

68106-1

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NO. 68106-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE HERNANDEZ-GARCIA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Miranda warnings are required only when a defendant is subjected to interrogation by a state actor while restrained to a degree associated with formal arrest. The trial court found that a reasonable person in Hernandez's position would have not believed that he was restrained to a degree associated with formal arrest based on the totality of the circumstances. Did the court properly find Hernandez was not in custody and properly admit Hernandez's confession absent Miranda warnings?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and Hernandez is not prejudiced. Here, the findings of fact which were entered by the trial court while the appeal was pending are consistent with the trial court's oral ruling. Has the trial court properly entered written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Jose Hernandez-Garcia¹ was charged with one count of Rape of a Child in the First Degree, one count of Child Molestation in the First Degree and one count of Communicating with a Minor for Immoral Purposes. CP 9-10. Pre-trial, Hernandez unsuccessfully moved to suppress his confession under CrR 3.5. 3RP 20. The recorded confession was admitted at trial. 8RP 71.² A jury found Hernandez- Martinez guilty as charged. CP 37-39.

2. SUBSTANTIVE FACTS.

Between 2007 and 2009, E.P., who was between four and six years of age, lived with her mother (Pedraza) in a small apartment in Seattle, WA. 6 RP 8-9, 16. Pedraza had a business whereby many friends and acquaintances would come to her apartment for freshly cooked meals. 6RP 12-13. Hernandez, who

¹ The State refers to Hernandez-Garcia as "Hernandez" for the sake of brevity, no disrespect is intended.

² The Verbatim Report of Proceedings consists of eleven volumes, referred to as follows: 1RP (9/28/2011), 2RP (9/29/2011), 3RP (10/6/2011), 4RP (10/10/2011), 5RP (10/11/2011), 6RP (10/12/2011), 7RP (10/13/2011), 8RP (10/18/2011), 9RP (10/19/2011), 10RP (10/20/2011), and 11RP (11/18/2011).

was in his thirties and frequented Pedraza's apartment for cooked meals, appeared to be fond of E.P. 6RP 13-16. Hernandez went by the nickname "Mucacho." 6RP 13; 9RP 33.

On one occasion, when Hernandez asked Pedraza he could watch a movie with E.P., the two went into the bedroom alone. 7RP28. E.P. thought they were going to watch a "Dora the Explorer" cartoon movie but Hernandez told her they were not going to watch Dora. 7RP 29. Hernandez pulled E.P.'s pants and underwear down. 7RP 29. Hernandez took off his pants and underwear and put his penis in E.P.'s vagina while she was on the edge of the bed. 7RP 29-30. Hernandez was leaning on his knees while E.P. was laying on the bed. 7RP 31.

When Hernandez's penis was inside E.P.'s vagina, E.P. felt pain. 7RP 31. Hernandez also put his penis inside her anus causing pain. 7RP 31-32. While this was happening E.P. tried to move away and get out of the bed but Hernandez would not let her. 7RP 32. E.P. yelled out to Pedraza for help but no one heard her. 7RP 32. E.P. was able to leave the room by telling Hernandez that she needed to use the bathroom. 7RP 32. E.P. attempted to tell

Pedraza what was happening but Pedraza was tending to customers in her apartment and did not have time to speak with E.P. 7RP 32-33.

On another occasion, while E.P. was watching a Dora movie on a portable DVD player, Hernandez took out the movie and put on a different movie. 7RP 34. When Hernandez turned on movie, it was a pornographic film showing adults having sex. 7RP 38.

For the 2010-2011 school year E.P. was a second grade student assigned to teacher Gayle Myles's elementary school classroom. 5RP 30. In September, Myles noticed that E.P. was walking in a manner that was sexual in nature and touching her body in private areas in an attempt to catch the attention of her peers. 5RP 31-35. Myles confronted E.P. about her behavior. 5RP 35. E.P. disclosed to Myles that she had been touched by a man named Mucacho. 5RP 35-42.³

After E.P. briefly disclosed to Myles what had happened with Hernandez, Myles alerted additional faculty and E.P.'s father, Juan

³ On appeal, Hernandez claims there was evidence that the abuser was Pedraza's boyfriend because E.P., on one occasion, referred to Mucacho as her mother's boyfriend. App. Br. at 14; 5RP 52. However, E.P. was never left alone with Pedraza's boyfriend and consistently reported that the abuser was Mucacho. 6RP 11. Further, E.P.'s father explained that the English word "boyfriend," due to its translation, is used by Spanish speakers to refer to either romantic male friends or platonic male friends. 6RP 72.

Martinez, was notified as well. 5RP 46. E.P. was subsequently examined by a pediatrician specializing in sexual assault exams and a child interview specialist. 6RP 74, 91; 7RP 61, 77. She disclosed to both that Hernandez had sexually assaulted her by putting his penis inside her vagina and anus on two separate occasions. 7 RP 10-11, 83.

Upon being interviewed by police, Hernandez confessed to rubbing his penis against E.P.'s vagina on two occasions and provided specific details of those incidents. 8RP 71; Ex. 14.⁴ He said one incident happened while E.P. was on the corner of the bed inside Pedraza's bedroom and the other incident happened while he was on the couch with E.P. in the apartment's living room. 8RP 71; Ex. 14. Hernandez claimed that E.P. had always initiated sexual interactions with him by trying to grab his groin area on the outside of his pants and by getting on top of him and moving around in a sexual manner which made him aroused. 8RP 71; Ex. 14. The circumstances and nature of this interview will be discussed in further detail below.

⁴ Hernandez designated Exhibit 4, a transcript of the recorded interview admitted at the pre-trial hearing. While helpful, the transcript cannot convey the tone or the length of the interview, both of which are important for this Court's determination on appeal. The State has designated Exhibit 14, the actual recording admitted pre-trial and at trial, in its supplemental designation.

C. ARGUMENT

1. HERNANDEZ'S CONFESSION WAS PROPERLY ADMITTED.

Hernandez claims that the trial court erred in admitting his confession to police detectives as Miranda⁵ warnings were not given prior to the interview. Hernandez's claim fails as the court properly found that he was not in custody in light of all of the circumstances surrounding the interrogation. At the CrR 3.5 hearing, the State called three witnesses to testify: Seattle Police Department detectives Susana Ditusa and Margaret Leslie Smith, and Janine Horton, a certified Spanish interpreter. Horton's testimony was limited to her qualifications as an interpreter and that she had no difficulty interpreting for the detectives and Hernandez on December 9, 2010. Defense counsel called no witnesses to testify at the hearing, thus the facts were undisputed.

a. Relevant Facts.

On December 2, 2010, Detective Smith, assigned to the Seattle Police Department's Sexual Assault Unit, was investigating allegations of sexual abuse against E.P. by a male adult nicknamed

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Mucacho. 1RP 24, 49. E.P.'s father spoke with relatives and determined that the suspect's last name was likely Hernandez.

1RP 49. E.P.'s aunt told Smith that she believed Mucacho worked at Ross Display. 1RP 49-50.

On December 2nd detectives Smith and Moore went to Ross Display, a cabinet making business in Seattle, Washington, to determine if Hernandez worked there, to verify his identity, find out if he was Mucacho, and to talk with him if he was willing. 1RP 25, 27 45. Both detectives were dressed in plainclothes. Upon arrival, Smith contacted one of the supervisors at the business who provided her with Jose Hernandez-Garcia's identifying information. 1RP 26. The supervisor then retrieved Hernandez from the back of the warehouse. 1RP 26. The detectives identified themselves to Hernandez and told Hernandez that they wanted to talk to him. 1RP 27.

The supervisor led Hernandez and the detectives to a break room⁶ and then left. 1RP 27-28. The 12' by 13' room had one door and window that opened to the street and another door that opened into the offices of the business. 1RP 27, 52. The room had several

⁶ The break room is also referred to in testimony as the storage room as it appeared to function as both based on the detectives' observations.

chairs and a small table inside and appeared to store uniforms. 1RP 27, 52. Smith told Hernandez that she wanted to verify who he was and establish if he could talk to her, but discovered that although Hernandez spoke some English, he was not fluent. 1RP 29. Smith was able to have a short conversation with Hernandez confirming his identity, his residential address and his availability for a subsequent meeting the following week. 1RP 29-30. Smith informed Hernandez that she would bring an interpreter with her when they next met. 1RP 30. Smith and Hernandez were able to understand each other during this brief conversation. 1RP 30.

Smith and Moore left the business allowing Hernandez to return to his work duties. 1RP 30-31. Smith returned a week later with Detective Ditusa and interpreter Janine Horton. 1RP 31-32. Both detectives were dressed in plainclothes. 1RP 35. During the intervening time, the detectives had not had contact with Hernandez. 1RP 31.

When the detectives arrived, a supervisor retrieved Hernandez from the warehouse. 1RP 32. At that time, the employees, including Hernandez, were beginning their break and heading toward the break room. 1RP 34. Smith informed Hernandez that she wanted to speak with him and Hernandez

agreed to speak with the detectives. 1RP 33, 36. The detectives told Hernandez and the supervisor that, based on the subject matter, Hernandez would probably want to speak in private and asked if there was a room available. 1RP 13, 21.

The supervisor led Hernandez, the detectives, and the interpreter to the same break room and left. 1RP 32-34. One of the detectives closed the door once they were all inside the room. 1RP 51. After Hernandez agreed to be recorded, the recorder was turned on and an interview proceeded. 1RP 35. At the beginning of the interview the detectives confirmed that Hernandez went by the nickname Mucacho. Ex. 14; Ex 4 p.1-3. They also verified that Hernandez knew Pedraza. Ex. 14; Ex. 4 p.3. The detectives told Hernandez that a police report was made and that E.P had told police about some things that had happened with Hernandez a few years prior. Ex. 14; Ex. 4 p.3-6.

Smith told Hernandez that the detectives were not there to take Hernandez to jail and that they just wanted to find out what had happened between Hernandez and E.P. Ex. 14; Ex. 4 p.8. They specified that E.P. had reported that something "intimate" had happened between her and Hernandez. Ex. 14; Ex. 4 p.8. Hernandez said that he understood what they meant by "intimate"

and claimed to be surprised. Ex. 14; Ex. 4 p.8. The detectives then told Hernandez that the allegations were that Hernandez touched E.P.'s privates and had her touch his. Ex. 14; Ex. 4 p.8.

Hernandez then stated "I'll have to start from the beginning to explain this" and told a long uninterrupted story about how four year old E.P. was the sexual aggressor and that she had made sexual movements while straddling his leg and had grabbed his penis from outside his pants. Ex. 14; Ex. 4 p.8-11. Hernandez said that he could not help from getting aroused based on four year old E.P.'s actions. Ex. 14; Ex. 4 p.32, 37.

Upon questioning, Hernandez admitted that E.P. touched his penis with her hand and that he had rubbed his penis against E.P.'s vagina on two occasions and provided the specific circumstances of each of the two incidents. Ex. 4 p.32-38, 38-41. Hernandez denied penetration occurred. Ex. 4 p.38, 41. During the interview, the detectives never took an aggressive tone with Hernandez and kept the interview conversational and friendly. Ex. 14.

b. Hernandez Was Not In Custody.

Miranda warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172, amended, 837 P.2d 599 (1992). A trial court's custodial determination is reviewed *de novo*. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

An objective test is used to determine whether a defendant was in custody. "The issue is not whether a reasonable person would believe he or she was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with formal arrest." State v. Ferguson, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995) (internal quotations removed); see also Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984); Post, 118 Wn.2d at 607 (holding that defendant must show some objective facts indicating his freedom of movement or action was restricted or curtailed).

The psychological state of the person being questioned is irrelevant to determining if his freedom of movement was restricted. Yarborough v. Alvarado, 541 U.S. 652, 667, 124 S. Ct. 2140, 158 L.Ed.2d 938 (2004). By limiting analysis to objective circumstances, the test avoids burdening police with the task of

anticipating each suspect's idiosyncrasies and divining how those particular traits affect that suspect's subjective state of mind. J.D.B. v. North Carolina, ___ U.S. ___ 131 S. Ct. 2394, 2397, 180 L.Ed.2d 310 (2011).

Further, a police officer's expectation of whether Hernandez is going to be taken into custody and subjective belief that Hernandez is the focus investigation are also irrelevant to this issue. Beckwith v. United States, 425 U.S. 341, 347, 96 S. Ct. 1612, 48 L.Ed.2d 1 (1976). Likewise, it is also irrelevant whether the police have probable cause to arrest a defendant (before or during the interview). Berkemer, 468 U.S. at 442.

Thus, in order for Miranda rights to be implicated, a trial court must conclude that the defendant was restrained to a degree associated with formal arrest. State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133, 140 (2004). To make this determination the court must "examine all of the circumstances surrounding the interrogation." Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994).

Whether a defendant is physically restrained is of significant importance to the determination of custody. Post, 118 Wn.2d at 607; Lorenz, 152 Wn.2d at 36-37 (2004). While the location of the

interview is not determinative, an interview in a police station or jail is more likely to be considered custodial. California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983). Here, Hernandez was never physically restrained and although both detectives were armed with firearms they never displayed those firearms to Hernandez. 1RP 43-44. Likewise, Hernandez was in a familiar place, a work break room, very much unlike a police station. While there were two female police detectives with him inside a small room, there were at least two doorways by which he could have left the room, one back into his workplace and one to the street outside. 1RP 27, 52.

What the police say to a defendant is also used to determine whether or not a reasonable person would believe he was in police custody. Lorenz, 152 Wn.2d at 37-38; United States v. Bassignani, 575 F.3d 879, 883 (9th Cir. 2009). Here, although Hernandez was not told that he was free to leave, he was told "we're not here to take you to jail." Ex. 14; Ex. 4 p.8. This statement would convey to a person in Hernandez's position that he was not currently under arrest and was not going to be arrested. Likewise, the undisputed testimony is that the detectives asked Hernandez, both on December 2 and December 9, 2010, if he would be willing to talk

with them and that he agreed to speak with him. 1RP 29-30, 33, 36. Where it is apparent that he was not ordered to speak with police, a reasonable person in his position would understand that he was not in custody and that he could go back to work as he wished.

The tone and nature of the interview is also a factor that courts should consider in determining custody. State v. S.J.W., 149 Wn. App. 912, 928, 206 P.3d 355 (2009), aff'd on other grounds, 170 Wn.2d 92, 239 P.3d 568 (2010); Ferguson, 76 Wn. App. at 568. Where police engage in good cop/bad cop tactics,⁷ or are aggressive or accusatory in nature, courts consider that as a factor that weighs in favor of custody. Bassignani, 575 F.3d at 884. Even if officers confront a defendant with accusations, if they take an open or friendly tone and the defendant is an active participant in the conversation, this factor weighs against finding he was in custody. Bassignani, 575 F.3d at 884-85. Here, the detectives presented themselves as approachable and open individuals who just wanted to find out Hernandez's side of the story by both the inflection of their voices and the questions that they asked. Ex. 14.

⁷ Federal courts refer good cop/bad cop tactics "Mutt and Jeff" tactics. Miranda, 384 U.S. at 452, 455, 86 S. Ct. at 1616, 1617. Mutt and Jeff were mismatched characters from a long-popular American comic strip that debuted in the San Francisco Chronicle in 1907.

Hernandez was likewise an active participant in the conversation and volunteered much of the information absent any intensive probing. Ex.14. Even when Hernandez denied genital contact, the detectives did not confront him in an accusatory way, rather they told him what E.P. alleged and asked if it was true. Ex. 14. Thus the entire tone of the interview would signal to a reasonable person in Hernandez's position that he was not in custody.

Of significant importance may also be a defendant's prior contact with the persons present during the interrogation and their relationship to the interview's location. See State v. D.R., 84 Wn. App. 832, 930 P.2d 350 (1997). In D.R., the minor defendant testified that he had been brought to the principal's office on prior occasions for school discipline and believed that he was not free to leave the principal's office as he wished. Id. at 834. Because of that prior experience, the court held that when police questioned the defendant in the same office with the principal present, a reasonable person in his position would not reasonably believe that he could leave unless expressly told he could. Id. at 837.

The trial court here concluded that Smith's prior contact with Hernandez was of similar importance to its determination of custodial status. Supp. CP __ (sub 80- Conclusions of Law 2 and

3); 3RP 20. In fact, the prior contact here weighed heavily in favor of finding that Hernandez was *not* in custody. The court noted that if a detective contacted a defendant at work week earlier and left without handcuffing that defendant and putting him into a police car to transport him to a police station or a jail, a reasonable person in that defendant's position would know that he was not being restrained to a degree associated to a formal arrest at the subsequent contact. 3RP 20. Logically, if a police officer contacts a defendant and makes an appointment to see him again a week later, the defendant does not anticipate that he will be arrested the following week.

The length of the interrogation, while not determinative, is a factor that federal courts have considered in this inquiry. Bassignani, 575 F.3d 879. In general, an interview that exceeds two and a half hours may support a finding of custody but a 45-minute or "over an hour" interview will weigh against custody. Id. at 886. However, even a five hour interview may be found non-custodial if other factors weigh against custody. Lorenz, 152 Wn. 2d at 36. While the entire recording at issue here is approximately one hour and 12 minutes (contained in two audio files), the interview lasted only for one hour and six minutes when Hernandez

was arrested and the questioning stopped. Ex. 14. This length is on the shorter end of the spectrum and thus weighs against a finding of custody.

Hernandez cites several federal cases that he attempts to analogize to Hernandez's situation but fails to provide many significant facts from those cases which distinguish them from the case at bar when looking at the totality of the circumstances. Common to all the cases cited by Hernandez on appeal is the distinction of the prior contact. None of the cited cases contain a prior contact where: (a) the defendant was contacted, not restrained or interrogated; (b) was asked if he would be willing to speak a week later; and (c) was left alone for an entire week with no intervening attempts to restrain or arrest him.

Hernandez cites U.S. v. Craighead and U.S. v. Griffin⁸ for the proposition that isolating a defendant from family and friends is one factor that weighs in favor of a custodial finding. While the intentional isolation of a person generally weighs in favor of custody, that cannot logically be the case where Hernandez was never isolated from family and friends and was told that officers

⁸ United States v. Craighead, 539 F.3d 1073 (9th Cir. 2008); United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990).

wanted to talk to him in a private setting to protect his privacy.

Further, as the determination of custody is determined based on the totality of the circumstances, this case is distinguishable from Craighead and Griffin on several other grounds.

In Craighead, the undisputed testimony was that a visibly armed law enforcement officer, who was not an active participant in the interview, was blocking the only door by which Craighead could exit the storage room where the interrogation was taking place. Craighead, 539 F.3d at 1078. Furthermore, eight law enforcement officers were present at Craighead's house and a search warrant was being served on the premises at the time. Id. Also, a friend of Craighead's was not permitted to come into the storage room while Craighead was being questioned. These facts are strikingly different where only two officers came to Hernandez's workplace, no one blocked either of the two exits to the room where the interview was taking place, and no one was purposefully excluded from the interview.

In Griffin, FBI agents interviewed Griffin for two hours inside the living room of his home and isolated him from his parents who were upstairs during the interview. Griffin, 922 F.2d 1343, 1346. In the course of interview Griffin asked to obtain cigarettes from other

places in the house and each time one of the agents escorted him. Id. The agents told Griffin that he was to stay in their view at all times. Id. Further, the agents never told Griffin that he would not be arrested. Id. at 1355. This case is clearly distinguishable as Hernandez's movement was never limited and he was not told that his movement was limited in anyway. Even though Hernandez was ultimately arrested at the end of the interview, due to his admissions, he was told at the beginning of the interview that he would not be arrested. Ex. 14; Ex. 4 p.8.

Hernandez also cites two federal cases where defendants were found to be in custody when they were interviewed by police at their places of employment. However, the cases do not suggest that interviewing a person at work weighs in favor of a finding of custody; rather, they find a custodial environment existed based on other facts readily distinguishable from the instant matter.

In U.S. v. Kim, the defendant arrived at her store and found it surrounded by police officers. United States v. Kim, 292 F.3d 969, 971, 974 (9th Cir. 2002). The police had taken over the store, locked it, and were serving a search warrant inside. Id. at 971-72. When the officers allowed Kim to enter the store, her husband tried to enter immediately behind her. Id. An officer quickly shut the

door in front of him and locked Kim's husband out. Id. Her husband knocked on the door again, but no one allowed him inside during Kim's interrogation. Id. Officers also questioned Kim for approximately 30 minutes without a Korean interpreter despite the fact that they knew she had difficulty comprehending in English. Id. at 972. The Ninth Circuit found that Kim was in custody, not because the interrogation was at her place of business, but because all of the other circumstances readily demonstrated a reasonable person in her situation would not feel free to leave. Id. at 973.

In U.S. v. Carter, a defendant was summoned to the company president's office and interviewed by postal inspectors with a company security manager present. United States v. Carter, 884 F.2d 368, 371-72 (8th Cir. 1989). The Eighth Circuit found this to be a custodial interrogation in noting that the company president's office was not a familiar place like a defendant's workstation. Id. The court also found that the officers' insistence that the interview remain in the president's office, rather than Carter's work station, gave the impression that Carter was not free to move about as he wished, particularly when the inspectors physically surrounded him by sitting on either side of him. Id. at

372. Further the court noted that the inspectors used a good cop/bad cop technique. Id. Again, Hernandez's actions were not limited, he was not in a supervisor's office, he was not surrounded, and no aggressive police tactics were used.

Hernandez also cites a Colorado case for a similar proposition. People v. LaFrankie, 858 P.2d 702 (Colo. 1993), abrogated by People v. Matheny, 46 P.3d 453 (Colo. 2002).⁹ In LaFrankie, the defendant was interrogated in the company president's office which the Colorado Supreme Court believed was an inherently intimidating location. LaFrankie, 858 P.2d at 706 n.5. The Colorado court also noted that the officers took an aggressive approach during the interview, accused LaFrankie of lying several times, and told him he would fail a polygraph test. Id. at 706-07. Both the location and the officer tactics are strikingly different in the case at bar.

The "totality of the circumstances" here show that a reasonable person in Hernandez's position would not have felt that he was being restrained to a degree associated with formal arrest.

⁹ The Colorado Supreme Court affirmed the trial court's suppression using a lower standard of review by holding that the determination of custody was supported by "competent evidence." LaFrankie, 858 P.2d at 706. That standard has since been abrogated by Colorado courts which now apply a *de novo* review to this issue. People v. Matheny, 46 P.3d 453 (Colo. 2002).

Thus the trial court properly held that Hernandez was not in custody at the time he was interrogated on December 9, 2010, correctly ruled that the recorded confession was admissible in the State's case in chief.

c. Erroneous Findings By The Trial Court That Should Not Be Relied Upon By This Court.

Unsurprisingly, Hernandez relies upon several oral findings made by the trial court that are unsupported by the record. App. Br. at 5, 17. Many of these oral findings have since been incorporated into the written findings. Findings that are unsupported by substantial evidence should not be relied upon by an appellate court. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

Here, the trial court incorrectly found that Hernandez was required to work a full day on December 2nd and December 9th and that it was presumed that he would not be paid if he did not work. 3RP 17; Supp. CP __ (sub 80- Finding of Fact 1). The court also incorrectly stated that on December 9th, Hernandez's supervisor told him the police were back to talk to him and that Hernandez's paycheck was at risk because he could not leave work with his supervisor saying "go into the room." 3RP 18.

There was no testimony at the CrR 3.5 hearing from any witness about Hernandez's work schedule, how he got paid or what his supervisor told him. Furthermore, any argument that Hernandez's concern about getting paid by his employer somehow pressured him is illogical under the facts of this case. The detectives told Hernandez' supervisor that would not need him for long and that he'd return to work and not be arrested. 1RP 20-21. Reasonably, had Hernandez decided to leave the interview, rather than answering the detectives' questions, he would have simply returned to his work duties.

The trial court also made some statements about the state of mind of the employer and the immigration status of Hernandez that are unsupported by any facts. The court "*imagined* that the supervisor was nervous because he may have an illegal immigrant that he shouldn't be paying which is an element in this case, not present in any other cases. However the supervisor did not testify." Supp. CP __ (sub 80- Finding of Fact 4) (emphasis added); 3RP 17. Because there was no testimony from Hernandez's supervisor, no testimony about the supervisor's demeanor and no testimony about Hernandez's immigration status these facts are, as the trial court put it, "imagined" and thus unsupported by the record.

Nevertheless, the subjective belief or demeanor of the supervisor is of no relevance to this inquiry.

Likewise, the trial court went on to state that, *assuming* Hernandez was an illegal immigrant trying to support himself and had been directed by his supervisor to talk to the police, Hernandez probably felt he had to talk and that he had no choice. 3RP 20; Supp. CP ___ (sub 80- Conclusion of Law 2). This conclusion (or finding of fact as it is more properly categorized) cannot be relied upon as a finding because it was premised on assumptions that are unsupported by the record. Further, as the court notes immediately after these comments, Hernandez's actual state of mind is irrelevant to the "reasonable person standard" that the court used in determining that Hernandez was not in custody. Supp. CP ___ (sub 80- Conclusion of Law 2).

Finally, Finding of Fact 5 erroneously states that Hernandez "was placed" in the storage room. Supp. CP ___ (sub 80- Finding of Fact 5). The wording of this finding incorrectly connotes an image of the police forcibly putting Hernandez inside a room. The testimony from the CrR 3.5 hearing was that an employee or supervisor from Hernandez's workplace showed the detectives and

Hernandez to this storage room so that they could speak in a private setting, not that anyone “was placed” into a room. 1RP 13-14.

2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 3.5 FINDINGS.

Hernandez asserts that the trial court failed to enter timely Findings of Fact and Conclusions of Law as required by CrR 3.5. As these findings have since been filed, remand is unnecessary.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and Hernandez is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984). Here the court has entered findings that have not significantly delayed resolution of Hernandez's appeal thus there is no resulting prejudice.

Upon receipt of Hernandez's opening brief, trial Deputy Prosecuting Attorney (DPA) Phillip Sanchez was asked if Findings of Fact and Conclusions of Law for the 3.5 hearing had been drafted or filed in this case. Supp. CP ___ (sub 74- Declaration of

DPA). Because they had not been drafted or filed, DPA Sanchez reviewed the record from the 3.5 hearing in order to prepare findings but did not review any of the appellate briefing nor speak with anyone about the issues being raised on appeal. Supp. CP ___ (sub 74- Declaration of DPA). DPA Sanchez presented proposed findings based on the court's oral rulings to trial defense counsel who agreed to the findings and signed them. Supp. CP ___ (sub 74- Declaration of DPA). The trial judge signed the findings on June 20, 2012, and they were filed on June 21, 2012. Supp. CP ___ (sub 73- Original Findings Subsequently Vacated).

On June 21, 2012, trial defense counsel filed a motion to vacate the agreed findings and requested a hearing on the findings. Supp. CP ___ (sub 75- Defense Motion to Vacate). Attached to that motion, trial counsel filed a certification explaining that he was asking to vacate and hold a hearing upon the request of appellate counsel Lila Silverstein. Supp. CP ___ (sub 75- Defense Motion to Vacate). Trial counsel's affidavit noted Ms. Silverstein was requesting additions be made to the State's proposed findings. Supp. CP ___ (sub 75- Defense Motion to Vacate). The trial judge vacated the June 21, 2012 findings and set a hearing to hear from the parties and to issue new findings. Supp. CP ___ (sub 76- Order

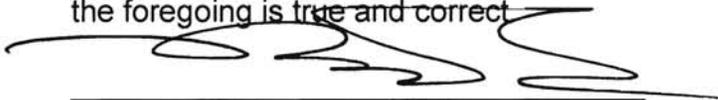
Vacating). Trial counsel presented proposed findings which contained language he proposed to be added to the original findings that the court had considered. Supp. CP ___ (sub 82-Defense Proposed Findings). On August 17, 2012, at a contested hearing, the trial court signed and filed findings. Supp. CP ___ (sub 80- CrR 3.5 Findings).

A review of the findings illustrates that the State did not tailor them to address Hernandez's claims on appeal. Supp. CP ___ (sub 80- CrR 3.5 Findings). The language of the findings is consistent with the trial court's oral ruling. 3RP 15-20. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Supp. CP ___ (sub 74- Declaration of DPA). In fact, the only appellate attorney involved in drafting findings was Hernandez's counsel Ms. Silverstein. Supp. CP ___ (sub 75-Defense Motion to Vacate). In light of the above, Hernandez cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.5 findings of fact and conclusions of law are properly before this Court.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOSE HERNANDEZ-GARCIA, Cause No. 68106-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct



Name
Done in Seattle, Washington

08-24-12
Date