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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MANUEL SANCHEZ-HERNANDEZ, Appellant.	2 CA-CR 2010-0072 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072468

Honorable Nanette M. Warner, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

B R A M M E R, Presiding Judge.

¶1 Manuel Sanchez-Hernandez appeals from his conviction and sentence for one count of aggravated assault with a deadly weapon or dangerous instrument. He

argues the trial court erred by denying his motion to suppress statements he made to police during his interrogation. We affirm.

Factual and Procedural Background

¶2 In addressing the trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to upholding the court's ruling. *See State v. Ellison*, 213 Ariz. 116, ¶ 25, 140 P.3d 899, 909 (2006). In June 2007, Sanchez-Hernandez crashed into a car driven by Sandra M. Sanchez-Hernandez told Sandra he did not want her to call the police because he did not want to "get in trouble." When he attempted to drive away, Sandra stopped him by putting her hand inside his car window and her leg on top of the car's hood. Sanchez-Hernandez then pulled a silver gun out of the car, pointed it at Sandra, and told her to get off the car or he would kill her. Afraid for her life, Sandra "melt[ed] into a fetal position," and Sanchez-Hernandez sped away.

¶3 Later that day, Sanchez-Hernandez was brought to a police station where he was interviewed by Detective Ramirez.[1] The interview was audiotaped. Ramirez, a native Spanish speaker, conducted the interview in Spanish because Sanchez-Hernandez indicated he did not speak English. Before questioning Sanchez-Hernandez, Ramirez read him warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), from a card that included a Spanish translation. Although Sanchez-Hernandez gave some indication he understood those warnings, he also expressed doubt about his understanding. Ramirez

[1]The state concedes the interview of Sanchez-Hernandez was a custodial interrogation.

then repeated the warnings and further explained some of them individually before Sanchez-Hernandez agreed to answer her questions.

¶4 Sanchez-Hernandez was indicted on one count of aggravated assault with a deadly weapon or dangerous instrument. Before trial, he moved to suppress his statements to Ramirez, arguing the *Miranda* warnings were inadequate and he did not waive his rights knowingly. At a suppression hearing, the trial court heard testimony from Ramirez. It also reviewed a recording of the interview, the state's English transcription of the interview, the court's own translation of the *Miranda* portion of the interview, and a copy of the card Ramirez had used to read Sanchez-Hernandez his rights. The court denied Sanchez-Hernandez's motion. After a three-day jury trial, Sanchez-Hernandez was convicted as charged and sentenced to a slightly mitigated ten-year prison term. This appeal followed.

Discussion

¶5 Sanchez-Hernandez contends the trial court erred in denying his motion to suppress the statements he had made during his interrogation. We review the factual findings underlying the court's ruling for an abuse of discretion but review its legal conclusions de novo. *See State v. Newell*, 212 Ariz. 389, ¶ 27, 132 P.3d 833, 841 (2006).

Knowing and Intelligent Waiver

¶6 Sanchez-Hernandez asserts the trial court abused its discretion by finding his waiver of rights to have been knowing and intelligent because, he alleges, the Spanish translation of the *Miranda* warnings was inaccurate and he therefore did not understand his rights. A person is entitled to be informed of certain procedural rights before being

subjected to custodial interrogation, including "that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479. A defendant may waive these rights provided the waiver is voluntary, knowing and intelligent. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). To be knowing and intelligent, a waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*; *see also State v. Rivera*, 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987). To determine whether Sanchez-Hernandez's waiver here was knowing and intelligent, we look to the totality of the circumstances surrounding it, including his "'background, experience and conduct.'" *See Rivera*, 152 Ariz. at 513, 733 P.2d at 1096, *quoting State v. Montes*, 136 Ariz. 491, 495, 667 P.2d 191, 195 (1983). The state must prove waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

¶7 Sanchez-Hernandez argues Ramirez's warning that "[i]f you cannot afford an attorney, you have the right that a court name an attorney for you before the, the interview"[2] was insufficient to apprise him of his right to have an attorney provided him free of cost because he was unfamiliar with the United States criminal justice system and because the term "name" was insufficient. No particular words, however, are required

[2]The court's translation of the statement differed slightly: "If you do not have the means with which to pay an attorney, you have the right to have a court [mispronounced] name you an attorney before the, uh, the interview is." When Ramirez repeated Sanchez-Hernandez's rights later in the interview, she stated "[i]f you cannot afford an attorney, you have the right that the court name an attorney before the interview." The court's translation of the second statement was: "If you are not able to pay an attorney, you have the right to have a court [mispronounced] name you an attorney before the interview is."

when explaining a suspect's *Miranda* rights. *Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010). Rather, "[t]he inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Id.*, *quoting Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (alterations in *Duckworth*); *see also State v. Olquin*, 216 Ariz. 250, ¶ 11, 165 P.3d 228, 230-31 (App. 2007) (no precise manner required but state must inform suspect in manner sufficient to apprise of rights). As Sanchez-Hernandez emphasizes, warnings informing a suspect of his right to counsel may fall below the minimum requirements if they are too confusing. *E.g.*, *United States v. San Juan-Cruz*, 314 F.3d 384, 387-89 (9th Cir. 2002) (warning insufficient where previous contradictory statement that counsel would not be paid at government expense); *United States v. Connell*, 869 F.2d 1349, 1353 (9th Cir. 1989) (same).

¶8 There was substantial evidence to support the trial court's conclusion that Ramirez's warnings were constitutionally sufficient and that they did not infer Sanchez-Hernandez would be charged for counsel. There is no evidence he was given any previous contradictory warnings suggesting the state would not pay for his attorney. Ramirez communicated that Sanchez-Hernandez had a right to have an attorney named if he could not afford one, using words similar to the words used to describe the right in *Miranda*. *See Miranda*, 384 U.S. at 479 ("[I]f [suspect] cannot afford an attorney one will be appointed for him . . . ."). Although "name" was used instead of "appoint," the two verbs are similar enough to reasonably convey the same meaning. *See Webster's Ninth New Collegiate Dictionary* 97, 786 (1985) (definition of "appoint" includes "to name officially," and synonym for "name" is "appoint"); *see also* Merriam-Webster

Online Spanish-English Dictionary, http://www.merriam-webster.com/spanish/nombrar (last visited Dec. 20, 2010) (translation of *nombrar*, Spanish verb Ramirez used in interview, includes "to appoint").

¶9 Sanchez-Hernandez also argues that, regardless of whether the words Ramirez had used were sufficient technically, he nonetheless did not understand his rights due to his "limited mental ability" and "low degree of education and different culture." He notes that he "never stated he understood the right to have counsel present or that there would be no cost" after expressing he was uncertain about whether he understood his rights. However, Arizona cases repeatedly have held that a defendant's limited intelligence, standing alone, does not invalidate an otherwise valid waiver shown by the totality of the circumstances. *E.g.*, *State v. Carrillo*, 156 Ariz. 125, 128, 134, 750 P.2d 883, 886, 892 (1988) (suspect with mild to moderate mental retardation capable of knowing and intelligent waiver of *Miranda* rights); *Rivera*, 152 Ariz. at 513, 733 P.2d at 1096 (defendant with limited education, no knowledge of English, and no experience with criminal justice system validly waived rights).

¶10 Ramirez conducted the interview in Spanish, and Sanchez-Hernandez remained engaged and responded appropriately to her questions. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 166, 800 P.2d 1260, 1274 (1990) (considering factors such as whether rights read in Spanish and whether suspect answered questions); *State v. Hicks*, 133 Ariz. 64, 73, 649 P.2d 267, 276 (1982) (factors for finding ability to understand included whether suspect aware of surroundings, cooperative and responsive). Ramirez had no concerns that Sanchez-Hernandez was having problems understanding their

discussion. She testified she had explained the right to counsel to him, and Sanchez-Hernandez indicated he understood that right before agreeing to answer questions. Upon its own review of the taped interview, the trial court noted Sanchez-Hernandez "appeared to . . . understand the Spanish words [Ramirez] was using." There was sufficient evidence from which the court could find Sanchez-Hernandez had understood his rights adequately to make a valid waiver, and we accept its determination. *See State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004) (trial court in best position to weigh evidence at suppression hearing).

¶11 The trial court, therefore, did not abuse its discretion in finding Sanchez-Hernandez had been advised adequately of his rights pursuant to *Miranda* and that he had waived them knowingly and voluntarily.

"Mere Formality"

¶12 Sanchez-Hernandez also argues the trial court erred in admitting his statements because Ramirez had implied that reading the *Miranda* warnings "was a mere formality." He acknowledges he did not raise this argument below but alleges it constitutes fundamental error. However, Sanchez-Hernandez offers no authority supporting his argument, as the one case he cites has been vacated, *see Doody v. Schriro*, 596 F.3d 620, 635-36 (9th Cir.), *vacated by Ryan v. Doody*, 131 S. Ct. 456 (2010), and so we decline to address it. *See* Ariz. R. Crim. P. 31.13(c)(vi) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal).

Voluntariness

¶13 Sanchez-Hernandez further contends the trial court erred in admitting his statement because he did not make it voluntarily.[3] He argues "[Ramirez]'s repeated statements that she had to ask him questions were coercive." Sanchez-Hernandez additionally argues his status as a foreign national should have been taken into account when determining whether his statements had been made involuntarily.

¶14 Whether a statement is given voluntarily and whether a *Miranda* violation has occurred are distinct inquiries. *Montes*, 136 Ariz. at 494, 667 P.2d at 194. We will not overturn a trial court's determination that a confession was given voluntarily absent clear and manifest error. *State v. Graham*, 135 Ariz. 209, 211, 660 P.2d 460, 462 (1983). Statements are presumed involuntary and the state has the burden of demonstrating, by a preponderance of evidence, that the statement was voluntary when made. *State v. Tapia*, 159 Ariz. 284, 287, 767 P.2d 5, 8 (1988). The state makes a prima facie case for admission "when the officer testifies that the confession was obtained without threat, coercion or promises of immunity or a lesser penalty." *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979).

¶15 "Voluntariness is a question of fact to be determined from the totality of the circumstances." *State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004). "A

[3]The state argues Sanchez-Hernandez waived the argument that his statement was not voluntary because he raised only *Miranda* issues below and asks us to review solely for fundamental error. However, because we see no error, we need not address whether fundamental error analysis applies. *See State v. Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d 601, 608 (2005) ("To obtain relief under the fundamental error standard of review, [appellant] must first prove error.").

confession may be found involuntary based on any of the following factors: '(1) impermissible police conduct, (2) coercive pressures that are not dispelled, or (3) a confession derived directly from a prior involuntary statement.'" *State v. Huerstel*, 206 Ariz. 93, ¶ 51, 75 P.3d 698, 710 (2003), *quoting Amaya-Ruiz*, 166 Ariz. at 164, 800 P.2d at 1272. Police coercion is a necessary predicate to finding a statement involuntary and the defendant's physical and mental states, although relevant to determining susceptibility to coercion, cannot alone make the statement involuntary. *State v. Smith*, 193 Ariz. 452, ¶ 14, 974 P.2d 431, 436 (1999); *see also Connelly*, 479 U.S. at 167.

¶16 In considering the totality of the circumstances, the trial court also must determine whether "the defendant's will was overborne." *Newell*, 212 Ariz. 389, ¶ 39, 132 P.3d at 843. In making that determination, the court should consider: "1) the environment of the interrogation; 2) whether *Miranda* warnings were given; 3) the duration of the interrogation; and 4) whether there was impermissible police questioning." *State v. Blakley*, 204 Ariz. 429, ¶ 27, 65 P.3d 77, 84 (2003). In addition, there must be "a causal relation between the coercive behavior and the defendant's overborne will." *State v. Boggs*, 218 Ariz. 325, ¶ 44, 185 P.3d 111, 122 (2008).

¶17 The state's burden is met by Ramirez's testimony she made no promises or threats prior to recording the interview, combined with the record's absence of any such statements. The record does not show Sanchez-Hernandez was coerced or improperly induced to give a statement. We agree with the trial court that nothing was coercive about Ramirez's statements that she needed to ask Sanchez-Hernandez questions, particularly because those statements were made in the context of explaining the *Miranda*

warnings to him and the reason for reading them to him. The assertion that Sanchez-Hernandez may have been susceptible to coercion because he was a foreign national is inadequate to render his statement involuntary absent actual coercion.[4] *See Smith*, 193 Ariz. 452, ¶ 14, 974 P.2d at 436 (physical and mental states alone insufficient to render statement involuntary).

¶18 Moreover, none of the factors enumerated above support a finding that Sanchez-Hernandez's will had been overborne by Ramirez's actions. *See Blakley*, 204 Ariz. 429, ¶ 27, 65 P.3d at 84 (in considering whether defendant's will overborne, court considers environment of interrogation, whether *Miranda* warnings given, duration of questioning, and whether police questioning impermissible). Sanchez-Hernandez does not allege, and the record does not suggest, that the environment of the interrogation or its duration was coercive or that Ramirez asked any impermissible questions. Although he alleges problems with the *Miranda* warnings he was given, we have determined they were sufficient. Under these circumstances, the trial court did not err in concluding Sanchez-Hernandez had made his statements voluntarily.

[4]Sanchez-Hernandez asks us to "reweigh" the factors used by the trial court to evaluate the voluntariness of a foreign national's statement described in *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002). He asserts the court abused its discretion in weighing the factors, but also concedes Arizona courts are not bound by the Ninth Circuit's test. We decline to reweigh these factors. *See Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d at 457 ("[T]he trial court determines the weight to be given evidence presented at [a] suppression hearing.").

Disposition

¶19 For the foregoing reasons, we affirm Sanchez-Hernandez's conviction and sentence.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

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

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