IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SUPRANOM KLOS,
Appellant.

No. 2 CA-CR 2018-0111
Filed December 10, 2019

Appeal from the Superior Court in Pima County
No. CR20153290001
The Honorable Janet C. Bostwick, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Heather A. Mosher, Assistant Attorney General, Tucson
Counsel for Appellee

James L. Fullin, Pima County Legal Defender
By Jeffrey Kautenburger, Assistant Legal Defender, Tucson
Counsel for Appellant

OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Eckerstrom and Judge Espinosa concurred.

E P P I C H, Presiding Judge:

¶1 Supranom Klos appeals her convictions for three counts of theft from a vulnerable adult, fraudulent use of a credit card, fraudulent scheme and artifice, and unlawful use of a power of attorney. She contends the trial court erred by denying her motion to suppress her self-incriminating statements because she was not adequately informed of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), or the consequences of waiving them before she was interrogated. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing, *State v. Gonzalez*, 235 Ariz. 212, ¶ 2 (App. 2014), viewing it in the light most favorable to upholding the trial court's ruling, *State v. Morris*, 246 Ariz. 154, ¶ 2 (App. 2019).

¶3 In June 2015, after a bank reported Klos's suspicious activity involving an elderly customer's accounts, Roger Nusbaum, a special agent from the Attorney General's office, and Tyler Evenson, an FBI agent, arrested Klos at the beauty salon she managed. Nusbaum drove Klos to the Attorney General's office in downtown Tucson, and because Klos had an accent indicating she was not a native English speaker, he talked with her during the twenty-minute trip to assess how well she understood English. Klos, a native Thai speaker who began to learn English when she moved to the United States in 1975, told Nusbaum she had difficulty understanding "hard words" but she could read and write in English at a tenth-grade level and had passed a cosmetology test in English. During the trip, Klos and Nusbaum conversed in English on various topics, with Klos generally responding appropriately to Nusbaum's questions and remarks.

¶4 Once at the office, Klos again indicated she could read and write English at a tenth-grade level. Nusbaum then provided Klos a written waiver form and read it with her:

> Nusbaum: Okay. All right, it says before we can ask you any questions it's my duty to advise you of your rights, okay?
>
> Klos: Umhm.
>
> Nusbaum: Because you're under arrest, you have the right to remain silent. Do you understand that?

Klos: Yes.

Nusbaum: Okay, anything you say can be used against you in a court of law or other proceedings. Do you understand that?

Klos: Um not really.

Nusbaum: Okay, if . . . we have a conversation, anything we say can end up in a court of law. Do you understand that?

Klos: Okay, uh, why? That's court of law, what that mean?

Nusbaum: You're gonna be charged with a criminal offense. You're under arrest for a crime, that's why we're gonna have this conversation.

Klos: Okay.

Nusbaum: Okay? You have the right to consult to an attorney before making any statements or answering any questions. Do you understand what that means?

Klos: Um, I don't have any, . . . I don't have lawyer.

Nusbaum: Okay, well . . . if you want to wait to talk to a lawyer before you talk to us, I just need to know that, okay? If you want to talk to us about, you know, the events, I just need to know that you understand this first. We'll talk about this—

Klos: Okay.

Nusbaum: You can decide whether you want to talk to us, you don't want to talk to us, you can answer some questions, answer no questions, whatever you want to do.

Klos: Okay.

Nusbaum: Okay?

Klos: Okay.

Nusbaum: All right, so you have the right to have an attorney present with you during questioning. Do you understand that?

Klos: Yeah.

Nusbaum: Okay.

Klos: I understand that one.

Nusbaum: Okay and if you cannot afford an attorney, one will be appointed for you before any questioning if you wish.

Klos: Okay right now, maybe that is the way we should do because I do not understand—

Nusbaum: Okay.

Klos: —what will happen, you know.

Nusbaum: Okay, well what's gonna happen is you're under arrest, you're gonna go to jail.

Klos: I'm gonna go to jail?

Nusbaum: Yes, you're gonna go to jail, today. Okay? I can't change that, okay?

Klos: But why is that?

Nusbaum: Well because you committed a crime.

Klos: What crime?

Evenson: We can talk about that—

Nusbaum: Okay, I can't—I can't talk to you unless we go through this first, okay?

Klos: Okay.

> Nusbaum: Okay (laughs) it's just the rules, okay?
>
> Klos: Okay (laughs).
>
> Nusbaum: It says if you decide to answer questions now, you have the right to stop answering questions at any time, or stop the questioning for the purpose of consulting an attorney. Do you understand what that means?
>
> Klos: Ummm—
>
> Nusbaum: So we can be having a conversation, you can say well I'll answer this question, won't answer that question, or I want to talk to a lawyer, I don't want to say anything.
>
> Klos: Oh, okay.
>
> Nusbaum: Do you understand what that means?
>
> Klos: Okay, now I got it.
>
> Nusbaum: You got it? Okay, all right.[1]

Klos then signed the waiver, which stated, "I have had the above statement of my rights read and explained to me and I fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or immunity."

¶5 During subsequent interrogation by Nusbaum and Evenson, Klos made numerous self-incriminating statements. She admitted, for example, that on several occasions she had withdrawn large amounts of cash from the bank account of an elderly widow to whom she provided some care and used the money to pay her gambling debts. She also admitted she had repeatedly withdrawn cash at casino ATMs to gamble, and had spent tens of thousands of dollars of the victim's money on dental

[1]Our recount of the *Miranda* advisory reflects our interpretation of the audio recording of Klos's interrogation, and contains several non-material differences from the transcript provided by the state at the suppression hearing.

implants and a luxury vehicle for herself. Finally, Klos admitted that in the days before she was arrested, she moved tens of thousands of dollars from the victim's bank accounts to an account jointly in her own name at a different financial institution. When confronted with the fact that she had taken over $200,000 of the victim's money, Klos did not express surprise at the amount and admitted she had not used the money for the victim's benefit, as required by the power of attorney she used to conduct the victim's affairs.

¶6 Klos was indicted on three counts of theft from a vulnerable adult, fraudulent use of a credit card, fraudulent scheme and artifice, and unlawful use of a power of attorney. Before trial, Klos filed a motion to suppress her statements to police, alleging that the investigators had violated her rights by interrogating her after she "unequivocally invoked her right to counsel." She also argued that she had not understood the waiver and it was not voluntary.

¶7 During the hearing, Nusbaum testified that Klos's responses throughout the *Miranda* warnings indicated that she understood him. When he advised Klos that "anything you say can be used against you in a court of law" and she responded she did not understand, he interpreted her response to mean that she did not understand "what was happening and why we were there," so he explained that she was being charged with a crime. When Klos remarked that maybe she should have an attorney appointed because she did not know what was going to happen, Nusbaum believed "[s]he was interested in the immediacy of what was going to happen to her, whether she was going to jail or not," so he told her she was going to jail. He did not take her statement as an invocation of her right to counsel. Finally, when she asked about what crime she was being charged with, Nusbaum testified he told her he could not talk about that until he completed the *Miranda* advisory simply because he needed to get through the advisory.

¶8 After the two-day suppression hearing, at which Evenson and Klos also testified and the state presented a transcript of the interrogation, audio recordings of the interrogation and Nusbaum's pre-interrogation conversation with Klos, and the signed *Miranda* waiver, the trial court denied the motion to suppress. The court found that Klos was "fairly conversant" in English, and her statement at the end of the *Miranda* advisory that she "got it" along with her act of signing the waiver indicated she understood her rights. The court also found Nusbaum's explanation that he told Klos that he did not tell her the charges against her in order to complete the *Miranda* warnings made "perfect sense" and found no

coercion or duress. Finally, the court found that Klos had not invoked her right to counsel.

¶9 After a six-day trial, at which Nusbaum testified to Klos's self-incriminating statements during the interrogation, a jury found Klos guilty on all counts. The trial court sentenced Klos to 6.5 years in prison followed by 3 years of probation, and ordered Klos to pay restitution of $311,833 to the victim. Klos timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶10 Klos contends that the trial court erred in denying her motion to suppress because she "was not adequately informed of her rights or the consequences of abandoning" her rights. "We review a trial court's ruling on a motion to suppress evidence for abuse of discretion, but review purely legal issues and constitutional issues de novo." *State v. Champagne*, 247 Ariz. 116, ¶ 28 (2019) (citation omitted). We defer to the trial court's factual findings, *State v. Wyman*, 197 Ariz. 10, ¶ 5 (App. 2000), and will sustain them if "substantial evidence" supports them, *State v. Mumbaugh*, 107 Ariz. 589, 597 (1971).

¶11 "In order to be admissible, statements obtained while an accused is subject to custodial interrogation require a prior waiver of *Miranda* rights." *State v. Carter*, 145 Ariz. 101, 105 (1985) (citing *Miranda*, 384 U.S. at 478-79). Under *Miranda*, a suspect must be "fully advised" that "[s]he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time," including the "critical advice that whatever [s]he chooses to say may be used as evidence against [her]." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). A suspect validly waives these rights only if she waives them "voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. To be voluntary, the waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). To be knowing and intelligent, the suspect must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver," however. *Spring*, 479 U.S. at 574.

¶12 "[P]oor linguistic abilities, standing alone, do not invalidate an otherwise knowing and intelligent waiver." *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 28 (2017), *abrogated on other grounds by State v. Escalante*,

245 Ariz. 135 (2018). Instead, we examine the "totality of the circumstances surrounding the interrogation" to determine whether a defendant has validly waived rights. *Moran*, 475 U.S. at 421. The totality of the circumstances includes the defendant's "background, experience and conduct." *Escalante-Orozco*, 241 Ariz. 254, ¶ 23. To evaluate whether a non-native English speaker validly waived her rights, a court may consider such factors as "(1) whether the defendant signed a written waiver; (2) whether the defendant was advised of [her] rights in [her] native tongue; (3) whether the defendant appeared to understand [her] rights; (4) whether a defendant had the assistance of a translator; (5) whether the defendant's rights were individually and repeatedly explained to [her]; and (6) whether the defendant had prior experience with the criminal justice system." *United States v. Garibay*, 143 F.3d 534, 538 (9th Cir. 1998) (citations omitted).

¶13 Here, substantial evidence supports the trial court's finding that Klos was "fairly conversant" in English. Klos had lived in the United States for over forty years. She had passed a professional licensing test in English and by her own admission could read and write English at a tenth-grade level. Her conversation with Nusbaum in the car showed that she had a good understanding of spoken English, supporting Nusbaum's testimony that he believed she understood her rights as he went over them with her. She continued to show good English skills during her interrogation, consistently responding appropriately to questions and explaining complex banking transactions. At no point did she request an interpreter or express any concern with the fact she was being questioned in English. Thus, Klos's background, experience and conduct generally support a conclusion that her grasp of English was sufficient to allow her to knowingly and intelligently waive her rights. *See Escalante-Orozco*, 241 Ariz. 254, ¶ 29 (waiver valid where defendant "appear[ed] to respond appropriately to questions" and interrogator testified he had no doubt defendant understood his rights).

¶14 Klos insinuates that her waiver is invalid because she was not afforded a Thai translator. But Klos has not cited, and we have not found, any case where waiver of rights in English was deemed invalid in circumstances substantially similar to those here. A review of cases shows that English-only *Miranda* warnings to non-native speakers are often found valid where the suspect's English skills are similar or even somewhat inferior to Klos's. *See, e.g.*, *United States v. Sriyuth*, 98 F.3d 739, 750 (3d Cir. 1996) (English-only *Miranda* waiver valid where defendant, a native Thai speaker, had lived in the United States for nine years, had attended high school and been employed in U.S., and acknowledged awareness of right to counsel from watching television shows); *Campaneria v. Reid*, 891 F.2d

1014, 1018, 1020 (2d Cir. 1989) (defendant had emigrated from Cuba only three years before);[2] *United States v. Abou-Saada*, 785 F.2d 1, 10 (1st Cir. 1986) (defendant had lived in the United States for sixteen years and answered questions in English well, including describing complex medical details of an injury); *see also* Kimberly J. Winbush, Annotation, *Suppression of Statements Made During Police Interview of Non-English-Speaking Defendant*, 49 A.L.R. 6th 343, § 20 (2009). In the cases we have reviewed where courts have found a non-native speaker's waiver in English to be invalid, the circumstances include facts not present here, such as evidence of poor English comprehension, a lack of evidence that the defendant understood any of her rights, failure to provide each right individually, and lack of a written waiver. *See, e.g.*, *Garibay*, 143 F.3d at 536, 538-40 (native Spanish-speaking defendant arrested at Mexican border was "borderline retarded with extremely low verbal-English comprehension skills"; no written waiver provided pursuant to government policy of not using written *Miranda* waivers at the border); *United States v. Short*, 790 F.2d 464, 465-69 (6th Cir. 1986) (defendant in United States for only three months spoke only "halting," "broken" English; no written waiver; and no recording of interrogation); *United States v. Barry*, 979 F. Supp. 2d 715, 719 (M.D. La. 2013) (*Miranda* rights not read or explained individually and defendant not asked whether he understood them); *Delacruz v. Commonwealth*, 324 S.W.3d 418, 420 (Ky. Ct. App. 2010) (*Miranda* rights not read or explained individually; when defendant indicated he did not understand them, interrogator repeated only the right to not answer questions); *see also* Winbush, *supra*, § 21.

¶15 Klos's affirmative responses during the *Miranda* warnings, her statement at the end that she "got it," and her act of signing the written waiver constitute further substantial evidence that she understood her rights. And while Klos initially expressed a lack of understanding when advised that her statements could be used against her in court, substantial evidence supports an interpretation that she understood that advice but did not understand why a court would be involved. When provided the advice, she first asked the question, "[W]hy?" This suggests that what she did not understand was *why* her statements would be used against her. When

[2]Of course, residing in the United States even for a lengthy period of time, standing alone, is not proof of fluency in English. It does, however, make it more likely than not that a person has been exposed to, and likely has gained some degree of understanding of, the most commonly spoken language. Accordingly, it is a legitimate factor to consider.

Nusbaum explained why—she was being charged with a crime—she said, "Okay," suggesting that Nusbaum had answered her question.

¶16 Other circumstances suggest that Klos's question centered on why her statements would be used against her in court. Klos had not yet been told that she would be charged with a crime, and Klos's statements before the *Miranda* warnings suggest she did not believe she would be criminally charged. For example, she said to Nusbaum during the ride to the interrogation that she "[didn't] know what's going on," but believed it involved the bank and said, "It's okay . . . I'm not so worried about that, because everything I did was, you know—I have proof." And she asked Nusbaum whether he would bring her back to the salon after she was questioned, suggesting she was not contemplating that she would be jailed and prosecuted.

¶17 Klos concedes her statement that "maybe" she should have counsel appointed to her because she did "not understand . . . what will happen," was equivocal and does not argue on appeal that this statement constitutionally prohibited law enforcement from interrogating her by invoking her right to counsel. *See Davis v. United States*, 512 U.S. 452, 455, 462 (1994) (defendant's equivocal statement, "Maybe I should talk to a lawyer," insufficient to invoke right to counsel).[3] She argues, however, that this statement shows she "did not fully understand both the nature of her right to counsel nor the consequence of the admissibility of any statements she might make during custodial interrogation." But, as noted above, Klos eventually said "[o]kay" after Nusbaum explained what would happen to her next by telling her she would go to jail—something she had not yet been told. Again, Klos's responses suggest Nusbaum addressed her uncertainty. Klos never reiterated any interest in obtaining counsel, made further statements indicating she understood her rights, and signed the written waiver stating that she "fully underst[oo]d" her rights—facts that further support a conclusion that Klos understood the nature of her right to an attorney and the warning that her statements could be used against her.

¶18 In sum, substantial evidence supports the trial court's conclusion that Klos was adequately informed of her rights and sufficiently

[3]It "will often be good police practice" for law enforcement to clarify whether a suspect wants to invoke the right to counsel when a defendant makes such an equivocal statement. *Davis*, 512 U.S. at 461. But there is "[no] rule requiring officers to ask clarifying questions." *Id.*

understood them. Thus, the trial court did not abuse its discretion in ruling that Klos knowingly and intelligently waived those rights.[4]

Disposition

¶19 We affirm the trial court's denial of Klos's motion to suppress her statements to law enforcement.

[4] On appeal, Klos does not argue, as she did at the suppression hearing, that her statements were coerced because Nusbaum refused to tell her the charges against her during the *Miranda* warnings. She thus does not argue that her waiver was involuntary.