No. 14-111217-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff, Appellant

vs.

HERMELINDO CANO ESPINOBARROS
Defendant, Appellee

BRIEF OF APPELLANT

Appeal from the District Court of Douglas County, Kansas
Honorable Paula B. Martin, District Court Judge
District Court Case No. 2013 CR 953

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Oral Argument: 15 minutes

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Nature of the Case

This is the State's interlocutory appeal of the suppression of the defendant's statement to police, pursuant to K.S.A. 22-3601(a) as authorized by K.S.A. 22-3603.

Statement of the Issues

Issue #1: The defendant was not in custody when he was interviewed by the police.

Issue #2: The district court lacked substantial and compelling evidence to suppress the defendant's statement because the court erroneously admitted the results of the court's independent investigation.

Issue #3: The district court lacked substantial and compelling evidence to suppress the defendant's confession because it erroneously admitted a written translation of the police interview that was prepared by an unqualified translator.

Issue #4: The defendant was given a legally sufficient *Miranda* warning.

Issue #5: The defendant voluntarily waived his rights.

Statement of Facts

Lawrence Police officers Hayden Fowler and David Garcia contacted the Defendant as part of an ongoing investigation. (R.II, 12-13). The officers first contacted the Defendant at his apartment where he lived with roommates. (R.II, 12). The officers asked the Defendant and one of his roommates if they would be willing to speak with the officers. (R.II, 12-13). The officers asked the Defendant and the roommate if they would talk with the police and told them that they were not under arrest and would not be arrested after the interview. (R.II, 13).

The Defendant agreed to speak with police but had no transportation to the police station. (R.II, 13). The officers offered to give the Defendant a ride to the station and back home after the interview. (R.II, 13). The Defendant traveled to the police station with the officers. (R.II, 14). At the station, Officer Fowler read the Defendant his *Miranda* rights and Officer Garcia interpreted them into Spanish. (R.II, 14). The Defendant told Officer Garcia that he spoke Mixteco. (R.II, 42). Despite that, the Defendant was able to respond appropriately in Spanish to questions asked in Spanish and to tell the officers if he did not understand what was said. (R.II, 28). Officer Garcia explained the rights more thoroughly in response to the Defendant's questions. (R.II, 15-18). The Defendant then agreed to speak with the officers. (R.II, 18-19). After the

interview, the Defendant was not arrested. (R.II, 24). He was taken back home by the officers. (R.II, 24).

Officer Garcia testified that he is a native Spanish speaker and that he spoke with the Defendant in Spanish from the initial contact through the interview. (R.II, 7, 18). Officer Garcia believed that the Defendant is fluent in Spanish because the Defendant's answers were responsive to the questions he was asked. (R.II, 28). Officer Garcia testified about what was said in Spanish and English in the interview. (R.II, 6-57).

The Court appointed Maximino Roquez as the interpreter for the Defendant because Mr. Roquez is a native Mixteco speaker. (R.II, 3). Mr. Roquez also testified on the Defendant's behalf about a transcript he prepared of the Defendant's interview with police. (R.II, 81-109). That interview contained no Mixteco, only Spanish and English. (R.III, DVD). Mr. Roquez included a disclaimer with his transcript that said, in part, "I suggest, you may consider the option to consult with a professional translator." (R.III, 5).

After hearing the evidence from the parties, the Court decided to hire another interpreter to create a transcript of the interview with the Defendant. (R.II, 165). The Court hired Shelley Bock to create a transcript with the Spanish translated into English. (R.II, 165). The State objected to the Court conducting an independent investigation into the case. (R.II, 165-166). Neither the State nor the Defendant moved to admit the transcript prepared by Mr. Bock. (R.II). The Court, over the State's objection, admitted the document and relied on it extensively to justify suppression of the Defendant's statement. (R.II, 174, 183).

The Defendant is referred to as Mr. Cano by the court throughout the record because he indicated at a previous appearance that that was what he preferred to be called. Additional facts will be developed as needed.

Arguments and Authorities

Issue #1: The defendant was not in custody when he was interviewed by the police.

The defendant raised this issue by filing a motion to suppress the Defendant's confession. (R.I, 91-102). Evidence was presented by the State and the Defendant at a motions hearing on January 8, 14th, and 21st, 2014. (R.II, 1-184). The District Court ruled that the Defendant was in custody and granted the defendant's motion to suppress. (R.II, 174-182).

Standard of Review: "We review a decision suppressing evidence under a mixed standard of review. We determine, without reweighing the evidence, whether the facts underlying the trial court's decision are supported by substantial competent evidence. We then conduct a de novo review of the district court's legal conclusion drawn from those facts. [Citation omitted]." *State v. Morton*, 286 Kan. 632, 638-39, 186 P.3d 785, 790 (2008).

"*Miranda* safeguards are only required for custodial interrogations, but not for investigatory, noncustodial interrogations." *State v. Vanek*, 39 Kan. App. 2d 529, 533, 180 P.3d 1087, 1091 (2008). "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'[Citations omitted]" *Morton*, 286 Kan. at 639.

A two prong inquiry is required to determine whether an interrogation is custodial:

> "The first prong is: what were the circumstances surrounding the interrogation?...The second prong of the inquiry is: under the totality of those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave?" *State v. Morton*, 286 Kan. at 640.

A number of factors must be considered in determining the circumstances surrounding the interrogation:

> "(1) the interrogation's place and time; (2) the interrogation's duration; (3) the number of police officers present; (4) the conduct of the officers and the person subject to the interrogation; (5) the presence or absence of actual physical restraint or its functional equivalent, such as drawn firearms or a stationed guard; (6) the status of the person being questioned as a suspect or a witness; (7) whether the person being questioned was escorted by the police to the interrogation location or arrived under his or her own power; and (8) the interrogation's result, *i.e.,* whether the person was ultimately allowed to leave, detained further, or arrested. No one factor outweighs another, nor do the factors bear equal weight. Every case must be analyzed on its own particular facts." *State v. Schultz*, 289 Kan. 334, 341, 212 P.3d 150, 155 (2009).

The facts that the district court relied on to find that the defendant was in custody are supported by substantial competent evidence; however, consideration of the district court's legal conclusion immediately reveals serious errors in the district court's analysis. First, the district court erred in using a subjective standard because it is the wrong legal standard. It is well established that "the proper analysis of whether a person is "in custody" is an objective analysis that ignores subjective beliefs, personality, and mental capacity of the defendant." *State v. William*, 248 Kan. 389, 405, 807 P.2d 1292, 1305 (1991). Despite this well established legal standard, the district court erroneously

considered subjective traits of the defendant in its analysis regarding the Miranda custody issue:

> "This is a unique case given the language issue, so this Court is considering some additional factors. Mr. Cano [the defendant, also known as Mr. Espinobarros] does not speak English. Spanish is not his first language. He is from Mexico, and the laws of this country and legal concepts are foreign to him. He is not familiar with the court system as evidenced by later comments about 'the court'. He left school in Mexico at age 12." (R.II, p.176).

The United States Supreme Court explained why a subjective standard, as the district court applied, is inappropriate for a Miranda custody analysis:

> "There is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test. As we stated in *Keohane,* "[o]nce the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry." [Citation omitted]. The objective test furthers "the clarity of [*Miranda*'s] rule," [Citation omitted], ensuring that the police do not need "to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect," [Citation omitted]." *Yarborough v. Alvarado*, 541 U.S. 652, 667, 124 S. Ct. 2140, 2151, 158 L. Ed. 2d 938 (2004).

The district court did the exact thing that *Yarborough* warns against when it took into account the defendant's language skills, his background, his familiarity with the American legal system, and his education. The district court reached the wrong legal conclusion because it used the wrong standard in making its determination.

The district court also reached the wrong legal conclusion because it focused only on the facts that supported a finding that the defendant was in custody and ignored the totality of the circumstances. The totality of the circumstances analysis requires the legal conclusion that a reasonable person would have felt free to leave the interview. The

interview began at 10:47 a.m on the defendant's day off work. (R.II, 13, 14). It lasted only an hour and eight minutes. (R.II, 24). Officers Fowler and Garcia were dressed in plain clothes. (R.III, DVD). The officers were polite and professional throughout. (R.III, DVD). The defendant was not restrained in any way. (R.II, 25). The defendant was a suspect. The defendant was transported to the police station by the police because he did not have transportation of his own. (R.II, 14).

The only factors that would tend to support the district court's legal conclusion are that the defendant was a suspect and that he was transported to the police station by the police. But Miranda warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977). Also, the fact that the defendant was transported to the police station is not an indication of custodial status in this case. In this case, transportation by police was a matter of convenience, not a restriction of freedom. (R.II, 13,14).

From the beginning, the police made clear the defendant was not being taken into custody. (R.II, 13). Officer Garcia testified that he first made contact with the defendant at the defendant's apartment. (R.II, 12). The defendant invited Officer Garcia into his home. (R.II, 12). Officer Garcia explained to the defendant and his roommate "that we'd like to talk to both of them in reference [to] an investigation, [and] asked them if they were willing to come down to the police station to talk to us." (R.II, 12-13). During the initial contact at the defendant's apartment, Officer Garcia told the defendant and his roommate that "they weren't under arrest and they were not going to be under arrest after

our conversation." (R.II, 13). In response, the defendant "said he would like to talk to us and wouldn't – had no issue going to the police department." (R.II, 13).

The defendant said he was willing to go with Officer Garcia, but he did not have transportation. Officer Garcia testified that the defendant "said if we were willing to give him a ride, he'd be more than happy to join us. We informed him we could give him a ride, that wasn't an issue, and we would bring him back home as well after we were done." (R.II, 13). Officer Garcia asked the defendant if he needed to finish any chores around the house or change clothes, but the defendant said "he didn't need to change and he was ready to go." (R.II, 13).

During the interview the defendant "was told that he could leave at any time, and if he chose to talk to us, at any time he could tell us he was done and just get up and leave." (R.II, 19). Officer Garcia told the defendant "if he were to stand up and leave and walk out the door, all we were going to do is just wave at him and say have a nice day." (R.II, 19). The district court apparently interpreted this statement as an indication that the defendant could not have a ride back home if he did not speak with police. (R.II, 176-177). The district court's interpretation of this statement is unreasonable because the defendant had already been told unequivocally that he would be given a ride back home. Would a reasonable person refuse to believe the police when they say they will give that person a ride home? Clearly, the police were trying to convey to the defendant that he did not have to talk to them. They did not threaten to withhold a ride from the defendant, and they previously told him they would give him a ride home.

The district court also attached significance to the exchange between the officers and the defendant about him being able to answer a call from his wife during the interview. (R.II, 177). The district court found that the exchange supported the finding that the defendant was in custody; however, a reasonable person would not have understood it that way. A review of that exchange shows that the police were trying to accommodate the defendant when he received a phone call from his wife. (R.III, DVD). They told him to take the call if he wanted to, and the officers even offered to step outside the interview room. (R.II, 26). In other words, the police made clear that the defendant was not being isolated from the world. He could use his cell phone and answer incoming calls. That tends to support a finding that the defendant was not in custody because his freedom to use his cell phone was not restricted in any way.

The defendant was not arrested after the interview. (R.II, 24). Instead, the police drove the defendant back to his apartment just as they promised they would. (R.II, 24). A review of the totality of the circumstances shows that the district court reached the wrong legal conclusion because a reasonable person in the defendant's position would have felt free to leave. The district court reached the wrong conclusion because it erroneously considered subjective factors of the defendant and ignored the totality of the circumstances that show the defendant was not in custody for *Miranda* purposes

Issue #2: The district court lacked substantial and compelling evidence to suppress the defendant's statement because the court erroneously admitted the results of the court's independent investigation.

The State objected to the admission of Court Exhibit 1. (R.II, 165-166, 174). The District Court overruled the State's objection and admitted Court Exhibit 1. (R.II, 174, 183).

Standard of Review: "We review a decision suppressing evidence under a mixed standard of review. We determine, without reweighing the evidence, whether the facts underlying the trial court's decision are supported by substantial competent evidence. We then conduct a de novo review of the district court's legal conclusion drawn from those facts. [Citation omitted]." *State v. Morton*, 286 Kan. at 638-39. "Generally, appellate review on questions of admissibility of evidence is governed by an abuse of discretion standard of review. [Citation omitted]. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *State v. Drach*, 268 Kan. 636, 647-48, 1 P.3d 864, 872-73 (2000). "Further, if a district court abuses its discretion in admitting expert testimony, the error is subject to harmlessness analysis." *State v. Gaona*, 293 Kan. 930, 940, 270 P.3d 1165, 1173 (2012).

"A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." KS R RULE 601B CJC Canon 2, Rule 2.9(C). "The adversary system embodied in this nation's courts operates on the assumption that justice may best be harnessed when the disputants test each other's legal theories and factual portrayals before detached observers—judges or jurors—charged with resolving those disputes." *State v. Hargrove*, 48 Kan. App. 2d 522, 547, 293 P.3d 787, 804 (2013).

The district court conducted an improper independent investigation in this case and admitted the results of that improper judicial investigation. The district court explained its actions as follows:

> "After our last hearing when I took the defendant's motion to suppress under advisement, I decided to hire an independent expert to translate the first ten or so minutes of the interview in which *Miranda* warnings were discussed. The Court retained Shelley Bock who completed his Master's degree at the University of London in Spanish translation. I informed counsel of this decision, and Mr. Simpson [the prosecutor] indicated after some thought he had objections to the this and I indicated we'd hear his objections today." (R.II, 165).

The State objected to the district court's translator because "it would be essentially the Court considering evidence that hasn't been presented by the parties, and so it would be essentially an independent investigation into the matter." (R.II, 166). In overruling the State's objection, the district court said:

> "Concerning the [State's] objection, this is an independent investigation. I appreciate Mr. Simpson's comments and his desire to avoid appeals, but I don't see this as an investigation but rather to simply learn what has already been said. It's really just an inquiry into the accuracy of what Mr. Garcia told Mr. Cano. And so I am going to overrule the objection and proceed to rule on the motion to suppress." (R.II, 174).

The district court then provided the parties with a transcript of the Miranda portion of the interview that had been prepared and translated by the district court's translator. (R.II, 169). Neither party moved to admit the court produced document. (R.II). The district court admitted the transcript over the State's objection as "the Court's exhibit." (R.II, 174,183). This evidence should not have been admitted or considered by the court because it was the result of an independent investigation by the court. It is not the role of the district court to investigate the facts of a case and present evidence. There is no wiggle room in the prohibition on independent investigations by the district court. It was abuse of discretion to contravene that bright line rule, and it was improper for the district court to consider Court Exhibit 1 in any way.

Not only was the admission of Court Exhibit 1 prohibited, but it significantly prejudiced the State. The district court said "As I went over earlier in looking at the two different translations [Defendant's Exhibit A and Court Exhibit 1], both support this conclusion. It's translated to say that it [anything the defendant says in the interview] can be used in the prosecution of others instead of against Mr. Cano himself." (R.II, 179). This factual assertion by the district court is incorrect. Only Court Exhibit 1 says such a thing.

A review of the record shows that Defense Exhibit B contradicts Court Exhibit 1. Defense Exhibit B says the defendant was told that his statements could be used against him. According to Defense Exhibit B, Officer Garcia told the defendant "if you agree to talk to us, and you are to say something that would be... if you were to say about something that was a crime, and if were charged with a crime, you would, the information we talked about *could be used against you* in prosecuting that crime." (Emphasis added. R.III, 4). Defense Exhibit B makes clear that Officer Garcia told the defendant that what he said could be used against the defendant himself, not just others. Contrast that with Court Exhibit 1 that interprets the same exchange as "It is best to say that if you say something criminal or give us information, we can use that information against a "Juan Carlos" or about "Juan Carlos", the practically we can use that information in court." (R.III, 10).

The testimony from Officer Garcia also contradicts Court Exhibit 1. Officer Garcia testified that he told the defendant "if we talk about any crimes that were committed during our conversation and charges could be filed, and if charges were filed,

anything we say during the conversation would be used against *him* in court." (Emphasis added, R. II, 15).

Only Court Exhibit 1 supports the district court's conclusion that the defendant was not advised that anything he said could be used against *him* in court. The district court made clear that this understanding of the evidence (which was consistent only with Court Exhibit 1) was a significant basis for its ruling:

> "But at times the rights that Mr. Cano has under the Miranda decision were not accurately conveyed. And, again, this is most clear in the right against self-incrimination when Mr. Cano fails to be told that whatever he says can be used against him in a prosecution against him." (R.II, 181).

The district court should not have admitted the results of its independent investigation, and the admission of the exhibit was decisive in the outcome of the motion hearing. Court Exhibit 1 should be excluded as a factual basis for the district court's findings upon review by this appellate court. The district court abused its discretion in a significant, foundational way and that cannot be overlooked as harmless error in this case.

Issue #3: The district court lacked substantial and compelling evidence to suppress the defendant's confession because it erroneously admitted a written translation of the police interview that was prepared by an unqualified translator.

The Defendant moved to admit Defense Exhibit B – the transcript prepared by Mr. Roquez at the defendant's request. (R.II, 89). The State objected. (R.II, 89, 93). The District Court admitted Defense Exhibit B over the State's objection. (R.II, 93-94).

Standard of Review: "We review a decision suppressing evidence under a mixed standard of review. We determine, without reweighing the evidence, whether the facts underlying the trial court's decision are supported by substantial competent evidence. We

then conduct a de novo review of the district court's legal conclusion drawn from those facts. [Citation omitted]." *State v. Morton*, 286 Kan. at 638-39. "If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are... within the scope of the special knowledge, skill, experience or training possessed by the witness." K.S.A. 60-456(b)(2). "The admissibility of expert testimony is within the broad discretion of the trial court. A party claiming an abuse of trial court discretion bears the burden of showing abuse of discretion." *State v. Gaines*, 260 Kan. 752, 756, 926 P.2d 641, 645 (1996). "Further, if a district court abuses its discretion in admitting expert testimony, the error is subject to harmlessness analysis." *State v. Gaona*, 293 Kan. at 940.

Defense Exhibit B was prepared by Mr. Roquez and titled "Translation of Miranda Portion of Interview of Defendant." This translation prepared by Mr. Roquez carried the following disclaimer:

> "I am an interpreter, and I interpret the meaning of the message to the target language and not words by words. I am not a translator, of what I understand translators do have some special education, and special skills to translate important documents. I have translated these part of the video by listening to each person speaking, I suggest, you may consider the option to consult with a professional translator." (R.III, 5).

Mr. Roquez's own disclaimer warned the district court that he was not qualified to prepare a "translation" of the Miranda warning given by Officer Garcia. The State objected to Mr. Roquez qualifications and conducted a voir dire examination of him regarding his qualifications. (R.II, 89). The following exchange is part of that examination:

> Q.[Prosecutor] And I respect that you speak three languages, that's very impressive, so I'm not being critical of you. But it seems to me like what you've written there indicates that you don't have the special education that's required to be a translator. Is that right?
>
> A. [Mr. Roquez] Sir, it is a complicated question to answer. Like I say, I went to school to learn Spanish, I went to school to learn English, writing and speaking to speak all three languages. The reason I mentioned that is because that's what my instructors advised me to do, so I do not normally accept the job to be a translator because of what I learned, and those are certain model, excuse me, rules that I must follow and that's why. And I speak Spanish the same way. I can write it. I Speak English the same way. I can write, or Mixteco, I can write all three. It can be limited and that's the reason why I wrote that. (R.II, 90).

The district court abused its discretion because it admitted a translation prepared by someone who warned the court that he was unqualified to prepare such a thing. Mr. Roquez did not possess the special knowledge, skill, experience, or training required to accurately translate the police interview.

Mr. Roquez comments to the court explain his unorthodox approach to his testimony and the transcript that he prepared and further illustrate his lack of qualifications:

> "I said I was going to interpret or translate the way I would understand what Mr. Garcia said, not to interpret or make it better, make it clearly or clearer, so that's what I did. So a lot of it could be a little confusing the way I wrote it because that's how I understood it, and what I did is I was trying to – *I put myself in the position like my Spanish was limited* and this is how I understood what he said and that's – I may have forgotten to mention that, so *I did not exactly interpret the meaning of what he [Officer Garcia] was saying.*" (Emphasis added. R.II, 170-171).

By his own admission, Mr. Roquez did not interpret what Officer Garcia said. Instead he speculated on what a person with limited Spanish would have understood Officer Garcia to say. There was no testimony that would allow the court to find that Mr. Roquez is qualified to render such an opinion. Furthermore, Mr. Roquez himself said he

did not translate exactly the meaning of what Officer Garcia said. A qualified translator would not have made that mistake.

Admission of Defense Exhibit B was not harmless since the district court relied on it to suppress the defendant's confession. (R.II, 174-183).

Issue #4: The defendant was given a legally sufficient Miranda warning.

The defendant raised this issue by filing a motion to suppress the Defendant's confession. (R.I, 91-102). Evidence was presented by the State and the Defendant at a motions hearing on January 8, 14th, and 21st, 2014. (R.II, 1-184). The district court granted the defendant's motion to suppress, in part, on the grounds that the Defendant was not given a sufficient Miranda warning. (R.II, 174-182).

Standard of Review: "We review a decision suppressing evidence under a mixed standard of review. We determine, without reweighing the evidence, whether the facts underlying the trial court's decision are supported by substantial competent evidence. We then conduct a de novo review of the district court's legal conclusion drawn from those facts. [Citation omitted]." *State v. Morton*, 286 Kan. at 638-639.

In order to protect a suspect's Fifth Amendment rights, the suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966).

The district court erroneously concluded that "at times the rights that Mr. Cano has under the Miranda decision were not accurately conveyed. And again, this is most clear in the right against self-incrimination when Mr. Cano fails to be told that whatever he says can be used against him in a prosecution against him." (R.II, p.181). Much of the district court's factual basis for this conclusion is not supported by substantial competent evidence.

The lack of evidence is made starkly clear in the court's discussion about why the court found that the defendant did not know that what he said could be used against him. The district court said "As I went over earlier in looking at the two different translations [Defendant's Exhibit B and Court Exhibit 1], both support this conclusion. It's translated to say that it [anything the defendant says in the interview] can be used in the prosecution of others instead of against Mr. Cano himself." (R.II, 179). This factual assertion by the district court is incorrect because only Court Exhibit 1 says this. As was discussed earlier, the court should not have admitted or relied upon Court Exhibit 1.

Without Court Exhibit 1, there is no factual basis for the court's conclusion because both Defense Exhibit B and Officer Garcia's testimony contradict Court Exhibit 1 on this issue.(R.III, 4 and R.II, 15). There is no substantial competent evidence, apart from the inadmissible Court Exhibit 1, in support of the court's conclusion that the Defendant was not told that what he said in the interview could be used against him in court.

Additionally, the district court asserted that the defendant was told "he can stop the interview and request an attorney as opposed to he can stop answering questions."

(R.II, 180). This distinction does not matter legally; however, that issue will be addressed later. For now, the important point is that the district court's factual assertion is contrary to Defense Exhibit B, which says that Officer Garcia told the defendant "If you decide to ask questions now without an attorney present, you still have the right to stop talking to me at anytime, and talk with your attorney." (R.III, 3). The Court's assertion is also contrary to the testimony from Officer Garcia, who testified that he told the defendant "we informed him if he chose to talk to us and that changed at any time, he still had the right to stop talking to us at any time during the interview." (R.II, 19). The only support for the district court's assertion is Court Exhibit 1, which should not have been considered. Without Court Exhibit 1, the district court again lacked substantial competent evidence for its finding regarding the right to counsel.

Next, the district court reached legal conclusions that are not consistent with existing case law. The district court took issue with the fact that the officers did not answer the defendant's question about why he would need an attorney. (R.II, 179). The district court seems to say that the officers were obligated to explain to the defendant why he might need an attorney. (R.II, 179). But, "A defendant need not be advised of every possible consequence of a waiver of the Fifth Amendment privilege." *United States v. Hernandez*, 93 F.3d 1493, 1503 (10th Cir. 1996). Put another way, "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or to stand by his rights." *Moran v. Burbine,* 475 U.S. 412, 422, 106 S.Ct. 1135, 1141, 89 L.Ed. 2d 410 (1986). The officers were only required to advise the defendant of his rights. They are not required to advise the defendant on the best course of action. The district court reached the wrong

legal conclusion in considering the officers' answer to the defendant's question about whether or not he needed an attorney as a relevant part of the *Miranda* analysis. Further, the officers are not qualified to give legal advice, so it unlikely that they could give the answers the district court seemingly felt defendant was entitled to.

Next, the district court considered "what Officer Fowler understands from Mr. Garcia's translation" as part of the analysis of whether or not the Miranda warning was properly given. (R.II, 179). The district court was critical of Officer Garcia's translation of the defendant's statements into English for Officer Fowler. (R.II, 179). The district court says "Mr. Fowler is relying on Mr. Garcia's interpretation also in believing that if he asks short or makes short statements, that Mr. Cano will understand. And I think this is important as he continues on with the Miranda rights." (R.II, 179-180). The State respectfully argues that there is no legal basis for the district court's conclusion that Officer Fowler's subjective understanding of what the defendant said has any legal significance regarding whether or not the defendant was properly advised of his rights. It does not matter what Officer Fowler understood. To conclude otherwise, as the district court did, is to reach an incorrect legal conclusion.

Next, the district court criticized the specific wording of part of the Miranda warning given to the defendant. As was discussed earlier, the State argues that there is not substantial and compelling evidence for the court's assertion regarding the legal infirmity of the *Miranda* warning regarding ending the interview upon request of an attorney. Regardless, even if the court's statement is factually correct the conclusion is legally incorrect. The district court said:

> So he's told the Court will appoint an attorney for him. He says he understands. And then where the proper statement is, "If you decide to answer questions now and not have a lawyer present, you still have the right to stop at any time until you talk to a lawyer,' and this is close but what he's told is he can stop the interview and request an attorney as opposed to he can stop answering questions. That once he requests an attorney, the interview must stop. (R.II, 180).

The district court seems to conclude that this distinction amounts to an inadequate *Miranda* warning on this issue. However, the type of hyper-technical parsing that the district court engaged in is contrary to what is required in a Miranda warning. "The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed." *Florida v. Powell*, 559 U.S. 50, 60, 130 S. Ct. 1195, 1204 175 L.Ed. 2d 1009 (2010). The warning that the defendant received was legally sufficient because there is no significant difference between telling the defendant he can stop the interview and ask for an attorney versus telling the defendant he can stop answering questions and ask for an attorney. The defendant was informed of the core right, which is all that the Constitution requires. Accordingly, the district court's legal conclusion was incorrect and is reversible error.

Issue #5: The defendant voluntarily waived his rights.

The defendant raised this issue by filing a motion to suppress the Defendant's confession. (R.I, 91-102). Evidence was presented by the State and the Defendant at a motions hearing on January 8, 14th, and 21st, 2014. (R.II, 1-184). The District Court ruled that the Defendant did not voluntarily waive his rights and the District Court granted the defendant's motion to suppress. (R.II, 174-182).

Standard of Review: "An appellate court employs the same standard of review for determining the voluntariness of the waiver of Miranda rights as it does for assessing the voluntariness of a defendant's statement. The inquiry requires an examination of the totality of the circumstances, and an appellate court reviews the factual underpinnings of the trial court's decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard." *State v. Mattox,* 280 Kan. 473, Syl. ¶ 3, 124 P.3d 6 (2005). "The essential inquiry in determining the voluntariness of a statement is whether the statement was the product of the free and independent will of the accused." *State v. Walker*, 283 Kan. 587, 596, 153 P.3d 1257, 1266 (2007).

In making a determination regarding the voluntariness of a statement, the following factors should be considered: (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language. *Id.* at 596-97.

The district court made very limited factual findings in support of the conclusion that the defendant's waiver of his rights was not voluntarily made. The court said:

> "Some of the first factors the Court considered in whether Mr. Cano would feel free to leave are also relevant here such as his lack of education. So after considering the language issue, Mr. Cano's continuing statements that he does not understand Spanish well and parts of the Miranda that were not accurately conveyed to him, the Court finds the defendant's motion must be suppressed. And I want to say I think the officers did the best they could given these circumstances. They were polite. I think they really wanted Mr. Cano to understand, and that none of this was done in bad faith or to trick him into giving a statement. But the conclusion remains that he did not make a knowing, a voluntary or an

intelligent waiver based on the totality of the circumstances." (R.II, 181-182).

The court also found that "the defendant does say he understands his rights under the law and that he's willing to talk with the officers." (R.II, 181). The court's finding that Mr. Cano *said* he did not understand Spanish well is supported by competent evidence; however, a finding that he in fact did not understand Spanish is not supported by competent evidence. The record is clear that the defendant was interviewed in Spanish; he gave responsive answers to questions asked in Spanish, and Officer Garcia was able to understand what the defendant said in Spanish. (CITE). Since the defendant understood the questions he was asked and gave understandable answers, there is no reasonable conclusion other than that the defendant understood Spanish.

The district court's legal conclusion is also lacking because there is no evidence of any coercion by the police. Consideration of the totality of the circumstances of the *Miranda* waiver demonstrates the following: First, the defendant's mental condition appears to be good. (R.II, 25). The interview lasted only one hour and eight minutes. (R.II, 24). The district court noted that the officers were polite. (R.II, 182). The defendant never requested communication with anyone outside the interview room. (R.II, 26). When his wife called, the police told him he could take the call, but he declined. (R.II, 26). The defendant was 34 years old when interviewed by police. The police asked the defendant about his education level, and he told them that he did not attend school after he was 12 years old. (R.II, 26).

While the defendant is not highly educated, it is vital to point out that the officers did not take advantage of the defendant's lack of education or background in a coercive

manner. "[A] mental deficiency in the defendant that is not exploited by law enforcement officers does not annul the voluntariness of a confession unless there is evidence of coercion." *State v. Johnson*, 286 Kan. 824, 838, 190 P.3d 207, 218 (2008). The officers repeatedly encouraged the defendant to speak up if he did not understand something. Whenever the defendant had a question, the officers took time to answer it and make sure the defendant understood. There is no evidence of coercion based on the defendant's educational level or language skills.

The officers dealt with the defendant in a way that ensured he understood what was said to him. As the court noted, "they really wanted the defendant to understand." (R.II, 182). It is important to note that the degree to which the defendant speaks Spanish is not the applicable legal standard. What matters is whether or not there was clear communication between the defendant and the police officers. This was expressed in the Kansas Supreme Court's consideration of K.S.A 75-4351, the statute that discusses the appointment of a translator in certain situations:

> "The purpose behind K.S.A. 75–4351(e) is to ensure that there is clear communication between one who is in custody and the officers who are questioning him. The statute does not state a rule of evidence. Whether or not an interpreter is appointed and is present at the taking of the statement, the trial court must still determine whether an in-custody statement was freely, voluntarily and knowingly given, with knowledge of the *Miranda* rights. That determination must be based upon the totality of the circumstances. [Citation omitted]" *State v. Nguyen*, 251 Kan. 69, 75, 833 P.2d 937, 942 (1992).

A review of the interview of the defendant indicates that there was in fact clear communication between the officers and the defendant. (R.III, DVD). This is evidenced by the fact that the defendant answered (in Spanish) the questions that were asked (in

Spanish) in a way that was responsive to the question. The defendant's topical responses to Officer Garcia's statements definitively establish that there was clear communication.

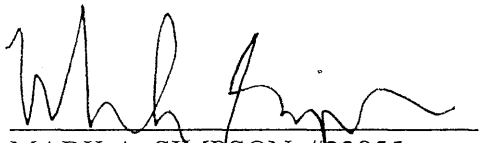
There is no evidence of coercion in the interview with the defendant. The Court noted "I think they [the police] really wanted Mr. Cano to understand, and that none of this was done in bad faith or to trick him into giving a statement." (R.II, 182). This is of the utmost legal significance because "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473 (1986). The lack of police coercion fatally undercuts the district court's decision to suppress this defendant's confession on the grounds that he did not voluntarily waive his rights. Without official coercion, the defendant's confession cannot be suppressed on the grounds that his *Miranda* waiver was not voluntary because "there must be a link between coercive activity of the State and the confession. [Citation omitted.]" *State v. Mays*, 277 Kan. 359, 376, 85 P.3d 1208, 1221 (2004). There was no coercion so the District Court erred when it found that the Defendant's *Miranda* waiver was involuntary.

The only reason to suppress a confession is to deter official misconduct. "The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Connelly*, 479 U.S. at 166. Questions regarding what the defendant meant by his confession are not constitutional issues. They are factual issues that are the province of the jury subject to the rules of evidence. It was reversible error for the court to suppress the defendant's confession.

CONCLUSION

The district court's suppression of the Defendant's confession must be reversed because it lacked substantial competent evidence and the court's legal conclusions were incorrect.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 31, 2014 two true and correct copies of the above and foregoing **Brief of Appellant** were placed in the United States Mail, first class postage prepaid, addressed to the following:

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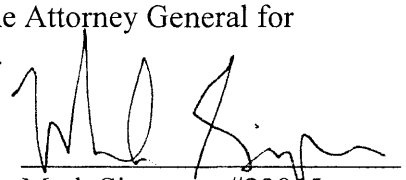
and delivered the original and 16 copies to the Office of the Attorney General for approval and filing with the Clerk of the Appellate Courts.



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