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NO. 68106-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSE HERNANDEZ-GARCIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Jose Hernandez-Garcia's Fifth Amendment privilege against self-incrimination by admitting his statements that law enforcement officers elicited during a custodial interrogation without providing Miranda¹ warnings.

2. The trial court erred in concluding that Mr. Hernandez-Garcia was not in custody when the officers interrogated him.

3. The trial court erred in failing to enter written findings and conclusions pursuant to CrR 3.5(c).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person is in custody for purposes of Miranda if he reasonably feels deprived of his freedom of action in any significant way, such that he would not believe he is free to terminate the interrogation. Where two police detectives and their interpreter interviewed Mr. Hernandez-Garcia in a closed storage room at his workplace for over an hour, never told him he was free to leave, and did not provide Miranda warnings, did the trial court violate Mr. Hernandez's Fifth Amendment rights by admitting the statements he gave detectives?

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. A trial court is required to enter written findings of fact and conclusions of law following a CrR 3.5 hearing. Where the trial court did not enter such findings and conclusions pursuant to CrR 3.5(c), should the case be remanded for entry of written findings and conclusions?

C. STATEMENT OF THE CASE

On December 2, 2010, Jose Hernandez-Garcia was at work at Ross Display in Seattle when his supervisor interrupted his work, told him to come with him, and escorted him to a small storage room where two police detectives were waiting to speak with him. 9/28/11 RP 25-27; 10/18/11 RP 59. The lead detective had told the supervisor she “needed to talk to” Mr. Hernandez about a criminal investigation. Before retrieving Mr. Hernandez, the supervisor provided the detective with Mr. Hernandez’s identification. 9/28/11 RP 25.

The detective verified Mr. Hernandez-Garcia’s identification but quickly realized she could not have an extended conversation with him without a Spanish interpreter. 9/28/11 RP 28-29. The detective asked Mr. Hernandez-Garcia in English if he would be willing to speak with her the following week with an interpreter, and he agreed to do so. 9/28/11 RP 29-30.

The lead detective returned the following week with a different detective and an interpreter. Mr. Hernandez-Garcia had not contacted the detectives in the interim. 9/28/11 RP 31-32. Mr. Hernandez-Garcia was brought out to the detectives and again placed in the small storage room with the two detectives and interpreter. 9/28/11 RP 34-36. The room was about 12' by 13' and had a rack of clothing, some chairs, and a small table. 9/28/11 RP 52. The detectives both wore guns. 9/28/11 RP 43. The detectives closed the door after Mr. Hernandez-Garcia was brought into the room. 9/28/11 RP 51.

The detectives proceeded to interview Mr. Hernandez-Garcia for over an hour, without having apprised him of his rights pursuant to Miranda v. Arizona. The detectives never told Mr. Hernandez-Garcia he did not have to talk to them. 9/28/11 RP 45; ex. 4 at 1-41. The detectives never told Mr. Hernandez-Garcia he was free to leave. 9/28/11 RP 45-46; ex. 4 at 1-41; 10/6/11 RP 17.

The detectives told Mr. Hernandez-Garcia that he was being accused of touching the "privates" of a girl he knew. Ex. 4 at 8. Mr. Hernandez-Garcia repeatedly denied the accusations, explaining that the little girl had touched him inappropriately – mimicking things she'd seen her mother doing – but that he had not touched

her. Ex. 4 at 8-24. The detective did not believe Mr. Hernandez-Garcia and said, "it's better for you to be honest about this." Ex. 4 at 24. The detective said, "You understand why we're asking you these questions over and over? This little girl [E.P.] is taking about things that she shouldn't know about. ... she described how you touched her" Ex. 4 at 26. The detective insisted, "we're just here talkin' to you right now because we're tryin' to find out the truth." Ex. 4 at 28. She said, "I would like to hear from you what really happened. I don't believe that she just straddled your leg and you pushed her away." Ex. 4 at 29.

The detective accused Mr. Hernandez-Garcia of having touched E.P with his penis. Ex. 4 at 29. Mr. Hernandez-Garcia said, "No. She went and touched me." Ex. 4 at 29. When pressed again, he again said, "I didn't touch her. No. She touched me, but I never touched her." Ex. 4 at 30. Mr. Hernandez-Garcia eventually acquiesced, though, and when the detective again said "you put your penis against her privates," Mr. Hernandez-Garcia agreed he did. Ex. 4 at 33. He went on to describe two incidents of sexual contact between him and E.P. Ex. 4 at 33-41.

After interviewing Mr. Hernandez-Garcia for over an hour, the detectives placed him under arrest. Ex. 4 at 41. He did not

make more statements after he was arrested and Mirandized.

9/28/11 RP 41.

The State charged Mr. Hernandez-Garcia with one count of first-degree rape of a child, one count of first-degree child molestation, and one count of communicating with a minor for immoral purposes. 9-10. Mr. Hernandez-Garcia moved to suppress the statements he made to the detectives because the detectives did not provide him with the required Miranda warnings prior to the custodial interrogation. CP 12-13; 9/28/11 RP.

The trial court found Mr. Hernandez-Garcia was never told he was free to leave and was never told he did not have to talk to the detectives. 10/6/11 RP 17. The court recognized:

The defendant or a reasonable person would know that he couldn't leave work or he couldn't get paid if he did leave work. He is told by his supervisor that the police are back to talk to him. His paycheck is at risk. The police want to talk to him in a private room. He can't leave work with his supervisor saying, "go into the room."

10/6/11 RP 18. The trial court said that Mr. Hernandez-Garcia "probably felt he had to talk, that he had no choice." 10/6/11 RP 20.

The court nevertheless ruled that Mr. Hernandez-Garcia was not in custody for purposes of Miranda, and denied the motion to

suppress. 10/6/11 RP 20. The court did not enter written findings and conclusions.

At trial, Mr. Hernandez-Garcia testified that he did not commit the crimes and that he only said he did after the detectives refused to believe he did not. 10/19/11 RP 28-31. The State played a recording of Mr. Hernandez-Garcia's confession for the jury. 10/18/11 RP 70-85. The jury found Mr. Hernandez-Garcia guilty as charged. CP 37-39. He timely appeals. CP 62-72.

D. ARGUMENT

The trial court violated Mr. Hernandez-Garcia's Fifth Amendment rights by admitting the statements he made to law enforcement officers during a custodial interrogation without the benefit of *Miranda* warnings.

1. Police officers must provide *Miranda* warnings before subjecting a suspect to a custodial interrogation.

The Fifth Amendment provides, "No person ... shall be compelled in any criminal case to be a witness against himself..." U.S. Const. amend. V. A suspect must be advised of his Fifth Amendment rights before a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In this case, it is undisputed that the detectives interrogated Mr. Hernandez-Garcia; the issue is whether he was in

custody during the interrogation. The trial court erred in ruling he was not.

An individual is considered to be in custody for purposes of Miranda not only when he is formally arrested, but any time “the defendant’s movement was restricted at the time of questioning.” State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Warnings are required when the suspect is “in custody at the station or otherwise deprived of his freedom of action in any significant way.” Orozco v. Texas, 394 U.S. 324, 327, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) (quoting Miranda, 384 U.S. at 477) (emphasis in original). Thus, even when an individual is “interrogated on his own bed, in familiar surroundings,” he may be “in custody” for purposes of triggering the warnings requirement. See id. (reversing conviction where officers questioned individual in his own home at 4 a.m. without giving Miranda warnings); State v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976) (reversing conviction where officer questioned a husband and wife at their own kitchen table without warnings).

A person is in custody if, under the totality of the circumstances, a reasonable person would “have felt he or she was not at liberty to terminate the interrogation and leave.” United

States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008) (citing Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). In other words, the question is “whether a reasonable person in [the defendant’s] position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation.” Craighead, 539 F.3d at 1082.

To answer the above question, courts consider several factors, including:

- Whether the suspect was isolated from others,
- Whether the suspect was restrained,
- Whether the suspect initiated the contact,
- The number of law enforcement personnel, and
- Whether the suspect was informed that he was free to leave or terminate the interview.

Id. at 1084; United States v. Griffin, 922 F.2d 1343, 1348-49 (8th Cir. 1990). The above list is not exhaustive; courts also look at the language used to summon the individual, the extent to which the defendant is confronted with evidence of guilt, the physical surroundings of the interrogation, and the duration of the questioning. United States v. Kim, 292 F.3d 969, 974 (9th Cir. 2002).

The question of whether a suspect is in custody for Miranda purposes is a mixed question of fact and law which this Court reviews *de novo*. Id. at 973.

2. Mr. Hernandez-Garcia was in custody because a reasonable person in his position would not have felt free to terminate the interrogation.

An analysis of the above factors shows that Mr. Hernandez-Garcia was in custody during the interrogation and should have been given Miranda warnings.

First, he was isolated from others. 9/28/11 RP 34-36, 51. “[T]he Supreme Court was explicit that the law enforcement technique of isolating the suspect from family and friends is one of the distinguishing features of a custodial interrogation.” Craighead, 539 F.3d at 1087 (citing Miranda, 384 U.S. at 445-46). Indeed, it is “perhaps the crucial factor.” Craighead, 539 F.3d at 1086. The main reason the questioning of a motorist during a routine traffic stop does not constitute a custodial interrogation is that “the typical traffic stop is public, at least to some degree.” Berkemer v. McCarty, 468 U.S. 420, 438, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); see also State v. Heritage, 152 Wn.2d 210, 219, 95 P.3d 345 (2004) (suspect questioned in public park surrounded by friends was not in custody). But “[o]fficers diminish the public

character of, and assert their dominion over, an interrogation site by removing a suspect from the presence of third persons who could lend moral support.” Griffin, 922 F.2d at 1352.

Thus, in both Craighead and Griffin, the courts held defendants were in custody even though they were in their own homes, primarily because they were separated from their friends and family members. Craighead, 539 F.3d at 1087; Griffin, 922 F.2d at 1355. In Griffin, another family member invited the two officers into the home. Griffin, 922 F.2d at 1346. The officers then took Griffin into the dining room to interrogate him alone, while the other two family members went upstairs. Id. The court found that this separation “eliminated any last vestige of a public interrogation” such that “[a]ny objective reasonable person would conclude from these actions that the authorities were now in complete control of the defendant.” Id. at 1355. Similarly here, the interrogation was not public and any reasonable person would conclude the two detectives were in complete control of Mr. Hernandez-Garcia. His isolation cuts strongly in favor of a finding of custody.

The “degree of restraint” factor is closely related to the isolation factor. One need not be handcuffed or jailed to be “restrained” for purposes of the custody analysis. Craighead, 539

F.3d at 1086. In Craighead, for example, the court concluded the defendant was restrained because two officers escorted him to a storage room, closed the door, and appeared to block access to it while questioning him. Id. Similarly here, Mr. Hernandez-Garcia's supervisor escorted him to a storage room where two detectives and a State-hired interpreter were waiting for him, and they closed the door as soon as Mr. Hernandez-Garcia was delivered to them. 9/28/11 RP 34-36, 51. Thus, Mr. Hernandez-Garcia's "freedom of action was restrained in a way that increased the likelihood that [he] would succumb to police pressure to incriminate himself."

Craighead, 539 F.3d at 1086.

The number of law enforcement officers also cuts in favor of a finding of custody. Mr. Hernandez-Garcia was outnumbered three to one by government actors, two of whom were detectives. 9/28/11 RP 34-36. In Dennis, this Court held a defendant was in custody even when he and his wife outnumbered the lone police officer questioning them at their kitchen table. Dennis, 16 Wn. App. at 419. The fact that two detectives assisted by a government interpreter interrogated Mr. Hernandez-Garcia after isolating him from his colleagues indicates that he was in custody.

Another indication that Mr. Hernandez-Garcia was in custody is the fact that he did not initiate contact. 9/28/11 RP 31-32.

“[W]hen the confrontation between the suspect and the criminal justice system is instigated at the direction of law enforcement authorities, rather than the suspect, custody is more likely to exist.” Griffin, 922 F.2d at 1351. As in Griffin, Mr. Hernandez-Garcia did not invite the officers into the building; a supervisor did. Nor did he initiate questioning; to the contrary, the detectives interrogated him in small, closed space. Under such circumstances, custody is more likely to exist. Id.

Finally, Mr. Hernandez-Garcia was not informed that he did not have to talk and that he was free to leave or terminate the interview. 10/6/11 RP 17-18. See Craighead, 539 F.3d at 1087; Lorenz, 152 Wn.2d at 37-38 (no custody where suspect was questioned outside on her porch, was told she was not under arrest and was free to leave at any time, and signed an acknowledgement of her freedom to leave). “[T]he absence of police advisement that the suspect is not under formal arrest, or that the suspect is at liberty to decline to answer questions, has been identified as an important indicium of the existence of a custodial setting.” Griffin, 922 F.2d at 1350. In Craighead, the court found the defendant was

in custody in his home *even though* an officer told him he was free to leave, was not under arrest, and would not be placed under arrest that day regardless of what he said. Craighead, 539 F.3d at 1087. The court found that the situation was custodial notwithstanding these assurances because of the large number of officers and the isolation of the suspect in a storage room. Id. at 1084-88. Like Craighead, Mr. Hernandez-Garcia was isolated and outnumbered, *plus* he was not told he was free to leave. Thus, Mr. Hernandez-Garcia was in custody for purposes of Miranda.

This case is like others in which courts have held suspects were in custody for Miranda purposes when questioned at their places of employment. See, e.g., Kim, 292 F.3d 969; People v. LaFrankie, 858 P.2d 702 (Colo. 1993); United States v. Carter, 884 F.2d 368 (8th Cir. 1989). In Kim, police officers interrogated the defendant inside the store she and her husband owned. Kim, 292 F.3d at 971. The officers closed the door and did not let the defendant's husband inside. Id. Two officers sat at a table with the defendant and one of them questioned her. Id. at 972. Although she was not handcuffed, no one told her she was free to leave. The officers questioned her for 30 minutes before a Korean interpreter arrived and another 15-20 minutes with the interpreter.

Id. After the interrogation, the officers left without arresting Ms. Kim. Id. The Court held Ms. Kim was in custody for purposes of Miranda because she was isolated, she was in a “police-dominated atmosphere,” she was questioned for 50 minutes, and the questions indicated she was a criminal suspect. Id. at 977. These circumstances “would have made a reasonable person believe that she could not have just walked away.” Id. at 978.

The same is true here. Mr. Hernandez-Garcia was questioned for an even longer period of time, and like the defendant in Kim, he was isolated from his family, friends, and colleagues, he was outnumbered by two detectives and an interpreter, and no one told him he was free to leave. Furthermore, unlike Ms. Kim, Mr. Hernandez-Garcia was actually arrested at the end of the interrogation. Like the defendant in Kim, Mr. Hernandez-Garcia was in custody for Fifth Amendment purposes and should have been given Miranda warnings.

In Carter, the court held the defendant was in custody for purposes of Miranda when he was summoned to the office of the company president and interviewed by postal inspectors in the presence of the company’s security manager. Carter, 884 F.2d at 369. Although the defendant was not arrested and was allowed to

go home after the interview, the court held under the totality of circumstances a reasonable person would not have believed he was free to leave. Id. at 369-70. This was so because the defendant was not questioned at his own workstation, he was isolated from others who might lend moral support, he was outnumbered by two inspectors and a security officer, he was not told he was free to leave or did not have to answer questions, he was questioned for nearly an hour, and he was “confronted with damning evidence of guilt.” Id. at 371-72.

The circumstances are remarkably similar in Mr. Hernandez-Garcia’s case. Mr. Hernandez-Garcia was removed from his own workstation, he was isolated from others, he was outnumbered by two detectives and an interpreter, he was not told he was free to leave or did not have to answer questions, he was questioned for over an hour, and he was confronted with damning evidence of guilt. 9/28/11 RP 34-53; 10/6/11 RP 17-18 ex. 4. Thus, under Carter, he was in custody for purposes of Miranda and his statements should have been suppressed. Carter, 884 F.2d at 372.

The court in LaFrankie also held that an employee was in custody at the time of his incriminating statements to police under

circumstances mirroring those of Mr. Hernandez-Garcia's case. LaFrankie, 858 P.2d at 707-08. When two detectives went to the defendant's workplace, a manager retrieved the defendant and brought him to the detectives. Id. at 704. The defendant agreed to meet with them, and they all went to the company president's office, a large 15' by 15' room. Id. The detectives closed the door and questioned the defendant. They were armed, but their weapons were not visible. Id. The defendant repeatedly professed his innocence, but the detectives told him they thought he was lying. After about 30 minutes, the defendant confessed. He had never been informed he was free to leave. Id.

The court held that under the totality of circumstances the defendant was in custody and should have been Mirandized. Id. at 705-07. The facts of Mr. Hernandez-Garcia's case are virtually identical, and the trial court erred in ruling he was not in custody for purposes of Miranda.

Indeed, the trial court seemed to understand that Mr. Hernandez-Garcia was in custody for purposes of Miranda. The trial court found Mr. Hernandez-Garcia was never told he was free to leave and was never told he did not have to talk to the detectives. 10/6/11 RP 17. The court also recognized:

The defendant or a reasonable person would know that he couldn't leave work or he couldn't get paid if he did leave work. He is told by his supervisor that the police are back to talk to him. His paycheck is at risk. The police want to talk to him in a private room. He can't leave work with his supervisor saying, "go into the room."

10/6/11 RP 18. The trial court said that Mr. Hernandez-Garcia

"probably felt he had to talk, that he had no choice." 10/6/11 RP

20. In light of these findings, the trial court's ultimate ruling denying the motion to suppress is perplexing, and should be reversed.

In sum, Mr. Hernandez-Garcia's Fifth Amendment rights were violated when the officers subjected him to a custodial interrogation without Miranda warnings, and when the trial court admitted the statements notwithstanding the omission. As the Eighth Circuit recognized:

The application of the rule of Miranda is not a process to be avoided by law enforcement officers. Custody should not be a mystical concept to any law enforcement agency. We see no reason why doubts as to the presence or absence of custody should not be resolved in favor of providing criminal suspects with the simple expedient of Miranda warnings.

...

The constant reluctance of law enforcement to advise suspects of their rights is counterproductive to the fair administration of justice in a free society. ... Such practices protect the integrity of the criminal justice system by assuring that convictions obtained by means of confessions do not violate fundamental constitutional principles.

Griffin, 922 F.2d at 1356.

Mr. Hernandez-Garcia's convictions, like defendant's in Griffin, violate fundamental constitutional principles and should be reversed.

3. The erroneous admission of the unwarned statements prejudiced Mr. Hernandez-Garcia, requiring reversal.

Miranda is a constitutional requirement. Dickerson v. United States, 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). As such, the State bears the burden of proving that the admission of statements obtained in violation of Miranda was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the confession did not contribute to the conviction. Fulminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26).

The State cannot meet this heavy burden here. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." Fulminante, 499 U.S. at 296

(internal quotation omitted). Mr. Hernandez-Garcia's confession was played for the jury and recounted by the detective, and the State cannot show that this "probative and damaging" evidence did not contribute to the conviction.

Although the State presented multiple witnesses, these witnesses simply parroted what the complainant, E.P., had told them. 10/11/11 RP 26-73; 10/12/11 RP 42-95; 10/13/11 RP 60-90. Only E.P. witnessed the alleged events in question. 10/13/11 RP 12-53. E.P. was very young when the alleged incidents occurred, and there was some indication that either her mother's boyfriend was the actual perpetrator or that the events did not occur at all. 10/11/11 RP 52; 10/12/11 RP 6-25. It was the admission of Mr. Hernandez-Garcia's statements that ensured the convictions, and the State cannot prove beyond a reasonable doubt he would have been convicted absent the improper admission of his confession. Accordingly, this Court should reverse and remand for a new trial. Chapman, 386 U.S. at 24.

4. Alternatively, this case should be remanded to the trial court for entry of written findings of fact and conclusions of law.

Following a hearing on the admissibility of an accused's statement:

[T]he court shall set forth in writing: (1) the undisputed facts, (2) the disputed facts, (3) conclusions as to the disputed facts, and (4) conclusion as to whether the statement is admissible and the reasons therefore.

CrR 3.5(c). A failure to abide by this rule requires remand for entry of written findings of fact and conclusions of law. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, the trial court failed to enter written findings and conclusions pursuant to Rule 3.5(c). Mr. Hernandez-Garcia maintains that reversal is required because his statement was improperly admitted, as explained above. If this Court disagrees, however, the proper course is to remand for entry of findings and conclusions pursuant to CrR 3.5(c). Head, 136 Wn.2d 624. On remand, the written findings must accurately reflect the oral ruling, and may not be tailored to the arguments raised on appeal. State v. Lopez, 105 Wn. App. 688, 693, 20 P.3d 978 (2001), review denied 144 Wn.2d 1016, 32 P.3d 283.

E. CONCLUSION.

For the reasons set forth above, Mr. Hernandez-Garcia respectfully requests that this Court reverse his convictions and remand for a new trial. In the alternative, the case should be

remanded for entry of findings and conclusions pursuant to CrR

3.5(c).

DATED this 8th day of June, 2012.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68106-1-I
v.)	
)	
JOSE HERNANDEZ-GARCIA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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