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May 03, 2012
Court of Appeals
Division III
State of Washington

No. 30412-4-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

ENRIQUE GONZALEZ MARTINEZ,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

By an Information filed in the Chelan County Superior Court the defendant, Enrique Gonzalez-Martinez, was charged with Third Degree Rape. *CP 15-16*. Prior to trial, the Information was amended to correct certain language. *CP 18-19 and RP 4*.¹ A CrR 3.5 hearing was held wherein the court found that post-arrest statements were admissible at trial. *See, CP 67-71 (Findings of Fact, Conclusions of Law, and Decision Admitting Statements Pursuant to CrR 3.5)*.

The case was tried to a jury on September 20 and 21, 2011. *See, RP (September 20 and 21, 2011)*. The jury found the defendant guilty of the charged offense. *CP 46 (Verdict Form)*. Upon sentencing, the defendant was ordered to to serve a standard range term of 10 months confinement. *CP 72-80 (Judgement and Sentence)*. This timely appeal followed.

¹ Throughout this brief “RP” will refer to the proceedings reported on September 20 and 21, 2011.

B. RELEVANT FACTS

Case Overview.

On July 8, 2011 the defendant visited his friend Patsy G. at her Wenatchee residence. RP 75-76. While there the defendant asked Patsy G.'s granddaughter, Melissa G., for a ride to the store to buy beer. *Id.* at 52-53 and 78. On the drive to and from the store, the defendant fondled Melissa G.'s breasts and digitally penetrated her vagina. *See, Id.* at 54-58. Melissa G. did not consent; in fact, she repeatedly told the defendant to stop. *Id.* at 56 and 73-74.

When Melissa G. and the defendant returned to the residence, Melissa G. was extremely emotional. *Id.* at 58-59 and 79. Melissa G. went straight to her room and stayed there until the defendant left. *Id.* Once the defendant left, Melissa G. told her grandmother what happened. *Id.* at 80. Because she hurt and had noticed blood when she urinated, Melissa G. went to the hospital. *Id.* at 60-61.

Police were called from the hospital. *Id.* at 61-62. In addition, a sexual assault examination was conducted. *Id.* at 87. In the examination a forensic nurse examiner found a laceration, bruising, and swelling to Melissa G.'s genitalia. *Id.* at 89 and 94. The findings were consistent

with sexual assault. *Id.* at 90 and 94. Biological samples were collected for possible DNA analysis. *Id.* at 90-91.

The primary investigator was Wenatchee Detective Jeff Ward. *Id.* at 104. After talking with Melissa G. and Patsy G., Detective Ward used local records to identify and locate the defendant. *Id.* at 107-8. Detective Ward contacted the defendant at his residence, placed him under arrest, and transported him to the hospital to collect biological samples. *Id.* at 108-12. Detective Ward then took the defendant to the county jail where he obtained a recorded statement before booking him into jail. *Id.* at 112-17. The defendant claimed the sexual contact was consensual. *Id.*, and *see, Exhibits 1 and 2.*

Facts Specific to Defendant's Statements.

At approximately 2:00 a.m. on July 9, 2011 Wenatchee Police Detective Jeff Ward and Officer Ron Wilson contacted the defendant at the defendant's Malaga, Washington residence intending to arrest the defendant pursuant to the allegation of rape. *CP 68-71 (Finding of Fact I)*. Upon contact, Detective Ward asked the defendant his name; the defendant identified himself as Enrique Gonzalez-Martinez and added that

he was normally called "Henry." *CP 68-71 (Finding of Fact 2)*. Detective Ward asked the defendant if he knew Mellissa G.; the defendant said he did and identified her as Pat's granddaughter. *Id.* Detective Ward told the defendant he was under arrest and explained that he had a search warrant for DNA. *CP 68-71 (Finding of Fact 3)*. The defendant was handcuffed and escorted to a patrol vehicle by Officer Wilson. *Id.*

When Detective Ward reached the patrol car, the defendant asked, "Is this because Melissa said I raped her?" *CP 68-71 (Finding of Fact 4)*. No question or statement had been made by Detective Ward or Officer Wilson to elicit an incriminating statement. *Id.* Detective Ward advised the defendant of his *Miranda* rights using a *Miranda* card borrowed from Officer Wilson. *Id.* After being advised of his rights, the defendant asked no questions about his rights. *Id.*

The defendant was transported to Central Washington Hospital for a sexual assault examination. *CP 68-71 (Finding of Fact 5)*. Evidentiary samples were collected pursuant to a search warrant. *CP 68-71 (Finding of Fact 6)*. During the examination, Detective Ward explained what was being done and gave the defendant instructions pursuant to execution of the search warrant. *Id.* Upon completion of evidence collection at the hospital, the defendant was transported to the Chelan County jail for

booking. *CP 68-71 (Finding of Fact 7)*. No interrogation occurred during transport or at the hospital. *CP 68-71 (Findings of Fact 5, 6, and 7)*.

While booking the defendant at the jail, Detective Ward asked the defendant if he knew why he was being arrested. *CP 68-71 (Finding of Fact 8)*. The defendant answered: "because I was stupid." Detective Ward asked the defendant what he meant. *Id.* The defendant indicated that he had sexual contact with Melissa G. *Id.* Detective Ward asked the defendant if he wanted to give a recorded statement. *Id.* The defendant answered "yes." *Id.*

Detective Ward and the defendant went into a counselor's office in the jail. *CP 68-71 (Finding of Fact 90)*. Detective Ward produced and activated a digital recorder. *Id.* After stating the date and time, Detective Ward asked the defendant if he had permission to record the defendant. *Id.* The defendant answered: "Yes you do." *Id.* Detective Ward then advised the defendant of his rights, reading from the same card used outside the defendant's residence. *Id.* The defendant stated that he understood his rights and that he wanted to talk. *Id.* The defendant answered questions regarding the alleged rape, admitting to sexual contact and intercourse, specifically digital penetration of the victim's vagina. *Id.* The defendant stated the conduct was consensual. *Id.* At the end of the

statement, Detective Ward stated the ending time before concluding the recording. *Id.*

From the time Detective Ward first contacted the defendant and the start of the recorded statement, approximately forty minutes had elapsed. *CP 68-71 (Finding of Fact 10)*. Throughout the contact, Detective Ward's manner was low-key and calm. *CP 68-71 (Finding of Fact 11)*. No threats or promises were made; nor was there any coercive or abusive conduct. *Id.*

The *Miranda* warnings read to the defendant correctly informed the defendant of his rights, including that he could exercise his rights at any time. *CP 68-71 (Finding of Fact 12)*. There was no indication that the defendant did not understand his rights or that he wanted to invoke a right. *CP 68-71 (Findings of Fact 11 and 13)*. Thus, the court found, the defendant understood his rights and his statements were the product of a knowing and voluntary waiver of rights, free of duress, threats, and promises. *CP 68-71 (Finding of Fact 14)*.

II. ISSUES PRESENTED

- A. WHETHER A DECISION ADMITTING STATEMENTS WILL BE UPHeld WHERE, IN UNCHALLENGED FINDINGS OF FACT, THE TRIAL COURT FOUND THE DEFENDANT WAS FULLY AND ACCURATELY ADVISED OF HIS RIGHTS AND VOLUNTARILY WAIVED HIS RIGHTS?**
- B. WHETHER A COURT MAY PROPERLY ADMIT A DEFENDANT'S STATEMENTS TO POLICE THOUGH APPROXIMATELY FORTY MINUTES ELAPSED BETWEEN THE ADVISEMENT OF RIGHTS AND QUESTIONING?**
- C. WHETHER POST-MIRANDA STATEMENTS FOLLOWING AN UNCOERCED CUSTODIAL ADMISSION MAY PROPERLY BE ADMITTED?**

**D. WHETHER IMPROPER ADMISSION OF A DEFENDANT'S
ADMISSIONS MAY BE HARMLESS WHERE THE
UNTAINTED EVIDENCE NECESSARILY ESTABLISHES
GUILT?**

III. ANALYSIS

**A. THE TRIAL COURT'S DECISION IS SUPPORTED BY
UNCHALLENGED FINDINGS OF FACT AND
SUBSTANTIAL EVIDENCE.**

The issues on appeal relate solely to the trial court's decision admitting the defendant's statements to Detective Ward. Following a CrR 3.5 hearing the trial court concluded those statements were the result of a knowing, voluntary, and intelligent waiver by the defendant. *CP 68-71 (Conclusion Law 5)*. The defendant assigns error to this conclusion and to the decision admitting his statements. No error is assigned to the court's findings of fact.

Unchallenged findings of fact entered following a CrR 3.5 hearing are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d

172 (1997). Challenged findings of fact will be verities if supported by substantial evidence in the record. *Id.* A reviewing court will not disturb a trial court's conclusion that a waiver was voluntarily made if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding. *State v. Athan*, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

The trial court herein found the defendant was fully and accurately advised of his rights. The court, moreover, found that the defendant understood and voluntarily waived his rights. These facts are verities on appeal. Further, examination of the record demonstrates the trial court's findings were supported by substantial evidence. Accordingly, there is no basis on which to upset the trial court's conclusion that the defendant knowingly and voluntarily waived his rights.

B. AN INTERVAL OF FORTY MINUTES BETWEEN AN ADEQUATE AND EFFECTIVE ADVICE OF RIGHTS AND QUESTIONING DOES NOT NECESSITATE RE-ADVISEMENT OF *MIRANDA* WARNINGS.

Approximately forty minutes passed between the defendant's arrest and advice of rights and the start of questioning. On this basis alone, the defendant argues the trial court erred in concluding his statements were voluntary. The State submits that once the defendant was adequately and effectively advised of his rights, there was no need to re-advise him before questioning.

The voluntariness of a confession is considered in light of the totality of the circumstances. *See, e.g., State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). However, the "totality-of-the-circumstances" test specifically applies to determine whether a confession was coerced by any express or implied promise or by the exertion of any improper influence. *Id.*; *see also, Broadaway, supra at 132 (the inquiry under the totality of the circumstances is whether the confession was coerced).*

Once a defendant has been adequately and effectively warned of his constitutional rights, it is unnecessary to give repeated warnings prior

to taking a later in-custody statement. *State v. Gilcrist*, 91 Wn.2d 603, 607, 590 P.2d 809 (1979); *see also, State v. Vidal*, 82 Wn.2d 74, 78, 508 P.2d 158 (1973) (*re-advisement not required where defendant was advised of rights in Idaho but questioning occurred in Tacoma after vehicle trip from Idaho*); *State v. Rowe*, 77 Wn.2d 955, 468 P.2d 1000 (1970) (*statements taken up to 48 hours after advice of rights admissible without re-advisement*); and *State v. Duhaime*, 29 Wn. App. 842, 631 P.2d 964 (1981), *review denied*, 97 Wn.2d 1009 (1982) (*two hour interval did not require re-advisement*).

Similarly, federal cases have found confessions voluntary in spite of significant passages of time between the advice of rights and questioning. In *United States v. Rodriguez-Preciado*, 399 F.3d 1118 (9th Cir. 2005), fifteen hours had passed. In *Puplampu v. United States*, 422 F.2d 870 (9th Cir. 1970), there was an interval of two days. And, in *Maguire v. United States*, 396 F.2d 1327 (9th Cir. 1968), three days had gone by.

The defendant's citation to *United States v. Gillyard*, 726 F.2d 1426 (9th Cir. 1983), is unavailing. There the defendant was advised of his rights during a voluntary polygraph test, but not before a subsequent interrogation by different officers. The trial court found the circumstances

were coercive. *Id.* While finding no error on the part of the trial court, the appellate court also observed that the trial court could have found there was a valid waiver. All-in-all, the passage of time alone appears to have been inconsequential to the result of the case.

Here the trial court found the defendant was fully and accurately advised of his rights and understood those rights. With no evidence of coercive police conduct, the trial court appropriately concluded that the defendant voluntarily relinquished his rights. Given the complete absence of any sort of coercive police conduct, the forty minute interval from the moment the defendant was advised of his rights to the start of questioning, did not render admission of the defendant's statements erroneous.

C. THE DEFENDANT WAS EFFECTIVELY RE-ADVISED OF HIS RIGHTS SUCH THAT HIS RECORDED STATEMENT WAS THE FRUIT OF A KNOWING AND VOLUNTARY WAIVER OF RIGHTS.

After the defendant's initial inculpatory statements, Detective Ward asked the defendant if he wanted to make a statement. When the defendant said he did, he was taken to an office where, following re-

advisement of his *Miranda* rights, the defendant admitted having consensual sexual contact with Melissa G. The defendant argues his recorded statements should have been suppressed notwithstanding the re-advisement of rights.

Even assuming the defendant's initial statements at the booking window were tainted by Detective Ward's failure to re-advise the defendant of his rights, the voluntariness of his subsequent recorded statement was unaffected and would have been admissible at trial. *See, State v. Russell*, 125 Wn.2d 24, 57, n. 8, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995), *citing, Oregon v. Elstad*, 470 U.S. 298, 309, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985); *see also, State v. Wethered*, 110 Wn.2d 466, 474, 755 P.2d 797 (1988).

The defendant's statements at the booking window were uncoerced. Indeed, there is no evidence tending to suggest any sort of coercion at any time. Nor is there any reason to believe that Detective Ward purposefully employed a two-step interrogation process such that the recorded advice of rights was rendered ineffective. *See, State v. Hickman*, 157 Wn. App. 767, 775-76, 238 P.3d 1240 (2010).

The defendant was fully, and accurately, advised of his rights - twice. The recorded *Miranda* warnings clearly informed the defendant that he could exercise his rights at any time. The defendant understood his rights and voluntarily waived his rights. Even if, therefore, the statements at the booking window should have been preceded by fresh *Miranda* warnings, the recorded statements flowed from a voluntary and knowing waiver.

D. THE VICTIM'S UNREFUTED TESTIMONY WAS CORROBORATED BY SUBSTANTIAL EVIDENCE, SUCH THAT ANY ERROR IN ADMITTING STATEMENTS WAS HARMLESS.

The defendant concedes, and the State agrees, that admission of statements contrary to *Miranda* can be harmless. See, *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991), *review denied*, 118 W.2d 1006 (1991). The test is whether the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.*, *citing, see, State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

The "untainted" evidence herein includes the victim's unrefuted testimony, physical evidence consistent with a sexual assault, evidence of the victim's manner and demeanor immediately after the assault, and the defendant's statement upon arrest (*Is this because Melissa said I raped her?*). Standing alone, this evidence leads to a finding of guilt. Furthermore, the defense herein was consent. The admitted statements allowed the defendant to present his defense without having to testify. If there was error, therefore, it was harmless in this case.

IV. CONCLUSION

For the foregoing reasons, the judgment of the Chelan County Superior Court should be affirmed.

Dated this 3rd day of May, 2012.

Respectfully submitted,

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Chelan County Prosecuting Attorney



By: Roy S. Fore WSBA #19604
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ENRIQUE GONZALEZ MARTINEZ,

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) Court of Appeals No. 30412-4-III
) Chelan County No. 11-1-00268-4
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) DECLARATION OF SERVICE
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I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 3rd day of May, 2012, I electronically transmitted to:

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Court of Appeals, Div. III
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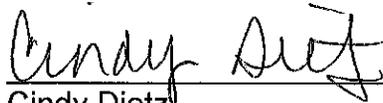
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Signed at Wenatchee, Washington, this 3rd day of May, 2012.



Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office