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Court of Appeals
Division III
State of Washington

NO. 34094-5

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

STATE OF WASHINGTON,

Appellant,

v.

ROGELIO NUÑEZ,

Respondent.

BRIEF OF APPELLANT

Respectfully submitted:
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I. IDENTITY OF APPELLANT

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

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The superior court erred in finding that principles of finality prevented the taking of testimony dispositive to a suppression issue before any ruling or judgment had issued.
2. The superior court erred in refusing to permit the State to present responsive testimony to a claim raised by defense for the first time in oral argument where no suppression motion had been filed and no notice of a suppression issue had been given.
3. Substantial evidence does not support the finding that the detective omitted any part of the *Miranda* advisement.
4. The superior court erred in holding that the State had the burden of proof in the Defendant's suppression motion.
5. The superior court erred in suppressing the Defendant's confession when:

- the Defendant was properly advised of his *Miranda* rights,
 - the statements were not custodial such that, regardless of the propriety of the advisement, *Miranda* did not apply, and
 - the confession was voluntary.
6. The superior court erred in denying the State's Motion for Reconsideration.
 7. The superior court erred in making a late finding that the statements were custodial based merely on the Defendant's presence at a sheriff's office where the location was by his own deliberate choice and in the face of all other evidence that the Defendant was free to leave prior to making his confession.
 8. The Appellant State assigns error to all disputed Findings of Fact 10-13 and to Conclusions of Law 1-5. CP 64.

Issues Pertaining to Assignments of Error

1. Whether it is error to close the record in a CrR 3.5 hearing under the principle of finality after a new factual claim is raised for the first time in oral argument?
2. Whether there is a tenable reason for a trial court to refuse to clarify a material point of confusion by taking a single additional statement of testimony during a pretrial hearing in

which testimony is being taken and before a ruling on the pretrial matter?

3. Whether the State has the burden of proof in the Defendant's suppression motion?
4. Whether *Miranda* was violated when the only facts on the record indicate that the Defendant was read and understood every part of the *Miranda* advisement?
5. Whether *Miranda* applied to the Defendant's non-custodial statements?
6. Whether the detective's agreement to speak with the Defendant at the Defendant's preferred location, i.e. the sheriff's office, rendered the Defendant not free to leave and his statement custodial?
7. Whether the Defendant's confession was voluntarily given?

III. STATEMENT OF THE CASE

The Defendant Rogelio Nuñez is charged with four counts of child molestation. CP 1, 4-5. The legislature finds such charges to be "most serious" offenses, deserving of indeterminate life sentences. RCW 9.94A.030(33); RCW 9.94A.507. The victim's childhood

memories of events from 12+ years ago are corroborated in detail by the Defendant's confession. CP 1. However, the lower court has suppressed that confession. CP 62-64. The State is seeking reversal of the lower court's ruling.

Only two witnesses testified at the CrR 3.5 hearing: Franklin County Sheriff's Deputy Ruben Bayona and Detective Jacinto Nuñez. CP 18, 37. They testified that after the detective visited the Defendant at his home to request an interview on a case, the Defendant decided to drive to the sheriff's office of his own volition later in the day – choosing both the time and place of his statement. CP 20-21, 38. The witnesses testified that the Defendant was not under arrest, was not advised he was under arrest, was not restrained, and had no reason to believe he was being held. CP 21, 30-31, 38, 46-47. Within minutes of his arrival and after receiving the *Miranda* warnings, the Defendant admitted sexually abusing two of his nieces. CP 35, 50.

The superior court suppressed the statement as being in violation of *Miranda* – misinterpreting the detective's testimony to have omitted more than the juvenile advisement and improperly assuming, without finding, that the interrogation had been custodial.

CP 14-15, 62-64; RP 7.

Although the Defendant speaks English, he requested that the interview take place in Spanish. CP 21, 29. The detective asked Deputy Bayona to be present at the start of the interview to make sure that there were no dialect difficulties and to assist in establishing rapport. CP 22, 34, 39-40. The deputy was present for the *Miranda* advisement, which the detective read to the Defendant using a Spanish language form. CP 22-23, 27-28, 39; PE 1.

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

read his rights and then to waive them. CP 39, 43.

The Defendant did not request clarification of his rights, did not request an attorney, and did not invoke his right to remain silent. CP 31. He had no trouble understanding the Spanish conversation. CP 29, 30-31. He was “pretty cheerful,” and did not appear to be tired or under the influence of any substance. CP 30.

Deputy Bayona began the conversation, explaining that one of the Defendant’s nieces, J.A., had made a complaint against him. CP 48. Before the detective could request permission to record, the Defendant immediately began to confess. CP 34-35 (the confession just spilled out of him), 50. The entire meeting, recorded and unrecorded, lasted between 30 to 45 minutes. CP 49. The Defendant expressed remorse, saying he felt he needed help, but that he could get through what he considered “his problem with little girls” on his own. CP 49.

At the CrR 3.5 hearing, defense counsel asked only a single question of the detective: “was the intent of the September 15th interview to coerce a confession from Mr. Nuñez?” CP 51. The prosecutor did not hear the question. RP 9. And the detective misheard the question. CP 14. His affirmative response was to the

apprehended question whether he intended to *elicit* a confession. CP 14-15, 51; RP 9. There is neither evidence nor findings of any coercion. CP 78-80; RP 9.

Counsel did not seek to clarify any fact regarding the *Miranda* advisement. CP 51. However, once the witness stepped off the stand, defense counsel began his argument by deliberately distorting the testimony – arguing the advisement omitted *the first sentence* in paragraph 2, which reads, “anything you say can be used against you in a court of law.” CP 53. The exhibit demonstrated that *only the second sentence*, the juvenile advisement, had been stricken. CP 54-55; PE 1.

The detective immediately requested permission to clarify his testimony, only to be rebuffed by the court. CP 54 (“the factual record is closed”). The court refused to explain the basis for refusing to permit any clarification of testimony. CP 55; RP 8.

The court made no finding as to whether the Defendant’s statement was custodial. CP 62-64. Nor did the court make any ruling on the voluntariness of the statement. *Id.* The court suppressed the confession as being in violation of *Miranda*, concluding that the detective failed to advise the Defendant of the first

sentence in paragraph 2, which reads, “anything you say can be used against you in a court of law.” *Id.*

At the reconsideration hearing, the judge advised that he would hear argument and render a decision *despite having failed to read any of the State’s briefing* (CP 6-15, 65-76). RP 3-5. The judge appeared to believe the State had conceded the custodial nature of the interview simply by eliciting testimony on the *Miranda* advisement. RP 7. The judge retired briefly to read a single case cited in the State’s argument, but failed to comprehend the opinion. CP 8; RP 9-10, 14-15. Finally, the judge added an oral finding – that the location of the interview in a police station was sufficient for the court to find it was custodial. RP 15.

This Court has accepted discretionary review.

IV. SUMMARY OF ARGUMENT

The trial court erred in finding that the finality principle prevented it from clarifying a fact material to a determination of the admissibility of a confession prior to its pretrial evidentiary ruling. The trial court erred in preventing the State from presenting evidence responsive to defense argument raised for the first time in oral

argument and material to the court's decision. The court abused its discretion in failing to take a proffered single sentence of testimony which would have been dispositive of the issue before the court.

The court's finding that the *Miranda* advisement omitted a phrase is not supported by the record. The court's suppression of the confession on this basis is error.

The trial court erred in suppressing a statement for violation of *Miranda* where the court had not found the statement to be custodial such that *Miranda* applied. The court erred in making a late finding that the location of the interview alone supported a finding that the statement was custodial. The record does not demonstrate that the defense proved the statement to be custodial.

The court erred in failing to address the purpose of the voluntariness hearing by entering no ruling on the voluntariness of the statement. The court erred in suppressing the Defendant's noncustodial, voluntary, and advised confession.

V. APPLICABLE STANDARDS

Before admitting the defendant's inculpatory statements, the court must hold a CrR 3.5 hearing, frequently called a "voluntariness

hearing,” to determine if they were voluntary or freely given. *State v. Myers*, 86 Wn.2d 419, 425, 545 P.2d 538 (1976); *State v. Kidd*, 36 Wn. App. 503, 509, 674 P.2d 674 (1983). The test for voluntariness is whether police behavior overbore the defendant’s will to resist. *State v. Tucker*, 32 Wn. App. 83, 85, 645 P.2d 711 (1982). Coercion is determined under the totality of the circumstances. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). The State need only prove voluntariness by a preponderance of the evidence. *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973).

Miranda is triggered only when a suspect is “in custody” and is subjected to “interrogation.” *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him “in custody.”

Id. To be in “custody” is either to be placed under arrest or to have one’s freedom of action or movement curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104

S.Ct. 3138, 82 L.Ed2d 317 (1984); *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). Without *Miranda* warnings, statements resulting from a custodial interrogation are presumptively involuntary. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345, 347 (2004).

“The burden of production and persuasion rests on the person seeking to suppress evidence.” *United States v. Smith*, 783 F.2d 648, 650 (6th Cir.1986); *United States v. Arboleda*, 633 F.2d 985, 989 (2d Cir.1980). Accordingly, a criminal defendant seeking to suppress statements under *Miranda* “has the burden of proving that he was under arrest or in custody.” *United States v. Davis*, 792 F.2d 1299, 1309 (5th Cir.1986) (citing *United States v. Charles*, 738 F.2d 686, 692 (5th Cir.1984); *United States v. De La Fuente*, 548 F.2d 528, 533 (5th Cir.), *cert. denied*, 431 U.S. 942, 97 S.Ct. 2640, 53 L.Ed.2d 249 and 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977)).

VI. ARGUMENT

- A. THE FINALITY PRINCIPLE DOES NOT APPLY PRIOR TO ANY RULING OR FINAL JUDGMENT AND DOES NOT JUSTIFY THE REFUSAL TO HEAR EVIDENCE RESPONSIVE TO A CHALLENGE RAISED FOR THE FIRST TIME IN ORAL ARGUMENT.

Before the rendering of any ruling and before any trial or final

judgment, the superior court denied the State's request to admit testimony responsive to an argument raised for the first time in argument. Initially, the court refused to explain the legal basis for its ruling. RP 55, ll. 16-17. Upon reconsideration, the court justified its ruling under the principle of finality. RP 14. Insofar as it relied on the finality principle, the court's ruling was an error of law, reviewed de novo. *State v. Jim*, 156 Wn. App. 39, 41, 230 P.3d 1080 (2010).

The finality principle has no application prior to a final judgment. See e.g. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Radio Station WOW v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L. Ed. 569 (1945); RCW 10.73.090; CrR 7.8(b); RAP 2.2; 15 Wash. Prac., Civil Procedure § 38:28 (2d ed.). Related principles of res judicata and collateral estoppel also do **not** apply **before** the rendering of any judgment. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979). There is no final judgment in this matter. We are in a pretrial posture. At the time of the State's request, the trial court had not even ruled on the CrR 3.5 issue. The finality principle does not apply here.

Nor does it apply where, as here, the parties have not had a

full and fair opportunity to litigate. *Montana v. United States*, 440 U.S. at 153–54.

[W]here the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules; and is not satisfied though the result is just, if the hearing was unfair.

Snyder v. Massachusetts, 291 U.S. 97, 137, 54 S. Ct. 330, 340, 78 L. Ed. 674 (1934) (Roberts, J., dissenting). It is fundamental that there can be no due process without reasonable notice of the claim. *Snyder*, 291 U.S. at 127 (Roberts, J., dissenting).

[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 U.S. at 122, (Cardozo, J., majority author). Thus any motion to suppress shall be in writing. CrR 3.6. But the defense filed no suppression brief and gave no notice of his claim that the detective had failed to advise that anything he said could be used against him. The defense raised this for the first time at oral argument.

The testimony had been that a portion of the advisement was omitted and stricken *as irrelevant due to the Defendant's age*. The exhibit demonstrated that the detective drew a line through a single sentence of the advisement, *the juvenile advisement only*. The defense made minimal cross-examination.

For the first time in oral argument, the defense took advantage of some imprecise testimony in order to deliberately misconstrue what portion of the *Miranda* advisement had been omitted. The defense had made no effort to clarify this point while the witness was on the stand, although, based on counsel's misimpression, a need for clarification was apparent. Rather than seeking out the truth of the matter, the superior court rewarded the defense's tactical misconception and refused to permit the State to clarify the evidence. The court made the unlikely comment that permitting the State to present evidence responsive to a challenge raised for the first time in argument was equivalent to giving the State "multiple abilities" to "correct" its evidence. RP 18. In fact, refusing to permit the State to answer a challenge raised for the first time in argument was a violation of due process, i.e. constitutional error.

While the superior court championed the finality principle, its

ruling undermined the doctrine's goal to conserve judicial resources and protect adversaries from the expense and vexation attending multiple lawsuits. *Montana v. United States*, 440 U.S. at 153–54. The entire evidentiary hearing took place in a portion of an afternoon. CP 16, 17-60 (only 44 pages of transcript). To clarify the dispositive fact with a single yes-or-no question would have lengthened this already short hearing by mere moments. The trial court conserves resources by taking the time to have a full and fair hearing in order to avoid noticeable mistakes that must then be reviewed.

Toward that goal, the trial court has authority to reopen a case in order to clear up uncertainties and to change its own findings. 15 Wash. Prac. Sec. 38.28. *See also* CR 52(b) (whether or not a party raises an objection or makes a motion, a court may make additional findings and amend its findings). It may do so even after the final judgment of a bench trial. 15 Wash. Prac. Sec. 38.28.

A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons, when the decision is unsupported in the record or applies the wrong legal standard, or when the court adopts a view that no reasonable person would take. *State v. Hampton*, 184 Wn.2d 656, 670-71, 361 P.3d 734, 740-41

(2015). The court's refusal to permit the brief testimony which would have clarified the very matter at issue was arbitrary and capricious. The pretrial hearing was ongoing at the time of the request. The factual record was unclear, and the witness was immediately available to clarify a simple factual but material matter. No ruling, preliminary or final, had yet issued. The detective's clarification would have been grounds for later reconsideration. CR 59(a). And this minor point of clarification posed no threat to finality. However the failure to clarify posed a grave threat, suppressing essential and entirely admissible evidence of a most serious offense. The court's reasoning is untenable and indefensible. Closing the record rewarded gamesmanship and violated due process rather than making a full and fair inquiry into the truth in a child molestation matter.

A finding of fact must be supported by substantial evidence, i.e. a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The court's finding that the Defendant was not advised that anything he said could be used against him is not supported by substantial evidence. Here the only two witnesses testified that the Defendant was read his *Miranda*

rights. The detective explained that he struck the juvenile advisement and drew a line through this language. This is apparent in the exhibit. He did not strike the language advising that anything the Defendant said could be used against him. This is apparent in the exhibit. The detective swore in his affidavit that the Defendant was advised that anything he said could be used against him. No witness contradicts the detective's testimony.

A conclusion of law is reviewed for support in the findings. *State v. Hagen*, 55 Wn. App. 494, 498, 781 P.2d 892, 894 (1989). Because the finding must be stricken, no factual finding supports the conclusions of law. The evidence is that the Detective properly and fully advised the Defendant under *Miranda* before the Defendant confessed. The Court's ruling to the contrary is unsupported by the record and must be reversed.

B. THE COURT ERRED IN SUPPRESSING A CONFESSION FOR A VIOLATION OF *MIRANDA* WHERE THE DEFENDANT WAS NOT IN CUSTODY.

A superior court's suppression rulings are reviewed de novo. *State v. Freepons*, 147 Wn. App. 689, 693, 197 P.3d 682, 684 (2008)

Even if the record supported a finding that the *Miranda* warnings had not been provided, this would be an insufficient basis for the superior court's suppression ruling. The *Miranda* advisement is only required when the suspect is in custody. *Oregon v. Mathiason*, 429 U.S. at 495. And the Defendant was not in custody.

In suppressing the confession, the trial court made no ruling that the Defendant was in custody, oral or written. CP 55-57, 62-64. Only in reconsideration did the trial court address this issue. RP 15. Then the court made an oral finding that the location alone (in a police station) was sufficient for the court to find the statement custodial. RP 15. This is plain legal error. The mere location of an interview at the station house will not support a finding that the interrogation was custodial in nature, i.e. under formal arrest or having one's freedom of action or movement curtailed to a degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1982).

The seminal case on this topic is *Oregon v. Mathiason, supra*. After an officer left a card at the defendant's apartment, Mathiason called the next day and said it would be convenient for him to meet at the state patrol office that afternoon. *Mathiason*, 429 U.S. at 493. In

an office with the door closed, the officer told the defendant he was not under arrest. *Id.* However, he was suspected of a burglary, and his fingerprints had been found at the scene. *Id.* In fact, there were no fingerprints; this was a ruse. *Id.* Mathiason sat for a few minutes and then confessed. *Id.* He was then advised of his rights and his taped confession was taken. *Mathiason*, 429 U.S. at 493-94. Thirty minutes later, at the conclusion of the taped conversation, the officer released the defendant and referred the matter to the district attorney. *Mathiason*, 429 U.S. at 494. The United States Supreme Court held that a defendant was not in custody or otherwise deprived of his freedom of action in any significant way (such that a *Miranda* advisement would have been required) when he came voluntarily to police station, was advised he was not under arrest, and gave a half hour interview confessing. *Oregon v. Mathiason*, 429 U.S. at 495.

Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a “coercive environment.” Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone

whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

Oregon v. Mathiason, 429 U.S. at 495.

In Washington, the law is the same. In *State v. Green*, 91 Wn.2d 431, 437, 588 P.2d 1370 (1979), a witness observed an adult lift a young girl and carry her kicking and screaming around the corner. The witness ran downstairs and saw the defendant Green holding the girl, his clothes covered in blood. Green claimed he was only a witness. Police transported him to the station and questioned him without providing the *Miranda* advisement. Noting that there was no evidence to suggest his presence there involuntary, and finding it reasonable to assume he was free to leave, the Washington Supreme Court found this statement to be noncustodial.

Interviews at police stations will be subjected to heightened scrutiny. *United States v. Jacobs*, 431 F.3d 99, 105 (3rd Cir. 2005). But the location alone is insufficient to find the interview custodial. Courts will look at many other factors. *Ferguson*, 12 Wash. Prac.,

Criminal Practice and Procedures, sec. 3309. See also *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1982) (not in custody when suspect was told he was not under arrest and voluntarily accompanied police to the station house to talk about a murder); *United States v. Jacobs*, 431 F.3d 99, 106 (3rd Cir. 2005) (not in custody when suspect responded to an officer request by calling and setting up a meeting at the parole office).

It is relevant that the Defendant chose to go to the police station understanding that questioning would ensue. CP 38, ll. 2-4; *United States v. Jacobs*, 431 F.3d 99, 106 (3rd Cir. 2005); *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002). It is relevant that he drove himself to the sheriff's office in his own vehicle, without escort, and hours after being contacted by police. *State v. Pinder*, 736 A.2d 857, 874 (Conn. 1999) (noting that the defendant had been given the option of riding in his own car or with the state police). The short duration is significant. *Slwooko v. State*, 139 P.3d 593, 597 (Alaska Ct. App. 2006); *Roman v. State*, 475 So.2d 1228, 1231 (Florida 1985). As is the friendly manner of questioning. *Slwooko v. State*, 139 P.3d at 597, 599. The number of officers can be significant.

United State v. Craighead, 539 F.3d 1073 (9th Cir. 2008) (describing an interview with 8 armed officers from 3 different agencies).

It is not significant that the Defendant was arrested *at the conclusion* of his confession to child molestation.

[T]he fact that the police arrest a suspect following an interview may shed light on otherwise ambiguous facets of the police officers' interaction with the suspect. But ***the fact that the police decide to arrest a person after the person has confessed to a serious crime is, of itself, unremarkable.***

Slwooko v. State, 139 P.3d 593, 600 (Alaska Ct. App. 2006) (emphasis added). *See also Roman v. State*, 475 So.2d 1228, 1231-32 (Florida 1985) (the mere fact that an arrest follows a confession does not convert what theretofore had been a noncustodial situation into a custodial one).

It is not significant that the Defendant was accused of a crime or whether there was probable cause of the crime at the time of the statement. *Beckwith v. United States*, 425 U.S. 341, 346-48, 440, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976) (A person is not placed in the functional equivalent of custody for *Miranda* purposes simply because that person is the focus of a criminal investigation and is being questioned by authorities); *State v. Short*, 113 Wn.2d 35, 40-41, 775

P.2d 458 (1989) (*Berkemer* rejected the existence of probable cause as a factor in the determination of custody; the sole inquiry has become whether the suspect reasonably supposed his freedom of action was curtailed).

Nor does a police officer's unarticulated plan have any bearing on the question of custody. *State v. Solomon*, 114 Wn. App. 781, 790, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025 (2003) (citing *Berkemer v. McCarthy*, 468 U.S. at 442).

Here, the Defendant Nuñez came to the police station at a time of his choosing and in his own vehicle, not accompanied or escorted by police. He was cheerful. There were no booking procedures performed. There was no statement regarding arrest. He was not given any reason to believe he was under arrest.

He met with the detective who had invited him. One other officer was also present for a short time – chosen because of his dialect skills and because of his nonjudgmental manner which builds rapport with suspected sex offenders. *Swooko v. State*, 139 P.3d 593, 597, 599 (Alaska Ct. App. 2006) (factoring in the “non-confrontational and polite” manner of police). They spoke to him in the language he preferred. Both officers testified that they were

surprised how quickly the confession spilled out of him, within minutes of his arrival, as soon as they explained the nature of the allegations. CP 35, 50. The officers employed no ruse, no aggression, and no coercion.

The Defendant had access to an attorney, having hired one in another ongoing investigation case. CP 46. However, after being advised of his right to have his attorney present during questioning, the Defendant waived that right. CP 42, 43, 46; PE 1 at ¶3. The interview was brief, lasting between 30-45 minutes.

On this record and under the authority of the United States and Washington Supreme Courts, the Defendant has not met his burden of proving his confession custodial in nature, i.e. his freedom of action or movement was not curtailed to a degree associated with formal arrest. And it is his burden when he is the party seeking to suppress on *Miranda* grounds. See Applicable Standards, *supra* at 11.

Because the Defendant was not in custody, the police were not required to provide him the *Miranda* warnings, and any error in the *Miranda* advisement cannot be a basis for suppression. The superior court's suppression ruling must be reversed.

C. THE DEFENDANT'S CONFESSION WAS VOLUNTARILY MADE AND THEREFORE ADMISSIBLE.

The purpose of the CrR 3.5 hearing was to determine voluntariness. However, the superior court failed to address the issue either at the CrR 3.5 hearing or upon the State's request for reconsideration (CP 11). Even were a statement obtained in violation of *Miranda*, it may be admissible for impeachment purposes if it was voluntarily given. *State v. Thompson*, 73 Wn. App. 122, 131, 867 P.2d 691 (1994). This Court should hold that the Defendant's statements were voluntarily given.

The test in determining whether a confession is voluntary is whether the behavior of the state's law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined. *State v. Tucker*, 32 Wn. App. 83, 85, 645 P.2d 711 (1982).

There is no evidence in this record of coercion. The only evidence in the record is that the confession was intelligently and voluntarily made. There is nothing to suggest physical abuse; isolation; withholding of sleep, food, drink, medical care, or bathroom privileges; intoxication; promises or threats; lack of understanding;

mental illness or low intelligence; language concerns; or police manipulation by attempts to deceive or confuse.

Under the preponderance standard, the Defendant's statements must be admitted as voluntarily made. *State v. Braun*, 82 Wn.2d at 162.

VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court reverse the suppression ruling and admit the Defendant's confession at trial.

DATED: November 22, 2016.

Respectfully submitted:

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A copy of this Motion to Modify was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED November 22, 2016, Pasco, WA



Original filed at the Court of Appeals, 500
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