

No. 70419-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN CRUZ-GRIJALVA,

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 erred by denying Juan Cruz-Grijalva's March 18, 2013, motion for a new attorney.

2. The trial court erred by denying Juan's November 21, 2012, motion for a new attorney.¹

3. Juan's Fifth Amendment privilege against self-incrimination was violated when the court admitted his custodial statements to Officer Luckie in the absence of proof that Juan knowingly, intelligently, and voluntarily waived his constitutional right to remain silent.

4. The trial court erred by concluding that Juan understood and voluntarily waived his constitutional right to remain silent.

5. Juan's Fifth Amendment privilege against self-incrimination was violated when the court admitted his custodial statements to Officer Nicholson in the absence of proof that Juan knowingly, intelligently, and voluntarily waived his constitutional right to remain silent.

¹ Although he was charged in adult court, Juan is referred to by his first name because he was a juvenile when the offense occurred.

6. The trial court erred by concluding that a reasonable person in Juan's position would believe he was not in custody when he was questioned by Officer Nicholson.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant's constitutional right to counsel is violated when he is forced to proceed with an attorney with whom he has an irreconcilable conflict. U.S. Const. amends. VI, XIV; Const. art. I, § 22. When the defendant asks to discharge his court-appointed attorney, the court must inquire into the nature and extent of the purported conflict. Juan asked the court to appoint new counsel because his attorney was not preparing a defense or explaining the case to him, and he later renewed the motion, adding that the lawyer had withheld evidence from him. Both times the court denied Juan's motion without posing the questions necessary to understand the nature of his dissatisfaction with his attorney. Was Juan's constitutional right to counsel violated when the court denied his motions for a substitute attorney? (Assignments of Error 1-2).

2. The state and federal constitutions guarantee a suspect the right not to incriminate himself. Prior to admission of a defendant's custodial statement, the court must determine if the defendant

knowingly, intelligently and voluntarily waived his constitutional rights to remain silent and to consult with an attorney.

a. Officer Luckie arrested Juan, read the Miranda rights orally, and interrogated Juan without asking if he waived his constitutional rights. The trial court ruled that Juan validly waived his constitutional rights because (1) Juan orally stated that he understood the rights, and (2) there was no evidence the waiver was made under duress, but the court failed to take Juan's age into account in determining that the 16-year-old validly waived his constitutional rights. Were Juan's Fifth Amendment rights violated by the introduction of his custodial statements against him at trial in the absence of evidence of a knowing, intelligent, and voluntarily waiver? (Assignments of Error 3-4).

b. Officer Nicholson did not advise Juan of his Miranda rights prior to questioning him. Without considering Juan's youth, the trial court found that the officer was not required to inform Juan of his Fifth Amendment rights because Juan was not under arrest and was not handcuffed or in a patrol car. Juan had been patted down, he was standing at the hood of a patrol car surrounded by several armed police officers and patrol cars with their emergency lights flashing, and he

was not free to leave. Where a reasonable 16-year-old in his position would believe that he was in police custody, were Juan's Fifth Amendment rights violated by the admission of his oral statements to Officer Nicholson at trial? (Assignments of Error 5-6).

C. STATEMENT OF THE CASE

Sixteen-year-old Juan Cruz-Grijalva was near his home where his family was gathering to celebrate his mother's birthday when he was stopped by Seattle Police Officer Scott Luckie. 2RP 80, 88-89; 4RP 44-45.² Officer Luckie was responding to a call of a recent robbery in the neighborhood, and he believed that Juan matched the description provided by the victim, Linda Geer. 2RP 80.

Another officer drove Ms. Geer to the location where Juan was stopped, and she stated that Juan was the person who robbed her. 2RP 42-44. The King County Prosecutor charged Juan in superior court with first degree robbery with a deadly weapon with an additional deadly weapon enhancement. CP 7-8; RCW 13.04.030(1)(e)(iv)(C).

² The verbatim report of proceeding of Juan's trial is referred to as follows:
1RP = 3/18/13
2RP = 3/20/13 and 3/21/13 (containing court rulings and defense witnesses)
3RP = 3/25/13
4RP = 3/26/13
5RP = 3/17/13, 4/8/13, 4/18/13 and 5/15/13
11/21/12 RP = motion for new counsel before Judge Mary Roberts
The volume dated 3/20/13 and 3/21/13 that contains jury selection and opening statements will not be cited.

Prior to his omnibus hearing, Juan asked the court to appoint a new attorney to represent him because he did not believe his court-appointed attorney was working on his defense. 11/21/12 RP 4-5. Juan explained that trial counsel had not talked to him about the case or developed a defense and was not honoring his choice to go to trial. 11/21/12 RP 4-5. The court denied the motion. CP 6; 11/21/12 RP 6.

Juan renewed his motion for new counsel on the first day of trial before the Honorable Lori Smith. 1RP 6-8, 10-11. Judge Smith denied the motion on the grounds that Judge Roberts had already ruled on the motion, even after Juan revealed that he learned after the hearing before Judge Roberts that his lawyer had withheld evidence from him. 1RP 11-14.

At a CrR 3.5 hearing, the trial court ruled that Juan's pre-Miranda statements to Officer Erin Nicholson were admissible because they occurred prior to Juan's arrest and Miranda warnings were therefore not needed. 1RP 82. The court also ruled that Juan's post-arrest statements were admissible even though the officer questioned Juan without obtaining an express waiver of his Miranda rights. 1RP 81-82. The court did not enter written findings of fact and conclusions of law.

At Juan's jury trial, Linda Geer testified that she noticed someone behind her as she was walking from her bus stop to her West Seattle home after work. 2RP 23-24, 28. When Ms. Geer slowed down to see if the man would pass her, he asked her what time it was, and Ms. Geer gave him the time. 2RP 29-31. When she looked up, the man was standing in front of her and asked her to give him the iPhone that she was holding in her hand. 2RP 32. Ms. Geer could see the blade of a knife in the man's hand. 2RP 33. Although it was dark and she was focused on the knife, Ms. Geer saw the robber's face. 2RP 30, 59.

Ms. Geer asked the man if she could first remove her personal information from her telephone. 2RP 33. The man told her to go ahead, and Ms. Geer spent a few minutes re-setting the iPhone. 2RP 34. When she was done, she held the telephone out and the man took it, returned Ms. Geer's ORCA card to her, and walked away. 2RP 35-36, 58. Ms. Geer continued home and, after about ten minutes, called the police. 2RP 37-38.

Officer Luckie was one of the Seattle Police officers dispatched to look for the robber, described as an Hispanic male in his early 20's, about 5'0" to 5'5" tall, wearing a dark "N.Y." or "New York" baseball

cap and a thick light green hooded jacket. 2RP 80-82. The officer saw Juan walking northbound on 35th Avenue and believed Juan met this description. 2RP 84. Juan was no longer on the street, however, when the officer made a U-turn to stop him. 2RP 85-86.

A few seconds later, Officer Luckie saw Juan step onto the sidewalk, no longer wearing the baseball cap the officer had earlier seen. 2RP 87. Officer Luckie pulled up to Juan, directed him to the hood of his patrol car, and frisked him. 2RP 88-89. Juan was wearing a gray jacket, not a green one. 2RP 108.

When other officers arrived, Officer Luckie asked them to watch Juan while Officer Luckie checked nearby residences for a knife and a cell phone. 2RP 89-90. Officer Nicholson talked to Juan about where he had been that evening. 3RP 57-59.

Officer Luckie found a New York Yankees baseball cap and some knit gloves in nearby yards, and he therefore handcuffed Juan and placed Juan under arrest. 2RP 91-93. Officer Luckie asked Juan if he had been in the area of the robbery, and Juan said he had ridden the bus to that area. 2RP 94. Juan explained that he was going to his mother's house, but also said he was going to a friend's home. 2RP 95. Officer Luckie opined that Juan's explanation of the location of the friend's

home changed over time and his description of his route did not make sense. 2RP 96. When asked why he removed his baseball cap, Juan stated he was afraid the officer might think he had stolen it. 2RP 96-97.

Ms. Geer was brought to Juan's location and asked if he was the person who took her cell phone. 2RP 42-43, 45-46. Officer Luckie placed the baseball cap he had found on Juan's head for the show-up. 2RP 99-100, 155. Ms. Geer identified Juan although she could only see the general shape of his face. 2RP 62; Ex. 17. Ms. Geer also identified Juan at trial. 2RP 25, 54.

The next day Officer Luckie found a knife with a four-inch blade in a neighboring yard. 2RP 100-01, 128. No fingerprints were found on the knife. 3RP 45.

Juan's sister Jennifer Valdez Grijalva explained that Juan lived with his mother in an apartment on the block where he was arrested. 4RP 44-45, 48-49. It was their mother's birthday, and the family was gathering to have dinner and go to church. 4RP 45. When she arrived, Juan was seated on the hood of a patrol car in handcuffs and surrounded by police cars. 4RP 46-47. She testified that Juan did not own a New York Yankees baseball cap. 4RP 47-48.

Juan was convicted as charged. CP 22-23. Judge Smith sentenced him to 70 months in prison, followed by 18 months community custody. CP 57-58. This appeal follows. CP 52-53.

D. ARGUMENT

1. **Juan's constitutional right to counsel was violated when the trial court denied his motion to discharge his court-appointed attorney.**

A criminal defendant has the right to counsel, which includes effective counsel who is working on his client's behalf. Juan twice asked the superior court to discharge his court-appointed attorney, expressing his concern that his attorney was not adequately explaining the case, was withholding evidence from him, and had not prepared a defense. The trial court, however, made only a limited inquiry concerning the problems in the attorney-client relationship. Juan's conviction must be reversed because the denial of his request for new counsel violated his right to effective assistance of counsel.

a. Juan had the constitutional right to effective assistance of counsel.

The federal and state constitutions provide a criminal defendant with the right to counsel and to due process of law.³ U.S. Const.

³ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel

amends. VI, XIV; Const. art. 1, §§ 3, 22. Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronin, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)).

"[T]he right to counsel is the right to effective assistance of counsel." Strickland, 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)); accord State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010).

The right to effective counsel is not fulfilled simply because an attorney is present in court; the attorney must actually assist the client and play a

for his defence." The Fourteenth Amendment states in part, "... nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685; A.N.J., 168 Wn.2d at 98.

An indigent defendant does not have the right to choose a particular court-appointed attorney. In re Personal Restraint of Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Thus, the trial court has discretion to determine if a defendant's dissatisfaction with court-appointed counsel is meritorious and warrants appointment of new counsel. Id. The defendant must show good cause for substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the defendant and his attorney. Id. at 734; Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991).

The right to counsel is violated when a defendant is forced to proceed with an attorney who he does not trust or with whom he has an irreconcilable conflict or cannot communicate. State v. Thompson, 169 Wn. App. 436, 463, 290 P.3d 966 (2012), rev. denied, 176 Wn.2d 1023 (2013); Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007); United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001); Brown v. Craven, 424 F.2d 1166, 1170 (D.C. Cir.

1970). The loss of trust and resulting breakdown in communication results in the constructive denial of counsel.

Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel.

Daniels, 428 F.3d at 1198 (quoting Brown, 424 F.2d at 1169).

b. The trial court improperly denied Juan's request for new counsel.

In reviewing the denial of a defendant's motion for new counsel, the appellate court considers (1) the adequacy of the trial court's inquiry into the conflict; (2) the extent of the conflict between the accused and his attorney, and (3) the timeliness of the motion. Stenson, 132 Wn.2d at 724 (citing United States v. Moore, 159 F.3d 1154, 1158 n.3 (9th Cir. 1998)); Daniels, 428 F.3d at 1197-98. An evaluation of the three factors demonstrates that the trial court improperly denied Juan's motion for a new attorney.

i. The trial court did not adequately inquire into the nature of Juan's dissatisfaction with his attorney.

When a trial court learns of a conflict between a defendant and his counsel, the court must thoroughly inquire into the factual basis of the defendant's dissatisfaction. State v. Dougherty, 33 Wn. App. 466,

471, 655 P.2d 1187 (1982) (“A penetrating and comprehensive examination by the court of the defendant’s allegation will serve as the basis of whether different counsel needs to be appointed”), rev. denied, 99 Wn.2d 1023 (1983); Smith, 923 F.2d at 1320 (court has “obligation to inquire thoroughly into the factual basis of the defendant’s dissatisfaction”) (quoting United States v. Hart, 557 F.2d 162, 163 (8th Cir.), cert. denied, 434 U.S. 906 (1977)).

When an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for the defendant’s dissatisfaction with his current counsel. The court may not summarily deny a defendant’s request for substitution of counsel because the defendant has failed to state, or stated in a vague and conclusory manner, the grounds for such discharge. It “generally has an obligation to engage the defendant in a colloquy concerning the cause of the defendant’s dissatisfaction with his representation.”

Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.4(b) at 700-02 (3rd ed. 2007) (footnotes and citations omitted) (quoting United States v. Graham, 91 F.3d 213, 221 (D.C. Cir. 1996), cert. denied, 519 U.S. 1136 (1997)).

“[I]n most circumstances, a court can only ascertain the extent of the breakdown in communication by asking specific and targeted questions.” United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78

(9th Cir. 2001). The inquiry thus should include questioning the attorney or the defendant “privately and in depth” and examining available witnesses. Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). Such an inquiry may also “ease the defendant’s dissatisfaction, distrust, and concern.” Adelzo-Gonzalez, 268 F.3d at 777).

Juan made at least three requests for new counsel.⁴ On November 21, Juan appeared before Chief Judge Mary Roberts to request the appointment of new counsel. Juan told the court that he believed his trial attorney was ineffective and that they had a conflict. Juan explained that trial counsel was not handling the case with an eye to proving his innocence and was not honoring Juan’s choice to go to trial. 11/21/12 RP 4. “I want a lawyer who is working with me and not against me.” *Id.*

When Judge Roberts asked him for an example, Juan said that his attorney did not confer with him in jail and sometimes did not even answer the telephone when he called. 11/21/12 RP 4-5. The court then asked him how that would be different with a new attorney. Juan

⁴ Prior to jury selection, Juan asked the court to continue the case so that his family could retain private counsel. 2RP 4-6. In addition, Juan’s desire to retain private counsel was cited as one of the reasons for an earlier continuance of the trial date. 1RP 8-9.

explained his only court appearances were for continuances. He added that defense counsel was not really trying and they had nothing to present at trial. 11/21/12 RP_5.

After inquiring of the prosecutor and defense counsel about the progress of the case, the court denied Juan's motion for a new attorney. CP 6; 11/21/12 RP 6. The court's ruling was based upon her understanding of Juan's case, her experience with Juan's lawyer, and the assurances of both counsel that defense counsel was preparing for trial. 11/21/12 RP 6.

On the first day of trial, Juan again requested that the court appoint new counsel and, in the alternative, asked that the case be continued so that his family could retain private counsel. 1RP 6, 7-8, 11. Juan related that his attorney had not explained the evidence against him so that he could understand the case. 1RP 7. The trial court denied the motion on the grounds that it had already been heard and denied by Judge Roberts and Juan had not presented any new issues. 1RP 11-12. Juan then explained that he learned after the hearing before Judge Roberts that defense counsel had withheld information from him. 1RP 12. He therefore lost his trust in defense

counsel and had “no faith that he will fight for me.” 1RP 12-13. The court, however, refused to consider this new information. 1RP 13, 14.

Neither superior court judge made an inquiry into the reasons for Juan’s dissatisfaction with his attorney that was searching enough to provide court with the information needed to make an informed decision. Judge Roberts asked Juan only two open-ended questions. 2/21/12 RP 4-5. Judge Smith’s only questions to Juan concerned where and when he made the prior request for new counsel. 1RP 6-7. Specific and targeted” questions are necessary to ascertain the nature of a defendant’s relationship with his attorney. Adelzo-Gonzalez, 268 F.3d at 777-78. Here, however, Judge Roberts barely inquired into Juan’s problems with his attorney and Judge Smith simply listened to Juan’s concerns. Juan’s limited description of his problems with his attorney required more searching follow-up in order to determine the nature of the problem. The court thus failed to fulfill its duty to inquire into the reasons for the conflict.

ii. Juan’s dissatisfaction with his counsel was serious.

Juan had lost faith in his public defender. Juan related that his attorney had withheld evidence from him and was not working to defend him. Juan made it clear that he did not believe his attorney was

on his side. Thus, his concerns that he was not receiving effective assistance of counsel were genuine.

“The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.” American Bar Association, ABA Standards for Criminal Justice Prosecution Function and Defense Function, Standard 4-1.2(b) at 120 (3rd ed. 1993). In addition to zealous advocacy, defense counsel must establish a relationship with his client of “trust and confidence.” Id. Standard 4-3.1(a) at 147. While this can be difficult when a teenager is facing serious charges in adult court, it was still counsel’s responsibility. Juan clearly did not trust his attorney, who he believed was not explaining the prosecution’s evidence, communicating with him, or working on a defense.

iii. Juan’s motions were timely.

In evaluating the timeliness of a motion for new counsel, the court balances the defendant’s important constitutional right to counsel with the resulting inconvenience and delay. Daniels, 428 F.3d at 1200 (quoting Moore, 159 F.3d at 1161). “Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is

timely if the conflict is serious enough to justify the delay.” Id. (citing Adelzo-Gonzalez, 268 F.3d at 780).

Juan first asked the court for new counsel on November 21, 2012, four months before his trial began in March 2013. At that time, defense counsel’s trial preparation was still underway. 11/21/12 RP 4. The motion was thus timely. See Adelzo-Gonzalez, 268 F.3d at 780 (motion made approximately six weeks prior to trial was timely).

When Juan renewed his motion, it was the first day of trial and pre-trial motions were heard. Juan, however, raised an important new reason for change of counsel – his attorney’s withholding of evidence. The renewed motion was thus also timely. Nguyen, 262 F.3d at 1003.

c. Juan’s conviction must be reversed.

The trial court violated Juan’s constitutional right to counsel by denying his motion to discharge his court-appointed attorney and forcing him to proceed to trial with an attorney he did not trust and believed was not working for him. The erroneous denial of a motion for new counsel is presumptively prejudicial. Daniels, 428 F.3d at 1199; Nguyen, 262 F.3d at 1005. Juan’s conviction must be reversed and remanded for a new trial.

2. Juan’s conviction must be reversed because the court improperly admitted custodial statements made without proof that he knowingly, intelligently, and voluntarily waived his constitutional right to remain silent.

A suspect in police custody must be advised of his constitutional rights to remain silent and to consult with an attorney before a police officer may interrogate him, and the suspect’s waiver of those constitutional rights must be knowing, intelligent, and voluntary. Officer Nicholson questioned Juan about his whereabouts while Juan was being held by several police officers, but did not first advise Juan of his constitutional rights. Officer Luckie later arrested Juan and read him the Miranda warnings, but immediately questioned Juan without ensuring he was validly waiving his constitutional rights. The trial court erred by admitting Juan’s statements to both officers, and Juan’s conviction must be reversed.

- a. Juan’s constitutional right not to incriminate himself is protected by the requirement that he knowingly, intelligently and voluntarily waive his *Miranda* rights.

The federal and state constitutions provide the accused the right not to incriminate himself.⁵ U.S. Const. amends. V, XIV; Const. art. I,

⁵ The Fifth Amendment provides that no person “shall be compelled in any criminal action to be a witness against himself.” The Fifth Amendment is applicable to the States through the Fourteenth Amendment. Miranda, 384 U.S. at 463-64.

§ 9. Due to the coercive nature of police custody, police officers must advise a suspect of this constitutional rights prior to questioning. Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The suspect must be unequivocally advised of his right to remain silent, that anything he says may be used against him in court, that he has the right to have an attorney present if he chooses to make a statement, and that an attorney will be appointed for him if he cannot afford one. Id. at 479.

An individual may knowingly and intelligently waive these constitutional rights and answer questions or provide a statement to the police. Miranda, 384 U.S. at 479. “The question whether the accused waived his rights is ‘not one of form, but rather of whether the defendant in fact waived the rights delineated in the Miranda case.’” Fare v. Michael C., 442 U.S. 707, 724, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979) (quoting North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)).

If a suspect waives his constitutional rights and interrogation continues without an attorney, “a heavy burden rests on the government

Article 1, section 9 of the Washington Constitution states, “No person shall be compelled in any criminal case to give evidence against himself.” Washington courts have given article 1, section 9 the same interpretation as the United States Supreme Court has given the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” Miranda, 384 U.S. at 475. The government must establish that (1) the waiver was voluntary and (2) the defendant understood both the rights he was abandoning and the consequences of a decision to waive those rights. Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); Fare, 442 U.S. at 725.

- b. The State did not prove that Juan validly waived his constitutional rights before answering Office Luckie’s questions.

The State bears the burden of proving the admissibility of a defendant’s confession, including the validity of the Miranda waiver and voluntariness of the confession. Missouri v. Seibert, 542 U.S. 602, 608 n.1, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). In the present case, the State did not prove that Juan waived his rights or that any implied waiver was knowing, intelligent, and voluntary.

Officer Luckie detained Juan and, after finding a baseball cap in a nearby lawn, handcuffed and arrested him. 1RP 24, 8-29. The officer read the Miranda rights out loud, asked Juan if he understood them, and began questioning the teenager without asking him if he agreed to waive his constitutional rights. 1RP 29-30, 34, 46.

The court must review the totality of the circumstances -- including the defendant's background, experience, and conduct -- to ascertain if the respondent's waiver of his constitutional rights was in fact knowing and voluntarily. Fare, 442 U.S. at 725; Butler, 441 U.S. at 374; Miranda, 384 U.S. at 475-77. A defendant's youth is necessarily one the considerations:

The totality approach permits - indeed it mandates - inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Fare, 442 U.S. at 725.

In admitting Juan's statements to Officer Luckie, the trial court noted that the case law does not require a specific waiver of Miranda rights. The court opined that obtaining an express waiver would have been a better practice, but determined that there was no evidence to show Juan's waiver was made under duress or that he did not understand his rights. 1RP 81-82.

The trial court was correct that the defendant's waiver of his constitutional rights need not be express. Berghuis v. Thompkins, 560 U.S. 370, 384, 130 S. Ct. 225, 176 L. Ed. 2d 1098 (2010); State v.

Terrovona, 105 Wn.2d 632, 646-47, 716 P.2d 295 (1986). But it is not sufficient to show that Miranda warnings were given and the accused made an uncoerced statement; the State must still prove that the defendant understood his constitutional rights. Thompkins, 560 U.S. at 384.

In Thompkins, the defendant remained largely silent until 2 hours and 45 minutes into a 3-hour interrogation when he answered in the affirmative after being asked if he prayed to God to forgive him “for shooting that boy.” Thompkins, 560 U.S. at 375. The defendant refused to make a written confession. Id. The Court looked at the totality of the circumstances in determining Thompkins knowingly waived his rights to remain silent and to consult with counsel. In addition to Thompkins’ behavior in providing only limited responses during the lengthy interview, he received a written copy of the Miranda warning, he was given time to read them, and he read aloud the warning that explained that he could assert his rights at any time during questioning. In addition, the detective first determined that Thompkins could read and write English and read the warnings out loud to the defendant. Id. at 385-86.

In contrast, Officer Luckie simply read the Miranda warnings out loud to Juan and, when Juan indicated orally that he understood them, the officer immediately began questioning him about his whereabouts that evening, assuming a waiver from the fact that Juan answered his questions. 1RP 46. Juan was only 16 years old when Office Luckie questioned him, but the officer did nothing to confirm that Juan actually understood that he was not obligated to answer his questions. 1RP 33, 46, 141; 2RP 94; 5RP 90. The trial court also failed to take Juan's age into account in deciding that he validly waived his constitutional rights, simply concluding that he said he understood his constitutional rights and there was no showing of duress. 1RP 81-82. The trial court thus erred.

This Court reviews factual findings supporting the court's CrR 3.5 rulings to determine if they are supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), rev. denied, 149 Wn.2d 1025 (2003). The trial court's legal conclusions are reviewed de novo. Id.

A waiver of the constitutional rights to remain silent and to consult with an attorney before making a custodial statement must be knowing, intelligent and voluntary. Fare, 442 U.S. at 724-25. This Court may not presume a waiver of important constitutional rights, but must “indulge every reasonable presumption against waiver” of those rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938); accord Miranda, 384 U.S. at 475 (“[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or imply from the fact that a confession was in fact eventually obtained.”)

There is scant evidence that Juan understood that he had a right to remain silent and consult with an attorney before answering Officer Luckie’s questions. The trial court’s determination that Juan knowingly, intelligently, and voluntarily waived his right to remain silent is not supported by the evidence.

- c. Juan’s statements to Officer Nicholson were inadmissible because Juan had not been advised of his constitutional right to remain silent and a reasonable person in Juan’s position would have understood he was in police custody.

Due to the coercive nature of police custody, police officers must administer Miranda warnings prior to interrogation of any suspect

who “has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Miranda, 384 U.S. at 444; accord J.D.B. v. North Carolina, __ U.S. __, 131 S. Ct. 2394, 2401-02, 180 L. Ed. 2d 310 (2011). A suspect is in custody if, in light of the totality of the circumstances, a reasonable person would have felt he “was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

In determining if a suspect is in custody, the reviewing court looks at “all of the circumstances surrounding the interrogation” to determine “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” J.D.B., 131 S. Ct. at 2402 (quoting Thompson, 516 U.S. at 112). The court must “‘examine all of the circumstances surrounding the interrogation,’ including any circumstance that ‘would have affected how a reasonable person’ in the suspect’s position ‘would perceive his or her freedom to leave.’” Id. (internal citations omitted) (quoting Stansbury v. California, 511 U.S. 318, 322, 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)).

Appellate courts review the trial court's custody determination de novo. State v. Daniels, 160 Wn.2d 256, 261, 266, 156 P.3d 905 (2007), cert. denied, 558 U.S. 819 (2009). The first step in the process, determining the circumstances surrounding the interrogation, is a factual one. Thompson, 516 U.S. at 112-13. The second question, whether a reasonable person in those circumstances would believe he was not free to leave, is a mixed question of fact and law. Id.

The trial court found that Officer Nicholson was not required to inform Juan of his Miranda rights because Juan was not under arrest but was being held as a result of a Terry stop. The court noted he was not yet in handcuffs or in a patrol car. 1RP 82. Officer Luckie, however, had ordered Juan to come to his patrol car, where Juan placed his hands on the hood of the car and the officer patted him down for weapons. 1RP 42. Several other armed police officers arrived in addition to Officer Luckie and detained Juan in the street with their patrol car lights flashing. 1RP 43; 2RP 135-36; Ex. 13, 17. Several patrol cars were in the area with emergency lights flashing. Ex. 13, 17. Juan was clearly not free to leave.

In determining if Miranda warnings were required, the court looked only to the facts that Juan was outside the patrol car, he was not

handcuffed, and the police were still investigating. 1RP 82. The court did not address Juan's young age. A child's age, however, is an objective fact that must be considered in determining if a reasonable person in the suspect's position would believe he was free to leave. J.D.B., 131 S. Ct. at 2402-03. "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult will feel free to go." Id. at 2403. The court was required to consider Juan's age in determining if he was in custody, and the court's failure to do so denied Juan "the full scope of the procedural safeguards that Miranda guarantees to adults." Id. at 2408.

Miranda warnings were required when a juvenile was interviewed by a plain-clothed detective in the assistant principal's office. State v. D.R., 84 Wn. App. 832, 834, 838, 930 P.2d 350, rev. denied, 132 Wn.2d 1015 (1997). In determining that the 14-year-old was in custody, the court noted (1) the detective did not inform him that he was free to leave, (2) the "naturally coercive nature of the school and principal's office environment for children of [the child's] age, and (3) the coercive nature of the questioning." Id. at 838.

Juan was in a much more coercive environment, standing by a police patrol case surrounded by several armed officers and patrol cars

with their emergency lights flashing. Juan knew he could not walk away from the officers. A reasonable 16-year-old in Juan's position would believe he was in police custody, and Miranda warnings were therefore required.

d. Juan's conviction must be reversed.

When a custodial statement is improperly admitted at trial, the appellate court must reverse the conviction unless the State can demonstrate beyond a reasonable doubt that the constitutional error did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); D.R., 84 Wn. App. at 383. The harmless error test is designed to prevent the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the outcome of the trial would have been different if the error had not occurred. Id. at 24.

While Juan did not tell Officer Luckie or Officer Nicholson that he robbed Ms. Geer, his statements concerning his whereabouts that evening were nonetheless incriminating. First, the robbery occurred

near Ms. Geer's bus stop at on 35th Avenue S.W., and Juan told both officers that he got off the bus nearby. 2RP 23-24, 94; 3RP 57-59.

Second, Officer Luckie testified that Juan's statements were contradictory and illogical. According to Officer Luckie, Juan said that he was going to his mother house for her birthday, but also said he was going to a friend's house. 2RP 95. His explanation of where the friend's house was located also changed over time. 2RP 95. The officer also testified that he had stopped Juan close to the friend's house, but Juan's description of the route he took from the bus made no sense. 2RP 96. And, if Juan was ultimately going to his mother's house, he was walking in the wrong direction. 2RP 97. Officer Luckie also doubted Juan's statement that he had earlier been accused of stealing the baseball cap he was wearing and therefore took the hat off when he saw the police officer. 2RP 96-97, 141-42.

In closing argument, the prosecutor used Juan's allegedly inconsistent statements as proof of guilt, arguing that what Juan said to the officer was not true and did not make sense. 5RP 33-34. Juan's custodial statements to Officer Luckie were thus critical to the State's proof that Juan was the person who robbed Ms. Geer.

The error in admitting the custodial statement is not harmless beyond a reasonable doubt. Juan's conviction for first degree robbery must be reversed and remanded for a trial. D.R., 84 Wn. App. at 839.

E. CONCLUSION

The superior court's denial of Juan's motion for a new court-appointed attorney violated Juan constitutional right to effective assistance of counsel. In addition, the trial court improperly admitted his statements to Officer Luckie and Officer Nicholson when the State did not prove that Juan knowingly, intelligently, and voluntarily waived his constitutional rights to remain silent and to consult with an attorney before speaking to the police officers. Juan's conviction for first degree robbery must be reversed and remanded for a new trial.

DATED this 4th day of April 2014.

Respectfully submitted,



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

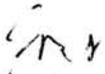
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70419-2-I
v.)	
)	
JUAN CRUZ-GRIJALVA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF APRIL, 2014, 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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<input checked="" type="checkbox"/> JUAN CRUZ-GRIJALVA 366950 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF APRIL, 2014.

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