IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GEORGE FRANCIS CURTIS, Appellant.	2 CA-CR 2012-0164 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111289001

Honorable Michael O. Miller, Judge
Honorable Javier Chon-Lopez, Judge

AFFIRMED IN PART; VACATED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant George Curtis was convicted of two counts of molestation of a child. He was sentenced to concurrent prison terms of ten years. On appeal, he asserts the trial court erred in denying his motion to suppress his confessions on various grounds. For the following reasons, we affirm Curtis's convictions and sentences, but vacate the criminal restitution order (CRO) entered at sentencing.

Factual and Procedural Background

¶2 In reviewing a trial court's decision on a motion to suppress, we consider only the facts presented at the suppression hearing, and we view them in the light most favorable to upholding the court's decision. *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007).[1] In April of 2011, at approximately one o'clock in the morning, Officers Brian Neuman and Randy Korth of the Marana Police Department came to Curtis's home and rang the doorbell. Curtis's wife, Tara, answered the door. The officers asked to be admitted to the residence to check on the welfare of her child, and she allowed them to enter.

[1]Curtis requests that we consider the trial testimony of Tara Curtis, a witness who did not testify at the suppression hearing. But in suggesting that we maintain discretion to consider trial testimony, Curtis relies on *State v. Eggers*, 215 Ariz. 472, 160 P.3d 1230 (App. 2007), *depublished*, 217 Ariz. 492, 176 P.3d 690 (2008), which cannot be cited as precedent. *See* Ariz. R. Sup. Ct. 111(c), (g). Assuming arguendo the rule limiting our review to evidence presented at the suppression hearing is discretionary, as he maintains, Curtis himself appears to acknowledge "the trial court's conclusions . . . hinged on the undisputed facts in the record." Further, if Curtis felt Tara's testimony was crucial to the issue of suppression, he had the opportunity to call her as a witness, but he chose not to. *Cf. State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984) ("The decision as to what witness should be called to testify on the defendant's behalf is a tactical, strategic decision."). We therefore do not consider Tara's trial testimony.

¶3 The officers explained to Tara that they had received an anonymous tip that her daughter, E., had been molested by Curtis. While the officers were talking to Tara, they saw Curtis standing at the top of the staircase and invited him to join the conversation. Curtis seated himself on a sofa, between his wife and Officer Neuman. Neuman explained again why he and Officer Korth had come, and initially, Curtis did not respond. Tara asked Curtis if the allegation was true and reminded him to tell the truth. Neuman continued to ask Curtis questions. Officer Korth, noting that Curtis and his wife were wearing Brigham Young University shirts, and seeing religious items around the house, stated that "honesty, integrity is—and truthfulness is an important factor within [Mormon] religion and all religions." Curtis then admitted the allegations were true.

¶4 After Curtis confessed, Officer Neuman advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), arrested him, and brought him to a police station. At the station, he was interrogated by Detective Joseph Castillo. The detective asked Curtis if he had been read his *Miranda* rights and if he understood them, and Curtis replied that he had. During Detective Castillo's interrogation, Curtis essentially repeated his earlier confession.

Motion to Suppress

¶5 On appeal, Curtis asserts the trial court erred in not suppressing his first and second confessions. He argues both were obtained without the benefit of a *Miranda* warning, that the second confession was the tainted product of the illegally obtained first confession, and that both confessions were involuntary. We review a trial court's denial

of a motion to suppress for an abuse of discretion. *State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009).

***Miranda* Warnings**

¶6 Curtis first contends the statements he made in his home and at the police station should have been suppressed as the product of a custodial interrogation without the benefit of a *Miranda* warning. We defer to the trial court's factual findings, but review any legal conclusions de novo. *Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d at 532.

¶7 Once a suspect has been taken into custody, "if the State wants to admit statements the person may make in response to questioning, the police must first inform him of certain constitutional rights." *Id.* ¶ 10. A person is in custody if, "in light of all the circumstances, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.*, *quoting State v. Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d 392, 395 (App. 2000). An interrogation conducted in a suspect's home is not per se custodial; in fact, it is generally non-custodial absent circumstances that turn the home into a "'police-dominated atmosphere.'" *United States v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008), *quoting Miranda*, 384 U.S. at 445. *Craighead* listed four factors to examine in determining whether an in-home interrogation is custodial:

> (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

Id. at 1084.

¶8 In *Craighead*, eight law enforcement officers entered the home, some wearing protective gear and some with their weapons unholstered. *Id.* at 1085. By contrast, here only two officers were present, both wearing the standard police uniform, and although both were armed, neither drew any weapons. Curtis was not physically restrained until after he had confessed.

¶9 As evidence of restraint, Curtis emphasizes that he was seated "as far away from the entrance to the home as possible," with an officer standing between him and the door. However, Curtis chose to seat himself on the couch. The record does not indicate the officers told him where to sit, or even instructed him to sit down. Curtis was also not isolated from others. His wife was present throughout the entire interview. Curtis asserts his wife's presence "heightened his isolation" because of her conduct. But the officers did not enlist his wife as an agent, ask her to aid in the interrogation, or give her any instructions on how to conduct herself. While Curtis was not told that he was free to leave or to terminate the interview, this is the only factor that would weigh toward a finding of custody; the other three factors weigh against such a finding.

¶10 Although the four factors articulated in *Craighead* support a finding that Curtis was not in custody, that list was intended to be illustrative, not exhaustive, *id.* at 1084, and so we consider the other arguments Curtis raises. Curtis maintains that the officer's use of religion to elicit a confession was coercive and contributed to a "police dominated atmosphere." But Curtis does not explain how the officer's observations

about religion, however effective in securing a confession, affected Curtis's perception of whether he was free to leave.

¶11 Curtis also suggests the officers' secret use of a recording device made the environment coercive. However, the analysis of whether a person is in custody focuses on "objective indicia of custody." *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983). Curtis acknowledges he was unaware of the recording device. Therefore, it could not have indicated to him that he was not free to leave or terminate the interview.

¶12 Finally, Curtis posits the officers "employed subterfuge" because they stated they had come to check on the welfare of E., but they did not make any attempt to see E. or ask any questions about her immediate well being. Assuming arguendo that we agreed with Curtis's characterization, "The fact that the police procured defendant's cooperation and presence by using a ruse does not necessarily change the interrogation from non-custodial to custodial in nature." *State v. Carrillo*, 156 Ariz. 125, 133, 750 P.2d 883, 891 (1988).

¶13 Because the officers' conduct did not render the home a police-dominated atmosphere, Curtis was not in custody when he made his first confession and a *Miranda* warning was not required. The trial court did not abuse its discretion in denying his motion to suppress the first confession.

¶14 Curtis also argues his second confession, which took place at the police station, was made without a sufficient *Miranda* warning. He claims that neither the *Miranda* warning read to him by Officer Neuman upon arrest nor the reminder of his

Miranda rights provided by Detective Castillo advised Curtis of his right to the presence of an attorney and to have an attorney provided for him if he could not afford one.

¶15 Curtis bases his contention that the *Miranda* warning provided by Officer Neuman was insufficient on the fact the audio recording of the interview is not entirely clear, and there are inaudible parts of the recording during the officer's recitation. However, Officer Neuman testified that he read Curtis the *Miranda* rights verbatim from his "cheat book." This recitation properly advised Curtis of the right to an attorney and, if he could not afford one, the right to have an attorney provided for him prior to any questioning. Curtis did not present any testimony or other evidence contradicting Officer Neuman's testimony.

¶16 Although Detective Castillo did not provide Curtis with another full *Miranda* warning, he asked Curtis if he had been "read [his] rights," and Curtis responded that he had. Officer Neuman's *Miranda* warning was given just before leaving the Curtis residence at 1:46 a.m. Detective Castillo began questioning Curtis less than an hour later, at 2:35 a.m. Our supreme court has repeatedly held that "once a defendant has been fully and fairly appraised of his rights, there is no requirement that the warnings be repeated each time the questioning is commenced." *State v. Miller*, 110 Ariz. 597, 598, 522 P.2d 23, 24 (1974). Because Curtis was fully advised of his *Miranda* rights before making his confession at the police station, the trial court did not abuse its discretion in denying Curtis's motion to suppress the second confession.[2]

[2]Because the first confession was not obtained illegally, we need not address Curtis's contention that the second confession was tainted. *See State v. Rendel*, 19 Ariz.

Voluntariness

¶17 Curtis argues his statements to the police, both at his home and at the police station, should have been suppressed because they were involuntary. Curtis did not present this argument to the trial court, but asserts that because the court ruled the statements were voluntary, we should consider the issue nonetheless. Curtis is incorrect in his assertion—in fact, the court did not rule on the issue of voluntariness in denying his motion to suppress. This argument is therefore waived absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Curtis does not argue any error was fundamental, and we find no error that can be characterized as such. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived if not argued on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not disregard fundamental error if it finds it). Accordingly, we do not further address this issue.

CRO

¶18 In its sentencing minute entry, the trial court stated it was reducing Curtis's fines, fees, and assessments to a CRO, ordering that "no interest, penalties or collection fees [were] to accrue while [Curtis was] in the Department of Corrections." But the imposition of such a CRO before the defendant's sentence has expired "'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231

App. 554, 557, 509 P.2d 247, 250 (1973) ("doctrine of the 'poisonous tree'" does not apply without prior police wrongdoing), *quoting Nardone v. United States*, 308 U.S. 338, 341 (1939).

Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Because this portion of the court's minute entry order is unauthorized by statute, we vacate the CRO.

Disposition

¶19 We vacate the CRO, but otherwise affirm Curtis's convictions and sentences.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge