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 APPELLEE

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

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NATURE OF THE CASE

This appeal involves the district court's suppression of the defendant's statement to the police. The State filed this interlocutory appeal pursuant to K.S.A. § 22-3601(a) as authorized by K.S.A. § 22-3603, claiming several errors by the district court. The defendant contends that the district court acted within its discretion in suppressing his statements.

STATEMENT OF ISSUES

Issue 1: **The defendant was in custody when the police interrogated him.**

Issue 2: **The district court had substantial competent evidence to suppress the defendant's statements and properly based its findings on the evidence before the court.**

Issue 3: **The district court had substantial competent evidence to suppress the defendant's statements and properly admitted a written translation of the police interview prepared by the Mixteco translator.**

Issue 4: **The defendant was not given a legally sufficient *Miranda* warning.**

Issue 5: **The defendant neither voluntarily nor knowingly waived his Fifth Amendment rights.**

STATEMENT OF FACTS

On January 28, 2013, Officer Hayden Fowler of the Lawrence Police Department contacted E.M., a minor, age 15, at Lawrence High School and transported her to the child friendly room at the Lawrence Police Department Investigations and Training Center (ITC) in order to talk to her about an alleged child sex crime reported to police by the Kansas Department for Children and Families, Prevention and Protection Services (KDC). (R. II, 61-62). Officer Fowler questioned E.M. at the ITC, advising her that she was not in trouble and that she was a victim in an ongoing investigation. (R. II, 62-63). Officer Fowler spoke with

E.M. for nearly three and a half hours[1] during their first interview, having her control the direction of most of the conversation. (R. II, 63). During the course of the interview, E.M. described many different instances starting when she was five or six years old in which male individuals had touched her inappropriately or had sex with her. (R. IV, 2-10). E.M. stated that some of the situations in which she had sex were against her will, but several of the others were not. (R. IV, 8-10). Nearly halfway into the first interview, Officer Fowler asked E.M. to tell him about *any* other instances other than the ones she had already described in which somebody had touched her where it was unwanted. (R. IV, 7). E.M. then described a party that she had attended with two of her friends, M.E. and A.C, where five guys were fighting over her. (R. IV, 7-9). None of the instances alleged by E.M. involved the defendant. (R. II, 63).

While talking about the party, E.M. admitted that she had been paid to have sex before and that she saw no problem with it. (R. IV, 10). Officer Fowler asked E.M. if she wanted to have sex the times that she was paid and E.M. stated that she did. (R. IV, 10). Officer Fowler then asked E.M. to tell him about the times when she was paid to have sex. (R. IV, 10). E.M. stated that the last time she was paid to have sex was around two weeks prior and that she had been paid for sex about three times total. (R. IV, 10, 13-14). Officer Fowler then told E.M. that he was taking her into protective custody. E.M. became visibly upset, told him that she likes sex, and that she was never raped. (R. IV, 10; R. II, 64-65). At this point Officer Fowler decided to break the interview up by taking E.M. around to the

[1] Officer Fowler testified at the Motions Hearing that he spoke with E.M. for about four and a half hours, including breaks. (R. II, 63).

places she had mentioned during their interview. (R. II, 65-67). Officer Fowler drove E.M. around Lawrence based on her statements and made her point to the apartments and houses that she had discussed during their interview. (R. II, 65-67). At some point E.M. was asked to identify some photographs, but at no point was she ever shown a picture of the defendant, nor did she ever identify him by name. (R. II, 77). After concluding the interview, driving around Lawrence, and visiting Children's Mercy Hospital, Officer Fowler took E.M. to be processed at the Juvenile Detention Facility. (R. II, 67-68).

On January 29, 2013, Officer Hayden Fowler interviewed E.M. for a second time at the ITC. (R. II, 68). This second interview lasted for another hour and a half. (R. II, 70). After recapping everything they had talked about the previous day including the party, Officer Fowler prompted E.M. to discuss anything else that had happened around the time of the party. (R. II, 69). E.M. mentioned another gathering that she had attended with her friend M.E. around the same time as the party. (R. V, 34; R. II, 69). E.M. described the inside of the apartment where the other gathering occurred and told Officer Fowler that she and her friend both had sex and drank at this other gathering. (R. V, 34; R. II, 69). E.M. stated that she had sex with two different men while she was there and that one of them paid her. (R. V, 34-35).

E.M. also described a few other encounters during her second interview with Officer Fowler, including another time that she was paid for sex. (R. IV, 13-15). It is noteworthy that E.M. did not mention the second gathering or any of these other encounters until her second interview with Officer Fowler after she had been taken into protective custody and

was prompted by Officer Fowler to do so. (R. II, 77) It is also noteworthy that E.M. never identified the defendant by name, nor was she ever asked to identify a photograph of the defendant. (R. II, 77).

Several months later on July 1, 2013, Officer Fowler while conducting a follow-up investigation, knocked on the door of the apartment where E.M. said the second gathering occurred. (R. II, 12, 78). The defendant answered the door and Officers Fowler and Garcia asked both him and his roommate to come speak with them at the ITC. (R. II, 12-13). Because the defendant is not fluent in English, Officer Garcia of the Lawrence Police Department translated the interview into Spanish. (R. II, 78). However, the defendant speaks Mixteco, an indigenous dialect spoken only in certain parts of Mexico. (R. II, 83-85). Officer Fowler read the defendant his *Miranda* rights in English, and Officer Garcia translated them line-by-line (it is unclear whether Officer Garcia translated them word for word) into Spanish. (R. II, 10-11, 96-99, 101). After completing the reading, Officer Fowler asked the defendant if he understood his rights. (R. III, 9; R. II, 104). The defendant stated that he did not understand them and told officers that he did not understand Spanish well as he spoke Mixteco. (R. III, 9-10). Specifically, the defendant told officers that he did not understand "this thing called court," or his right to an attorney. (R. III, 10, 12; R. II, 96). After attempting to explain the process better, Officer Fowler failed to ask the defendant if he was willing to waive his *Miranda* rights and speak with officers. (R. III, DVD: Defendant's Exhibit A). Instead, Officer Fowler immediately began questioning the defendant by getting

his personal information from him after attempting to break down the *Miranda* rights piece by piece. (R. III, DVD: Defendant's Exhibit A).

After obtaining the defendant's personal information, Officer Fowler explained to him that he was "a very little part of a very big investigation" and stated that he wanted to talk to him about his involvement in things. (R. V, 20). Despite not knowing whether the defendant was the man E.M. described, Officer Fowler concluded he was simply because E.M. had pointed to the apartment where the defendant was contacted five months later on July 1, 2013. It is noteworthy that at no point was the defendant's name mentioned by E.M. (R. II, 77). The defendant told officers that he did not know what they were talking about. (R. V, 20). Officer Fowler explained to the defendant that two girls had reported that they had consensual sex with him and his roommate. (R. V, 34-35). The defendant continued to tell officers that he did not know the girls that they were talking about. (R. III, DVD: Defendant's Exhibit A). Eventually, the defendant stated that he remembered that some women[2] had come over and asked for beer and money for sex. (R. V, 21-22). The defendant told officers that he did not want to give them any money or have sex, but the "Hispanic" girl took what money he had in his wallet and made him have sex with her anyway. (R. V, 22-23). The defendant also told officers that after the women arrived, he took a phone call outside and was gone from the apartment for approximately forty minutes. (R. III, DVD: Defendant's Exhibit A). The defendant stated that when he returned to the apartment, the women were gone. (R. III, DVD: Defendant's Exhibit A). During a brief recap of what they

[2] The term "women" is used throughout because this is the word that Officer Garcia used with the defendant (rather than the word "girls" as Officer Fowler was using). (R. II, 19).

had discussed, the defendant told officers that he did not want to have sex with the "Hispanic" woman because she appeared young, but then she told him that she was 18. (R. V, 22-23). Over the course of the interview, it was clear that a language barrier existed between the defendant and Officer Garcia, as several times throughout the interview the defendant responded to what appeared to be a different question than what was asked by Officer Fowler. (R. III, DVD: Defendant's Exhibit A). Additionally, on multiple occasions, Officer Garcia mistranslated what Officer Fowler was saying to the defendant. (R. II, 95-99). Most notably, Officer Garcia used the Spanish word for "women" instead of the word for "girls," the word that Officer Fowler was actually saying. (R. II, 19-20, 54). At the conclusion of the interview, Officer Fowler did not arrest the defendant and they drove him home after completing the interview with the defendant's roommate. (R. II, 24).

Eventually, the defendant was arrested and charged with one count of aggravated indecent liberties with a child in violation of K.S.A. § 21-5506(b)(1), a level 3, person felony, and one count of patronizing a prostitute in violation of K.S.A. § 21-6421(a)(2), a class C, misdemeanor. (R. I, 5). At the preliminary hearing, Officer Garcia testified that the defendant informed him that he did not understand the *Miranda* rights and that he spoke Mixteco. (R. V, 19). At the hearing on the defendant's Motion to Suppress, Officer Fowler testified that he asked Officer Garcia if they needed to obtain a different interpreter, and Officer Garcia informed him that he did not think that was necessary. (R. III, 11; R. II, 55-56). Nevertheless, Officer Garcia continued to speak to the defendant in Spanish, not Mixteco. (R. V, 17; R. II, 55-56). As a result of the clear language barrier, the defendant

completed his own investigation and eventually obtained the services of a native Mixteco speaker, Maximino Roquez. (R. II, 3, 83). Mr. Roquez is also fluent in Spanish, having learned it when he was twelve years old. (R. II, 83). Mr. Roquez prepared an interpretation of the *Miranda* portion of the interview of the defendant conducted by Officers Fowler and Garcia. (R. II, 88-89). Mr. Roquez prepared an interpretation of the *Miranda* portion for purposes of the defendant's Motion to Suppress. (R. II, 146-47). Mr. Roquez inserted a disclaimer at the end of the interpretation, explaining that he is an interpreter and not a translator and suggesting that the court may want to consult with a professional translator. (R. II, 89-90). Upon being questioned about his disclaimer, Mr. Roquez described the differences between an interpreter and a translator, explaining that his instructors taught him to include a disclaimer because of the possibility that an interpretation may not always be the "best" interpretation possible. (R. II, 90-91). Mr. Roquez later explained to the court that he did not make any attempts at cleaning up his interpretation and so some of the wording could have been a little confusing. (R. II, 170-71).

In order to competently review the evidence presented by both the defendant and the State, the court hired a separate translator to produce an interpretation of Defense Exhibit A (a DVD of the interview of the defendant conducted by Officers Fowler and Garcia). (R. II, 165). The court hired Shelley Bock, who completed his Master's degree at the University of London in Spanish translation. (R. II, 165). Over the State's objection, the court admitted Mr. Bock's translation as its own exhibit, explaining its position that the interpretation was not an independent investigation, but rather an act to understand what had already been

presented. (R. II, 174). As the district court is not fluent in Spanish, it is reasonable that an independent translator was hired to interpret the DVD evidence presented by the defendant and the State. No new evidence was garnered through the district court's actions. As the district court stated, it is an interpretation of what was already said. (R. II, 174). Relying on all of the evidence presented by both the State and the defendant, including the interpretation of Mr. Bock, the court ruled that the defendant "did *not* make a knowing, a voluntary or an intelligent waiver based on the totality of the circumstances." (emphasis added) (R. II, 182).

ARGUMENTS AND AUTHORITIES

Issue 1: The defendant was in custody when the police interrogated him.

Standard of Review

The defendant agrees with the standard of review as explained in *State v. Morton*, 286 Kan. 632, 638-39, 186 P.3d 785 (2008), and as cited by the State. Brief of Appellant at 4. The defendant adds, however, that "in reviewing a district court's decision regarding suppression, this court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a *de novo* standard with independent judgment. [Citation omitted]. This court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. [Citation omitted]." *State v. Mays*, 277 Kan. 359, 372, 85 P.3d 1208 (2004).

Argument

Caselaw is clear that *Miranda* warnings are not necessary each and every time that police speak to a person. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Morton*, 186 Kan. at 639; *State v. Jones*, 283 Kan. 186, 192-93, 151 P.3d 22 (2007). It is also clear, however, that *Miranda* warnings are required when a person's freedom has been restricted to such a degree as to render him "in custody." *Id.* Thus, *Miranda* warnings are necessary for custodial interrogations, but are not a requirement of noncustodial, purely investigatory interrogations. The State correctly asserts the two-prong test for determining whether an interrogation is considered custodial as identified in *Morton*: (1) what were the circumstances surrounding the interrogation; and (2) under a totality of said circumstances, would a reasonable person feel as though his or her liberty to leave and terminate the interrogation were restricted? 186 Kan. at 640. In analyzing the first prong, totality of the circumstances, the court is to consider several factors. The primary factors to be considered are: (1) place and time of the interrogation; (2) length of the interrogation; (3) number of officers present during the interrogation; (4) conduct and words communicated by both the officers as well as the subject of the interrogation; (5) use of any physical restraint, or its functional equivalent such as a guard at the door; (6) whether the subject of the interrogation is a suspect or merely a witness; (7) means of arrival at the interrogation – i.e. was the subject of the interrogation escorted by police or did he arrive on his own volition; and (8) result of the interrogation - i.e. was the subject of the interrogation permitted to

leave, detained further, or arrested? *State v. Schultz*, 289 Kan. 334, 341, 212 P.3d 150 (2009); *Morton*, 186 Kan. at 640; *Jones*, 283 Kan. at 194.

Caselaw is clear that no one factor necessarily outweighs another, nor do the factors bear equal weight. *Id.* Each case should be analyzed on its own set of individual facts, and each factor's importance may vary from case to case. *Id.* The State concedes that the factors the district court relied upon are supported by substantial competent evidence. However, the State argues that the court used a subjective rather than an objective standard because the court also considered other factors in reaching its conclusion. Citing *State v. William*, the State explains that an objective standard ignores the subjective beliefs, personality, and mental capacity of a defendant. 248 Kan. 389, 405, 807 P.2d 1292 (1991). The State goes on to cite *Yarborough v. Alvarado*, stating that "there is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience." 541 U.S. 652 (2004).

While the district court did consider additional factors beyond the eight primary factors listed above, only one of them concerns the defendant's beliefs, personality, and mental capacity - the fact that he left school in Mexico at the ago of 12. (R. II, 176). Officers could not have been expected to know this fact without asking. The other factors the court considered though were obvious to the officers without them having to ask any questions, and in fact they made such determinations before the interrogation even began - they had a Spanish speaking officer with them when they went to knock on the defendant's door. Officers were well aware that the defendant did not speak English and that he was from

Mexico - a judicial system that no doubt varies from our own. (R. II, 176). Despite the State's rigid adherence to the eight primary factors listed above, an objective analysis considers "how a reasonable person *in the suspect's position* would have understood the situation." *State v. Hebert*, 277 Kan. 61, 68, 82 P.3d 470 (2004) (emphasis added); *see also State v. Valdez*, 266 Kan. 774, 791, 977 P.2d 242 (1999).

While Kansas caselaw has not necessarily addressed the precise issue faced in this case, the Tenth Circuit provides some guidance in addressing this issue. "'The determination of custody, from an examination of the totality of the circumstances, is necessarily fact intensive.' [Citation omitted] We thus avoid hard line rules and instead allow several *non-exhaustive* factors to guide us... Although these factors are useful, we emphasize that we must look to the totality of the circumstances and consider the police-citizen encounter as a whole, rather than picking some facts and ignoring others." *United States v. Jones*, 523 F.3d 1235, 1240 (10th Cir. 2008) (emphasis added) (*quoting United States v. Griffin*, 7 F.3d 1512, 1518 (10th Cir. 1993)). By asking this Court to ignore the clearly apparent, objective facts that the defendant is from Mexico and does not speak English, the State is picking and choosing which facts should be considered and which should be ignored - the very thing *Jones* and *Griffin* caution against.

Next, the State argues that the district court chose to focus its analysis only on the facts supporting the finding that the defendant was in custody, ignoring the totality of the circumstances. By making this argument, however, the State asks this Court to do the same thing with the facts that support a finding that the defendant was *not* in custody. Using a

fact-intensive analysis of the totality of the circumstances, and considering the *non-exhaustive* list of factors as well as factors that fall outside of the articulated list, the district court reached the reasonable conclusion that a reasonable person *in the defendant's position* would have felt as though they were in custody. (R. II, 176-77). Specifically, and in favor of its decision, the district court considered that the police transported the defendant to the police station, that the questioning took place at the police station in an interrogation room, that the defendant was a suspect, that the defendant does not speak English, and that the defendant is from Mexico where the laws and legal concepts differ from the United States. (R. II, 176). The district court further considered that at multiple times throughout the interview, officers stated that they would take the defendant home *when they finished* talking to him. (R. II, 177). The district court also considered the factors that were not in favor of granting the defendant's motion - that the interrogation was not terribly lengthy, that there were only two police officers present, that there was no physical restraint, that there were no guns drawn or guards posted, and that the defendant was transported back home and not arrested after the interrogation concluded. (R. II, 176). Noting that the importance of each factor varies from case to case, the district court reached the conclusion that under the totality of the circumstances, "a reasonable person [in the defendant's] situation would not have felt free to leave." (R. II, 175-77).

Finally, the State attempts to downplay the exchange between the defendant and officers regarding his ability to get up and end the interrogation. What's more is this is one of the eight factors to which the State is asking this court to rigidly adhere - the words and

conduct of the officers during the interrogation. It is without a doubt that officers informed the defendant that he was not being taken into custody. (R. II, 13). However, the words that matter the most to a reasonable person's perception, and consequently the words that the district court highlighted, were those spoken in the interrogation room - "when we get done talking, we'll take you home," and "this is how we plan to talk to you the whole day," and "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, 177). Furthermore, officers felt it necessary to *Mirandize* the defendant, suggesting that they viewed this as a custodial interrogation. (R. II, 14). It is reasonable for a person - especially one not familiar with the U.S. legal system - to conclude that a ride home was conditioned upon talking to officers until *they* were satisfied with the conversation. Telling the defendant that they would wave at him and say have a nice day if he chose to get up and leave simply reaffirms such a perception. Reasonable people do not intentionally wave at people and tell them goodbye and then walk with them down the street. The perception of a withheld ride was a reasonable perception for the defendant to have, and the district court recognized such. (R. II, 177). It is further reasonable for a person to believe that upon receiving the *Miranda* warnings, they are in custody, even if it is only for a brief amount of time. That *Miranda* warnings are only required for custodial interrogations only serves to reaffirm this reasonable perception.

Under a totality of all of the objective circumstances - those not contingent upon a person's beliefs, personality, and mental capacity - the district court reached a reasonable conclusion, supported by substantial competent evidence, that a reasonable person in the

defendant's position would have felt as though he were in custody for purposes of the interrogation. This conclusion was not in error, and the district court did not consider subjective factors in lieu of the well-established totality of the circumstances test.

Issue 2: The district court had substantial competent evidence to suppress the defendant's statements and properly based its findings on the evidence before the court.

Standard of Review

The defendant again agrees with the standard of review as explained in *State v. Morton*, 286 Kan. 632, 638-39, 186 P.3d 785 (2008), and as cited by the State, adding again the standard cited in *State v. Mays*. "In reviewing a district court's decision regarding suppression, this court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with independent judgment. [Citation omitted]. This court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. [Citation omitted]." *State v. Mays*, 277 Kan. 359, 372, 85 P.3d 1208 (2004). The defendant also concurs with the judicial discretion standard of review as explained in *State v. Drach*, 268 Kan. 636, 647-48, 1 P.3d 864 (2000), and as cited by the State. The defendant, however, does not agree that the district court abused its discretion, and so the harmlessness standard cited in *State v. Gaona*, 293 Kan. 930, 940, 270 P.3d 1165 (2012), and as cited by the State, is inapplicable to the facts of this case.

Argument

The defendant does not dispute the State's assertion that judges are not to independently investigate the facts of a case. That much is clear in both the Kansas Code of Judicial Conduct as well as Kansas caselaw. *See* KAN. CODE OF JUD. CONDUCT Canon 2 R. 2.9(C) (2009); *see also State v. Hargrove*, 48 Kan. App. 2d 522, 547, 293 P.3d 787 (2013). However, the State improperly classifies the district court's actions as an independent investigation. While it is true that the district court hired its own translator to translate the *Miranda* portion of the defendant's interrogation with the police, this was not an arbitrary, fanciful, or unreasonable action. The State objected to the district court's action arguing that "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). The State's classification of the translation as "new" evidence, however, is incorrect and surprising given their objections to the defendant's use of an "unqualified translator." No new evidence was considered through the district court's actions - the untranslated interview had been submitted into evidence, an "unqualified" translation (as the state puts it) had been submitted into evidence, and the State presented its own witness to testify as to the translation. It is surprising that given all the evidence presented to the district court that the State would object to the translation as "new" evidence, or even object at all to the admission of an "unqualified" translation.

The district court also explained that it did not view its actions as an independent investigation, but rather as a means "to simply learn what has already been said. It's really

just an inquiry into the accuracy of what Mr. Garcia told [the defendant]." (R. II, 174). In fact, the defendant's own interpretation called into question some of what Officer Garcia testified he told the defendant. (R. II, 94-99). Given that the State objected to the introduction of the defendant's translation (R. III, 1-7) because the interpreter was not a "professional translator," one would almost expect the State to welcome a "professional translation" geared at clearing up any differences between the defendant's translation and the State's witness' testimony. (R. II, 89-93). While reasonable persons could argue as to the propriety of the district court's actions, a strong argument can be made that the court's actions were most certainly reasonable and hardly arbitrary or fanciful when it hired an independent "professional translator" to clear up any mistranslations or contested portions of the interview.[3] After all, the court was simply using the evidence before it (the untranslated interview) in order to compare translation A (Officer Garcia's testimony) to translation B (the defendant's translation). However, because the "professional translation" did not benefit the State's case, the State now objects to its existence. The defendant doubts that the State would have objected if the translation had benefited the State or had no effect either way.

The district court reached the conclusion that in considering both translations - the defendant's translation and the court's independent translation - each supported the

[3] United States Supreme Court Rule 31 regarding translations even contemplates lower courts having the authority to order translations. "Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court..." SUP. CT. R. 31. Even though Rule 31 specifically concerns written material, it logically follows that a lower court would also have the authority to order a translation of an audio/video file.

conclusion that "[anything that was said] can be used in the prosecution of others instead of [the defendant] himself." (R. II, 179). The State argues that the defendant's translation contradicts that finding and clearly states that the defendant's statements could be used against him. The State quotes a portion of the defendant's translation that in fact does say that his statements could be used against him, but the State failed to recognize that the portion of the translation it quoted was the English portion spoken by Officer Fowler, not the Spanish portion spoken by Officer Garcia. (R. III, 4, 10).

The Spanish portion, on the other hand, spoken by Officer Garcia is not as clear as the State attempts to portray it. The defendant's translation states if the defendant says "something about a criminal or something that is about others, or have that information and they give you charges, or give the charges to someone, everything we are talking about can be used in the court." (R. III, 4). The translation by Officer Garcia to a trained professional may appear convoluted and complex at first glance, but the general idea of that portion of the *Miranda* warning could be gleaned from his awkward wording. To a layperson with little or no experience with the legal system and with a language barrier, however, Officer Garcia's statements are anything but clear. The district court's independent translation supports this lack of clarity,[4] and the defendant's statement that he "understand[s] some, more or less" shows there was at least some lack of understanding. (R. III, 4, 10).

[4] The district court's translation stated that if the defendant were to "say something criminal or give us information, we can use that information against a 'Juan Carlos' or about 'Juan Carlos,' then practically, we can use that information in court." (R. III, 10).

The district court did not violate any bright line rule; no "new" evidence was introduced; and no arbitrary, fanciful, or unreasonable actions were taken by the district court in seeking its own independent translator in order to completely and accurately consider the evidence already before the court. Therefore, the district court did not abuse its discretion in admitting the independent translation and considering it in making its ruling. Because the district court did not abuse its discretion, no harmlessness analysis need be made, and the district court's ruling and admission of Court's Exhibit 1 should not be disturbed.

Issue 3: The district court had substantial competent evidence to suppress the defendant's statements and properly admitted a written translation of the police interview prepared by the Mixteco translator.

Standard of Review

The defendant agrees with the standard of review as explained in *State v. Morton*, 286 Kan. 632, 638-39, 186 P.3d 785 (2008), and as cited by the State, adding again the standard cited in *State v. Mays*. "In reviewing a district court's decision regarding suppression, this court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with independent judgment. [Citation omitted]. This court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. [Citation omitted]." *State v. Mays*, 277 Kan. 359, 372, 85 P.3d 1208 (2004). The defendant also concurs with the judicial discretion standard concerning the admissibility of expert testimony as cited in *State v. Gaines*, 260 Kan. 752, 756, 926 P.2d 641 (1996), and as cited by the State. The

defendant, however, does not agree that the district court abused its discretion, and so the harmlessness standard cited in *State v. Gaona*, 293 Kan. 930, 940, 270 P.3d 1165 (2012), and as cited by the State, is inapplicable to the facts of this case.

Argument

The use of interpreters is not uncommon in criminal proceedings. In Kansas, the qualifications for such interpreters is found in K.S.A. § 75-4353, which include:

> (1) A general understanding of cultural concepts, usage and expressions of the foreign language being interpreted, including the foreign language's varieties, dialects and accents;
>
> (2) the ability to interpret and translate in a manner which reflects the educational level and understanding of the person whose primary language is other than English;
>
> (3) basic knowledge of legal rights of persons involved in law enforcement investigations, administrative matters and court proceedings and procedures, as the case may be; and
>
> (4) sound skills in written and oral communication between English and the foreign language being translated, including the qualified interpreter's ability to translate complex questions, answers and concepts in a timely, coherent and accurate manner.

The State argues that because the translation prepared by the defendant's interpreter, Mr. Roquez, contains a disclaimer, then it means that Mr. Roquez is not qualified to prepare an interpretation of the *Miranda* warnings provided by Officer Garcia. As previously discussed, however, Mr. Roquez was taught to use a disclaimer in his interpretations because he was trained as an interpreter of *spoken word*, not a translator of the *written*

word. (R. II, 90-91). He explained that this disclaimer is simply inserted to cover himself, as his instructors taught him to "suggest that [his interpretation] could be right, it could not be the best way, however." (R. II, 90). While the disclaimer clearly states that Mr. Roquez is an interpreter and not a translator, it explains that he has been given special education and skills necessary to translate. (R. III, 5). Over the State's objections to Mr. Roquez's qualifications, the district court found Mr. Roquez a competent and qualified interpreter under the qualifications established under K.S.A. § 75-4353. Additionally, given that "K.S.A. 75-4354 does not impose an absolute requirement on an interpreter to give a literal translation," but instead requires that "the interpreter's translation must be to the best of his skill and judgment," the district court's decision was not an abuse of discretion. *State v. Van Pham*, 234 Kan. 649, 664, 675 P.2d 848 (1984).

Despite Mr. Roquez's explanation concerning the difference between an interpretation and a translation, the State still objects to the inclusion of Mr. Roquez's interpretation, stating that he did not possess the special knowledge, skill, experience, or training required to accurately translate the interview. As was clear in Mr. Roquez's explanation, however, he did not prepare a translation, which he explained would have to be perfect and may not actually convey the appropriate meaning, but rather an interpretation.[5] (R. II, 90-93). Furthermore, Mr. Roquez detailed the education and training he received, thus explaining his use of the disclaimer. (R. II, 90-91). The district court clarified the

[5] While it appears that "translation" and "interpretation" are used interchangeably throughout Mr. Roquez's testimony at the motions hearing, his testimony is clear that his instructors taught him that an interpreter interprets the spoken word, whereas a translator translates the written word.

differences between interpreting and translating and admitted Mr. Roquez's interpretation, apparently finding his education and training sufficient for the purposes of interpretation. (R. II, 93-94). Because K.S.A. § 75-4354 does not require a literal translation by an interpreter, but rather requires that the interpreter make a "true interpretation in an understandable manner," and because the district court found Mr. Roquez in possession of the appropriate skills, training, and education required to be an interpreter, the court did not abuse its discretion in admitting Mr. Roquez's interpretation. As such, the district court's ruling and admission of Defendant's Exhibit B should not be disturbed.

Issue 4: The defendant was not given a legally sufficient *Miranda* warning.

Standard of Review

The defendant agrees with the standard of review as explained in *State v. Morton*, 286 Kan. 632, 638-39, 186 P.3d 785 (2008), and as cited by the State, adding again the standard cited in *State v. Mays*. "In reviewing a district court's decision regarding suppression, this court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard with independent judgment. [Citation omitted]. This court does not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. [Citation omitted]." *State v. Mays*, 277 Kan. 359, 372, 85 P.3d 1208 (2004).

Argument

The *Miranda* guidelines were "established to protect a person's constitutional privilege against compulsory self-incrimination." *State v. McConico*, 4 Kan. App. 2d 420,

424, 607 P.2d 93, 96 (1980). "Unless and until such *warnings and waiver* are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (emphasis added). In addition to simply giving the *Miranda* warnings, the defendant must also be able to *fully* understand the rights that he has. *See State v. Mattox*, 280 Kan. 473, 488, 124 P.3d 6 (2005) (emphasis added). It should go without saying that an English recitation of the *Miranda* warnings is insufficient as it relates to an individual who does not speak any English. The same premise follows for an individual who is given his *Miranda* warnings in Spanish, but who does not understand Spanish. In this case, the defendant speaks Mixteco, not English, not Spanish. (R. II, 83-85). To argue, as the State does, that he received a sufficient *Miranda* warning when he does not fully understand Spanish is to argue that officers could read the *Miranda* warnings in any language for any defendant and they would be sufficient regardless of the defendant's level of understanding. Such an argument is absurd and is akin to arguing that officers could read the *Miranda* warnings in Chinese for an English only speaking defendant and they would be sufficient.

In *State v. Nguyen*, the district court discussed the statutory requirement that an interpreter be "qualified." 281 Kan. 702, 710, 133 P.3d 1259 (2006). The district court noted that "the State does not have...a general qualification standard for interpreters. So the Court has to consider the qualifications of an interpreter on a case-by-case basis." *Id.* The *Nguyen* Court noted the interpreter's testimony that there are subtle cultural differences between North and South Vietnam and that there is a difference in accent. *Id.* at

707. Nonetheless, the *Nguyen* Court found the interpreter qualified and found that he properly conveyed the defendant's legal rights. *Id.* at 723. Contrasted to this case, Mixteco is not simply a dialect of Spanish with subtle cultural differences and a difference in accent, but rather is another language entirely. (R. II, 178). Officer Garcia even testified that he did not know what language the Mixteco interpreter was speaking and that he could not understand the interpreter. (R. II, 56-57). Nonetheless, Officer Garcia testified that he persisted in the interrogation without obtaining a Mixteco translator because it was his opinion that the defendant understood *everything* that Officer Garcia was saying. (R. II, 53-56). Officer Garcia maintained this opinion despite the defendant telling him that he did not understand his rights and did not truly speak Spanish. (R. II, 41).

The State hearkens back to its argument that it was in error for the district court to include its own translation and use it at least as a partial basis for its decision regarding the *Miranda* warnings. The State argues that only the court's own exhibit supports its conclusion concerning the use of the defendant's statements against others rather than himself. Without rehashing this argument, the defendant simply restates that the State only quotes the English portion of the *Miranda* warnings spoken by Officer Fowler, rather than the Spanish portion spoken by Officer Garcia. (R. III, 4, 10).

The State focuses much of its argument on the district court's discussion of how Officer Garcia translated the *Miranda* warnings to the defendant, while attempting to lessen the point that the defendant simply did not understand his rights because he does not understand Spanish very well. The district court's discussion of Officer Garcia's translation,

however, was simply to explain the specific rights that the court believed the defendant did not understand accurately. The district court concluded that while the defendant may have understood *some* of his rights as read to him in Spanish, he certainly did not fully understand each of them individually as is required. (R. II, 181-82). The district court stated that there was no doubt that the officers *wanted* the defendant to understand his rights, but given the language barrier and his continued statements that he did not understand Spanish well, aspects of his *Miranda* rights simply could not be accurately conveyed to him. (R. II, 182). This decision was not in error, and to overturn it would be akin to reweighing the evidence and reconsidering the conflicts that existed in the evidence. The district court already competently considered the evidence and its conflicts, deciding that the defendant was not given a legally sufficient *Miranda* warning. This decision is supported by substantial competent evidence and should not be disturbed.

Issue 5: The defendant neither voluntarily nor knowingly waived his Fifth Amendment rights.

Standard of Review

The defendant agrees with the standard of review as explained in *State v. Mattox*, 280 Kan. 473, Syl. ¶3, 124 P.3d 6 (2005), and as cited by the State. The defendant also agrees with the essential inquiry as mentioned in *State v. Walker*, 283 Kan. 587, 596, 153 P.3d 1257 (2007).

Argument

The essence of *Miranda* is that the "opportunity to exercise [one's] rights must be afforded...throughout the interrogation. After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such *warnings and waiver* are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (emphasis added). While different courts have recognized that a valid waiver may be implied from the circumstances, each of them is clear that the individual making the waiver must do so intelligently and with a clear understanding of what his/her rights are. *See State v. Baker*, 2 Kan. App. 2d 395, 401-02, 580 P.2d 90, 95-96 (1978); *State v. Wilson*, 215 Kan. 28, 31-32, 523 P.2d 337, 341 (1974) (overturned on other grounds); *United States v. Mix*, 446 F.2d 615, 621 (5th Cir. 1971); *United States v. Hilliker*, 436 F.2d 101, 102 (9th Cir. 1970). In this case, not only was an express waiver not sought, but as previously discussed, it is clear from the circumstances that the defendant did not fully understand his rights. (R. II, 177-78; R. III, 9-12). Without a full understanding of one's rights, it is impossible to give an intelligent waiver of such. Because the defendant told officers that he did not understand everything and in fact that he was having trouble even understanding Officer Garcia's translation, no intelligently given waiver can even be *implied* from the circumstances.

The State carries the burden of proving that a confession was the product of the free and independent will of the accused and must meet that burden by a preponderance of the

evidence. *State v. Gonzalez*, 282 Kan. 73, 103, 145 P.3d 18 (2006). While this standard specifically concerns confessions, a confession cannot be the product of the free and independent will of the accused unless a freely and independently given waiver is first obtained. Thus, it logically follows that the same standard can be used in examining the *Miranda* waiver. As the State posits, the voluntariness of a statement is determined by a totality of the circumstances, specifically considering: (1) the mental condition of the accused; (2) the manner and duration of the interrogation; (3) the accused's ability to communicate with the outside world upon request; (4) the age, intellect, and background of the accused; (5) the fairness of the officers' conduct in the investigation; and (6) the accused's fluency with the English language. *State v. Walker*, 283 Kan. 587, 596-97, 153 P.3d 1257 (2007); *see also State v. Hebert*, 277 Kan. 61, 76, 82 P.3d 470 (2004). No single factor is dispositive and all factors must be considered. *Id.* After considering all of the factors, the district court found that the State did not meet its burden in this case. (R. II, 182).

The first three factors in the totality of the circumstances test cut in favor of the State. As the State points out, there is no indication that the defendant's mental condition was impaired. (R. II, 25). The interview only lasted approximately one hour and ten minutes. (R. II, 24). Finally, the defendant never specifically asked to speak with anybody in the outside world. (R. II, 26). The remaining factors, however, do not favor the State's burden. Despite the defendant's age, he only completed primary school and his education ceased at the age of 12. (R. II, 26). Officers may have been polite during their interaction

with the defendant, but Officer Garcia mistranslated aspects of the interrogation, taking advantage of the fact that the defendant does not speak English and does not understand Spanish very well. (R. II, 181-82). Finally, the defendant has no fluency with the English language. (R. II, 176). The district court even went so far as to find that the defendant is not fluent in Spanish either. (R. II, 177).

An individual whose education ceased when he was only 12 years old does not necessarily have the kind of intellect it takes to understand our justice system and the specific rights it affords. This is especially true of an individual from another country. While the State argues that officers did not specifically take advantage of the defendant's lack of education in a coercive manner, Officer Garcia certainly took advantage of the fact that the defendant did not understand English at all and did not understand Spanish very well when he purposely switched the word "women" for "girls." Additionally, officers did not even ask about the defendant's educational level until the very end of the interview. (R. III, DVD: Defendant's Exhibit A). This indicates that officers were not even concerned with the defendant's level of education, allowing them to argue that they had not taken advantage of the defendant's educational level. This willful blindness is as bad as if officers had deliberately taken advantage of the defendant's lack of education. The State argues that Officer Garcia's actions were not coercive as he "repeatedly encouraged the defendant to speak up if he did not understand something." Officer Garcia's actions, however, speak louder than his claimed encouragement. Officer Garcia purposely mistranslated words, failed to answer clarification questions when they were asked of him, and failed to obtain a

clear waiver after reading the defendant his *Miranda* rights in Spanish. (R. II, 19-20, 44-45, 179, 182; R. III, 12; R. III, DVD: Defendant's Exhibit A). These actions certainly seem coercive, and at the very least were unfair to the defendant given his lack of understanding and moments of confusion throughout the entire interrogation.

The *Miranda* guidelines were "established to protect a person's constitutional privilege against compulsory self-incrimination." *State v. McConico*, 4 Kan. App. 2d 420, 424, 607 P.2d 93, 96 (1980). Furthermore, the right to counsel under *Miranda* "is a prophylactic to assure voluntariness of custodial interrogation product." *Id.* at 426. Not only did the defendant not waive his rights, he was never even asked if he would like to waive his rights and speak with Officer Fowler. (R. III, 7). Nevertheless, Officer Fowler pressed forward with the interview, even attempting to start questioning before Officer Garcia was done attempting to explain the defendant's rights more clearly. (R. III, 11; R. III, DVD: Defendant's Exhibit A). As previously discussed, the Kansas Supreme Court has held that there need not be an express waiver of one's *Miranda* rights and that waiver may be implied from the circumstances. *Id.* at 425. The lack of complete understanding, however, cuts against any claim of an informed and intelligent waiver, express or implied. Because the defendant neither expressly nor impliedly waived his *Miranda* rights, the prophylactic assurance that the custodial interrogation product would be voluntary does not exist.

The district court found that under the totality of the circumstances, the defendant did not make a knowing, voluntary, or intelligent waiver of his *Miranda* rights. (R. II, 182). Furthermore, the district court noted that an individual cannot understand his rights if he is

not correctly advised of them. (R. II, 177). The district court concluded that the defendant's *Miranda* rights were not accurately conveyed to him, despite officers' best efforts and desire to get the defendant to understand. (R. II, 181-82). The district courts findings were not in error, and its decision is supported by substantial competent evidence. As such, the finding that the defendant neither voluntarily nor knowingly waived his rights should not be disturbed.

CONCLUSION

The district court's suppression of the defendant's confession was supported by substantial competent evidence and was not erroneous. Additionally, the district court's legal conclusions were correct and none of them were an abuse of discretion. Therefore, for all the reasons and arguments provided herein, the defendant respectfully requests that this Court affirm the district court's suppression of the defendant's statements to police.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of May, 2014, service of the above and foregoing brief was made by hand-delivering two copies to:

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