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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 34094-5

FRANKLIN COUNTY SUPERIOR COURT NO. 15-1-50417-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

ROGELIO NUNEZ,

Respondent.

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the State Waived the issue of the custodial nature of the statements when it failed to challenge this prior to or at the time of the original CrR 3.5 hearing?
2. Whether the State bears the burden of disproving custody?
3. Whether the trial court was acting within its' discretion in denying the State's motion to reopen the factual record when the trial court found that granting the motion would result in the purpose of the hearing being to continue to conduct it until the State wins?
4. Whether the trial court correctly found the defendant's statements inadmissible when the detailed testimony of the interrogating detective clearly indicated a failure to advise the defendant of one of the cornerstone Miranda advisements?
5. Whether the State's argument regarding the voluntariness of the defendant's confession applies only in regards to impeachment purposes should the defendant testify at trial and therefore need not be decided prior to trial itself?

B. COUNTER STATEMENT OF FACTS

On January 19, 2016 a motion was held in accordance with CrR 3.5 as the State had indicated an intent to offer the defendant, Mr. Nunez', statements

in their case in chief. CP 17. The State called two witnesses to testify, Deputy Ruben Bayona and Detective Jacinto Nunez. CP 17. Deputy Bayona testified that he had been informed by Detective Nunez that they would be interviewing Mr. Nunez ¹ to investigate a sexual-related crime as a suspect. CP 20. The interrogation took place in Spanish. CP 21. Deputy Bayona was present when Detective Nunez read “rights” to Mr. Nunez. CP 21.

The State offered and entered the Spanish rights form that had been read to Mr. Nunez. CP 22-23. There was some discussion regarding the propriety of the use of Mr. Nunez’ interpreter but the trial court ultimately ruled to allow Detective Nunez to read the form in Spanish, as he had read it to Mr. Nunez, while the interpreter interpreted into English. CP 23-24. Deputy Bayona did not go into any detail in his testimony regarding the specific “rights” read. CP 22-36. The advisement of “rights” was not recorded with the remainder of the interrogation. CP 32 &34.

After Deputy Bayona was excused, Detective Nunez testified. CP 38. Detective Nunez had State’s exhibit 1, the Spanish “rights” form in front of him while he testified. CP 39. Detective Nunez testified that he “read Nos. 1, 3, 4 and 5 to Mr. Nunez” CP 41. He testified further that when it came to No. 2 “I asked him how old he was. He told me he was 47 years old, so I crossed it out. It’s a warning to juveniles.” CP 41. Detective Nunez then went on to describe

¹ Both the lead detective and the defendant share the same last name I will differentiate them as “Detecive Nunez” and “Mr. Nunez” respectively.

that he puts a “checkmark” next to each of the rights read to Mr. Nunez. CP 41. He indicated on this form there were “checkmarks next to Paragraph 1, 3, 4 and 5”. CP 41. The State then requested that Detective Nunez read those four paragraphs as written to all the interpreter to interpret. CP 41. Detective Nunez then read through each of those four paragraphs in Spanish and they were interpreted simultaneously into English. CP 42-43.

Paragraph No. 4 indicated “If you cannot use or occupy an attorney...one will be named so that they can represent you before the ask any questions, if you wish.” CP 42. Paragraph No. 5 contained a word that did not exist in Spanish. CP 43. The interpreter indicated she believed it to be a misspelling. CP 43. Detective Nunez was asked by defense counsel “[w]as the intent of the September 15th interview to coerce a confession from Mr. Nunez?” to which Detective Nunez replied, “[y]es”. CP 51. Detective Nunez was then excused and the factual record closed. CP 51.

The State indicated during oral argument that “there’s no contested evidence.” CP 52. Defense counsel brought to the court’s attention that in Detective Nunez’ very detailed recounting of the advisement of rights for Mr. Nunez, he failed to advise Mr. Nunez that “[a]nything you say can be used against you...” CP 53. Defense counsel then asked the court to find that the warnings were not accurately given and Mr. Nunez’ statement should therefore be suppressed. CP 53. The trial court then asked for response argument from

the State and the State attempted to salvage the error by adding information from Detective Nunez. CP 54. The court then clarified that the factual record for the hearing was closed. CP 54. The State then continued to attempt to add facts not in the record. CP 54.

The court recited his memory of the testimony given, that “Right No. 2 was not given. And the indication – and there was no differentiation made between any portion of it.” CP 55. The court continued; “the testimony that the Court recalls did not differentiate between a part of the right, which is inconsistent with Ms. Chen’s argument, but the evidence in the record was that the second right was crossed out and not given due to the age of the defendant.” CP 55. The State again requested the court reopen the record so she could have Detective Nunez make changes to his testimony. CP 55-56. The Court indicated the State could file a motion for reconsideration and would need to provide authority that the State could reopen the factual record. CP 56.

The court then went on to identify and rule on additional issues presented at the hearing, such as the fact that Detective Nunez indicated the intent was to coerce a statement from Mr. Nunez. CP 57. The court indicated that although Deputy Bayona had testified regarding the absence of threats or promises, he was not present for the entirety of the interview and Detective Nunez had not testified regarding threats or promises, creating a due process issue. CP 57.

On January 26, 2016 the State filed a Motion for Reconsideration. CP 6-13. In this Motion for Reconsideration the State raised a number of issues that it had not raised at the initial hearing. CP 6-13. On this same date the State also filed the self-serving affidavit of Detective Nunez addressing all the testimonial deficiencies previously outlined by the court after the initial CrR 3.5 hearing. CP 14-15. Defense counsel filed a response to the Motion for Reconsideration and the State filed a reply. CP 65-76. Findings of Fact and Conclusions of Law for the CrR 3.5 hearing were entered on January 26, 2016.

On February 16, 2016 the court held a motion hearing regarding the State's Motion for Reconsideration. RP 1. The court clarified that the issue as now raised by the State is that Miranda was not required. RP 4-5. The court inquired of the State's implied concession that the interrogation was custodial. RP 7. The State indicated, incorrectly, that a CrR 3.5 hearing is "not a Miranda hearing." RP 7. The State provided a citation to the court to support the assertion that the burden of proving the interrogation was "custodial" is on the defendant; *United States v. Bassignani*, 560 F. 3d 989 (2009). RP 10 & 14. The State did not inform the court that all references to the burden of proof were removed when the opinion was amended and superseded on denial of rehearing in *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009).

The Court ultimately ruled that "when the State fails to present sufficient evidence such that a confession could be deemed admissible, the

State loses the opportunity to reopen.” RP 14. The court indicated a need for finality as a matter of fairness: “[i]f we don’t have finality, then the meaning of the hearing is that we continue to conduct it until the State wins. That’s not the purpose of the hearing.” RP 14. The court further reasoned that to find otherwise “would simply mean that the State of Washington would have multiple abilities to correct its evidence after it had had the opportunity to present its case. And for that reason, I find the citations to other portions of the court rules unavailed.” RP 18. The court also made findings that the interrogation was custodial. RP 14-15.

The State then filed a Motion for Discretionary Review with this court. CP 81. The motion was denied and the State filed a motion for reconsideration which this court granted. This appeal now follows.

C. ARGUMENT

1. ***The State Waived the issue of the custodial nature of the statements when it failed to challenge this prior to or at the time of the original CrR 3.5 hearing.***

The CrR 3.5 hearing “is a threshold determination of whether a *custodial* statement was obtained with proper regard for the defendant's rights. That is, the issue in a CrR 3.5 hearing is constitutional, not evidentiary.” *State v. Viney*, 52 Wn. App. 507, 510, 761 P.2d 75 (1988) (emphasis added.). By its very nature, the 3.5 hearing applies only to those statements which are the

product of custodial interrogation. *Id*; See also, *State v. DeCuir*, 19 Wn. App. 130, 574 P.2d 397 (1978) (CrR 3.5 hearings do not apply to non-custodial statements.); *State v. Faulk*, 17 Wn. App. 905, 909, 567 P.2d 235 (1977) (“The constitutional concerns exemplified by CrR 3.5 apply only to custodial statements.”). This well-established principle was clearly in the mind of the trial court when it expressed confusion about why the State was raising the issue in its Motion for Reconsideration:

The Court: Well, let me ask you about that. Didn't you, didn't you, as part of your initial argument in this matter, concede that it was custodial through your argument regarding Miranda?

Ms. Chen: No, I never made that concession....

The Court: Well, why have a Miranda hearing?

Ms Chen: We have a 3.5 hearing as a matter of course. It's not a Miranda hearing, it's a 3.5 hearing for the court to determine whether the statements were voluntary and therefore admissible. And Miranda is something of a factor to consider when considering voluntariness.

The Court: Actually the due process voluntary prong and Miranda are separate inquiries, are they not?

RP 7. Clearly, the trial court understood the purpose of the 3.5 hearing even though the State did not. The Court rule regarding omnibus hearings, CrR 4.5, states that in regards to motions:

All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. *Failure to raise or give notice at the hearing*

of any error of issue of which the party consented has knowledge may constitute waiver of such error or issue.

CrR 4.5 (d) (emphasis added). Failure to raise an objection generally constitutes a waiver. See also, *State v. Rice*, 24 Wn. App. 562, 565-567, 603 P.2d 835 (1979) (“CrR 4.5 provides for an omnibus hearing for the resolution of preliminary matters prior to trial, and must be read in conjunction with CrR 3.5.). The efficient administration of justice requires that attorneys state any legal objections they might have to any proposed action by a court. Objections raised after the fact result in needless appeals and motions for reconsideration or revision.

The State did not object or raise the issue of the custodial nature of the statements at any time prior to or during the CrR 3.5 hearing, the purpose of which is specifically to address only “custodial” statements. By requesting the CrR 3.5 hearing the defendant has clearly indicated he believes the statements to be custodial in nature or there would be no need for the hearing. Just as a defendant could waive a CrR 3.5 hearing on the basis that his statements were not custodial, the State can waive objection to the custodial nature of the interrogation and has done so in this case.

Should this court be inclined to disagree on this issue of waiver, the record below is clear that defense counsel and the court were under the reasonable belief that the custodial nature of the interrogation was not at issue

and Due Process would seem to require a hearing to address that issue alone to have a full and complete factual record.

2. *The State bears the burden disproving custody.*

Although there appears to be no Washington State case dealing with this issue there are indicators that the 9th circuit has declined to follow the 5th circuit's holdings on this issue. The State initially cited the 9th circuit case, *United States v. Bassignani*, 560 F. 3d 989 (2009), to the trial court to support the assertion that it was the defendant who bore the burden of proving the custodial nature. RP 10 & 14. However, the State's citation to *United States v. Bassignani*, 560 F.3d 989, 993 (9th Cir. 2009), is unavailing because all references to the burden of proof were removed when the opinion was amended and superseded on denial of rehearing in *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009). In the original opinion filed by the Ninth Circuit in *United States v. Bassignani*, the court addressed the specific issue regarding the burden of proof in demonstrating whether a defendant is in custody for purposes of *Miranda*. *Bassignani*, 560 F.3d 989, 993 (9th Cir. 2009) (holding that defendant bore the burden of proof and noting that the language in the *Miranda* opinion regarding the government's "heavy burden" applied to determinations regarding waiver, not custody). However, this portion of the opinion was deleted in the amended opinion. *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009).

Looking outside of Washington, our close neighbor and fellow 9th circuit jurisdiction partner, California, has made some clear and logical findings on this issue:

Quite clearly, the burden of showing whether defendants were or were not in custody and whether or not the investigation had focused on defendants should rest on the prosecution. The evidence on these issues ordinarily is in possession of the prosecution, and not easily available to the defense. This is an important factor in determining who has the burden of proof (see Witkin, Cal. Evidence (1958) 56, p. 74; cf. *People v. Stockman*, supra, 63 Cal.2d at p. 499). This is part of the foundation that the prosecution must lay before the confessions are admissible.

People v. Davis, 66 Cal.2d 175, 180-181, 57 Cal. Rptr. 130, 424 P.2d 682 (1967). California's rationale is logical and Mr. Nunez would urge this court to follow the same path. Arguably, the United States Supreme Court case of *United States v. Matlock*, seems to support the assertion that the government bears the burden of proving by a preponderance of the evidence that the defendant was not subjected to custodial interrogation. *United States v. Matlock*, 415 U.S. 164, 178-79, 94 S. Ct. 988, 39 L. Ed. 2d 242, and n. 14 (1974).

Taken together, these cases would seem to support a finding that it is the State that bears the burden of disproving custody.

3. ***The trial court was acting within its' discretion in denying the State's motion to reopen the factual record when the trial court***

found that granting the motion would result in the purpose of the hearing being to continue to conduct it until the State wins.

It is within a trial court's discretion to decline to reopen a hearing, and reversal is only warranted upon a showing of an abuse of discretion. *Estes v. Hopp*, 73 Wn. 2d 263, 483 P.2d 205 (1968). "Abuse of discretion is discretion exercised on untenable courts for untenable reasons." *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991). "Consideration should be given to whether the law on point at the time was unclear or ambiguous, as well as to whether new evidence came to light after the proceedings closed." *United States v. Coward*, 296 F.3d 176, 181-182 (3rd Cir. 2002) (citing *United States v. Kithcart II*, 218 F.3d 213, 220 (2000)) (finding reopening inappropriate because the government "was fully aware of what it had to establish to successfully oppose Kithcart's suppression motion" and nothing suggested "that evidence was either newly discovered or unavailable during the first hearing").

Here, the trial court did not abuse its discretion and set forth reasonable explanations for its decision: "[i]f we don't have finality, then the meaning of the hearing is that we continue to conduct it until the State wins. That's not the purpose of the hearing." RP 14. The court again addressed the State's objections by indicating that granting the State's request "would simply mean that the State of Washington would have multiple abilities to correct its

evidence after it had had the opportunity to present its case. And for that reason, I find the citations to other portions of the court rules unavailed.” RP 18.

Much like *Kithkart*, the State "was fully aware of what it had to establish to successfully oppose" the suppression and there is no evidence in the record that "evidence was either newly discovered or unavailable during the first hearing." *Kithkart*. The Detective was present and testified in great detail regarding what he advised the defendant of. The State alleges that the "defense took advantage of some imprecise testimony in order to deliberately misconstrue..." The reality is that the State failed to show Mr. Nunez was adequately advised; there is nothing to misconstrue about it. The State also poses an objection to defense counsel not clarifying during cross examination. The State cites to no authority indicating that defense has an obligation to rehabilitate the State's witness. To the contrary, that would seem to be an act that would undermine defense counsel's duty to his client.

The State has also made the argument that "refusing to permit the State to answer a challenge raised for the first time in argument was a violation of due process." The State cites no authority for this assertion and seems to confuse a defendant's due process rights with the State's. Respondent has been unable to find any authority for the assertion that the State has Due Process rights in a criminal trial.

As for the State's argument regarding the issue of being unaware of the challenge until argument, it was a CrR 3.5 hearing. The entire purpose of this hearing was to determine admissibility of the custodial statements made by Mr. Nunez and necessarily included whether the Mr. Nunez was adequately advised of his rights. *State v. Fanger*, 34 Wn. App. 635, 663 P.2d 120 (1983). If that was not the case, the State would not have had the detective go into such great detail about the rights he did read. The self-serving affidavit filed after the conclusion of the hearing and with the benefit of the court's rulings detailing the deficiencies should not be considered by this court. Washington's appellate courts have held on a number of occasions the insufficiencies of a self-serving affidavit of a defendant. *State v. Osborne*, 102 Wn. 2d 87, 684 P.2d 683 (1984); *In re Pers. Restraints of Reise*, 146 Wn. App. 772, 192 P.3d 949 (2002).

The interest of finality and the decision to reopen the factual record for the hearing would also seem to be supported by the purposes of the hearing itself:

The purpose of a pretrial confession hearing under CrR 3.5 is to allow the court, prior to trial, to rule on the admissibility of sensitive evidence. *State v. Taylor*, 30 Wn. App. 89, 92, 632 P.2d 892 (1981). The rule promotes judicial efficiency by insulating the jury from tainted evidence, thereby avoiding mistrials and continuances. *State v. Rice*, 24 Wn. App. 562, 565, 603 P.2d 835 (1979). A confession hearing also enables the parties to determine the weaknesses in their cases and thus encourages settlement. *Taylor*, at 92-93.
State v. Fanger, 34 Wn. App at 637.

The cases cited by the State on this issue simply do not seem to support the assertions they are making. The State was fully aware of the purpose of the CrR 3.5 hearing and called appropriate witnesses. Those witnesses testified in great detail about the statements made and the rights given. The testimony was not sufficient to meet the State's burden. The State does not now, after the benefit of the court ruling outlining the deficiencies of said testimony, get to fill in the gaps to make the record one that addresses those deficiencies so that the statements may be admitted.

4. ***The trial court correctly found the defendant's statements inadmissible when the detailed testimony of the interrogating detective clearly indicated a failure to advise the defendant of one of the cornerstone Miranda advisements.***

The trial court's legal conclusions regarding the adequacy of the Miranda warnings are issues of law that we review de novo. *State v. Mayer*, 184 Wn. 2d 548, 555, 362 P.3d 765 (2015); *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007); *State v. Johnson*, 94 Wn. App. 882, 897, 974 P.2d 855 (1999). The State bears the burden of demonstrating that a suspect knowingly and intelligently waived his Miranda rights before it may introduce incriminating statements made during the course of custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602 (1966).

The ultimate question for decision is always: Was the confession or statement voluntarily given? *State v. Fullen*, 7 Wn. App. 369, 374, 499 P.3d

893 (1972), quoting *State v. Creach*, 77 Wn. 2d 194, 199, 461 P.2d 329 (1969). “*Miranda*, however, indicates that an affirmative answer cannot be supported unless the five warnings listed are given to the accused prior to interrogation.” *Fullen*, 7 Wn. App. at 574. The warnings which must be given an accused as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966), are stated as follows in *State v. Creach*, 77 Wn.2d 194, 199, 461 P.2d 329 (1969):

In general, *Miranda* requires that, prior to custodial interrogation of an accused, he must be warned: (1) that he has the right to remain silent; (2) that any statement he does make can and will be used as evidence against him in a court of law; (3) that he has the right to consult with counsel before answering any questions; (4) that he has the right to have his counsel present during the interrogation; (5) and that if he cannot afford an attorney, one will be appointed for him without cost to him, prior to questioning, if he so desires.

Creach, 77 Wn. 2d at 199; *Fullen*, 7 Wn. App. at 574.

Once again, Respondent must urge this court not to consider the self-serving affidavit that was drafted after the trial court’s ruling detailing the deficiencies. Certainly, if a defendant were to rely solely on such affidavits this court would find that insufficient. *State v. Osborne*, 102 Wn. 2d 87, 684 P.2d 683 (1984); *In re Pers. Restraints of Reise*, 146 Wn. App. 772, 192 P.3d 949 (2002).

The trial court made the following findings of fact that the State now disputes:

10. Detective Nunez testified that the constitutional right contained in paragraph 2 applies to minors and was not given and that he struck it out. Detective Nunez' wrote "47 years" next to paragraph 2.

11. Detective Nunez testified that the following constitutional rights were read to the defendant in Spanish: a. You have the right to remain silent. b. You have the right at this time to talk to a lawyer and have a lawyer present with you while you are being questioned. c. If you cannot afford to 'occupy' a lawyer, one will be appointed to represent you before any question, if you wish. D. You can decide at any time to exercise these rights and not answer any questions or make any statements.

13. Detective Nunez' testified that the purpose of the interview with the defendant on September 15, 2015 was to coerce a confession from the defendant to the sexual crimes under investigation.

CP 63. Based on these findings of fact, the trial court concluded "Detective Nunez did not properly advise the defendant of all of his constitutional rights as he did not inform the defendant that "anything you say can be used against you in a court of law." CP 64. The trial court's factual findings clearly support the conclusions of law in this case.

Once again, Respondent must emphasize that the result of finding the State has the right to reopen the factual record at a suppression hearing when they are fully aware of what is needed to establish admissibility of a statement during a CrR 3.5 hearing and have no evidence that is newly discovered or unavailable at the first hearing will result in a major change that would essentially allow the court to "continue to conduct it until the State wins." RP

14. Finding that the State of Washington would have multiple abilities to

correct its evidence after it had had the opportunity to present its case” would seem to violate fundamental principles of fairness, due process and finality.

5. *The State’s argument regarding the voluntariness of the defendant’s confession applies only in regards to impeachment purposes should the defendant testify at trial and therefore need not be decided prior to trial itself.*

The trial court ruled “[t]he statements to Detective Nunez and Deputy Bayona are suppressed in their entirety as evidence of guilt or for any use in the State’s case in chief.” CP 64. The Court did not make a ruling or conclusion of law regarding voluntariness for purposes of potential impeachment. The only finding potentially relevant to this is the trial court’s finding of fact no. 13 that “[d]etective Nunez testified that the purpose of the interview with the defendant on September 15, 2015 was to coerce a confession from the defendant to the sexual crimes under investigation. CP 63. There is nothing in the record indicating that the State could raise the issue of using the statements for impeaching the defendant, should he testify. The State may use statements obtained in violation of Miranda for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 225-26, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971); *State v. Hubbard*, 103 Wn.2d 570, 575, 693 P.2d 718 (1985); *Riddell v. Rhay*, 79 Wn.2d 248, 252-53, 484 P.2d 907, cert. denied, 404 U.S. 974 (1971).

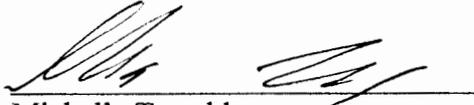
There is no need for prior determination if it is unknown if defendant will testify. That issue does not appear to have been decided by the trial court and is therefore not appropriate for review.

D. CONCLUSION

Based on the forgoing, the Respondent requests this court affirm the trial court and remand for trial.

February 21, 2017

Respectfully submitted,
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PROOF OF SERVICE

I, Michelle Trombley, being over the age of 18, hereby declare that on the 21 day of February, 2017, I caused a true and correct copy of the Respondent's Brief. 34094-5 to be served on the following in the manner indicated below:

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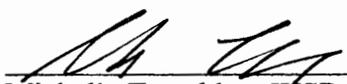
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 21 day of February, 2017

By: 
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