2013 IL App (2d) 120358-U
No. 2-12-0358
Order filed September 5, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellant,	)	
v.	)	No. 10-CF-2053
ANDREW VILLAREAL,	)	Honorable Gary V. Pumilia,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendant's motion to suppress his statements at a first interview, on the basis that defendant did not understand one of his *Miranda* rights, but erred in granting his motion as to the second and third interviews, as by then fresh *Miranda* warnings had been given and waived and the misunderstanding had been alleviated; that some discussion, not consisting of custodial interrogation, was not recorded was irrelevant.

¶ 2 Defendant, Andrew Villareal, was charged with first-degree murder (720 ILCS 5/9-1(a) (West 2010)) in the beating death of Christian Hernandez. Defendant moved to suppress his confession, contending that he did not understand, and did not properly waive, his rights pursuant

to *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial court granted the motion, finding that defendant did not understand his right to appointed counsel and that, despite his obvious confusion, the officers failed to clarify the right. The State filed a certificate of impairment and timely appealed, contending that the trial court's ruling was overly narrow and did not consider the totality of the circumstances. We affirm in part, reverse in part, and remand.

¶ 3 On June 24, 2010, Rockford police interviewed defendant three times in connection with Hernandez's murder. The first interview began shortly after 2:30 p.m., when detectives Mark Posley and Randall Peraza entered the interview room. Posley explained that they needed to make sure that defendant understood his rights. Defendant stated that he was 17 years old and had just completed his sophomore year of high school. Using a preprinted form, Posley began reading and explaining the *Miranda* rights. During this portion of the interview, the following exchange occurred:

"Posley: (Reading.) 'You have the right to talk with a lawyer before questioning and to have a lawyer be present with you during questioning.' Do you understand that?

Defendant: Yeah.

Posley: Ok, what does that mean?

Defendant: Um, to get your lawyer before you question me or to like he with me when you question me.

Posley: Uh-hmmm. (Reading.) 'If you cannot afford a lawyer, one will be appointed for you prior to any questions, if you desire.' You understand that?

Defendant: Yeah.

Posley: What does that mean?

Defendant: That like, uh, if you get like, a State's Attorney or something?

Posley: Well, that that's saying that before we talk to you, he can be with you while we're talking to you.

Defendant: Oh.

Posley: You understand that?

Defendant: Yeah."

¶ 4 Defendant stated that he understood his rights and wished to speak with the detectives. He initialed each line of the form and later signed a second *Miranda* waiver form. Defendant acknowledged that he and the victim were members of rival gangs and that they had had an escalating personal animosity. However, he denied being involved in the victim's death.

¶ 5 The first interview continued, with several breaks. During one break, defendant used the restroom. When he returned to the interview room, he placed his head on the table and began sobbing. About 45 minutes later, Posley and Peraza returned to the room and resumed the interview. Defendant continued to deny involvement in the murder.

¶ 6 Between the first and second interviews, defendant told Peraza that he wanted to speak to the detectives again. Defendant was returned to the interview room, where he again began to cry. Posley and Peraza read defendant his *Miranda* rights again, and he signed a second set of waivers. Defendant explained that he and some others had lured Hernandez to a meeting by pretending to be members of Hernandez's gang. When Hernandez arrived, he was attacked from behind with a baseball bat and a pipe. Defendant acknowledged that the baseball bat belonged to him but denied that he participated in the attack itself. At that point, defendant was returned to a holding cell and the second interview ended.

¶ 7 Sometime later, defendant again told Peraza that he wanted to amend his statement, so he and the detectives returned to the interview room. Defendant again waived his *Miranda* rights. In this third interview, defendant acknowledged that he was at the scene and participated in the attack on Hernandez by kicking him.

¶ 8 Defendant moved to suppress the statements he made during the interviews. In support of this motion, defendant testified that the detectives upset him by, among other things, talking about his child. He did not intend to waive his rights.

¶ 9 Defendant testified that, between the second and third interviews, Peraza came to the holding cell and told him that if he admitted to hitting Hernandez he would get a "lesser charge." Defendant thus said that he kicked Hernandez. Peraza told him to go back to the interview room and repeat what he had said.

¶ 10 Defendant further testified that he did not understand his *Miranda* rights. Specifically, he did not know that he had the right to ask for an attorney who would be his advocate during the interview.

¶ 11 The trial court granted the motion to suppress. The court found that, although the detectives engaged in some deception and some pressure tactics, these did not overcome defendant's will and his confession was voluntary. However, the court found that defendant did not understand his rights. The court observed that the detectives were not required to have defendant independently explain the *Miranda* rights but, once they did so, they were required to explain any concepts that defendant did not understand. Defendant's explanation of the right to appointed counsel, in which he referenced the State's Attorney, demonstrated that he did not understand the concept of having appointed counsel who would be his advocate. Posley's explanation, moreover, did not clear up the

misunderstanding about who would be present with defendant, but merely used the pronoun "he." The court held that defendant's lack of understanding of his rights required the court to suppress the confession. The State filed a certificate of importance and a timely notice of appeal.

¶ 12 The State contends that the trial court erred by suppressing defendant's confession. The State argues that the voluntariness of a confession is based on the totality of the circumstances and that the court, despite finding that defendant was neither threatened nor deceived, focused too narrowly on the single aspect of defendant's arguable confusion about one of the *Miranda* rights. The State contends that defendant stated several times that he understood the rights and that his answer about the State's Attorney could have been a reference to any attorney employed by the government, including public defenders.

¶ 13 A valid waiver of *Miranda* rights has two distinct elements. First, the decision to relinquish the rights " 'must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Colorado v. Spring*, 479 U.S. 564, 573 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). In addition to these federal voluntariness principles, a confession must also be voluntary in a state-law sense. *People v. Scott*, 148 Ill. 2d 479, 509 (1992).

¶ 14 Whether a defendant has validly waived his rights is a fact question based on the totality of the circumstances, including the characteristics of the defendant and the details of the interrogation. *Id.*; see also *People v. Simmons*, 60 Ill. 2d 173, 179 (1975). Initially, the State has the burden of proving by a preponderance of the evidence that a defendant made a voluntary, knowing, and

intelligent waiver. *Scott,* 148 Ill. 2d at 509-10. However, once the State does so, the burden shifts to the defendant to show that the waiver was not voluntary. *Id.*

¶ 15 In reviewing a trial court's ruling on a motion to suppress, we apply a two-part standard of review. *People v. Hopson*, 2012 IL App (2d) 110471, ¶ 8 (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). We defer to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence. *Id.* We review *de novo*, however, the court's ultimate legal ruling that suppression is warranted. *Id.*

¶ 16 Here, the trial court found that the State established the first element: that defendant's confession was the result of a deliberate choice rather than intimidation, coercion, or deception. The court's ruling focused on the second element, that defendant lacked "a full awareness" of the right to appointed counsel. At least with regard to the first interview, we cannot say that the court's finding was against the manifest weight of the evidence.

¶ 17 Defendant's statement about the State's Attorney being present at the interrogation evinced a fundamental misunderstanding about the right to appointed counsel. Defendant evidently did not realize that he had the right to have an appointed advocate on his behalf present during questioning. Moreover, Posley's explanation did not clear up the confusion about *who* could be present with defendant, telling him only that "*he* can be with you while we're talking to you." (Emphasis added.)

¶ 18 The State responds to this argument with speculation about what defendant's comment might have meant. Pointing out that defendant initially said "yes" when asked if he understood the right to appointed counsel, the State posits that defendant may have used "State's Attorney" to mean any attorney employed by the government. However, the State's Attorney is a specific officer and represents the State, not defendants. We cannot simply assume that defendant meant something else.

While the trial court could perhaps have drawn this inference, it did not, and we must defer to its factual findings. See *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). Moreover, this argument ignores defendant's testimony at the hearing that he did not in fact understand the right to appointed counsel.

¶ 19 Further, at least as to the first interview, the trial court's conclusion that defendant's failure to understand the right to counsel mandates suppressing his statements was not legally erroneous. As noted, a waiver made without " 'full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it' " (*Spring*, 479 U.S. at 573 (quoting *Burbine*, 475 U.S. at 421)) is invalid. The State argues that the totality of the circumstances shows that defendant understood his rights. Defendant repeatedly stated that he understood the rights as they were read, and he initialed the form. He had no apparent cognitive difficulties. However, this is at best circumstantial evidence and does not overcome the direct evidence that defendant did not understand at least one of the rights. We also note that defendant was only 17 years of age and had had minimal prior experience with the criminal justice system. Specifically, he had not received *Miranda* warnings before.

¶ 20 In the cases the State cites, the defendants merely stated that they understood the *Miranda* warnings, but were not asked to explain the warnings using their own words. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), for example, the issue was whether the defendant's answering a question after a long silence validly waived his *Miranda* rights. In holding that it did, the Court noted that there was no question that the defendant understood his rights. The Court observed that the defendant read one of the rights aloud, but noted that merely reading from a preprinted form is not the same as paraphrasing the right in one's own words. Here, the trial court reasonably found

that defendant did not understand at least one of the *Miranda* rights and that this failure required suppressing his statements during the first interview.

¶ 21 We reach a different conclusion, however, regarding the second and third interviews. We note initially that the trial court's precise ruling on the admissibility of the second and third interviews is unclear. What the parties have termed the first interview comprises four DVDs. The second and third interviews comprise one DVD each. In discussions between the attorneys and the trial court, it is often unclear whether they are referring to a subsequent disc from the first interview or to the discs comprising the second and third interviews.

¶ 22 Moreover, the trial court's precise rationale for excluding the second and third interviews (assuming that it did so)[1] is unclear. At a couple of points, the trial court stated that the mere repetition of the *Miranda* warnings did not cure the original error (*i.e.*, the failure to clarify defendant's misunderstanding of the right to appointed counsel). It is unclear whether this refers to Posley's attempted explanation of the warnings the first time, or to the giving of fresh *Miranda* warnings prior to the second and third interviews. The trial court also stated that there appeared to have been additional conversations between defendant and the detectives that were not recorded, and that this rendered defendant's subsequent recorded statements inadmissible except for impeachment. However, the court also found that defendant's confession was voluntary.

¶ 23 By the second interview, the evidence clearly showed that defendant understood the difference between the State's Attorney and defense counsel. Near the end of the first interview, the detectives stated that they were going to go to the State's Attorney to see what charges would be

[1]At oral argument, the State suggested that the trial court's ruling did not encompass the second and third interviews at all.

brought. Thus, by that point, defendant should have realized that the State's Attorney did not represent his interests and that he would be represented by his own appointed counsel. Moreover, the second and third interviews were separated from the first interview and from each other by spans of several hours. Both were preceded by fresh *Miranda* warnings. Both times, defendant clearly and unequivocally stated that he understood his rights, and he signed appropriate waivers. Providing fresh *Miranda* warnings may, under appropriate circumstances, be sufficient to allow admission of a statement. *People v. Foster*, 119 Ill. 2d 69, 85 (1987) (citing *Michigan v. Mosley*, 423 U.S. 96, 104 (1975)). In *Foster* and *Mosley*, the suspects had expressly invoked their right to remain silent. Here, defendant merely expressed momentary confusion about one of the *Miranda* rights. We cannot accept that this momentary confusion tainted all subsequent statements defendant made, even several hours later.

¶ 24 We further note that Peraza testified that defendant himself initiated the later interviews, stating, without apparent prompting from police, that he wanted to amend his statement. See *People v. Miller*, 393 Ill. App. 3d 1060, 1065 (2009) (subsequent statement admissible if suspect reinitiates conversation after requesting counsel and waiver is voluntary). As the Supreme Court held in a slightly different context, to hold that a defendant could not, for whatever reason, reinitiate contact with police in this situation would be to " 'imprison a man in his privileges and call it the Constitution.' " *Michigan v. Harvey*, 494 U.S. 344, 353 (1990) (quoting *Adams v. United States*, 317 U.S. 269, 280 (1942)). The reading of fresh *Miranda* warnings prior to the second and third interviews, defendant's unequivocal statements that he understood them, and his signing of new waivers removed any taint from the prior violation and rendered defendant's subsequent statements admissible.

¶ 25 The trial court alternatively barred the subsequent interviews because it believed that some additional, unrecorded conversations occurred between defendant and the detectives. The court, noting defendant's change in demeanor during the first interview, concluded that "the detective indicated there may have been more to the conversation than what he testified to in court" and held that "statements taken during or after an off-camera interview may be used only for impeachment purposes, and that is my finding." However, this appears to conflict with the court's finding that the confession as a whole was voluntary.

¶ 26 The trial court's comments appear to refer to section 5-401.5(b) of the Juvenile Court Act of 1987 (the Act), which in relevant part provides:

> "An oral *** statement of a minor who, at the time of the commission of the offense was under the age of 17 years, made as a result of a custodial interrogation conducted at a police station *** shall be presumed to be inadmissible as evidence against the minor in any criminal proceeding *** for an act that if committed by an adult would be brought under [the first-degree murder statute] *** unless:
>
> (1) an electronic recording is made of the custodial interrogation; and
>
> (2) the recording is substantially accurate and not intentionally altered." 705 ILCS 405/5-401.5(b) (West 2010).

¶ 27 Here, there was simply no credible evidence that any unrecorded conversation about the murder occurred. Peraza testified that, before the third interview, defendant called him into the holding cell. On the DVD, Peraza recounted the conversation as "[w]hen I brought you water and chips you said you wanted to add to the interview." Peraza testified that, when defendant began to talk about the murder, he was returned to the interview room and the recording resumed.

¶ 28 We do not read section 5-401.5(b) as prohibiting any unrecorded conversation between the police and a juvenile suspect. Such a reading would have the absurd result of meaning that a simple request for food and water—as occurred here—would render any subsequent confession by the suspect inadmissible except for impeachment. The statute's plain language refers only to "custodial interrogation," which it defines as questioning "(i) during which a reasonable person in the subject's position would consider himself or herself to be in custody and (ii) during which a question is asked that is reasonably likely to elicit an incriminating response." 705 ILCS 405/5-401.5(a) (West 2010); see *People v. Travis*, 2013 IL App (3d) 110170, ¶ 44. There was simply no evidence of such a conversation here; defendant's request for food and his stated desire to amend his statement were not an interrogation that would trigger section 5-401.5(b) of the Act.

¶ 29 In summary, the trial court did not err by barring the first interview (consisting of four discs) from evidence. However, the second and third interviews were admissible. We thus affirm in part and reverse in part the order of the circuit court of Winnebago County, and we remand the cause for further proceedings consistent with this order.

¶ 30 Affirmed in part and reversed in part; cause remanded.