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Court of Appeals
Division III
State of Washington

32113-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

18

LUIS A. AVILA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF ASOTIN COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering the following findings:
 1. On June 12, 2011, Bonnie J. Larson, an elderly resident of the Sycamore Glen Family Home, a facility licensed by the state for long-term care, told various people at her church that she had been forcibly raped by an employee of the home the previous night
 2. On June 13, 2011 while at a local hospital for a routine appointment, Ms Larson reported again that she had been raped at Sycamore Glen on June 11, 2011 by a caregiver named "Luis." She was given a rape examination but there were no overt signs of assault. The medical personnel collected "swabs" as part of a standard rape kit, which were sent to the Washington State Patrol Crime Lab for analysis.
 3. The medical personnel contacted law enforcement and Detective Jackie Nichols of the Asotin County Sheriffs Office was assigned the case and responded to the hospital to investigate.

4. Detective Nichols interviewed Ms Larson at the hospital and spoke with other potential witnesses.

5. The Detective contacted Saree Kromrei, the Administrator of Sycamore Glen. Ms Kromrei told Detective Nichols that the employee identified as “Luis” was LUIS A. AVILA. She indicated that she was a friend of Mr. AVILA’s and that she had heard about the report but did not believe it. She told the Detective that she had already spoken with Mr. AVILA and that he had told her that the accusations were “completely false.” Throughout the entire investigation Ms Kromrei advocated for, and assisted Mr. AVILA.

9. The interview room is regularly used for non-custodial interviews of witnesses, victims (including child victims), and persons of interest. The room is decorated in a nonthreatening manner with “homey” decor which includes muted lighting, upholstered chairs, pictures on the walls, and small throw rug on the floor.

13. Prior to asking any questions, Detective Nichols told Mr. AVILA that he was not under arrest and that he was free to leave at any time. At no time during the interview was Mr. AVILA handcuffed or physically restrained in any manner. Neither he nor Ms Kromrei was searched nor were they even asked whether they were carrying any weapons.

16. The Detective began the interview by telling Mr. AVILA about the accusations and asked him for his account of the evening in question.

(CP 98-101)

2. The court erred in concluding “a reasonable person would have felt that he or she was at liberty to terminate the interrogation and leave” (CP 102, Conclusion 1)
3. The court erred in concluding “Detective Nichols’ interview of LUIS A. AVILA was not a custodial interrogation for the purposes of CrR 3.5 to the extent that it would trigger the requirement that she advise him of his rights under *Miranda*.” (CP 102, Conclusion 2)

4. The court erred in entering an order stating the Mr. Avila's statements during the interview were voluntarily made and admissible at his trial. (CP 102, Order)

B. ISSUES

1. When, following a CrR 3.5 hearing, the court enters numerous findings incorporating information obtained from sources other than evidence introduced at the hearing and supporting the court's conclusion that the defendants are admissible, should the court's order be reversed?
2. When substantial evidence shows that a Guatemalan immigrant is informed that he has been accused of rape and is asked to come to the sheriff's office, where a uniformed officer places him in a closed room and asks him to respond to the allegations, does the court err in concluding the suspect's answers were made voluntarily, *Miranda* warnings were not required, and the suspect's statements are admissible at trial?

C. FACTUAL BACKGROUND

This court granted the State's motion to remand for a hearing on the admissibility of statements Luis Avila purportedly made during an interview by Asotin County Sheriff's Detective Jackie Nichols.

Detective Nichols testified that she investigated a report of an alleged rape. (RP 5) The suspect was identified as a person named "Luis" and Detective Nichols testified that she was able to figure out that this was Luis Avila. (RP 6) She interviewed the victim, who was a resident of an adult care facility, and contacted employees of the residence and Mr. Avila. (RP 7) She told Mr. Avila she wanted to talk to him about the case and asked him to come to the sheriff's office. (RP 7) He said that he would. (RP 8)

After she spoke with Mr. Avila, Detective Nichols was contacted by Sherry Kromrei, the woman who runs the adult care center. (RP 8) Ms. Kromrei told Detective Nichols she was a friend of Mr. Avila and said she wanted to come to the interview. (RP 8) Detective Nichols said that was fine. (RP 8)

Three days later Mr. Avila arrived at the sheriff's office. (RP 8) Detective Nichols, Mr. Avila and Ms. Kromrei went to the interview room. (RP 10) Detective Nichols testified that she told them they were free to leave and could go out either the back door or the front door, and

she told them the interview room door was unlocked. (RP 10, 19) When the detective asked if she could record the interview, Ms. Kromrei and Mr. Avila talked about it and Mr. Avila said he did not want the interview recorded. (RP 11)

Detective Nichols told the court that she knew Mr. Avila already knew about the allegations so she asked him to explain what happened. (RP 11) She asked him if he had had any sexual contact with the victim and whether there was any reason his DNA would be found inside the victim. (RP 11-12) Mr. Avila said no. (RP 12)

She testified that Mr. Avila appeared to understand her questions and his responses were appropriate. (RP 12) He did not ask for a lawyer and he did not ask to leave. (RP 12) He did not ask her to stop asking questions. (RP 13) After the interview was over, Mr. Avila left. (RP 13)

Mr. Avila testified that, before Detective Nichols called him, Ms. Kromrei called and told him the detective wanted to interview him. (RP 25) He was afraid he was going to be arrested because he knew there was an outstanding immigration warrant and because he had been working “under the table” for Ms. Kromrei. (RP 25) He testified that he was from Guatemala. (RP 26) Ms. Kromrei told him she would talk to Detective Nichols and ask if she could be with him during the interview. (RP 27)

She assured him that she would be able to help him if he was arrested.
(RP 27)

He told the court Ms. Kromrei drove him to the interview. (RP 29)
He did not recall being told that he was free to leave before the interview
began. (RP 29) He did not recall being shown the back door. (RP 29)
After the interview the detective told him he was free to go and that he
was not under arrest. (RP 31)

The State cross-examined Mr. Avila at length regarding his prior
experience with the legal system between 2006 and 2006, including
divorce proceedings, charges of domestic violence, violation of a no
contact order and failure to appear, failure to provide proof of insurance
and driving under the influence. (RP 32-41) Mr. Avila acknowledged
that, based on these experiences, he was aware that he had a right to an
attorney. (RP 42)

The court found the interview situation was not tantamount to full
custodial arrest and, based on Ms. Kromrei's presence and Mr. Avila's
criminal history, it was obvious he knew he could refuse to answer the
detective's questions and concluded his statements were admissible. (RP
56-57)

D. ARGUMENT

“The court reviewing a decision to deny a motion to suppress determines whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. *State v. Rosas–Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013); *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). The conclusion as to whether the defendant was in custody is reviewed *de novo*. See *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

1. THE COURT’S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial court errs if it enters suppression hearing findings of fact that are not supported by substantial evidence. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). “‘Substantial evidence,’ in the context of a criminal case, means evidence sufficient to persuade ‘an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.’” *State v. Summers*, 107 Wn. App. 373, 388, 28 P.3d 780, 43 P.3d 526 (2001) (quoting *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)).

The trial court entered numerous allegedly “undisputed” findings for which there is no support in the record. (CP 98-100)

No evidence supports the finding that Bonnie Larson was a member of Sycamore Glen Family Home, or that Sycamore Glen was licensed by the state, or that Ms. Larson told various people at her church anything. (CP 98, Finding 1) No evidence supports the finding Ms. Larson was at a routine appointment when she reported that she had been raped at Sycamore Glen by a caregiver named “Luis.” (CP 98, Finding 2) No evidence supports the finding that any medical personnel contacted law enforcement, or that Detective Nichols responded to the hospital to investigate. (CP 98, Finding 3) No evidence supports the finding that Detective Nichols interviewed Ms. Larson at the hospital. (CP 98, Finding 4)

Detective Nichols testified that she received a report of rape allegations, providing “Luis” as the name of the suspect. (RP 6) She did not identify the alleged victim by name or state where the alleged rape occurred or to whom any reports were made. She told the court she initially interviewed the victim, who was a resident of an adult care facility, and began to investigate the things she was told, which included contacting Luis. (RP 6-7)

No evidence supports the finding that the detective contacted Sherry Kromrei, that Ms. Kromrei was the administrator of Sycamore Glen, that she did not believe the allegations against Mr. Avila, or that she advocated for Mr. Avila throughout the investigation. (CP 99, Finding 5) Detective Nichols told the court that Sherry Kromrei runs the adult care home and contacted her after the detective had told Mr. Avila she wanted to talk to him about the case and asked him to come to the sheriff's office. (RP 7-8) There is no evidence Mr. Avila requested Ms. Kromrei's presence at the interview. Ms Kromrei said she wanted to come to the interview with Mr. Avila, and stated that she was a friend of Mr. Avila. (RP 8) Apart from her discussing with Mr. Avila whether he should agree to have the interview recorded, there is no evidence Ms. Kromrei advocated for Mr. Avila. (RP 11, 19-20)

No evidence supports the finding that Mr. Avila arrived at the sheriff's office during regular working hours, or that the detective met them in the lobby. (CP 99, Finding 8) Detective Nichols told the court she wasn't sure how he got there, and when he arrived at the sheriff's office they went to the interview room. (RP 8-9) She did not remember who let him in through the locked door to the sheriff's office or whether she may have initially met him in the interview room. (RP 15-16) She did not mention the time when any of this happened.

The evidence does not support the finding that the interview room is decorated in a non-threatening manner with homey décor which includes muted lighting and a small throw rug on the floor. (CP 99, Finding 9) The detective testified that the room was more like a home than a jail and has a throw rug type carpet on the floor. (RP 9-10) Defendant objected to the detective's characterization of the room as "non-threatening" and the statement was withdrawn. (RP 9)

No evidence supports finding that before asking him questions the detective told Mr. Avila that he was not under arrest. (CP 99, Finding 13) She told the court she had told him and Ms. Kromrei they were free to leave but did not mention arrest. (RP 10-11) Mr. Avila testified she only told him he was not under arrest at the conclusion of the interview. (RP 30)

The finding that the detective began the interview by telling Mr. Avila about the accusations is not supported by the record. (CP 100, Finding 16) The detective testified that she knew he already knew about the allegations so she asked him to explain what happened. (RP 11)

The findings entered in support of the court's conclusions include numerous statements that are not supported by substantial evidence, or indeed in most cases by any evidence whatsoever. The court's oral findings suggest that the court considered Ms. Kromrei's presence as a

significant factor supporting the inference Mr. Avila knew he was free to terminate the interview:

[H]e had a intermediary he was going through Sherry Kromrei who made inquiry on his behalf the sheriff's office and was told that she would be able to attend and was able to attend sat with him throughout the proceedings. It was obvious that he understood that he had the ability to confer with Ms. Kromrei and to reasonably deny a request by the police because he denied permission to record his statement.

(RP 56) "There is no testimony that he asked Ms. Kromrei if he needed to answer questions or if he was free to go at any time even though he fully had the ability to do so" (RP 57)

Although no evidence showed Mr. Avila was ever interviewed by law enforcement as part of any of these proceedings, the trial court in the case stated, the court apparently assumed such an interview had occurred:

The testimony that he was somehow locked in the conference room I don't find to be credible and Mr. Avila was well aware what a custodial law enforcement environment looked like based upon his past history.

(RP 56)

In reaching its conclusions, the court relied on facts and assumptions that were not supported by evidence presented at this hearing.

2. THE COURT’S CONCLUSIONS WERE NOT SUPPORTED BY THE RECORD OR THE LAW.

The Fifth Amendment to the United States Constitution guarantees that “no person . . . shall be compelled in any criminal case to be a witness against himself.” *Griffin v. California*, 380 U.S. 609, 619, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). “The right against self-incrimination is liberally construed.” *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). Due process requires that a confession be voluntary and not the product of police coercion. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991).

The question of voluntariness is one of fact, to be determined by the trial court from the totality of all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). “The test for voluntariness is whether ‘the confession [is] the product of an essentially free and unconstrained choice by its maker.’” *State v. Thompson*, 73 Wn. App. 122, 867 P.2d 691 (1994).

Whether a person is in custody depends on “whether the suspect reasonably supposed his freedom of action was curtailed.” *State v. C.G.*, 84 Wn. App. 832, 836, 930 P.2d 350, *review denied*, 132 Wn.2d 1015 (1997), *citing State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989). “[T]he only relevant inquiry is how a reasonable person in the suspect’s

position would have understood his situation.” *United States v. Berkemer*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984).

Ms. Kromrei directed her request to be present during the interview to the detective and the detective granted the request. There is no evidence that Mr. Avila requested her presence or was even asked whether he wished to have Ms. Kromrei present. Ms. Kromrei represented to Mr. Avila that she would be in a position to help him, although there is no evidence she was in any way qualified to do so. Mr. Avila believed the interview might involve the fact that he had been working for Ms. Kromrei “under the table,” which may have constrained his sense of choice in responding to the request for the interview. (RP 25) This possibility also could implicate Ms. Kromrei’s motives for wishing to be present at Mr. Avila’s interview.

The court emphasized the importance of Ms. Kromrei’s presence at the interview, and apparently relied on it as support for the conclusion that Mr. Avila had come to and remained at the sheriff’s office voluntarily. (CP 99, Findings 5, 7, 8 and 12; CP 101, Conclusion 4)

The detective was certainly aware of the allegations, and when she asked Mr. Avila to tell her about the night in question she knew the question was “reasonably likely to elicit an incriminating response.” *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988). Moreover, Mr.

Avila had indeed been told of the allegations, namely that a woman who had been in his care had accused him of rape, and he was aware that this was why he had been asked to come to the sheriff's office. These circumstances would strongly suggest to Mr. Avila that "his freedom of action was curtailed." See *C.G.*, 84 Wn. App. at 836.

The court concluded that a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave. (CP 105, Conclusion 1) The court did not conclude that a reasonable person *in Mr. Avila's position* would not have felt that his freedom of action was not "significantly restrained." *Berkemer*, 468 U.S. at 441. Indeed a reasonable person who immigrated to the United States from Guatemala, with a somewhat limited command of English, about whose education nothing is known, who had prior convictions for minor offenses and was aware he had been identified as the person who had raped a woman who had been in his care, who was asked to come to the stationhouse for an interview, was admitted through a locked door and conducted to an interview room, who know that he and his former employer had engaged in unlawful employment practices and who was accompanied to the interview by that employer, and who was questioned by a uniformed detective about the alleged rape, might very reasonably believe that

despite assurance to the contrary he might not be allowed to leave the room.

The court also concluded that the interview was “not a custodial interrogation for the purposes of CrR 3.5 to the extent that it would trigger the requirement that she advise him of his rights under *Miranda*.” (CP 105, Conclusion 2) A statement is custodial for *Miranda* purposes not only when there has been an arrest, but whenever a person’s freedom of movement has been significantly restrained. *Berkemer*, 468 U.S. at 441, citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Warnings must be given whenever a person has been deprived of his freedom in any significant way. *Miranda*, 384 U.S. at 444.

A custodial interrogation occurs when police ask questions they “should know are reasonably likely to elicit an incriminating response.” *Sargent*, 111 Wn.2d at 650. The focus is on “the perceptions of the suspect, rather than the intent of the police.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

“*Miranda* warnings are required whenever there is a custodial interrogation.” *State v. Burt*, 24 Wn. App. 867, 871, 605 P.2d 342 (1979). In *Burt*, “defendant voluntarily came to the police station to pick up some documents, he stayed only a few minutes and then left the police station

without hindrance. There was no evidence that he was either required to come to the station or stay for any length of time.” *Id.* Mr. Burt went to the police station to pick up his property police had found in his car. He had not been asked to come to the station for an interview. The court found Mr. Burt’s response to questions was voluntary. *Id.* at 870.

Detective Nichols testified that she “asked him to come to the sheriff’s office.” The language is ambiguous and could readily be understood as stating a requirement. See *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004). In *Rankin*, “[t]he Court of Appeals . . . held that while an officer may not *require* a passenger to provide identification, unless there are independent grounds to question the passenger, the officer may *request* identification.” *Id.* at 694. The Supreme Court reversed, holding that “passengers are unconstitutionally detained when an officer requests identification.” *Id.* at 695. Although *Rankin* involved privacy interest in the context of a seizure, the same principle should apply in a context where the issue is whether an individual may reasonably believe he is in custody. In some contexts, a request for information, made by a uniformed police officer, is readily perceived as an order. Here, the officer’s request for an interview with the accused regarding an alleged victim’s claim that he had raped her, conducted by a uniformed officer in a closed room within the sheriff’s office, was perceived as such an order.

The court erred in finding *Miranda* warnings were not required and declining to suppress Mr. Avila's statements to Detective Nichols.

E. CONCLUSION

Mr. Avila's conviction should be reversed and the matter remanded for a new trial from which evidence of his involuntary statements to the detective should be excluded.

Dated this 3rd day of June, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No.32113-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
LUIS A. AVILA,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on June 3, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on June 3, 2015, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 3, 2015.


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