 1RP 64-65, 70-71, 100; 2RP 22-23. Brunson, the polygraph examiner, does not speak Spanish. 1RP 100.

Brunson orally advised Escobar of his constitutional rights. 1RP 66-67, 101, 103-05; 2RP 22-28. Escobar signed another Advice of Rights form, first indicating his understanding of his rights, then indicating that he wished to speak to Brunson. 1RP 103-05; 2RP 22, 27-28.

Brunson conducted a pre-polygraph interview, asking Escobar basic questions in order to determine whether a polygraph

was appropriate. 1RP 102-03, 105-09. Asked about any medical problems, Escobar indicated that he had addictions to drugs and alcohol but was sober at the time of the interview. 1RP 108. Escobar said that he had diabetes, high cholesterol, and liver damage. 1RP 108. He said that he had been hospitalized about six years before for mental illness. 1RP 108. Escobar appeared to be tracking the questions asked, responding appropriately. 1RP 106. Brunson concluded that Escobar understood what was happening and was able to communicate well. 1RP 108-09. Escobar said that he was comfortable taking the polygraph. 1RP 108-09.

Brunson administered the polygraph and after a brief analysis, determined that the results indicated that Escobar's denial of the sexual contact was deceptive. 1RP 112. After he was told that the polygraph indicated deception, Escobar admitted that E.R.'s pants had come down and he had put his tongue into E.R.'s vagina. 1RP 114. He said he knew it was wrong. 1RP 114.

Brunson made no threats or promises to Escobar in order to persuade Escobar to speak. 1RP 104; 2RP 29. At the pretrial hearing, Escobar described Brunson as "very, very pleasant." 2RP 29.

At this point, Knudsen entered the room and took another recorded statement from Escobar. 1RP 69. He began by advising Escobar of his constitutional rights again. 1RP 70-73. Escobar signed the Spanish Advice of Rights form again in two places, first indicating his understanding of his rights, then indicating that he wished to speak to Knudsen. 1RP 72; 2RP 29-31; Pretrial Ex. 8. Escobar testified that Knudsen was pleasant toward him. 2RP 31. Escobar again admitted that he had licked E.R.'s vagina. 1RP 69; Pretrial Ex. 9 at 4-5. This entire statement lasted 14 minutes. Pretrial Ex. 9 at 1, 8.

Escobar testified at the CrR 3.5 hearing. He stated that Spanish is his primary language and that he is able to read. 2RP 4, 12-13. He did not indicate that he had any difficulty understanding the Spanish spoken to him by Knudsen on January 15th, or through the interpreter during the interviews on January 16th. 2RP 16-31. Defense counsel agreed with the trial court's conclusion that there was no language issue in this case. 2RP 43.

On direct examination, Escobar testified that he needed to tell his story. 2RP 9. He then elaborated that he felt he had to talk to the police because Knudsen "had already told me he was going to arrest me." 2RP 9.

Escobar explained that he had had an attorney before, and that a public defender is appointed for a person without money. 2RP 10. He explained how a defendant may contact a public defender while in the jail. 2RP 20-11. Asked if he knew how to find a public defender if he (Escobar) were not in jail, Escobar responded that he did know how, but pointed out that if he were not in jail, he would not need one. 2RP 11.

On cross-examination, Escobar agreed that he had been advised of his constitutional rights three times. 2RP 16, 22, 29-30. Asked about each of the rights specified, Escobar agreed that he understood them. 2RP 18-20, 23-27.

During the pretrial hearing, the State sought a ruling that the booking questions and both interviews on January 16th (except the polygraph itself) were admissible for all purposes. 1RP 76-77. The trial court found all of these statements admissible for all purposes, up to the point in the final interview when Escobar asked Knudsen not to ask the question about licking E.R.'s vagina again. 2RP 45-46; CP 34-35.

As to the recorded interview with Knudsen at the precinct on January 15th, the State initially sought only a ruling that Escobar's statements during that interview were voluntary, and the court so

ruled. 1RP 77; 2RP 45. During its rebuttal case, the State asked the court to rule as to the admissibility of the first recorded statement as substantive evidence. 6RP 20-21. The court indicated that it would have found it admissible for all purposes at the pretrial if asked and did so at that point. 6RP 19-21.

The court entered written findings reflecting its rulings. CP 32-35 (attached as Appendix 1).

C. ARGUMENT

1. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S CONCLUSION THAT ESCOBAR KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS.

Escobar argues that his statements were coerced and that the trial court erred in finding that he knowingly, intelligently and voluntarily waived his constitutional rights.² That claim should be rejected. Substantial evidence supports the trial court's findings that Escobar was properly advised of his rights, was not coerced, and knowingly, intelligently and voluntarily waived his rights.

² Escobar does not challenge the trial court's conclusion that his statements providing booking information were voluntary and admissible.

The State bears the burden of showing a voluntary, knowing, and intelligent waiver of Miranda³ rights by a preponderance of the evidence, based on the totality of the circumstances. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007); Lego v. Twomey, 404 U.S. 477, 486-89, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

The appellate courts will not disturb a trial court's conclusion that a waiver was voluntarily made if substantial evidence in the record supports that finding. Athan, 160 Wn.2d at 380; State v. Cushing, 68 Wn. App. 388, 393, 842 P.2d 1035, rev. denied, 121 Wn.2d 1021 (1993). The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). In determining facts, appellate courts will not reevaluate the credibility of the witnesses below. State v. Davis, 73 Wn.2d 271, 283, 438 P.2d 185 (1968).

The trial court's finding of a voluntary and intelligent waiver is supported by substantial evidence and, therefore, should be affirmed.

³ Miranda v. Arizona, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

a. Findings Of The Trial Court.

The trial court's written findings pursuant to CrR 3.5 are attached as Appendix 1. The findings regarding Escobar's statement on January 15, 2009, include the following:

3. Knudsen advised the defendant of his Miranda warnings using a pre-printed rights form in the Spanish language. The defendant signed his name indicating he understood his rights. He also indicated that he wished to waive his rights and speak with the detective, and signed his name under the waiver portion.

....

5. Knudsen did not threaten or promise the defendant anything in exchange for the defendant giving a statement. The defendant did not at any point indicate that he did not understand his rights, he did not exercise his right to remain silent, nor to have a lawyer. Detective Knudsen observed that the defendant was tracking his questions and that the defendant did not appear to have any problems understanding him.

CP 33.⁴

The court's findings regarding Escobar's statements to Brunson on January 16, 2009, include the following:

7. Brunson spoke with the defendant with the use of Mr. Fuentes, the Spanish interpreter. Brunson verbally advised the defendant of his Miranda warnings using a pre-printed form. The defendant signed his name indicating he understood his rights. The defendant also indicated that he wished to waive his rights and speak with Brunson, and signed his name under the waiver portion.

....

⁴ The court's findings and conclusions as to the booking questions are not discussed in this brief because Escobar does not assign error to the admission of those statements.

9. Brunson did not threaten or promise the defendant anything in exchange for the defendant giving a statement. The defendant did not, at any point, indicate that he did not understand his rights, he did not exercise his right to remain silent, nor to have a lawyer. Brunson observed that the defendant was tracking his questions and that the defendant did not appear to have any problems understanding him.

CP 33-34.

The court's findings regarding Escobar's second taped statement to Knudsen (after Brunson's interview) included the following:

10. The defendant was advised of his Miranda warnings, using the exact same form that he [Knudsen] used on the 15th of January. The defendant again affixed his signature to the form indicating he understood his rights, and that he wanted to speak with Knudsen. The defendant proceeded to give a recorded statement....

11. Knudsen did not threaten or promise the defendant anything in exchange for the defendant giving a statement. The defendant did not at any point indicate that he did not understand his rights, he did not exercise his right to remain silent, nor to have a lawyer. Detective Knudsen observed that the defendant was tracking his questions and that the defendant did not appear to have any problems understanding him.

CP 34.

In a paragraph entitled "Disputed Facts," the court made this finding:

The defendant testified while on direct that he did not understand his rights, but then on cross examination admitted that he understood each of the enumerated rights

that were read to him. He further testified that he wanted to talk with Knudsen and Brunson to get out his side of the story.

CP 34.

The trial court concluded that when Escobar was interviewed at the precinct on January 15th he was in custody. CP 34. As to that interview, the court concluded, in pertinent part:

The defendant was advised of his Miranda warnings, and the defendant acknowledged those rights and waived those rights. The court finds that the defendant made a knowing, intelligent and voluntary waiver of his rights.

CP 34. The court also found that this statement was voluntary. CP 34-35.

As to the interview with Brunson on January 16th, the trial court concluded: "The defendant was advised of his Miranda warnings, and made a knowing, voluntary and intelligent waiver of those rights." CP 35. The court found those statements admissible in the State's case in chief. CP 35.

As to the interview with Knudsen on January 16th, the trial court concluded: "The defendant was advised of his Miranda warnings, and made a knowing, voluntary and intelligent waiver of those rights." CP 35. The court concluded that when Escobar was asked at page 6 of the transcript of the final interview about licking

E.R.'s vagina, his response, "[P]lease ask him not to ask me that question anymore...," was an invocation of Escobar's right to remain silent. CP 35. The court found the statements prior to that request admissible in the State's case in chief. CP 35. The statements after that request were excluded. CP 35.

b. Escobar's Statements Were Not Coerced.

Escobar asserts that his statements were involuntary because of coercive police tactics and his own limited education and apparent mental illness. This claim is without merit. It fails because the police did not engage in any coercive conduct. Further, Escobar did not assert in the trial court that mental illness prevented his understanding his rights, nor was there any evidence of such a disability. The trial court's findings as to Escobar's capacity to understand the situation are findings of fact based on the court's determination of credibility of the witnesses, and are supported by substantial evidence, so they are verities on appeal.

The voluntariness test is whether, under the totality of the circumstances, the confession was coerced. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). "Coercive police activity is a necessary predicate to the finding that a confession is

not 'voluntary.'" State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008)(quoting Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)).

Circumstances potentially relevant to the analysis include the "crucial element of police coercion"; the location, length and continuity of the interrogation; the defendant's maturity, education, physical condition and mental health; and whether police advised the defendant of his right to remain silent and to have an attorney present. Unga, 165 Wn.2d at 101 (quoting Withrow v. Williams, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)).

The court will consider promises or misrepresentations made by police and determine whether there is a causal relationship between the promise and the confession, that is, whether the defendant's will was overborne. Broadaway, 133 Wn.2d at 132. The question is not whether the confession would have been made absent the police questioning but whether police behavior was so manipulative or coercive that they deprived the suspect of the ability to make a decision. Unga, 165 Wn.2d at 102.

The trial court concluded that neither Knudsen nor Brunson made any threats or promises in order to obtain a statement. CP 33 (Findings of Fact 5, 9). Escobar does not challenge the findings

that no threats or promises were made. These unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Moreover, the circumstances support the trial court's finding that the statements were made voluntarily. Escobar was 49 years old. 1RP 52. Escobar was advised of his constitutional rights and was aware of the allegation and its severity. There was nothing coercive about the nature of the interviews or the behavior of the officers involved. In fact, Escobar testified that both Knudsen and Brunson were pleasant toward him. 2RP 29, 31.

The interview the day that Escobar was arrested was conducted by one detective and lasted less than an hour. Escobar was advised of his rights and signed an acknowledgement and waiver. 1RP 58; 2RP 20-21; Pretrial Ex. 7 at 4; Pretrial Ex. 8. Escobar was offered a soft drink, which he initially declined but later requested and drank when his throat became dry. 1RP 95-96; Pretrial Ex. 7 at 2, 18. The detective offered to get Escobar's jacket; Escobar declined the offer. Pretrial Ex. 7 at 2. The interview was videotaped, allowing direct observation of the entire interview. 1RP 54-55.

When he talked to Brunson the next day, Escobar again was advised of his constitutional rights and signed an acknowledgement and waiver. 1RP 103-05; 2RP 22, 27-28. Escobar told Brunson that he was sober and was comfortable taking the polygraph. 1RP 108-09. Escobar testified that Brunson was very, very pleasant to him. 2RP 29. During this interview, Escobar asked for a glass of water and Brunson provided one. 2RP 29.

Escobar's argument that Brunson's apparent offer of sympathy (with the possibility that E.R. was "coming on to" Escobar)⁵ was coercive is without support in the law or facts and defies common sense. There was no evidence presented at the pretrial CrR 3.5 hearing that this statement was made.⁶ Escobar did not mention this statement of Brunson in his pretrial testimony. Nor did Escobar suggest that any sympathy offered by Brunson affected Escobar's decision to speak to him.

⁵ 5RP 72-73.

⁶ The citations to the record in Escobar's brief on appeal are to trial testimony of Knudsen, describing Brunson's interview with Escobar. App. Br. at 15. This testimony is irrelevant to the court's pretrial ruling.

In any event, an interview technique that suggests that the interviewer could understand the reason for a defendant's criminal behavior is not the type of police conduct that precludes a rational decision by the suspect about whether to talk.

A police officer's psychological ploys such as playing on the suspect's sympathies ... may play a part in a suspect's decision to confess, 'but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.'

Unga, 165 Wn.2d at 102 (quoting Miller v. Fenton, 796 F.2d 598, 605 (3rd Cir. 1986), additional citations omitted).

Escobar's argument that use of a polygraph renders a resulting statement involuntary also is without merit. The Supreme Court has specifically rejected the argument that interrogations by polygraph examiners are inherently coercive. State v. Rupe, 101 Wn.2d 664, 679-80, 683 P.2d 571 (1984). No special warning regarding the admissibility of polygraph results is necessary. Id. at 676-77; State v. Acheson, 48 Wn. App. 630, 635, 740 P.2d 346 (1987), rev. denied, 110 Wn.2d 1004 (1988).

The use of a polygraph or reference to a polygraph examination is not rendered coercive because the results of a polygraph examination normally are not admissible in a criminal trial. Police may falsely state that they have evidence linking a

suspect to a crime and that tactic does not render the suspect's statement involuntary. State v. Furman, 122 Wn.2d 440, 451, 858 P.2d 1092 (1993). Like a polygraph result, that false evidence would not be admissible at trial, but the Washington Supreme Court has concluded that describing false evidence as an interview tactic is not inherently coercive. Id.

Nor did the final interview involve coercion by the police. This second interview by Knudsen was another recorded interview - it lasted 14 minutes. Pretrial Ex. 9 at 1, 8. Escobar was advised of his rights, acknowledged understanding them and signed a waiver. 1RP 70-73; 2RP 29-31; Pretrial Ex. 8.

Over the course of the three interviews, Escobar was advised of his rights three separate times, by his own admission. 2RP 16, 22, 29-30. When asked about his understanding of each right stated in the advice of rights, Escobar testified that he understood them. 2RP 18-20, 23-27.

Escobar's claim that he was particularly susceptible to coercion is not supported by the record. His limited English is irrelevant: he speaks Spanish and the advice of rights and all interviews either were conducted in Spanish, or were translated by a Spanish interpreter. 1RP 49-50, 54, 56-58, 64-65, 70-71, 100;

2RP 20-23; Pretrial Ex. 7, 8. While Escobar asserts that he did not understand the word "waiver," the advice of rights forms (read by the interviewers) explained the waiver of rights without using that word. Instead they state "I have decided not to exercise these rights at this time[.]" and, "The following statement is made by me freely and voluntarily and without threats or promises of any kind." 2RP 20-21; Pretrial Ex. 7 at 4. In his lengthy pretrial testimony, it is apparent that Escobar understands these basic concepts. Escobar himself testified that he understood.⁷ 2RP 18-20, 23-27.

Escobar's reference on appeal to his "possibly subnormal intelligence" is unsupported by any citation to the record. Escobar testified that he had attended school for only a few months in El Salvador but later learned to read by studying the Bible. 2RP 4, 12-13. He said that he had read the driver's handbook in both English and Spanish. 2RP 32. Escobar's lack of schooling in El Salvador does not establish low intelligence.

Escobar testified that he had opened a bank account and read and understood all of the documents involved in that transaction. 2RP 15, 32-33. Escobar testified that he was the

⁷ At trial, he testified that he had no trouble understanding the interpreter's Spanish. SRP 131.

named lessee and responsible for collecting the monthly rents from a number of tenants at two buildings and paying the total rent to the landlord. 2RP 13-14. He testified that he knows a little about the criminal justice system, from the news and reading books at libraries. 2RP 6-7.

Escobar's statements and testimony also generally reflected intelligence and an ability to take command of the situation. In the police interviews, he minimized his contact with E.R. (until confronted with the polygraph result) and repeated that E.R.'s mother said that he had not raped E.R. E.g., Pretrial Ex. 7 at 8-11, 14, 15, 22. In court, he responded to questions asked, explained his awareness of the availability of public defenders, and described his interactions with the police in fair detail. 2RP 10-11, 15-31.

There was no evidence presented to the trial court that Escobar suffered any particular mental illness. While Escobar testified that he was disabled and mentioned in his statements to the investigators that he had been hospitalized in the past for mental problems, the nature of those problems was not disclosed. Although Escobar's competency had been the subject of an

examination at Western State Hospital in the months before trial,⁸ he did not present evidence that he currently suffers a mental illness that affects his ability to understand his rights or to voluntarily decide to waive them.

The trial court's finding that all of Escobar's statements were voluntary was supported by overwhelming evidence and should be affirmed.

c. Escobar Knowingly, Intelligently And Voluntarily Waived His Constitutional Rights.

Escobar does not challenge the three trial court findings that he was advised of his Miranda rights each time he was interviewed. These unchallenged findings are verities on appeal. Hill, 123 Wn.2d at 644.

Escobar nevertheless claims on appeal that some of his statements during the interview and during his testimony establish that he did not understand his rights. App. Br. at 16. The trial court rejected this claim below and its findings are supported by overwhelming evidence.

The court's finding that after each advisement of his constitutional rights, the defendant indicated that he acknowledged

⁸ CP 4-10.

and understood them, is supported by the testimony of Knudsen and Brunson and the recordings and transcripts of the first and third interviews. Evidence of the acknowledgement included Escobar's signature, which appeared six times on the two Advice of Rights forms. 1RP 58, 72, 103-05; Pretrial Ex. 8. Escobar also testified that he understood each of his rights, and he signed the advice forms. 2RP 20-22, 27-28.

A defendant need not understand all of the legal subtleties of his exercise or waiver of his constitutional rights in order for the court to find that he knowingly and intelligently waived those rights. "[T]he 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. Harrell, 83 Wn. App. 393, 402, 923 P.2d 698 (1996)(citing State v. Aiken, 72 Wn.2d 306, 434 P.2d 10 (1967), vacated on other grounds, Wheat v. Washington, 392 U.S. 652, 88 S. Ct. 2302, 20 L. Ed. 2d 1357 (1968)). This Court has observed that it would be surprised if many adults "understand the full import of the exercise or waiver of their constitutional rights." Harrell, 83 Wn. App. at 402.

As the court found in Harrell, even a juvenile with a learning disability and attention deficit hyperactivity disorder has the capacity to knowingly and intelligently waive constitutional rights, when he is a functioning individual who can understand well enough to act to his own benefit. Id. at 401-04. The Washington Supreme Court has held that a 16-year-old can make a statement voluntarily and intelligently, noting that many defendants of a similar age or younger have been found to have voluntarily confessed. Unga, 165 Wn.2d at 108-09. The United States Supreme Court has reached the same conclusion. Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

Even people of quite low intelligence may be capable of knowingly and intelligently waiving their rights. E.g., State v. Hutchinson, 85 Wn. App. 726, 739-41, 938 P.2d 336 (1997), rev'd on other grounds, 135 Wn.2d 863, 959 P.2d 1061 (1998) (IQ of 79); Cushing, 68 Wn. App. at 392-95 (defendant diagnosed as "mildly mentally retarded"). Suspects who are mentally ill also may be capable of intelligently waiving their rights. E.g., State v. McDonald, 89 Wn.2d 256, 571 P.2d 930 (1977), overruled on other grounds, State v. Sommerville, 111 Wn.2d 524, 760 P.2d 932 (1988) (paranoid schizophrenic defendant who was delusional and

was found incompetent to stand trial); Cushing, 68 Wn. App. at 392-95 (mentally ill defendant). As the Supreme Court explained in McDonald, "The test is whether defendant knew that he had the right to remain silent, not whether he understood the precise nature of the risks of talking." McDonald, 89 Wn.2d at 264.

There is no indication that Escobar was of other than normal intelligence. There is no evidence that Escobar suffered from a mental illness that, at the time of the questioning, interfered with his ability to understand his rights, in light of his own repeated assertions that he did understand his rights.⁹

There is no question that Escobar was aware that he was being questioned about sexual contact with E.R., a young child, on a particular occasion, and that it was a serious allegation. Courts have focused on that elementary awareness as a basis for finding that waivers were intelligent. Unga, 165 Wn.2d at 109; State v. Massey, 60 Wn. App. 131, 142, 803 P.2d 340, rev. denied, 115 Wn.2d 1021 (1990).

Escobar had no difficulty communicating with the police. Interviewers had no difficulty communicating with him and had no

indication that he did not understand either the advice of rights or the questions they asked of him. 1RP 63, 66-67, 106-09.

Escobar also made thoughtful decisions about his responses during questioning. In the first interview, he pointed out repeatedly that E.R.'s mother confirmed that he had not raped E.R., and that E.R.'s father had threatened him after E.R. reported the assault. Pretrial Ex. 7 at 7-10, 14, 17, 22-23. In the last interview, after he admitted several times that he had licked E.R.'s vagina, Escobar told Knudsen to stop asking that question "because it's traumatizing to me," continuing, "I already told you that but please don't repeat it to me, please." Pretrial Ex. 9 at 6. The decision to decline to answer some questions indicates that a suspect understands his rights. State v. Parra, 96 Wn. App. 95, 977 P.2d 1272, rev. denied, 139 Wn.2d 1010 (1999). The trial court found it a significant factor in this case. 2RP 49.

In sum, Escobar was a 49-year-old man who had some knowledge of the criminal justice system, and knew about the availability of public defenders. There is no dispute that he was properly advised of his rights. The trial court's findings

⁹ The claims of subnormal intelligence and "apparent mental illness" are discussed more fully in the previous section of this brief.

that his three separate written waivers of his constitutional rights were freely and voluntarily given, and that his statements were voluntarily made, were supported by substantial evidence. The court's conclusion that the statements were admissible should be affirmed.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Escobar's conviction.

DATED this 29 day of November, 2010.

Respectfully submitted,

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By: DLW
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Appendix 1

Appendix 1

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KING COUNTY, WASHINGTON

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 09-1-00755-8 SEA
)	
vs.)	
)	FINDINGS OF FACT AND
JOSE ESCOBAR,)	CONCLUSIONS OF LAW
)	PURSUANT TO CrR 3.5
)	
)	
)	
)	

This matter came before the Honorable Helen Halpert for pre-trial matters in November 2009. The defendant was present represented by his attorney, Victoria Foedisch. The State of Washington was represented by Senior Deputy Prosecuting Attorney Julie Kays.

I. FINDINGS OF FACT

1. On January 15, 2009, Detective Knudsen, with the King County Sheriff's Department, arrived at the defendant's apartment to arrest him. Knudsen spoke with the defendant first in English, and when the defendant indicated he did not speak English that well, Knudsen spoke with him entirely in Spanish. Knudsen is proficient in speaking and understanding the Spanish language. He has several years of coursework in Spanish from various learning institutions, and he has spoken Spanish regularly while performing his job as a KCSO patrol deputy and detective.

2. The defendant identified himself by name, and answered various questions concerning his date of birth, social security number, and address. Knudsen needed this information in order to book the defendant into jail. The defendant had not been advised of his Miranda rights prior to Knudsen asking him these booking type questions. The defendant was arrested and transported to the Burien precinct of the KCSO some five minutes away.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 3.5 - 1

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1 3. Once at the Burien precinct, the defendant was placed in an interview room. The
 2 interview room was audio recorded. The entire conversation was recorded with the permission of
 3 the defendant. A transcript of the conversation was marked as an exhibit and admitted into
 4 evidence for pre-trial purposes. Detective Knudsen spoke with the defendant in Spanish.
 5 Knudsen advised the defendant of his Miranda warnings using a pre-printed rights form in the
 6 Spanish language. This form was admitted into evidence for pre-trial purposes. The defendant
 7 signed his name indicating he understood his rights. He also indicated that he wished to waive
 8 his rights and speak with the detective, and signed his name under the waiver portion.

9 4. During this January 15, 2009 conversation with the defendant at the precinct, Knudsen
 10 asked the defendant if he would submit to a polygraph examination, and the defendant agreed to
 11 do so.

12 5. Knudsen did not threaten or promise the defendant anything in exchange for the
 13 defendant giving a statement. The defendant did not at any point indicate that he did not
 14 understand his rights, he did not exercise his right to remain silent, nor to have a lawyer.
 15 Detective Knudson observed that the defendant was tracking his questions and that the defendant
 16 did not appear to have any problems understanding him.

17 6. On January 16, 2009, the defendant was checked out of the King County Jail and taken to
 18 an interview room in the King County Courthouse for a polygraph examination. Ed Fuentes,
 19 Washington state and court certified Spanish translator/interpreter, was present for this
 20 conversation to act as a translator for the defendant. Jason Brunson is a polygraph examiner for
 21 the KCSO. Brunson has been in law enforcement for over 15 years, and has spent the past five
 22 years as a polygraph examiner for the KCSO. Detective Knudsen observed the entire
 23 conversation between Brunson and the defendant through a one-way mirror and sound system.

24 7. Brunson spoke with the defendant with the use of Mr. Fuentes, the Spanish interpreter.
 Brunson verbally advised the defendant of his Miranda warnings using a pre-printed form. This
 form was admitted into evidence for pre-trial purposes. The defendant signed his name indicating
 he understood his rights. The defendant also indicated that he wished to waive his rights and
 speak with Brunson and signed his name under the waiver portion.

8. Brunson asked the defendant to explain to him what had occurred, and the defendant
 spoke with Brunson. Following the defendant's narrative, Brunson discussed with the defendant
 the polygraph questions he would ask of him. The defendant was then hooked up to the
 polygraph machine and the test was administered. The defendant was informed by Brunson that
 he had failed the polygraph examination. The defendant then spoke with Brunson, and admitted
 that he had placed his mouth on ER's vagina and licked it.

9. Brunson did not threaten or promise the defendant anything in exchange for the
 defendant giving a statement. The defendant did not, at any point, indicate that he did not
 understand his rights, he did not exercise his right to remain silent, nor to have a lawyer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
 PURSUANT TO CrR 3.5 - 2

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1 Brunson observed that the defendant was tracking his questions and that the defendant did not
2 appear to have any problems understanding him.

3 10. Within minutes of concluding his interview with the defendant, Knudsen entered the
4 interview room. Knudsen, with the assistance of Mr. Fuentes, took a recorded statement from
5 the defendant. The defendant was advised of his Miranda warnings, using the exact same form
6 that he used on the 15th of January. The defendant again affixed his signature to the form
7 indicating he understood his rights, and that he wanted to speak with Knudsen. The defendant
8 proceeded to give a recorded statement to Knudsen. A transcript of that statement was admitted
9 into evidence for pre-trial purposes.

10 11. Knudsen did not threaten or promise the defendant anything in exchange for the
11 defendant giving a statement. The defendant did not at any point indicate that he did not
12 understand his rights, he did not exercise his right to remain silent, nor to have a lawyer.
13 Detective Knudson observed that the defendant was tracking his questions and that the defendant
14 did not appear to have any problems understanding him.

10 II. DISPUTED FACTS

11 12. The defendant testified during this pre-trial hearing. He testified on direct that he did not
12 have an understanding of the court system in the United States; that he read little English; that he
13 had been through only a small amount of schooling in his native El Salvador. The defendant
14 testified while on direct that he did not understand his rights, but then on cross examination
15 admitted that he understood each of the enumerated rights that were read to him. He further
16 testified that he wanted to talk with Knudsen and Brunson to get out his side of the story.

14 III. CONCLUSIONS OF LAW

15 The court, having considered the testimony of witnesses, exhibits admitted into evidence,
16 authority and argument of counsel, hereby enters the following conclusions of law:

17 13. On January 15, 2009, the defendant was placed under arrest by Detective Knudsen.
18 Knudsen's questions of the defendant concerning his name, date of birth and other biographical
19 information were necessary to book the defendant into custody. These routine booking questions
20 fall outside of the protections of Miranda. The statements the defendant made in response to
21 these routine booking questions are admissible in the State's case in chief.

22 14. On January 15, 2009, the defendant was in custody to the degree associated with formal
23 arrest when he was taken to an interview room at the KCSO Burien precinct. The defendant was
24 advised of his Miranda warnings, and the defendant acknowledged those rights and waived those
rights. The court finds that the defendant made a knowing, intelligent and voluntary waiver of
his rights. At the time of the 3.5 hearing, the State only requested that the court make a finding
of voluntariness with respect to this statement. The court at that time, found that the statement
was voluntary. The defendant later testified at trial, and the State requested to present this
January 15th statement in its rebuttal case. The court at that time, at the request of the State,

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 3.5 - 3

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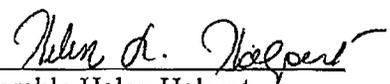
1 expanded its pre-trial ruling to find that not only was this statement voluntary, but that it would
2 have been admissible in the State's case in chief, if requested.

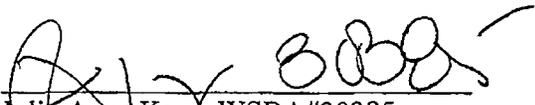
3 15. On January 16, 2009 the defendant was in custody to the degree associated with formal
4 arrest when he spoke, with the assistance of an interpreter, to Jason Brunson. The defendant was
5 advised of his Miranda warnings, and made a knowing, voluntary and intelligent waiver of those
6 rights. The defendant's statements made to Brunson are admissible in the State's case in chief.

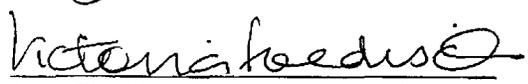
7 16. Immediately following the defendant's conversation with Brunson, the defendant spoke
8 with Detective Knudson. The defendant remained in custody. The defendant was advised of his
9 Miranda warnings and made a knowing, voluntary and intelligent waiver of those rights. The
10 defendant's statements made to Knudson are admissible. The court finds that the defendant, at
11 page 6 of the transcript of the interview, in essence, invoked his right to remain silent as to the
12 issue of whether he licked ER's vagina when he stated "Uh, please ask him not to ask me that
13 question anymore....". The court finds that the defendant's statements made after that point are
14 not admissible, and directs the State to make the appropriate redactions to the statement to
15 conform with the court's ruling. With this exception noted, the Court finds that the defendant's
16 statements to Detective Knudson are admissible in the State's case in chief.

17 The court hereby incorporates by reference and without limitation its oral rulings as set
18 forth on the record.

19 Signed this 15 day of January, 2010.

20 
21 The Honorable Helen Halpert

22 
23 Julie Anne Kays, WSBA#30385
24 Senior Deputy Prosecuting Attorney

25 
26 ~~Victoria~~ Foedisch, Attorney for Defendant
27 VICTORIA WSBA# 15763