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Court of Appeals
Division I
State of Washington

NO. 72745-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN PEREZ-REYES,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The defendant did not assign error to Finding of Fact 1.26 or 1.29, that the defendant had told multiple stories of what happened to little D.P.R. that caused his death and that the death was not caused by an accidental fall. Are unchallenged findings verities on appeal?

2. Detectives interviewed the defendant in a car after they advised him he was not under arrest and was free to leave at any time. The defendant, in fact, left during a 10-20 minute break in the interview. Toward the end of the interview, the detectives discussed whether to take the defendant to jail but did not place him under arrest or interfere with his ability to walk away. Did the court properly determine that the entire interview was noncustodial?

3. Following the conversation regarding jail, the defendant continued to deny culpability in his baby's death. Was any error in admitting that statement harmless when it was identical to the statements he made to police before the alleged Miranda violation occurred?

II. STATEMENT OF THE CASE

On July 19, 2013, the State charged Brian Perez Reyes with Second Degree Murder, Domestic Violence (DV), for killing his

almost-3-month old son. CP 133-34. On September 22, 2014, the State amended the charge to First Degree Manslaughter (DV) with a vulnerable victim aggravator and the defendant agreed to a bench trial based on stipulated evidence. CP 105; CP 91-104.

The stipulation consisted of two envelopes of evidence. CP ___ (List of Exhibits Filed, Sub. No. 66). Trial Exhibit 1 was over one thousand Bates-stamped pages of affidavits, police reports, witness interviews, and medical records, including the Affidavit of Probable Cause and transcripts of three law enforcement interviews of the defendant. Trial Ex. 1.

The Affidavit of Probable Cause summarizes the evidence. CP 123-131. On the afternoon of June 27, 2013, the victim's mother A.C. dropped off perfectly healthy 65-day old D.P.R. with the defendant/father so she could go to work. CP 128. At 9 pm, the defendant texted her that little D.P.R. was fine. Id.

Eight hours later, at 5 a.m. on June 28, the defendant brought D.P.R. to Swedish Children's Hospital, blue, not breathing, and with no neurologic activity. CP 123-24. Doctors described the baby as suffering from a "devastating", "traumatic", non-accidental brain injury. Id.

When A.C. arrived at Children's, she asked the defendant, "What did you do?" CP 128. The defendant told her that he had gotten up to make a bottle for the baby who was crying and returned to find the baby not breathing and non-responsive. CP 129. He told the attending physician the baby had not been crying when he left to get the bottle. CP 124. He told a social worker that the baby had been crying when he went to get the bottle. CP 125-26.

The baby died the next day. CP 123-24. Experts who examined little D.P.R. agreed that his injuries were consistent with inflicted trauma. CP 125. A physician specializing in child abuse and the medical examiner agreed that the baby died from inflicted trauma caused by intentional shaking. CP 123-24.

While the baby was being treated at Children's, two Snohomish County detectives interviewed the defendant in their Ford Escape in his apartment's parking lot. 1RP 10, 12; Trial Ex. 1091. Trial Exhibit 1 at 1091. Detectives left the motor on to keep the air conditioning running and to allow the defendant to control his own window. Id. The doors were not locked and could be opened by simply pulling on the door lever. Id.

The defendant was told and acknowledged, both orally and in writing, that he was not under arrest and could leave at any time. Trial Ex. 1 at 1092; CP __ (Criminal Minute Entry, Sub. No. 42), Hearing Ex. 2. Nor was he handcuffed. 1RP 14.

Two plainclothes detectives conducted the interview which lasted over three hours. 1RP 18, 33. The interview was interrupted by a 10-20 minutes break. 1RP 19. During the break, the defendant let himself out of the car and spent the break unaccompanied by any law enforcement. 1RP 19, 42.

During the first session, the defendant said he had been watching the baby the night before. He took D.P.R. into his room and the baby fell asleep first. Trial Ex. 1, 1100-11. D.P.R. was acting normally but maybe a little sad. Id. at 1109. The baby woke up at 3 a.m. but then fell back to sleep, as did the defendant. Id. at 1113.

According to the defendant, the baby awakened again at six and the defendant got up to make him a bottle. Id. As he got up from the bed, the defendant tripped on a cord attached to his leg and accidentally dropped the baby. Id.; 1115-16; 1117-18; 1128-29. The baby fell no more than three feet. Id. at 1130. Right away, the baby stopped breathing. Id.

The defendant claimed he shook the baby two or three times to awaken him and tried CPR but it didn't work. Id. at 1116, 1140. The baby remained unconscious and not breathing. Id. at 1130, 1141.

The first session ended when detectives took a break to get an update on D.P.R.'s condition. Id. at 1156. The defendant asked if he had to stay in the car and detectives told him no, he was free to leave. Id. at 1156-57. The defendant let himself out of the car and remained unaccompanied by law enforcement until he got back into the car. 1RP 19.

During the break, detectives learned that the baby's injuries were inflicted, not accidental. 1RP 21. The injuries came from shaking, not from a fall or blow. 1RP 43.

The detectives and the defendant got back into the car and the interview continued. 1RP 18. The defendant was still not under arrest. 1RP 21. He remained cooperative and never expressed any hesitancy about speaking with detectives. 1RP 21, 55. He continued to maintain that he had not shaken the baby but had accidentally dropped D.P.R. which caused the baby to stop breathing. Trial Ex. 2, pp. 1158-1253.

At no time did the defendant's version of what had happened to D.P.R. change or expand during the second session which lasted approximately two hours. 1RP 21; Trial Ex. 2, pp. 1158-1253.

Toward the end of the second session, Detective Ross said he understood the defendant was scared sitting in a car with two detectives while his baby was in the hospital. 1RP 34; Trial Ex. 1 at 1240. Shortly thereafter, when the defendant continued to say he had only accidentally dropped the baby, Detective Scharf said, "I think we're gonna just have to take him to jail." 1RP 28. Hearing Ex. 4. It was his way of letting Detective Ross know he thought they were wasting their time. 1RP 45. Detective Ross responded, "That's what I'm thinking. Do you wanna tell us what really happened or are we done?" Hearing Ex. 4.

The defendant spent a few more minutes denying having intentionally hurting his baby. Id. He said he wanted to be with his son and the interview ended. Id. He agreed, orally and in writing, that his statements had been voluntary, freely made, and were true. Hearing Ex. 1.

Detective Ross got out of the car and Detective Scharf stayed with the defendant. 1RP 46. After five minutes, Detective

Ross returned, opened the door, placed the defendant under arrest, and read him his Miranda rights. 1RP 47.

After the arrest, the defendant was given his Miranda warnings, in writing and verbally, and waived them. 1RP 60, Hearing Ex. 6 and 7. He spoke to a third detective and demonstrated how he had dropped little D.P.R. but not violently shaken him. Trial Ex. 1 at 907- 942. When the defendant asked for a lawyer, all questioning ceased. 1RP 64-65.

At a CrR 3.5 hearing on September 5, 1014, defense moved to suppress statements made during the second interview session after the defendant overheard detectives talking about taking him to jail. CP 70. The court denied the motion. CP 107-113.

The court found that the defendant had been advised that he was not under arrest and that he was not in custody when the interview began. Id. Even when detectives made statements about jail, the physical circumstances of the interview did not change. Id. Until he was formally arrested, the defendant's freedom of movement was not curtailed to a degree associated with formal arrest. Id. Therefore, the entire interview was non-custodial and no Miranda warnings were required. Id. Statements made thereafter were also admissible. Id.

On November 20, 2014, based on the stipulated evidence, the trial court found the defendant guilty. CP 37-41. It found that the baby had died as the result of a devastating, inflicted, non-accidental injury as determined by medical professionals at Children's Hospital and at the autopsy. Id. The injury came from "violent, violent shaking" that occurred during the time the defendant was alone with the baby. Id. The injury was not caused by a fall from a bed. Id. The defendant had been warned several times about handling the baby roughly. Id.

As to the defendant's statements, the trial court found that the defendant has told multiple stories about what had happened to D.P.R. Id. He told detectives he picked up D.P.R. to make him a bottle, tripped, and dropped him on his head, causing the baby to stop breathing. Id. The court found that D.P.R had not died from a fall but from violent shaking done with great force. Id.

III. ARGUMENT

A. THE COURT'S FINDING THAT THE DEFENDANT TOLD SEVERAL STORIES, INCLUDING TO DETECTIVES, ABOUT HIS SON'S DEATH WAS UNCHALLENGED AND IS A VERITY ON APPEAL.

Unchallenged findings of fact following a bench trial are treated as verities on appeal. State v. Homan, 181 Wn.2d 103, 106, 330 P.3d 182 (2004); State v. A.M., 163 Wn. App. 414, 419,

260 P.3d 229 (2011). Review of them is limited to whether they support conclusions of law. Id.

The trial court found that the defendant made conflicting statements regarding his involvement in his baby's death. CP 40, Finding of Fact 1.26. He told the mother he went to get a bottle and the baby stopped breathing while he was gone. Id. He told the maternal grandmother he tried to rouse the baby but D.P.R. wouldn't wake up. Id. He told detectives that he woke up the baby, got up to get him a bottle, but dropped him. Id. The court also found that the baby from a fall as the defendant claimed. CP 40, Finding of Fact 1.28.

Those facts are now verities on appeal. The defendant's assignment of error to the court's consideration of his statement is irrelevant because he did not challenge the factual finding.

B. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S NON-CUSTODIAL STATEMENTS AND SUBSEQUENT CUSTODIAL STATEMENTS.

Even if the issue had been preserved, the court properly considered the defendant's statements.

The protections of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), are triggered when a suspect is taken into custody and subjected to custodial interrogation. State v.

Lorenz, 152 Wn.2d 22, 27, 93 P.3d 133 (2004). A person is in custody when his freedom of action is curtailed to a degree associated with formal arrest. Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); State v. Grogan, 147 Wn. App. 511, 517, 195 P.3d 1017 (2008), granting review and remanding on other grounds, 168 Wn.2d 1039 (2010); Lorenz, 152 Wn.2d at 27.

The factual inquiry looks at the circumstances surrounding the interrogation. Grogan, 147 Wn. App. at 517. The legal inquiry determines whether a reasonable person would have felt he was being detained to the level of a formal arrest. Id. Lorenz, at 27. That the police believe they have probable cause to arrest does not transform a non-custodial interrogation into a custodial interrogation. Lorenz, 152 Wn.2d at 27. Rather, custody occurs when a reasonable person would believe his freedom of movement is curtailed to a degree associated with a formal arrest. Id.

In Grogan, the defendant voluntarily appeared for a polygraph. He was not formally arrested, was told he was free to leave, used the restroom when he wished, and eventually left when he wished. Id. at 517-18. A reasonable person would not have believed he was in custody. Id.

In Lorenz, multiple officers arrived at the defendant's house with a warrant, asked her to step out, and told her she was not free to go back inside while they searched. 152 Wn.2d at 37. Officers did not arrest her but instead advised her that she was free to go and could leave at any time. Id. at 27. Following a five-hour interview, she completed a written statement at the end of which she acknowledged in writing that her statement was voluntary. Id.

The Supreme Court found no custodial interrogation. While the defendant was not permitted to reenter her home, she was not required to stay. Id. at 37-38. She had been told explicitly and acknowledged in writing that she was not under arrest. Id. She never asked to have the interview ended and never asked for an attorney. Id. A reasonable person would not have believed she was under arrest. Id.

The same is true in the present case. Here, the defendant freely and voluntarily spoke with detectives in their car in his parking lot. Detectives advised him that he was free to go and could leave at any time. He acknowledged that advisement at the start of the interview and reaffirmed that his interview was voluntary at the end of the interview. During a break in the interview, the defendant, in fact, got out of the car by himself and returned by

himself. No one ever advised him that he was not free to go. As in Lorenz, “[A] reasonable person under the circumstances being told by officers verbally and acknowledging in a written statement that [he] was free to leave would indeed believe [he] was not in custody.” 152 Wn.2d at 38.

Detectives in the present case discussed the possibility of taking the defendant to jail. However, they did not arrest him, tell him he was under arrest, or tell him that he would be arrested should he decide to leave. The doors to the car remained unlocked. Detective Ross stepped out of the car and never told the defendant to stay. No guns were drawn and no handcuffs shown. A reasonable person in the defendant’s position would have believed he was still free to leave.

Finally, the defendant acknowledged at the end of the interview that his statement was freely and voluntarily given, without threats or promises. Only shortly thereafter, when Detective Ross returned to the car, was the defendant actually arrested.

Because there was no custodial interrogation during the interviews, all of the defendant’s statements were properly admitted.

C. EVEN IF ERROR OCCURRED, IT WAS HARMLESS BECAUSE THE DEFENDANT SAID NOTHING AFTER THE ALLEGED MIRANDA VIOLATION THAT HE HAD NOT SAID BEFORE.

Even if the interrogation became custodial after the detectives' comments about jail, any error in considering those statements was harmless beyond a reasonable doubt.

Admitting a confession made in violation of Miranda may be harmless error. State v. France, 131 Wn. App. 394, 400-01, 88 P.3d 1003 (2004), on reconsideration, 129 Wn. App. 907, 120 P.3d 654 (2005). The error is harmless when, beyond a reasonable doubt, the untainted evidence of guilt is so overwhelming it necessarily leads to a guilty verdict. Id. State v. Reuben, 62 Wn. App. 620, 626, 814 P.2d 1177, review denied, 118 Wn.2d 1006 (1991); State v. Cervantes, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991).

That is precisely the situation in the present case. In fact, if the "tainted" statements are removed from the evidence the court considered, the remaining evidence remains not only overwhelming but also exactly the same.

The defendant argues that his interrogation became custodial when detectives discussed the possibility of taking him to

jail. Before the "custodial" interrogation, the defendant repeatedly told detectives that D.P.R. was injured when he tripped and dropped him on his head. That is precisely the statement on which the trial court relied when it made its findings of fact. CP 40, Finding of Fact 1.26. During the "custodial" interrogation, the defendant continued to deny he had done anything to harm the baby and to say that the injury must have come from the fall. There was absolutely no difference between the statements the defendant made during the latter portion of his interview.

Even if the "tainted" statements had been suppressed, the court still would have found that the defendant told several versions of events, including the one he told detectives: that he accidentally dropped, but did not violently shake, the baby. Taking the "tainted" statements out would have left the court with exactly the same evidence.

The evidence of the defendant's involvement in his son's death was so overwhelming, with or without his continued and repetitive denials of culpability, it necessarily led to the guilty verdict. Any error was harmless in admitting his later comments was harmless beyond a reasonable doubt.

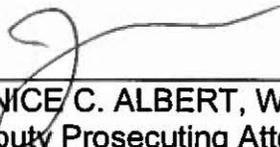
IV. CONCLUSION

Based on the foregoing, the court should affirm the conviction.

Respectfully submitted on September 21, 2015.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20th day of September, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Kevin A. March, Nielsen, Broman & Koch, MarchK@nwattorney.net and Sloanej@nwattorney.net.

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

Dated this 20th day of September, 2015, at the Snohomish County Office.


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Legal Assistant/Appeals Unit
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