IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CR-285

State of Indiana,
Appellant,

–v–

Axel Domingo Diego,
Appellee.

Argued: March 11, 2021 | Decided: June 9, 2021

Appeal from the Cass Circuit Court
No. 09C01-1806-FA-1
The Honorable Stephen Roger Kitts, II, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 20A-CR-227

Opinion by Justice David

Chief Justice Rush and Justices Massa and Slaughter concur.
Justice Goff dissents with separate opinion.

David, Justice.

Police may not interrogate a person in custody without proper *Miranda* warnings or else the State risks having those custodial statements suppressed in a criminal trial. But not every station house interview implicates *Miranda*. *Miranda* warnings are only required when a person is in custody—i.e. when his or her freedom of movement is curtailed to a level associated with formal arrest and when he or she is under the same inherently coercive pressures in the police station as those at issue in *Miranda v. Arizona*.

Two years ago in *State v. E.R.*, 123 N.E.3d 675, 683 (Ind. 2019), we determined a defendant was subjected to custodial interrogation at a police station house because, based on the totality of objective circumstances, the curtailment of his freedom of movement was akin to formal arrest and he was subjected to overt coercive pressures throughout the interrogation. In the present case, which incidentally involves the same detective and the same police department as in *E.R.*, the trial court found the circumstances amounted to custodial interrogation and suppressed statements made by the defendant during a police interview.

Today, we call on *E.R.* to answer a similar question: Was defendant Axel Domingo Diego's freedom of movement in this case curtailed to a level akin to formal arrest when he had a free-flowing exchange in a detective's personal office? We find it was not. We therefore reverse the trial court's suppression order and remand this matter for further proceedings.

Facts and Procedural History

During the investigation of a possible incident involving child molestation, the Logansport Police Department ("LPD") contacted Detective Sergeant Troy Munson of the Seymour Police Department ("SPD") because LPD believed a suspect was located in SPD's community. After reviewing LPD's interview of the alleged victim, Detective Munson searched SPD's database to locate the home address of the suspect, Axel Domingo Diego. A uniformed officer went to the residence and spoke to

Domingo Diego's English-speaking girlfriend, Andrea Martin, who prompted Domingo Diego to come speak with the officer.[1]

Martin translated the conversation with the officer because Chuj was Domingo Diego's primary language. Domingo Diego also spoke some Spanish and English. The officer gave the couple Detective Munson's business card and told Domingo Diego that he needed to go to the police department to find "Mr. Troy." Tr. Vol. 2 p. 45.

Domingo Diego and Martin arrived at SPD a few days later—perhaps by appointment. Upon entry into SPD's front lobby, an officer opened a door from the lobby to the rest of the police station and, after the couple moved through the open door, it was shut behind them. The door was secure from the lobby, meaning a person would have to be buzzed through to enter the rest of the police station. A person could freely exit the door to the lobby without assistance, but nobody explained this to Domingo Diego or Martin.

The couple boarded an elevator to the second floor. At some point, Detective Munson met the couple. Detective Munson wore his police badge and carried a gun on his person. Despite Martin's warning that Domingo Diego didn't speak Spanish clearly, Detective Munson told Martin to have a seat outside the room because he had the assistance of a Spanish/English translator.

The interview took place inside Detective Munson's personal office which had two exterior windows and was adorned with family pictures. Munson shut the door and closed the blinds on a window overlooking the rest of the detective division at SPD. The door was unlocked, but Domingo Diego was seemingly unaware of this. Through the translator, Domingo Diego was advised that he was not under arrest and that he was

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[1] The parties did not request—and the trial court did not provide—findings of fact in this matter. Our standard of review requires that we consider conflicting evidence in the light most favorable to suppression. *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006). We honor this standard throughout this recitation of facts because the testimony of Detective Munson, Domingo Diego, and Martin varies significantly.

free to leave anytime. Domingo Diego indicated that he understood and later testified he felt that he could have left in the middle of the interview but chose not to because he was with a police officer. Munson did not read Domingo Diego any *Miranda* warnings.

During the course of the approximately forty to forty-five minute interview, Detective Munson asked Domingo Diego questions about the incident in Logansport. Detective Munson told Domingo Diego he had listened to a recording of the victim's father confronting him about an alleged sexual interaction with the victim and that lying to the detective would make things worse. Though he had only reviewed LPD's interview, the detective also implied to Domingo Diego he had spoken directly with the victim. Thereafter, the detective pressed Domingo Diego on what exactly occurred with the victim and Domingo Diego made several potentially incriminating statements. At the end of the interview, Detective Munson asked if Domingo Diego wanted to write an apology letter to the victim but did not require him to do so. After the interview, Detective Munson wished Domingo Diego and Martin a good day and the couple left the building unaccompanied.

Domingo Diego was charged with Count I, Child Molesting, a Class A Felony, Count II, Child Molesting, a Class A Felony, and Count III, Child Molesting, a Class C Felony. Thereafter, Domingo Diego moved to suppress the statements he made during his interview at SPD on the basis that the interview amounted to a custodial interrogation and the statements were obtained in violation of the Fifth Amendment of the United States Constitution and Article I, Section 14 of the Indiana Constitution. Finding the facts of this case similar to those considered by this Court in *E.R.*, the trial court granted Domingo Diego's motion to suppress.

The State filed a motion for a discretionary interlocutory appeal under Indiana Appellate Rule 14. The trial court granted the State's motion,

denied Domingo Diego's motion to reconsider, and certified the matter for interlocutory appeal.[2]

The Court of Appeals affirmed. *State v. Domingo Diego*, 150 N.E.3d 715, 717 (Ind. Ct. App. 2020), *aff'd on reh'g*. After considering our Court's opinion in *E.R.*, the court found, "Domingo Diego's freedom of movement was curtailed to the degree associated with an arrest, and he was subjected to inherently coercive pressures such as those at issue in *Miranda*." *Id*. at 720. Therefore, the court affirmed suppression of the statements because, "[Domingo Diego's] statements were obtained during custodial interrogation without *Miranda* warnings." *Id*. at 721.

On rehearing, the Court of Appeals clarified footnote twelve of its opinion and construed the State's Appellate Rule 14 interlocutory appeal as a discretionary appeal brought pursuant to Indiana Code section 35-38-4-2(6). *State v. Domingo Diego*, 159 N.E.3d 629, 633 (Ind. 2020), *on reh'g*.

The State sought transfer, which we now grant. Ind. Appellate Rule 58(A).

Standard of Review

As the party appealing from a negative judgment, the State "must show that the trial court's decision was contrary to law—meaning that the evidence was without conflict and all reasonable inferences led to a

[2] We note the unfortunate procedural history of this case. The present action was originally filed in Cass Superior Court II, but due to the passing of the presiding judge, a senior judge heard Domingo Diego's motion to suppress. After the senior judge issued an order granting the defendant's motion, the State moved to correct error. While the State's motion was pending, a second senior judge issued an order transferring the case to Cass Circuit Court because the new presiding judge of Cass Superior Court II was the former Cass County elected prosecutor, thus creating a conflict of interest. The Circuit Court denied the State's motion to correct error on the basis that it lacked jurisdiction to review a lateral court's entry. Because the first senior judge's order granting the defendant's motion to suppress stated, "Upon motion, the Court will certify its order for interlocutory appeal," the Circuit Court denied the defendant's motion to reconsider the order granting the State's interlocutory appeal and "merely enforce[d]" the first senior judge's order. App. Vol. 2 at 54-55.

conclusion opposite that of the trial court." *E.R.*, 123 N.E.3d at 678-79 (citation omitted). Whether a defendant is in custody is a mixed question of fact and law. *Id*. at 679. The circumstances surrounding the interrogation are matters of fact and "we consider conflicting evidence most favorably to the suppression ruling." *Id*. (citing *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006). "Whether those facts add up to *Miranda* custody is a question of law" which we review de novo. *Id*. (citing *State v. Brown*, 70 N.E.3d 331, 335 (Ind. 2017)).

Discussion and Decision

The question before us today is whether Domingo Diego was "in custody" such that Detective Munson should have read him *Miranda* warnings prior to the interview. "Custody under *Miranda* occurs when two criteria are met. First, the person's freedom of movement is curtailed to the degree associated with formal arrest. And second, the person undergoes the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *E.R.*, 123 N.E.3d at 680 (quotations and citations omitted).

Custody, therefore, is "a term of art that specifies circumstances that are thought generally to present a **serious** danger of coercion." *Howes v. Fields*, 565 U.S 499, 508, 132 S.Ct. 1181, 1189, 182 L.Ed.2d 17 (2012) (emphasis added). There is no bright line rule requiring *Miranda* warnings be given prior to an interview simply because a particular defendant is questioned in a police station. Indeed, the Supreme Court of the United States has advised:

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the

> questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d. 714 (1977) (per curiam); *accord California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam).

With this focus, we dispose of today's question under the first of *E.R.*'s two-factor test: the freedom-of-movement inquiry. *See Howes*, 565 U.S at 509, 132 S.Ct. at 1190 (observing the freedom-of-movement test is a "necessary and not a sufficient condition for *Miranda* custody"). "Under *Miranda*, freedom of movement is curtailed when a reasonable person would feel not free to terminate the interrogation and leave." *E.R.*, 123 N.E.3d at 680 (citation omitted). The benchmark for this inquiry is whether the level of curtailment is akin to formal arrest. *Id*. To make this determination, we examine the totality of objective circumstances surrounding the interrogation, including "the location, duration, and character of the questioning; statements made during the questioning; the number of law-enforcement officers present; the extent of police control over the environment; the degree of physical restraint; and how the interview begins and ends." *Id*.

In *E.R.*, we observed there was substantial, probative evidence that, under the totality of objective circumstances, the defendant in that case was not free to end police questioning and leave the building. *Id*. First, the detective told the defendant he needed to be interviewed at the police station and did not inform him that any other time or place would suffice. *Id*. Second, the detective led the defendant through the lobby to a secured-entry door, to a police squad room, up an elevator and stairs, through a second, propped-open door, and into a small interview room with no windows. *Id*. at 680-81. This effectively "cabined" the defendant into a small compartment with officers positioned near the single door. *Id* at 681. Third, a second detective entered the room thirty minutes into the interview; police outnumbered the defendant two-to-one. *Id*.

Although the detective told the defendant a single time that he was free to walk out the door, we noted three reasons a reasonable person would not feel free to leave: (1) officers told the defendant to "sit tight" multiple times; (2) officers led the defendant through a labyrinthine route and did not explain security doors were unlocked going in the opposite direction; and (3) there was a dramatic change in the interrogation atmosphere with the arrival of a second officer. *Id*. This, combined with the character of the detectives' questioning and prolonged interview lasting almost an hour, added up "to a situation in which a reasonable person would not feel free to end the interrogation and leave." *Id*. at 681-82. In other words, taken together, these factors showed curtailment akin to formal arrest where a reasonable person would not feel free to leave.

The present case admittedly resembles certain circumstances in *E.R*. Like *E.R.*, Domingo Diego and Martin testified that an officer told them Domingo Diego "needed" to come to SPD to talk to "Mr. Troy." Tr. Vol. 2 at 45. The couple arrived at the police station a few days later, perhaps by appointment.

Next, Domingo Diego and Martin testified to varying degrees that they entered the SPD lobby, went through a door, then to an elevator, rode the elevator up one floor, and were then separated when they met Detective Munson. While perhaps not as labyrinthine as the route described in *E.R.*, evidence favorable to suppression indicates they made this journey with minimal assistance or guidance from SPD personnel.

Finally, though the interview was in Detective Munson's personal office and not an interrogation room, the door was shut and the blinds to the interior of the building were closed. Domingo Diego was outnumbered two-to-one in the interview by SPD personnel: Detective Munson and a Spanish/English interpreter who was employed by SPD as a dispatcher.

But beyond these aforementioned circumstances, we conclude Domingo Diego's freedom of movement was not curtailed to the degree associated with formal arrest.

To start, the tone and tenor of the interview was certainly less dramatic than the *E.R.* interrogation. At the start of the interview, Detective Munson informed—and Domingo Diego understood—that he was free to leave at any time. Detective Munson's interview style remained constant; no additional statements like "sit tight" were made throughout the interview that would have made a reasonable person feel that they could not leave.[3] *See id*. at 681. The interview took place in the detective's personal office with two exterior windows and family photos as opposed to a "standard" interview room with a couch, table, and chairs. The translator was dressed in civilian clothes. Overall, this presented a more casual atmosphere than the pressure cooker present in *E.R.*

Next, Detective Munson asked questions about the incident, truthfully telling Domingo Diego he had listened to a conversation between Domingo Diego and the victim's father and that lying about the situation wouldn't help. Although the detective suggested he had personally talked to the victim, he had in fact reviewed the LPD interview of the victim to hear her version of the alleged events. Toward the end of the interview, Munson asked Domingo Diego if he wanted to write an apology letter to the victim but did not require him to do so. Taken as a whole, Detective Munson's line of questioning was exploratory rather than accusatory or aggressive.[4] *See id*.

Additionally, at the end of the interview, Detective Munson told Domingo Diego he was not going to jail and wished the couple a good day. Domingo Diego and Martin left SPD unaccompanied. Other than the secure door from the lobby to the rest of the police station, there is no evidence the couple had to overcome additional significant barriers. *See id.*

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[3] Domingo Diego's subjective thought that he should stay out of "respect" to authority is irrelevant to our objective review of these factors. *See post* at 5.

[4] The dissent argues this factor should tip in Domingo Diego's favor because Detective Munson was a highly experienced detective, was the sole "aggressive" interrogator, and his interview was designed to elicit an incriminating response. *Post* at 4. Our test in *E.R.* accounts for tactics that imply custody—such as multiple "sit tight" commands—simply not present in this case.

at 680-81 (describing entry to a "police squad room", up a set of stairs after the elevator, and into a windowless room behind a keyed door). This suggests Domingo Diego was not sequestered deep in the building with no hope of independent exit.

Finally, we are mindful—as the dissent and Defendant highlight—that Domingo Diego had limited English proficiency. *See post* at 8. It is true that the Supreme Court of the United States has included at least one individual characteristic in the list of acceptable considerations for the objective custody test. *See J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394, 2406, 180 L.Ed.2d 310 (2011) (holding "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test"). But even if, as the dissent suggests, were we to consider its proposed objective circumstance in our present inquiry, we think that "a reasonable officer would not have thought that [Domingo Diego]'s language abilities prevented him from feeling free to leave." *United States v. Burden*, 934 F.3d 675, 695 (D.C. Cir. 2019); *see also J.D.B.*, 564 U.S. at 277 (declining to find that a child's age would be determinative or even significant in every case).

As tempting as it may be to inject a subjective viewpoint into this inquiry, we must consider this purported factor from the objective shoes of a reasonable officer.[5] *J.D.B.*, 564 U.S. at 270, 131 S.Ct. at 2406. Contrary to the suggestion that the SPD dispatcher was an unqualified officer in disguise, *post* at 9, the transcript of the interview reveals very little meaningful difference between the interpreter's live translation and an after-the-fact certified forensic transcript translation. Though Domingo Diego had some trouble forming responses and perhaps lacked perfect

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[5] The dissent hypothesizes that a language barrier "clearly existed" and that the couple would have been uncomfortable with the translator had they known the individual was a dispatch officer. *Post* at 9-10. This is a dubious proposition given Martin and Domingo Diego's testimony that Munson never visited their home at all such that he could explain the presence of a Spanish translator or to even recognize the need for an interpreter in the first place.

comprehension of Detective Munson's questions, "the evidence does not suggest that it would have been apparent to a reasonable officer that [Domingo Diego] was not understanding what was being said." *Burden*, 934 F.3d at 695. So, unlike a situation in which a language barrier presented a high degree of confusion, *see, e.g., Koh v. Ustich*, 933 F.3d 836, 845-46 (7th Cir. 2019), the transcript reveals a fluid, conversational exchange between all parties involved. Blunt, yes, but coercive, no.

Focusing only on the freedom-of-movement inquiry, we think there is considerable daylight between *E.R.* and the present case that directly undercuts Domingo Diego's claim of custodial interrogation. The interview took place in Detective Munson's personal office, not an interview room. The approximately forty-five minute interview—while certainly lengthy—was not particularly hostile; it was exploratory and conversational rather than accusatory. Domingo Diego and Martin left the station unaided, which gives rise to a reasonable inference that Domingo Diego was not cabined into a remote place in the police station. Although blunt, the interview would not have revealed to a reasonable officer that Domingo Diego did not understand what was being said.

True, the couple was told they "needed" to come to the police station, Detective Munson did carry his gun, Domingo Diego was outnumbered in the interview room, and the couple had to move through several barriers. But given the casual atmosphere, exploratory and conversational line of questioning, and relatively unimpeded pathway to the room, the totality of these objective circumstances does not represent a curtailment akin to formal arrest. *See E.R.*, 123 N.E.3d at 683 (observing "a person is not in custody simply because he is questioned at a police station, or because he is an identified suspect, or because he is in a coercive environment"); *see also Mathiason*, 429 U.S. at 495, 97 S.Ct. at 714 (same) *and Beheler*, 463 U.S. at 1125, 103 S.Ct. at 3520 (same).

Conclusion

We find that the totality of objective circumstances surrounding the interrogation would make a reasonable person feel free to end the

questioning and leave. Thus, the limited curtailment of Domingo Diego's freedom of movement was not akin to formal arrest. We reverse the trial court's suppression order and remand this matter for further proceedings.

Rush, C.J., and Massa and Slaughter, JJ., concur.
Goff, J., dissents with separate opinion.

ATTORNEYS FOR APPELLANT
Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Deputy Attorney General
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE
Mark K. Leeman
Logansport, Indiana

Goff, J., dissenting.

Is a *Miranda* warning necessary when a limited-English-speaking suspect, having been summoned to a police station by a fully uniformed officer, endures a prolonged and accusatory interrogation by an armed detective in a visually cabined office with no clear path to the office door and with no knowledge of his ability to freely exit the secured station-house entrance?

Under these facts, I would answer that question in the affirmative. My colleagues on the Court, however, would not. And for that reason, I respectfully dissent.

Discussion

Nearly two years ago, this Court decided *State v. E.R.*, establishing a benchmark for Indiana courts to use in conducting a custody analysis. *See* 123 N.E.3d 675 (Ind. 2019). In that case, two officers questioned the defendant in a secured room at the police station without informing him of his *Miranda* rights. *Id.* at 677. While the officers told E.R. that he could "walk out" of the room "at any time," we found that statement insufficient "to make a reasonable person feel free to leave." *Id.* at 681. In support of that conclusion, we first observed that the officers instructed E.R. several times to "sit tight," effectively contradicting "any prior indication that [E.R.] was free to go." *Id.* We further noted that "the circuitous path by which" the police led E.R. to the interrogation, and their failure to inform him that he could freely exit the secured door through which he entered, created "a labyrinthine" of "obstructions to egress." *Id.* Finally, we concluded that "the police significantly undercut any initial message of freedom" when a second officer entered the room and "took over as the main, and more aggressive, interrogator." *Id.* This evidence, we determined, along with "[o]ther statements the officers said or omitted" and "the character of their questioning," clearly supported the trial court's conclusion that the interrogation was custodial. *Id.*

Today, we consider the same question of custody in a case involving the same detective at the same police station conducting an interrogation under strikingly similar circumstances. The Court, however, finds "considerable daylight between *E.R.* and the present case," *ante*, at 11, ultimately concluding that the circumstances here amount to something less than custodial interrogation.

But the record, in my opinion, paints a different picture, supporting few—if any—distinctions. And to the extent there are factual differences between this case and *E.R.*, those differences, I believe, fall far short of showing that the trial court's decision was contrary to law. There is, however, one important factor that distinguishes this case from *E.R.*—a factor that bolsters the trial court's conclusion that police conducted a custodial interrogation: Diego's limited-English proficiency.

For these reasons, I would affirm the trial court's order to suppress Diego's statements to police.

I. The totality of circumstances surrounding the interrogation would have led a reasonable person to conclude that he was not free to leave.

In determining whether a suspect has been subjected to custodial interrogation, courts ask (1) whether police have limited the suspect's freedom of movement to "the degree associated with a formal arrest," and (2) whether the suspect undergoes "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *E.R.*, 123 N.E.3d at 680 (citations and quotation marks omitted).

The first prong of this custody analysis—the freedom-of-movement inquiry—asks whether a reasonable person would feel free to terminate and to leave the interrogation. *Id.* This question "requires a court to examine the totality of objective circumstances surrounding the interrogation." *Id.* These circumstances include "the location, duration, and character of the questioning; statements made during the questioning; the number of law-enforcement officers present; the extent of police

control over the environment; the degree of physical restraint; and how the interview begins and ends." *Id.*

The Court initially acknowledges that this case "resembles certain circumstances in *E.R.*" *Ante*, at 8. These similarities, the Court observes, include instructions from police, on both occasions, that the suspects "needed" to report to the station for questioning; the circuitous paths at the station through which both suspects navigated to reach their interrogators; the enclosed spaces in which both suspects sat for questioning; and the fact that police officers outnumbered each suspect "two-to-one." *Id.*

But beyond these circumstances, the Court concludes, the similarities between this case and *E.R.* apparently begin to fade. *Id.* at 8. These distinctions, the Court explains, include the interview's "tone and tenor," the "exploratory" rather than "accusatory" line of questioning in the detective's "casual" office, and Diego's "unaccompanied" and "unaided" release from the station upon conclusion of the interview. *Id.* at 9–10, 11.

As I explain further below, none of these purported distinctions are supported by the record.

A. There's no meaningful difference in the "tone and tenor of the interview" here and in *E.R.*

"To start," the Court concludes, "the tone and tenor of the interview" here "was certainly less dramatic than the *E.R.* interrogation." *Id.* at 9. In support of this proposition, the Court points to the detective's statement that Diego was "free to leave at any time," and the fact that the detective never told Diego to "sit tight" (as E.R. was instructed). *Id.* I find this conclusion and reasoning problematic for two reasons.

First, the detective's statement to Diego that he was "free to leave at any time" is **not** a distinction from *E.R.*; it's a similarity. Indeed, just like the detective here, the "interrogating officer" in *E.R.* told the suspect that he "d[id]n't have to talk to" him and that he could "get up and walk out that door at any time." *E.R.*, 123 N.E.3d at 680.

Second, while the detective here never told Diego to "sit tight," the absence of such a statement doesn't account for the host of other factors that undercut the detective's suggestion that Diego was free to go. These factors include the lack of statement to Diego, from anyone at the station, that he could freely exit the secured door through which he first entered; Diego's separation from his girlfriend, on whom he relied for interpreting; the prolonged and accusatory questioning to which the armed detective subjected Diego; the closed door and closed blinds in the detective's office; the police workstations just outside the detective's office; and the officer-interpreter sitting between Diego and the office door.

To be sure, unlike in *E.R.*, no second officer here changed the tenor of the interview by entering the room mid-way through and taking "over as the main, and more aggressive, interrogator." *E.R.*, 123 N.E.3d at 681. But the absence of this factor, in my opinion, had no effect on the custodial environment in which Diego already found himself. The detective, a highly experienced interrogator with special training in felony sex crimes, served as the sole "aggressive" interrogator from beginning to end, ultimately "subverting the force and applicability" of the free-to-leave statement he made earlier in the interview. *See id.* And at no point during the interrogation did either officer—whether the detective or the interpreter—suggest anything to preserve the statement's validity.[1] *See id.* *Cf. Luna v. State*, 788 N.E.2d 832, 833, 835 (Ind. 2003) (affirming denial of suppression where officers informed the defendant **multiple times** that he did not have to talk to the police, that he was not under arrest, and that he was free to leave at any time). Finally, while Diego may have understood the detective's statement that he was free to leave, he also testified to

[1] While the interpreter here may not have been an armed police officer, he **was** a dispatch officer working for the department and there's nothing apparent from the record that Diego understood any difference in the officers' authority.

having felt obligated to stay out of "respect" for authority.[2] Tr. at 63–64, 65.

B. The detective's line of questioning *was* in fact "accusatory," not just "exploratory."

The Court also attempts to distinguish this case from *E.R.* by insisting that the detective's line of questioning here was merely "exploratory" rather than "accusatory." *Ante*, at 9. And whereas the interrogating officer in *E.R.* lied to the suspect, the detective here, the Court insists, spoke "truthfully" with Diego. *Id.* I find these conclusions to be demonstrably incorrect.

In *E.R.*, the interrogating officers were "explicit" in their belief that the defendant "had engaged in the accused conduct," and their "questions were accusatory—not exploratory, like ones to identify suspects in the early stages of an investigation." 123 N.E.3d at 681. **Similarly**, the detective here stated that he believed—and that the evidence "clearly" showed—that Diego had "some type" of improper contact with the child. Ex. 4, pp. 17–19. On top of that, the detective claimed to have heard a recording of alleged incriminating statements from Diego, and he clearly

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[2] The Court opines that "Diego's subjective thought that he should stay out of 'respect' to authority is irrelevant" to its "objective review" of the circumstances. *Ante*, at 9 n.3. But Diego is far from alone in his sentiment, as courts and commentators alike have pointed out. *See, e.g.*, *Lawrence v. United States*, 566 A.2d 57, 61 (D.C. 1989) ("Implicit in the introduction of the [officer] and the initial questioning is a show of authority to which the **average person** encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer.") (quoting 3 Wayne LaFave, Search and Seizure § 9.2(h) at 410–11 (1987 and Supp. 1989)) (emphasis added); Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 236 (2001) (noting that "obedience to authority is deeply ingrained [and] people will obey authority even when it is not in their own best interest to do so"). *See generally* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L.J. 1962 (2019) (citing numerous studies). And these authorities speak of your "average person." How much more would a person who grew up in the shadow of a repressive police force be impacted by a desire to comply with authority? *See generally* Christopher M. Sullivan, *Political Repression and the Destruction of Dissident Organizations: Evidence from the Archives of the Guatemalan National Police*, 68 World Pol. 645 (2016). *See* Ex. 4, p. 5 (noting Diego's country of origin as Guatemala).

implied that Diego was lying when he denied the accusations. *Id.* at 22. What's more, by his own testimony, the detective's line of questioning was explicitly designed to elicit "an incriminating response" from Diego. Tr. Vol. II, p. 33.

Finally, contrary to the Court's insistence that the detective here spoke "truthfully" with Diego, the evidence shows that the detective deliberately misled him. While stating that the child had "told" him directly in "pretty great detail" what Diego had done, the detective in fact had **never** spoken with the child directly—a point specifically acknowledged by the Court. Ex. 4, p. 17. *See ante*, at 4. Adding to the subterfuge, the detective feigned commiseration with Diego, recognizing that men sometimes act improperly on their sexual impulses. Ex. 4, p. 15. The detective also tried to elicit a confession in the guise of a written apology. *Id.* at 30. "While subterfuge, trickery, and deception" are generally "acceptable interrogation tactics," *Hartman v. State*, 988 N.E.2d 785, 790 (Ind. 2013), the methods used here offer no support for the Court's conclusion that police questioned Diego and spoke with him "truthfully" in a non-custodial setting.

C. The route Diego followed to his interview was no less circuitous than in *E.R.*

Unlike in *E.R.*, the Court observes, the detective here, upon conclusion of the interview, told Diego that "he was not going to jail" and he "wished the couple a good day" as they left the station "unaccompanied." *Ante*, at 9. But this is hardly a distinction. After the interrogation in *E.R.*, the suspect there left the station "unhindered." 123 N.E.3d at 680. And while nothing in *E.R.* suggests that the officers there extended their well-wishes to the suspect at the interview's conclusion, I fail to see how that minor detail makes **any** difference whatsoever. In fact, because the detective told Diego to have a "good day" as he was leaving (*i.e.*, **after** the interview had ended), I question whether such a comment is even relevant to the custody inquiry at all.

Still, the Court concludes that the couple's departure from the station "unaided" leads to a "reasonable inference" that they were "not cabined

into a remote place in the police station" and suggests that the path to and from the interview was not so labyrinthine as the one in *E.R. Ante*, at 11. But this conclusion, in my opinion, stands on questionable grounds. To begin with, the Court describes no meaningful difference between the detective's personal office (replete with "exterior windows and family photos") and a standard interrogation room (containing "a couch, table, and chairs"). *See id.* at 9. Second, this is the **same** police department as in *E.R.* And while it's certainly possible that Diego took an alternative path to the interview room, the record suggests that the route he followed was no less circuitous than in *E.R.*[3] Soon after arriving at the station, police-department personnel buzzed Diego and his girlfriend through a secure door which shut behind them. From there, the couple made their way down a hallway to an elevator, which took them to the second floor. Upon their exit from the lift, the detective met them in a common area before separating the couple and leading Diego through the "bullpen" of detective desks to his own office. *Compare* Tr. Vol. II, pp. 19, 32, 48–49, 60–61, 64 (testimony relating the couple's route), *with E.R.*, 123 N.E.3d at 680–81 (describing E.R.'s path through the station to the interview room). And although the parties here dispute whether police escorted Diego and his girlfriend at any point, the couple, according to the detective's own admission, clearly needed directions to exit the building upon the interview's conclusion. *See* Tr. Vol. II, p. 22. This evidence, in my opinion, including the couple's need for directional guidance, fully undermines the Court's conclusions.

In the end, the Court acknowledges that the detective here "did carry his gun," that "Diego was outnumbered in the interview room," and that "the couple had to move through several barriers to reach the interview room." *Ante*, at 11. Nevertheless, the Court concludes, "the totality of th[e] objective circumstances do not represent a curtailment akin to formal arrest." *Id.* I disagree, and would find that the circumstances here—

[3] And the Court seems to acknowledge this, finding "no evidence the couple had to overcome **additional** significant barriers." *See ante*, at 9 (emphasis added).

strikingly similar to those in *E.R.*—clearly point to a finding of custody, showing that the trial court's suppression order was not contrary to law.

D. Diego's limited-English proficiency adds another factual layer to support a finding of custody.

As documented above, there are several factors here that, taken together, lead me to conclude that police subjected Diego to custodial interrogation: the premise that police "needed" to question Diego at the station, the lack of a clear statement from police-department personnel that Diego could freely exit the secured door through which he entered, Diego's separation from his girlfriend on whom he relied for interpreting, the visually cabined space in which the armed detective conducted the interrogation, the police workstations just beyond the detective's office, the officer-interpreter sitting between Diego and the office door, the subterfuge and accusatory line of questioning directed at Diego from the detective, and Diego's need for directions on how to exit the building upon conclusion of the interview.

But that's not all. There's another important factor distinguishing this case from *E.R.*—a factor which only bolsters the trial court's conclusion that police conducted a custodial interrogation: Diego's limited-English proficiency. *See* Tr. Vol. II, pp. 7–8 (prosecutor acknowledging that there was not "a language barrier in [*E.R.*] as there apparently is here").

When conducting a custody inquiry, courts often consider a suspect's "individual characteristics," including, for example, a suspect's age. *United States v. Burden*, 934 F.3d 675, 694 (D.C. Cir. 2019) (cleaned up) (citing *J.D.B. v. North Carolina*, 564 U.S. 261, 275 (2011)). *See also B.A. v. State*, 100 N.E.3d 225, 232 (Ind. 2018). Beyond this trait, "English language capabilities might have an objectively discernible relationship to a reasonable person's understanding of his freedom of action that would bear on the custody analysis for purposes of *Miranda*." *Burden*, 934 F.3d at 695 (internal quotation marks omitted). Recognizing this relationship, some courts factor language barriers into the custody inquiry. *See, e.g.*, *Thatsaphone v. Weber*, 137 F.3d 1041, 1045 (8th Cir. 1998) (explaining that "the ultimate issue is whether a reasonable police officer conducting [an]

otherwise noncustodial interview would have given *Miranda* warnings because he realized that the questioning would be perceived by [the suspect] as custodial due to his limited English language skills"); *United States v. Kim*, 292 F.3d 969, 977 (9th Cir. 2002) (weighing the suspect's limited-English proficiency as one of several circumstances that bore on her ability to understand whether she was a criminal suspect).

Here, a language barrier clearly existed between Diego and his interrogator. *See* Tr. Vol. II, p. 18 (detective acknowledging that he "picked up" early on that there was "a language barrier" between him and Diego). And during the interview, Diego had no assistance from his girlfriend, who spoke not only English and Spanish but also Diego's native language, Chuj. While the dispatch-officer-turned-interpreter seems to have spoken fluent Spanish, there's no evidence that he was qualified—let alone certified—to interpret under the circumstances. *See Ponce v. State*, 9 N.E.3d 1265, 1268 (Ind. 2014) ("Ensuring **competent** interpretation services is 'an essential component of a functional and fair justice system.'") (quoting ABA Standards) (emphasis added). Because "untested and untrained interpreters often deliver inaccurate, incomplete information to [persons] with limited English proficiency," the practice of "simply providing 'any' interpreter upon request" is often "insufficient." *Id.* at 1269 (internal quotation marks omitted). *See also* Ind. R. Evid. 604 ("An interpreter [at trial] must be qualified and must give an oath or affirmation to make a true translation."). Given our precedent on the importance of a qualified interpreter, and given the officer-interpreter's inability to speak Diego's native language, I would find the trial court's suppression order defensible.

To be sure, when the detective asked Diego and his girlfriend if they were comfortable with him "get[ting] a Spanish translator" for the interview, the couple responded in the affirmative. Tr. Vol. II, p. 18. But had they known that the "translator" was a dispatch officer whom the detective had admittedly used only "four or five times" in the past for

such work, *see id.* at 21–22, 32, it's questionable whether they would have consented to the detective's proposal.[4]

Considering his limited-English abilities, and given his separation from the one person he trusted to accurately interpret for him, Diego "could well have assumed" that he "was a criminal suspect" in custody at the police department. *See Kim*, 292 F.3d at 977 (finding a custodial interrogation warranted *Miranda* warnings where the suspect communicated poorly in English, was separated from her English-speaking son, and was subjected to a "full-fledged interrogation" for "at least 30 minutes before an interpreter arrived and another 20 minutes once the interpreter joined the interrogation"). *Cf. Burden*, 934 F.3d at 695, 696 (holding that "a reasonable officer would not have thought that [the suspect's] language abilities prevented him from feeling free to leave" where there was no evidence that the suspect failed to understand the purpose of the interview "or somehow believed he could not leave an interview" to which he agreed "by phone and shown up for of his own accord"); *Thatsaphone*, 137 F.3d at 1046 (holding that suspect's limited-English skills did not turn a short, otherwise non-custodial police interview into a custodial interrogation requiring *Miranda* warnings where the suspect responded affirmatively multiple times that he could speak and understand English, responded coherently in English, rarely used an interpreter at the suppression hearing, and used both colloquial and sophisticated English terms throughout the proceedings).

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[4] The Court dismisses the existence of a language barrier as mere "hypothesi[s]" and characterizes as "dubious" any reluctance the couple may have had with using the dispatch officer as an interpreter. *Ante*, at 10 n.5. But this overlooks the prosecutor's acknowledgment and the detective's testimony at trial. *See* Tr. at 7–8 (prosecutor acknowledging that there was not "a language barrier in [*E.R.*] as there apparently is here"); *id.* at 18 (detective acknowledging that he "picked up" early on that there was "a language barrier" between him and Diego). And regardless of any conflict in testimony from Diego and his girlfriend, it was the detective himself who recognized the need for an interpreter. *See id.* at 18.

II. The interrogation included the coercive pressures that drove *Miranda*.

The second inquiry to a custodial analysis "asks whether the circumstances exert the coercive pressures that drove *Miranda*." *E.R.*, 123 N.E.3d at 682. The answer to this question, while perhaps less clear in the context of a traffic stop or a *Terry* stop, is generally "obvious" when "the case involves the paradigm example of interrogating a suspect at a police station." *Id.* (citations and quotation marks omitted).

The Court declined to reach this stage of analysis, having resolved the issue under the freedom-of-movement inquiry. *Ante*, at 7. Because the totality of objective circumstances surrounding the interrogation would have, in my opinion, led a reasonable person to conclude that Diego was not free to leave, I pick up where the Court left off in its analysis.

The interrogation here, the evidence clearly shows, "was not brief roadside questioning or interrogation in the low atmospheric pressure of a suspect's typical surroundings." *See E.R.*, 123 N.E.3d at 682 (cleaned up). To the contrary, Diego's interview "took place at the station house in an isolated room—removed from [his girlfriend] and familiar environment, and with [one] officer[] employing various interrogation tactics for almost an hour, trying to convince [Diego] to incriminate himself." *See id.* What's more, as noted above, the detective misled Diego by telling him that the victim had explained to him, in "pretty great detail," what Diego had done to her. Ex. 4, p. 17. The detective expanded on this skullduggery by trying to sympathize with Diego, telling him that he understood men sometimes act improperly on their sexual impulses. *Id.* at 15–16. The detective also asserted that he had heard a recording of incriminating statements Diego had allegedly made and that he believed Diego was lying when he denied the accusations. *Id.* at 16–19.

In short, the detective here, as in *E.R.*, "engaged in prolonged, persistent, and accusatory questioning that focused on encouraging [Diego] to admit to [his] description of the wrongdoing" and he "applied multiple layers of subtly coercive forces that, together and in the absence

of *Miranda*'s safeguards, would impair [Diego's] free exercise of the privilege against self-incrimination." *See* 123 N.E.3d at 682, 683.

Conclusion

Our law-enforcement officers play a critical role in keeping us safe. And their jobs, no doubt, are incredibly difficult. But for well over fifty years, our courts have clearly established that statements made during a custodial interrogation may not be admitted as evidence unless the suspect received an adequate *Miranda* warning. The expedient of this warning, so ubiquitous and "so simple" in its application, ensures a privilege "fundamental to our system of constitutional rule." *Miranda*, 384 U.S. 436, 468 (1966). And the specificity of this warning "benefits the accused and the State alike," outweighing any burden on law-enforcement agencies by reducing unnecessary disputes over the suppression of otherwise probative evidence at trial. *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (internal quotation marks omitted).

These principles, I believe, extend to a custodial interrogation of a suspect with limited-English proficiency. So, upon electing to interrogate such a suspect, a prudent officer, in my opinion, should consider whether the suspect's language barrier might reasonably bear on the suspect's understanding of his freedom of action. *See Burden*, 934 F.3d at 695. If so, a *Miranda* warning would greatly assist a judge tasked with ruling on the admissibility of any statements made during the interview.

Under these facts, and absent such a warning, I cannot find the trial court's suppression order contrary to law.