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Court of Appeals
Division III
State of Washington

32113-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LUIS A. AVILA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF ASOTIN COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The State's use of Mr. Avila's statements to the investigating officer in its case in chief violated his rights under the Fifth and Fourteenth Amendments.

B. ISSUES

1. The investigating officer determined the time, place, and circumstances for interviewing a Guatemalan citizen who was the only suspect in a rape investigation. Absent evidence the officer advised the suspect of his right to remain silent or told him that he was free to leave, do the circumstances show that the suspect's statements were involuntary?
2. Is the admission into evidence of the suspect's involuntary statements to law enforcement manifest constitutional error that requires reversal?

C. STATEMENT OF THE CASE

Luis Avila grew up in Guatemala. (RP 301) He came to the United States where he met his wife. (RP 301) They lived in Guatemala for two years, then returned to the United States in 2005. (RP 301-02) He has two sons. (RP 302) He and his wife divorced, but he maintains close ties with his children. (RP 302)

He and his sons began attending church, where he became involved in church activities. (RP 234, 304-05)

Through his church activities, he met Sharee Kromrei's sons Cody and Jesse. (RP 303) Ms. Kromrei owns a licensed nursing home, Sycamore Glen. (RP 233, 302) Caring for the elderly is an important value in Guatemalan culture, and in visiting his friends at Sycamore Glen Mr. Avila became interested in a career in home health care. (RP 302, 305-06) Mr. Avila had also met Patty Torres at church. (RP 235, 303) She too owned an adult care home. (RP 303) He began working for Ms. Torres doing cleaning and repairs. (RP 303)

The weekend of June 11, 2011, Jesse Kromrei asked Mr. Avila to cover a shift for him because the family was going to be out of town. (RP 236, 304) He was assigned to the middle unit, where Woody, Bonnie, Tammy and Josephine lived. (RP 307) Ms. Kromrei was comfortable hiring Mr. Avila for this temporary work because she had had opportunities to observe him at church and knew him to be a patient, kind father. (RP 236) She also knew Ms. Torres had been pleased with his work. (RP 236-37)

Mr. Avila's understanding was that the residents would be in bed and that he would be on call in case anyone needed help. (RP 307) He also had to keep a close eye on Josephine, who tended to pull at her medical equipment. (RP 308, 311) The other three wanted to smoke outside, so Mr. Avila had to help

Tammy get in and out of her wheelchair. (RP 310-11) He finally got the residents to bed around 2:30 in the morning. (RP 312)

Bonnie Larsen had moved to Sycamore Glen from Clarkston Care Center in 2010. (RP 242) She had a younger visitor, Michael Jackson, whom she called her boyfriend. (RP 243) The term “boyfriend” caused Ms. Kromrei some concern, because she considered Ms. Larsen a vulnerable adult. (RP 243) The next time Mr. Jackson visited Ms. Larsen, Ms. Kromrei went to Ms. Larsen’s bedroom where she found Mr. Jackson engaging in inappropriate intimate activity with Ms. Larsen. (RP 243) She promptly reported the incident to the Department of Social and Health Services. (RP 244) As a result of the ensuing police investigation, Mr. Jackson was convicted of rape based on an incident that had occurred at the Clarkston Care Center. (RP 158-592, 272) Ms. Larsen later brought a legal claim against Clarkston Care Center. (RP 101)

Beginning in October 2010, Ms. Larsen reported dreaming that she had been raped. (RP 135) In March 2011, her caregiver awakened her after he found her yelling in her sleep, and her roommate told him Ms. Larsen had been up and down all night having bad dreams. (RP 136) In May 2011, Ms. Larsen complained that she had been having bad dreams of Michael Jackson. (RP 136-37) On June 4, 2011, Ms. Larsen reported having had very bad nightmares in which a man was trying to get her. (RP 137) On June 10, she reported that Woody had exposed himself to her. (RP 62, 256)

Ms. Larsen had an appointment with her counselor on the morning of June 13, 2011. (RP 130) She told her counselor that she had been raped. (RP 97) She was taken to St. Joseph's Hospital where a doctor conducted a sexual assault examination, which included collecting samples from various orifices. (RP 43, 166-69) She identified Mr. Avila as her assailant. (RP 46) The hospital reported the allegations to the Asotin County Sheriff's Office. (RP 38) Sheriff Deputy Jackie Nichols responded to the call. (RP 39) Based on Ms. Larsen's allegations, Mr. Avila was eventually charged with second degree rape. (CP 1)

Detective Nichols described her investigation to the jury. (RP 37-76)

According to Detective Nichols, Ms. Larsen told her a man named Luis had sexually assaulted her. (RP 41) Detective Nichols was eventually able to figure out that she was talking about Luis Avila. (RP 41) Ms. Larsen told Ms. Nichols that she had been raped at Sycamore Glen. (RP 42)

Detective Nichols reviewed medical records provided by the hospital and determined that the account Ms. Larsen had given the medical team was consistent with the account she had given the detective. (RP 44) Detective Nichols confirmed that Ms. Larsen had told the medical providers that on Saturday night she had been assaulted in the bathroom, that Mr. Avila had told her to bend over, and he had sex with her. (RP 46) The detective testified that Ms. Larsen had told her the same thing. (RP 46)

Detective Nichols arranged to interview Mr. Avila on June 14, and Ms. Kromrei asked to be present during the interview. (RP 51) Mr. Avila denied the allegations. (RP 52) Following that interview, Detective Nichols again interviewed Ms. Larsen: "I told her that I had heard from Sharee Kromrei that she had recanted her story and that Luis hadn't raped her, and she said oh no, he raped me. Luis raped me. But I heard that he got fired and sent away, so I'm okay." (RP 53)

Ms. Larsen told the jury she had been raped by a man named Luis. (RP 93) She identified Mr. Avila after some hesitation. (RP 94-95) She said her roommate knew about it but wouldn't tell anybody for fear of getting kicked out. (RP 95) She testified that she had told people at church about this but they didn't believe her. (RP 96) She said she couldn't tell her regular caregiver because she was afraid she would get kicked out. (RP 96) She told Mr. Kromrei about it but Ms. Kromrei was mean and told her to lie. (RP 97)

Ms. Larsen testified that she had wanted to leave Sycamore Glen and that the staff, including her regular caregiver, had prevented her from leaving. (RP 99, 101-02, 106) The regular caregiver, Brandon Praus, described a conversation he had with her in 2012:

- A. One of the days that she was down, I mean I talk with all my residents to try to see what's wrong with with them or anything like that. But as I was talking to her, she was -- just kept saying throughout that morning how bad she wants to move and she had recently not been able to go with her son

and everything like that. And so she was fairly depressed and she had made the statement of, I thought because of what I said I would have been out of here by now. And I asked her what she had meant by that and she said, about Luis. How she described Luis, and I asked her if she had said that as a way to try to move. And she said, maybe I did.

Q. I see.

A. And after that I just came back out and I documented it and just kind of left it along because I didn't really want to press too hard on it.

(RP 155-56)

Detective Nichols arranged for the samples taken during the sexual assault examination to be sent to the crime lab. (RP 43) A DNA analyst from the Washington State Patrol Crime Lab testified that the DNA sample taken from Ms. Larsen's vagina and the sample provided by Mr. Avila were an exact match.

(RP 176-77, 183)

Mr. Avila denied raping Ms. Larsen. (RP 317) He testified that after the residents had gone to bed, a friend had joined him and kept him company for a while. (RP 314) They had begun kissing, but as things became more amorous, she decided to leave. (RP 314) After she left, Mr. Avila had gone into the bathroom and ejaculated when he discovered Ms. Larsen was by the door looking at him. (RP 315) He immediately pulled up his pants and left, and Ms. Larsen went inside. (RP 315) He didn't tell Detective Nichols about this incident because he was very embarrassed. (RP 318) On cross-examination, he explained that he had ejaculated on the toilet seat. (RP 322)

D. ARGUMENT

1. THE DETECTIVE'S TESTIMONY RELATING MR. AVILA'S STATEMENTS TO HER VIOLATED HIS RIGHT TO REMAIN SILENT AND HIS RIGHT TO DUE PROCESS.

The Fifth Amendment to the United States Constitution guarantees that “no person . . . shall be compelled in any criminal case to be a witness against himself.” *Griffin v. California*, 380 U.S. 609, 619, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). “The right against self-incrimination is liberally construed.” *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). Due process requires that a confession be voluntary and not the product of police coercion. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991).

The question of voluntariness is one of fact, to be determined by the trial court from the totality of all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). “The test for voluntariness is whether ‘the confession [is] the product of an essentially free and unconstrained choice by its maker.’” *State v. Thompson*, 73 Wn. App. 122, 867 P.2d 691 (1994).

a. The Statements Were Not Voluntary.

The State may not use custodial statements of a defendant at trial absent proof that the defendant's privilege against self-incrimination was adequately protected by warnings set out in *Miranda v. Arizona*, 384 U.S. 436,

86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). “[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege.” *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127, 1131 (1988).

A statement is custodial for *Miranda* purposes not only when there has been an arrest, but whenever a person’s freedom of movement has been significantly restrained. *United States v. Berkemer*, 468 U.S. 420, 441, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984). Warnings must be given whenever a person has been deprived of his freedom in any significant way. *Miranda*, 384 U.S. at 444.

A custodial interrogation occurs when police ask questions they “should know are reasonably likely to elicit an incriminating response.” *State v. Sargent*, 111 Wn.2d at 650. The focus is on “the perceptions of the suspect, rather than the intent of the police.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

Whether a person is in custody depends on “whether the suspect reasonably supposed his freedom of action was curtailed.” *State v. C.G.*, 84 Wn. App. 832, 836, 930 P.2d 350, *review denied*, 132 Wn. 2d 1015 (1997), *citing State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989). “[T]he only

relevant inquiry is how a reasonable person in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442.

Detective Nichols provided a limited description of the circumstances of her interrogation of Mr. Avila on June 16, 2011:

- Q. What happened when you tried to contact him?
- A. I arranged to do an interview with him, and then I was contacted by Sharee Kromrei and she requested that she be present during the interview with him.
- Q. And I believe that interview took place on June 16th?
- A. Yes.
- Q. You didn't speak to Mr. Avila at any point prior to June 16th?
- A. Not other than arranging the interview.
- Q. When you interviewed Mr. Avila, did you have any problems communicating with him?
- A. No.
- Q. He appeared to understand your questions?
- A. Yes.
- Q. And he responded to the questions asked?
- A. Yes.
- Q. What did you ask him about what had happened on the night of June 11?
- A. Well I knew he already knew about the allegations 'cuz Sharee Kromrei told me that she had talked to him about it and that he had denied that anything had happened; and so I asked him to tell me about that night, just what had happened in general. And he told me about attending to another patient, told me that he was never alone with Bonnie, and denied the allegations -- denied that anything had happened.
- Q. Didn't he deny that he had ever been in the bathroom with Bonnie Larson?
- A. Correct.
- Q. Did you specifically ask him if there is any way that his DNA could have ended up inside of Bonnie Larson?
- A. Yes.
- Q. And what was his response to that question?

- A. He first said that they both use -- they share a bathroom, not at the same time, but that they use the same bathroom. And so to be sure that he understood what I meant, I said, no I mean inside her body, inside her vagina, is there any reason that your DNA would be inside of her? And he said, no.
- Q. At that time, didn't you tell him that they were going to be doing a rape kit on her and that was something he needed to explain or needed to talk about?
- A. Yes.

(RP 51-52)

The record shows that Mr. Avila was not a citizen of the United States and had spent a limited time in this country. Detective Nichols testified that she arranged the interview rather than requesting it. Ms. Komrei directed her request to be present during the interview to the detective and the detective granted the request. There is no suggestion that Mr. Avila was asked whether he wished to have Ms. Kromrei present. According to the detective, Ms. Kromrei had already told Mr. Avila about the allegation against him. The detective was certainly aware of the allegations, and when she asked him to tell her about the night in question she knew the question was likely to elicit an incriminating response. These circumstances would strongly suggest to Mr. Avila that his freedom of action was curtailed.

The detective did not testify about where this interview took place. She did not testify that she told Mr. Avila that he was not required to answer her questions or that he was free to leave. The evidence before the court showed this to be a custodial interrogation for purposes of evaluating whether Mr. Avila's

statements to the detective were voluntary. Certainly his answers do not appear to be “the product of an essentially free and unconstrained choice” *Schneckloth*, 412 U.S. at 225.

Any ambiguity as to whether Mr. Avila’s statements were made knowingly and voluntarily could have been resolved by advising him of the constitutional rights identified in *Miranda v. Arizona*. There is no evidence the detective advised Mr. Avila of those rights. The State’s introduction of evidence into Mr. Avila’s alleged statements to Detective Nichols violated his rights under the Fifth and Fourteenth Amendments.

b. The Issue May Be Raised On Appeal.

Generally, “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). An exception to this general rule is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). To meet this exception, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error ‘manifest’, allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1999). “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The consequence of admitting evidence of Mr. Avila's statements to the detective was that it provided the prosecutor with a basis for discrediting Mr. Avila's defense. The State relied on Detective Nichols's description of her interview with Mr. Avila during cross-examination:

- Q. (Mr. Nichols) Do you remember telling Detective Nichols that you never went in to Bonnie Larson's room?
- A. Well, I don't remember at this moment, but you know I went to Bonnie's room to help Tammy to help her to go outside and smoke while Bonnie Larson and Woody they were smoking outside.
- Q. In fact you were in Bonnie Larson's room several times that night to help Tammy out, right?
- A. That was only one time when I help her out and to help her go back inside.

(RP 319) Although it misrepresented Detective Nichols's testimony, this question served to discredit Mr. Avila by suggesting he had changed his story. The prosecutor then used the detective's testimony to suggest that Mr. Avila's explanation was a recent fabrication:

- Q. When Detective Nichols interviewed you, on the 14th -- or the 16th -- excuse me you're right, the 16th, do you remember that?
- A. Yes.
- Q. She specifically asked you about if there was any way that your semen, your sperm, could have gotten inside of Bonnie Larson, and you told her there was no way.
- A. Yes.
- Q. And now, today, you're saying there is, you masturbated on a toilet seat.
- A. Yes. Well I never, ever thought the semen was going to be in the -- her.

(RP 321)

In closing argument the prosecutor relied on Mr. Avila's alleged statements to the detective to support the State's position that Mr. Avila's explanation for the presence of his DNA in Ms. Larsen's vagina was a fabrication: "He was interviewed by Detective Nichols, nothing happened, there is no reason that my DNA would be inside Bonnie" (RP 356)

The State's use of Detective Nichols's testimony relating her interview with Mr. Avila was a manifest violation of his constitutional rights.

c. The Error Requires Reversal.

Error arising from a Fifth Amendment violation is presumed to be prejudicial. *State v. Easter*, 130 Wn.2d at 236-37; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, *Guloy v. Washington*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). Reversal is required unless the State meets the heavy burden of establishing that the constitutional error was harmless beyond a reasonable doubt. *Easter*, 130 Wn.2d at 242; *State v. Levy*, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006). Constitutional error is harmless beyond a reasonable doubt only if the evidence is so overwhelming that any rational trier of fact would necessarily have found the defendant guilty. *Easter*, 130 Wn.2d at 242.

The defense theory of the case may be improbable but it is not impossible and a rational trier of fact could entertain reasonable doubt that Mr. Avila is guilty. Under the circumstances, the remedy is a new trial. *Id.*

E. CONCLUSION

Mr. Avila's conviction should be reversed and the matter remanded for a new trial.

Dated this 20th day of June, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No.32113-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
LUIS A. AVILA,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on June 20, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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