

NO. 42630-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ELVIA ROSES-MIRANDA,

Appellant.

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

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously concluded that appellant was not in custody when she was interrogated by police.

2. The court erred in admitting appellant's statements made in the course of a custodial interrogation before she was advised of her constitutional rights.

3. The trial court's failure to enter written findings of fact and conclusions of law requires remand.

Issues pertaining to assignments of error

1. After appellant consented to the search of her apartment, an officer remained with her in the living room for an hour and a half, did not permit her to get up when she attempted to leave, spoke to visitors and sent them away, and questioned appellant about items found during the search. Appellant was never advised of her constitutional rights to remain silent or to an attorney. Where a reasonable person under appellant's circumstances would understand she was in custody during the officer's interrogation, should her statements have been suppressed?

2. Does the trial court's failure to enter written findings of fact and conclusions of law as required by CrR 3.5 necessitate remand for entry of the missing findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural History

On January 24, 2011, the Clark County Prosecuting Attorney charged appellant Elvia Rosas-Miranda and co-appellant Angel Rosas-Miranda with possession of heroin with intent to deliver and possession of methamphetamine with intent to deliver. The information alleged that these offenses were committed within 1000 feet of a school bus route stop. CP 1-3; RCW 69.50.401(1), (2)(a), (2)(b); RCW 69.50.435(1)(c); RCW 9.94A.533(6). Additional charges and firearm allegations were filed solely against Angel Rosas-Miranda. CP 1-3. The information was later amended, clarifying the language of the school bus route allegation and dropping some of the charges against Mr. Rosas-Miranda. CP 17-19.

The case proceeded to trial before the Honorable Barbara Johnson, and the jury returned guilty verdicts and affirmative findings on the special verdicts. CP 87, 89, 90, 92. The court imposed an enhanced standard range sentence of 40 months, and Ms. Rosas-Miranda filed this timely appeal. CP 97-98, 107.

2. Substantive Facts

Elvia Rosas-Miranda was charged with possession with intent to deliver heroin and methamphetamine, based on evidence seized from the apartment she shared with her brother Angel Rosas-Miranda. CP 17-19.

Prior to trial the court held an evidentiary hearing to determine the admissibility of statements made and evidence seized during the search.

Officer Shane Hall was the only witness for the State at the pretrial hearing. He testified that on January 14, 2011, Vancouver police officers arrested Carlos Rosas-Miranda for possession of heroin following a controlled buy. 1RP¹ 14, 33. In a search of his home and vehicles police found additional narcotics, guns, and illicit monies. 1RP 14. Police learned that some of Carlos's vehicles were registered at another apartment in the same complex, and they suspected someone at that apartment might be involved with more narcotics or firearms. They went to that apartment to investigate. 1RP 14, 33.

When Hall knocked on the door to the apartment, Angel Rosas-Miranda answered. 1RP 14. Hall spoke with him in Spanish. Angel² said that he and his sister Elvia lived there with a number of children and that Carlos is their brother. 1RP 15. Hall told Angel that Carlos had been arrested for drugs and weapons charges, and he asked Angel if there were any guns or drugs in the apartment. 1RP 15-17. Angel said there were

¹ The Verbatim Report of Proceedings is contained in six volumes, designated as follows: 1RP—8/10/11; 2(A)RP 8/15-16/11; 2(B)RP—8/16/11 (cont'd); 3RP—8/17/11; 4RP—8/18/11; 5RP—8/19/11, 9/28/11.

² The appellants and their brother are referred to by their first names to avoid confusion. No disrespect is intended.

not. Hall told Angel he would like to search the apartment, but he needed to speak to Elvia before he did so. 1RP 17-18.

Angel called for Elvia, who responded that she was in the bathroom. 1RP 18. After a couple of minutes Hall asked Angel to go check on Elvia, and a couple of minutes later they both came to the front door. 1RP 19. Hall spoke with Elvia in Spanish, explaining why police were there and that they wanted to search the apartment for guns and drugs. 1RP 20.

Hall told Angel and Elvia that it would be a voluntary search, they could refuse permission, they could revoke permission at any time, and they could limit the scope of the search. 1RP 20-21. Hall did not ask whether they understood each right as he stated it. 1RP 42. Nor did he use a form to explain their rights. 1RP 35, 48. Rather, he simply listed the rights and asked if they were willing to allow the search. 1RP 21. At the end of his speech, they said “Si.” 1RP 42.

Elvia testified that she gave Hall permission to enter the apartment. 1RP 74. She explained that they were told they could revoke their consent to the search, but when Angel told the police to come back later because there were children present, the officer said, “We’ll be brief” and proceeded with the search. 1RP 76-77.

Eight or nine officers entered the apartment and began searching. 1RP 89. Hall testified that he did not handcuff Angel or Elvia, but he stayed with them in the living room during the search. 1RP 22. He was in the apartment with them for an hour and a half. 1RP 84. Elvia testified that when she wanted to get up, she was told she could not. 1RP 76, 81. At one point some visitors came to the door, and Hall stepped outside to speak to them instead of letting Elvia or Angel do so. 1RP 84.

As certain items of narcotics or firearms were found, Hall separated Angel and Elvia to ask them questions. 1RP 23-24. He did not provide Miranda warnings or advise them that they had the right to refuse to answer questions. 1RP 45, 53.

During the search, officers found plastic packaging material containing what looked like heroin residue in the bathroom next to the toilet. 1RP 28. Hall asked Elvia about that item, and she said that Carlos had brought some heroin into the apartment a few weeks ago. When the police showed up at the apartment that day, she was frightened so she flushed six to seven balls of heroin down the toilet. 1RP 28.

Once the search was concluded, Angel and Elvia were handcuffed and formally arrested. 1RP 30. Hall asked them no further questions after that. 1RP 31. At no time did Hall provide Miranda warnings. 1RP 31, 45.

Following the evidentiary hearing, the court ruled that Elvia and Angel were properly advised of their rights regarding the voluntary search and that they gave their consent. 1RP 112. It denied the motion to suppress evidence seized during the search. 1RP 113.

As to the admissibility of Elvia's statements, the State argued that Miranda warnings were not required because Elvia was not in custody when she was questioned, since she was in her own home and not handcuffed. 1RP 95-96. Elvia's defense counsel responded that a reasonable person in Elvia's circumstances would have understood that she was in custody. Numerous officers were present to search the apartment, and the fact that Hall did not let Elvia speak to visitors who arrived was a strong indication that she was not free to leave. 1RP 104-05.

The court found that Elvia was not under arrest and not in custody when she was questioned. It reasoned that this was an investigatory stage of the proceedings, she was in her own home, and she was not handcuffed or otherwise detained. It concluded that Miranda warnings were not required that Elvia's statements were admissible at trial. 1RP 114. The court did not file written findings of fact or conclusions of law as required by CrR 3.5.

At trial, the State presented evidence that heroin was found in the kitchen and Angel's bedroom and that methamphetamine was found under

Angel's bed. 2(A)RP 304; 2(B)RP 334, 356; 3RP 548, 550, 552. Police found two guns in Angel's closet, for which Angel faced additional charges. 2(B)RP 334; CP 17-19. A digital scale was found in a hall closet and another in the kitchen. 2(B)RP 336, 366. Police also found \$1190 in cash in the apartment. 2(A)RP 273-74; 2(B)RP 322. Police found no cell phones or drug notes, which Hall testified were almost always found where drug deals were conducted. 3RP 446, 467, 468.

Some packaging materials with a brown substance were found in one of the bathrooms in the apartment. 2(B)RP 325; 3RP 434. Hall testified that he asked Elvia about the materials, and she said that when Angel told her police were at the door, she got scared. She went to her bedroom closet, retrieved the packaging and its contents, went to the bathroom and emptied the contents into the toilet and flushed it. 3RP 434-35. Despite defense counsel's objection that neither the contents of the packaging nor the remaining residue was ever tested, Hall was permitted to testify that Elvia referred to the contents as "negra," which is a slang word for heroin in Spanish. 2(A)RP 161-62, 164, 205-06; 3RP 435.

When Hall was called for the defense, he testified that before going to the apartment, he arrested Angel's and Elvia's brother Carlos for selling heroin to a confidential informant. 3RP 606-08. In a search of Carlos's car and residence, police found methamphetamine, heroin, guns, cell

phones, drug notes, scales, packaging materials, and \$5000 in cash. 3RP 607-10.

Carlos testified that he was at Angel's and Elvia's apartment almost daily, including times when Angel and Elvia were not at home. 4RP 630-31. He admitted that he put the heroin, methamphetamine, scales, and guns in the apartment, and that Angel and Elvia did not know they were there. 4RP 632-36. Carlos explained that Angel and Elvia were at work when he stashed the items in their apartment, and he planned to retrieve them that afternoon, but he was arrested. 4RP 639. Carlos also testified that, the day before, he had given Elvia a package of 8-balls to keep for him, but she did not know what was in the package. 4RP 652. Carlos repeated that Angel and Elvia were not involved in his drug dealing and that he hid the drugs in their apartment without their permission. 4RP 653, 660.

Angel and Elvia confirmed Carlos's testimony that they knew nothing about the controlled substances found in their apartment. 4RP 681, 707-07. Elvia also testified she did not know Carlos was in the drug trade before this incident. 4RP 703. Carlos had given her a package and told her to put it away for him, but she did not know what was in it. When Angel told her police were at the apartment and Carlos had been arrested, she was afraid the package he gave her contained something illegal, so she

opened it up and flushed the contents. 4RP 704. Elvia explained that when Hall asked her what was in the package, she used the term “negra,” meaning something black. She did not know if the contents were heroin. 4RP 706-07.

C. ARGUMENT

1. ELVIA WAS NOT ADVISED OF HER CONSTITUTIONAL RIGHTS BEFORE BEING SUBJECT TO CUSTODIAL INTERROGATION, AND HER STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

An individual has the right to remain free from compelled self-incrimination while in police custody. U.S. Const. amends. V & XIV; Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). In Miranda, the Supreme Court recognized that custodial interrogation, by its very nature, “isolates and pressures the individual,” “blurs the line between voluntary and involuntary statements,” and thereby heightens the risk that an individual will be deprived of his privilege against compulsory self-incrimination. Dickerson v. United States, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000). Thus, before a suspect in custody may be interrogated by a state agent, he or she must be advised of the right to remain silent and the right to an attorney. Miranda, 384 U.S. at 479.

A person is in custody, and thus Miranda applies, “as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” State v. D.R., 84 Wn.App. 832, 836, 930 P.2d 350 (quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984), review denied, 132 Wn.2d 1015 (1997)). The question of whether the subject is in custody is an objective one: how would a reasonable person in the suspect’s position have understood the situation? Berkemer, 468 U.S. at 442. Restraint is custodial 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).

Under this standard, the Miranda requirement is not limited to interrogation conducted at a police precinct. For example, in State v. France, 121 Wn. App. 394, 88 P.3d 1003 (2004), a police officer stopped the defendant walking alongside a highway, told him a domestic dispute had been reported, and said they “needed to clear it up before France would be free to leave.” France, 121 Wn. App. at 399-400. The officer then interrogated France without Miranda warnings. This Court held that his statements were inadmissible as the result of an improper custodial interrogation. France, 121 Wn. App. at 400.

Police officers may create a coercive environment rendering a suspect in custody even when the questioning is conducted in the suspect's home. For example, this Court found two defendants were in custody in their own home when officers, attempting to execute a search warrant, entered the home, told the suspects he knew there were drugs in the refrigerator, and suggested that they produce the evidence voluntarily. State v. Dennis, 16 Wn. App. 417, 419, 421-22, 558 P.2d 297 (1976). Even though the officer did not tell the suspects they were under arrest or not free to leave, "the atmosphere was nonetheless dominated by the officer's unwelcome presence and his insistence on remaining in a position where he could monitor and thus restrict the occupants' freedom of movement within their home." Dennis, 16 Wn. App. at 421-22. The level of physical control exercised by the police is thus more important than the familiar setting. Orozco v. Texas, 394 U.S. 324, 326-27, 89 S. Ct. 1095, 22 L.Ed.2d 311 (1969) (custodial interrogation when officers entered suspect's bedroom while he was sleeping and began questioning him); Oregon v. Elstad, 470 U.S. 298, 315, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985) (State conceded questioning of teenage suspect in his living room with mother close by was custodial).

Here, as in Dennis, the circumstances demonstrated that Elvia was in custody when she was questioned, despite the fact that she was in her

home. The evidence showed that Hall kept her in the living room for an hour and a half while eight or nine other officers searched her apartment. 1RP 84, 89. While Hall testified that he remained with Angel and Elvia in case Angel or Elvia wanted to revoke their consent to the search, since he was the only officer present who spoke Spanish, he did not explain that to them. 1RP 23, 53. He never reiterated their rights regarding the search after he entered the apartment, and he never advised them they could refuse to answer his questions. 1RP 53.

A suspect does not have to be handcuffed or told he or she is under arrest to reasonably believe he or she is in custody. An officer's physical control of the environment speaks as loudly as words. See Dennis, 16 Wn. App. at 421-22. Although there is no evidence that Elvia was handcuffed or told she was under arrest, she testified that when she wanted to get up from the living room she was told she could not. 1RP 76, 81. She was also isolated from others during the search and interrogation. Hall spoke with and turned away some visitors to the apartment without letting Elvia or Angel speak to them, and he separated Angel and Elvia to question them about items that were found during the search. 1RP 23-24, 84. Any reasonable person under these circumstances would believe he or she was in custody.

Moreover, Hall's questions to Elvia constituted interrogation. The Supreme Court has defined interrogation as "questioning...reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). An officer may, before giving Miranda warnings, ask questions that are solely for officer or public safety purposes. State v. Lane, 77 Wn.2d 860, 862-63, 467 P.2d 304 (1970). For example, where the officer had good reason to believe the suspect was armed and dangerous, asking whether he had a gun was not interrogation but was related solely to officer safety. Lane, 77 Wn.2d at 861-63. But Miranda warnings are required if the officer's question goes beyond the scope of a precautionary inquiry regarding weapons. State v. Spotted Elk, 109 Wn. App. 253, 259, 34 P.3d 906 (2001) (officer's question whether arrestee had anything on her person he needed to be concerned about constituted custodial interrogation which necessitated Miranda warnings).

Here, Hall did not merely question Elvia in the interest of safety. Instead, he asked her to explain evidence located by officers conducting a search for narcotics. IRP 24. His questions were undoubtedly likely and intended to elicit an incriminating response, and they constitute interrogation. Because Elvia was not given her Miranda warnings, her

statements elicited by the custodial interrogation are inadmissible in evidence. See Spotted Elk, 109 Wn. App. at 260-61.

Miranda is a constitutional requirement. Dickerson, 530 U.S. at 438. As such, the State bears the burden of proving that the admission of a statement 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). Constitutional error is harmless only if the overwhelming untainted evidence necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). In other words, the State must show that admission of the statement did not contribute to the conviction. Fluminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26).

The State cannot meet this heavy burden here. The State relied on Elvia's statements to argue that she was complicit in the storage of narcotics in the apartment for delivery. 4RP 771. But the heroin was found hidden in a sweater inside a drawer in the kitchen and hidden in a vacuum attachment behind a television in Angel's room, and the methamphetamine was found in a box hidden inside the box spring in Angel's room; Carlos testified that he put the drugs in the apartment without Elvia's knowledge or permission; and Elvia confirmed that she

knew nothing about the drugs. 2(A)RP 304, 308; 2(B)RP 335, 356; 4RP 632-36, 707-09. Given this evidence, the State cannot prove beyond a reasonable doubt that the improperly admitted statements had no effect on the verdict, and Elvia's convictions must be reversed.

2. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRES REMNAD.

Criminal Rule 3.5 requires the trial court to make a written record of its factual findings and conclusions of law following a hearing on the admissibility of a defendant's statements. That rule provides, "After the hearing, the 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 therefor." CrR 3.5(c). These findings and conclusions are mandatory and the failure to enter them is error. State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992).

Moreover, they are necessary to effective appellate review. "An appellate court should not have to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Absent the required findings and

conclusions, an appellant cannot properly assign error, and the appellate court cannot review whether the findings and conclusions are supported by the record. See e.g. Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 854 P.2d 665 (1993) (appellate court only reviews whether findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n. 7, 12 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

Without findings by the trial court regarding the circumstances surrounding Elvia's contact with the police, this Court cannot determine whether it correctly concluded she was not in custody. See State v. Solomon, 114 Wn. App. 781, 878, 60 P.3d 1215 (2002)(citing Thompson v. Keohane, 516 U.S. at 112-13), review denied, 149 Wn.2d 1025 (2003) (circumstances surrounding police contact are factual inquiry, and whether a reasonable person, under those circumstances, would have felt free to terminate interrogation and leave is legal question). The proper remedy is remand for entry of the absent findings and conclusions. Head, 136 Wn.2d at 624.

D. CONCLUSION

The court's admission of Elvia's custodial statement in violation of Miranda was not harmless, and her convictions must be reversed.

Moreover, the court's failure to enter written findings of fact and conclusions of law pursuant to CrR 3.5 requires remand.

DATED this 28th day of February, 2012.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

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Certification of Service

Today I delivered a copy of the Brief of Appellant in *State v. Elvia*

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I certify under penalty of perjury of the laws of the State of Washington
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Catherine E. Glinski
Done in Port Orchard, WA
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