08CA0630 Peo v. Sanchez 02-10-2011

COLORADO COURT OF APPEALS

Court of Appeals No. 08CA0630
Douglas County District Court No. 06CR643
Honorable Nancy A. Hopf, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ricardo Jaime Sanchez,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE CASEBOLT
Loeb, J., concurs
Fox, J., concurs in part and dissents in part

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced February 10, 2011

John W. Suthers, Attorney General, Emmy A. Langley, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Joseph Paul Hough, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Ricardo Jaime Sanchez, appeals the judgment of conviction entered on a jury verdict finding him guilty of first degree murder. He asserts that the trial court erred by denying his motion to suppress incriminating statements because they were gathered in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), and by refusing to instruct the jury on the affirmative defense of involuntary intoxication. We disagree and thus affirm.

I. Facts

Defendant was involved in an argument with one of his coworkers. The coworker apparently threatened to kill defendant and rape defendant's wife, prompting defendant to purchase a gun and bullets. After arriving at the construction site where he was employed, defendant shot the coworker ten to fifteen times at close range, killing him.

The prosecution charged defendant with first degree murder after deliberation under section 18-3-102(1)(a), C.R.S. 2010. Defendant asserted self-defense and involuntary intoxication. Following trial, the jury convicted defendant as charged and the trial court sentenced him to life in prison without parole. This appeal ensued.

II. *Miranda* Violation

Defendant asserts the trial court erred in denying his motion to suppress incriminating statements because the waiver of his *Miranda* rights was neither knowing nor intelligent. We disagree.

A. Standard of Review

When ruling on a motion to suppress statements, we defer to the trial court's findings of fact if supported by the record, but review the legal effect of those facts de novo. *People v. Bostic*, 148 P.3d 250, 254 (Colo. App. 2006).

B. Law

Under *Miranda*, police must specifically inform an accused that he or she has the right to remain silent; that if the accused waives this right, anything he or she says may be used against him or her in court; that he or she has the right to have an attorney present; and that an attorney will be appointed for the accused if he or she cannot afford one. *Miranda*, 384 U.S. at 444; *People v. Redgebol*, 184 P.3d 86, 93 (Colo. 2008). If the police fail to give this advisement before questioning, then the statements must be excluded from evidence. *People v. Kaiser*, 32 P.3d 480, 483 (Colo. 2001).

An accused's statement made during the course of custodial interrogation is inadmissible unless it is provided pursuant to a valid waiver of his or her constitutional rights. *Miranda*, 384 U.S. at 444; *People v. Owens*, 969 P.2d 704, 706 (Colo. 1999).

When an objection is raised to the introduction of an incriminating statement on the basis that law enforcement officials obtained the statement in violation of *Miranda*, the prosecution has the burden to prove by a preponderance of the evidence that the statement was made after a knowing, voluntary, and intelligent waiver. *Owens*, 969 P.2d at 706. In determining whether a defendant validly has waived his or her *Miranda* rights, a court applies a two-part inquiry: (1) whether the waiver was voluntary, in the sense that it was the product of a free and deliberate choice rather than obtained by intimidation, coercion, or deception; and (2) whether the waiver was made "knowingly and intelligently." *People v. Jiminez*, 863 P.2d 981, 984 (Colo. 1993). Only the second prong of the test is at issue here.

To determine whether a knowing and intelligent waiver has occurred, courts must examine the totality of the circumstances surrounding the custodial interrogation. Only if the totality of the

circumstances reveals the requisite level of comprehension may a court properly conclude that constitutional rights under *Miranda* have been validly waived. *Owens*, 969 P.2d at 706-07.

Among the factors to be considered in a review of the totality of the circumstances surrounding a waiver are the time between advisement and interrogation; whether the defendant or the interrogating officer initiated the interview; whether and to what extent the interrogating officer reminded the defendant of his or her rights prior to the interrogation by asking if he or she recalled those rights, understood them, or wanted an attorney; the clarity and form of the defendant's acknowledgement and waiver, if any; and the background and experience of the defendant in connection with the criminal justice system. *People v. Hopkins*, 774 P.2d 849, 852 (Colo. 1989).

The totality of the circumstances analysis also includes any language or comprehension barriers encountered by the defendant during the advisement and interrogation. *Kaiser*, 32 P.3d at 484. While no translation is perfect, a person acting as an interpreter must be sufficiently capable of accurately expressing the substance

of the suspect's rights. *People v. Mejia-Mendoza*, 965 P.2d 777, 781-82 (Colo. 1998).

In reviewing waiver issues involving a defendant whose first or only language is something other than English, the supreme court has articulated additional guiding principles. Specifically, we should determine whether any involved interpreter has linguistic deficiencies and, if so, we should determine whether those deficiencies contributed to a defendant's inability to adequately understand, and therefore knowingly and intelligently waive, his *Miranda* rights. *Id.* at 782. In addition, a defendant's cultural background has limited relevance; it goes "only to whether he understood his basic choices – not whether he understood the tactical advantages of each [choice] or the constitutional premises upon which they are based." *People v. Al-Yousif*, 49 P.3d 1165, 1170 (Colo. 2002).

While the supreme court has acknowledged the limited nature of the understanding that must be proved to show a knowing and intelligent waiver, it has still required that the prosecution demonstrate that the police accurately communicated and that the defendant understood "three precepts: (1) he did not have to talk,

(2) he could have an attorney present, and (3) if he did talk, his statements could be used against him." *Id.* at 1172; *see also People v. Aguilar-Ramos*, 86 P.3d 397, 401 (Colo. 2004).

C. Application

Here, defendant focuses his argument on the portion of the *Miranda* advisement concerning the provision of an attorney. He contends that he was confused and did not understand that he was entitled to consult with and be represented by a lawyer free of charge.

At the hearing on defendant's motion to suppress, the New Mexico police officer who interrogated defendant testified that he conducted an extensive interview in Spanish, which was defendant's only language and the officer's first language (having been raised speaking Spanish at home, while having learned English at school). The officer testified that he gave defendant an advisement and waiver of rights form that was in Spanish, made some lines after each sentence for defendant to initial, asked him to read it and initial after each line, and told defendant that if he was willing to give a statement or talk to the officers and give them

permission to speak with him, to sign the form at the bottom. The officer further testified that defendant said he could read Spanish.

The prosecution introduced the *Miranda* waiver form at the suppression hearing, as well as the actual recorded interview. The police officer also testified that he had reviewed the interview and a written English and Spanish transcription of the interview, and opined that the translation noted in the transcript was fair and accurate. The court admitted the form and the transcript of the interview, as well as a digital video disc of the interview itself.

As pertinent here, the *Miranda* form told defendant that he had the right to consult with an attorney before any questions were asked. The form further told defendant that if he decided to answer questions without an attorney present, he had the right to stop answering the questions whenever he wanted, and that he also had the right to stop answering questions until he had an attorney present. The form then had a waiver of rights, which stated in part:

> I have read this declaration of my rights. I am conscious of my rights. I know what my rights are. I am willing to give a statement and answer questions. I do not want a lawyer present at this time. I understand and know what I'm doing. There has [sic] not been any promises or threats made against me, no pressure has been used against me.

The officer testified that defendant read the form, initialed the pertinent lines following the statement of each right, and then signed the waiver form at the bottom.

During cross-examination, the officer acknowledged that there were some misspellings on the *Miranda* form. He also agreed with defense counsel that the form itself did not state that, if the accused cannot afford an attorney, one would be provided to him free of charge. However, the officer then reviewed the transcript of the interview, which reflects that the following conversation occurred about an attorney:

> Officer: What I want is to clarify how things happened. Because look, I have . . . like fifteen years doing this.
>
> Defendant: Uh-huh.
>
> Officer: Like (inaudible) me. And . . .
>
> Defendant: But that, it is not very necessary a lawyer because the lawyer is going to want money, true? Decide a lawyer, because the lawyer is going to want money, true?
>
> Officer: Well, the thing is yes, they are, if you don't have the means of hiring a lawyer one would be assigned, but the things, where we are, we are going to talk soon.
>
> Defendant: It is better like this, true?

> Officer: We[,] I do not say what is better. If you are ready, I . . .
>
> Defendant: Sure, why go around it, true, if finally, what was done, was done.

At the hearing, the police officer did not initially recall this conversation verbatim but stated, "I did tell [defendant] if he could not afford [an attorney] one would be appointed for him."

When defense counsel asked further about the quoted conversation, the officer conceded that he never specifically said that any attorney assigned to represent defendant would also be "free of charge" or that he would not have to "pay for the attorney himself." However, he testified that his statement that if defendant did not have the means of hiring a lawyer, one would be assigned, was equivalent.

The person who had translated the interview into English also testified, and opined that the translation and transcript were fair and accurate. On cross-examination, defense counsel pointed out various inconsistencies and areas where the Spanish word used could have different or multiple meanings, but none of this testimony went to the provision of counsel.

The trial court denied defendant's motion, stating that defendant's inquiry was adequately addressed by the police officer and that defendant's *Miranda* waiver was valid. The court stated:

> Mr. Sanchez was provided with his rights in Spanish. He appeared to be reading them and following along with them. He said he understood them. He was talking to someone in Spanish, did not express any inability to understand and was willing to sign that he understood those rights.
>
> He did ask a question about an attorney being expensive and he was told that if he didn't have the means to hire one, would be appointed for him. That's what this Court tells people every day in court. He did not seem to have any confusion about that and I'm not going to presume that he didn't understand what it meant.
>
> He didn't ask any further questions about it and he said — he answered something to the effect, "It's better like this, true," in other words to talk and the law enforcement officer said, "Well I do not say what is better. If you are ready, I . . ." and Mr. Sanchez responded, "Sure, why go around it, true, if finally what was done was done," and went on to make statements all of which were clearly voluntary.
>
> Mr. Sanchez was very matter of fact about things and volunteered things and was smiling at some points, had no apparent reluctance. In fact, much of the interview there was hardly any questions being asked. He really was speaking clearly voluntarily in his statements.

. . . .

> So for those reasons and having reviewed the tape and the transcript, the Court finds that the interview should not be suppressed and that all those statements were voluntary.
>
> In making that – finding that and concluding that, the Court notes that there was some cross-examination about the interpreter about the preciseness of her translation of this interview and how different words have different meanings, but in the context of the whole interview, the errors or potential errors that were pointed out in cross-examination were not material ones to the understanding of what happened in this interview.

After defense counsel noted that he wished to make a record that "there was no discussion [in the interview] about if you don't have the money or if you cannot afford one, anything about if he didn't have the means to hire an attorney that one would be appointed," the trial court indicated it would make a further record, and stated:

> What he said was, "If you don't have the means of hiring a lawyer, one would be assigned." So I believe that adequately informed Mr. Sanchez that even though lawyers are expensive, if he couldn't afford to hire one, one would be assigned to him. That's the basis of the Court's ruling in that regard.

We conclude that there is record support for the trial court's findings and conclusions. The *Miranda* form lists each right in Spanish, and the digital video disc of the interview confirms that defendant spent some time reviewing it and initialing various places before he signed the waiver. It appears that defendant could read and write Spanish. Both the officer and the translator testified that the translation from Spanish to English shown on the transcript of the interview was fair and accurate.

The form does not state that, if defendant could not afford an attorney, one would be provided free of charge. However, the colloquy between defendant and the officer discussed the provision of an attorney. The officer stated that, if defendant did not have the means to hire one, one would be appointed for him. The trial court indicated that such a statement was the same advisement it gives defendants during arraignment. We are satisfied that the assurance that an attorney would be assigned or appointed, when coupled with the phrase "if you don't have the means," adequately conveyed to defendant that an attorney would be provided free of charge if he could not afford one.

There was only a brief time between advisement and interrogation. Defendant confirmed in writing that he understood his rights. There does not appear to have been any misunderstanding between the Spanish-speaking officer and defendant during the interview and there was no language barrier that we can discern. Because the *Miranda* form was already in Spanish, it was not erroneously translated as in *Aguilar-Ramos*, 86 P.3d at 398-99 (detective made numerous mistakes in translating the advisement into Spanish); and as in *Mejia-Mendoza*, 965 P.2d at 779 (translator erroneously translated defendant's rights and incorrectly told interrogating officer that defendant had understood and waived his *Miranda* rights). The officer answered, in Spanish, the questions defendant had concerning the provision of an attorney and did not fail to respond to any questions defendant posed. *See Aguilar-Ramos*, 86 P.3d at 398-88 (detective failed to respond to defendant's questions).

The interview does not reflect that defendant had any previous experience with the legal system. However, we perceive no intellectual disability issues here, because defendant could read and write Spanish. *Cf. Jiminez*, 863 P.2d at 982 (suspect had both

language and intellectual ability issues, including functioning at the level of a six-year-old).

We are not persuaded that *Aguilar-Ramos*, 86 P.3d at 401, requires a different result. There, the supreme court affirmed the trial court's determination that a Spanish-speaking defendant had not validly waived his *Miranda* rights. The defendant presented an expert witness at the suppression hearing, a certified court interpreter who had spent fifty hours reviewing the transcript and the videotaped interview, who opined that the interrogating detective's lack of proficiency in Spanish rendered him unable to effectively communicate with the defendant. Specifically, the expert noted that the detective had told the defendant that he had the right to "carry" silent, rather than to remain silent. He noted that the detective used the word "designar" in describing the right to counsel, which has two meanings in Spanish, to appoint or to design, and therefore the warning did not adequately convey to the defendant that he had right to have counsel present and appointed to him free of charge. The expert also noted that the detective failed to respond to the defendant's question regarding the right to have counsel present, and opined that the detective and the defendant

miscommunicated regarding a number of areas during the interview. Further, the detective did not know several words in Spanish crucial to the interrogation. The defendant also testified at the suppression hearing that he was unable to understand the warnings communicated to him by the detective, and that he had received only three years of schooling in Mexico.

Here, the record is substantially different. Defendant presented no expert testimony concerning any linguistic difficulties, nor did defendant testify at the suppression hearing about his understanding (or lack thereof) concerning the right to appointed counsel free of charge. And while we acknowledge that defense counsel was able to point out misspellings and question the officer and the translator concerning double meanings of different Spanish words, none of those errors appear to have been made in the context of the officer's discussion of the right to counsel.

Moreover, the *Aguilar-Ramos* court, while it affirmed the trial court's suppression order, noted the following:

> In upholding the trial court's suppression order, we do not require that every bilingual effort between an officer and a suspect be perfect in order to withstand scrutiny. Indeed, we require only that a defendant "minimally

> understand" that he had the right to remain silent and to have counsel present and that anything he said could be used against him.

86 P.3d at 402.

Here, we are satisfied that defendant understood those three key components of his *Miranda* rights.

For these reasons, we agree with the trial court's legal determination that defendant's waiver was knowing and intelligent. *See Bostic*, 148 P.3d at 254; *Al-Yousif*, 49 P.3d at 1169; *Mejia-Mendoza*, 965 P.2d at 781-82.

III. Involuntary Intoxication Instruction

Defendant asserts the trial court erred in failing to instruct the jury on the affirmative defense of involuntary intoxication. We are not persuaded.

A. Standard of Review

To submit an affirmative defense of involuntary intoxication to the jury, a defendant must present "some credible evidence" of the condition. *People v. Garcia*, 113 P.3d 775, 783 (Colo. 2005). Whether a defendant has met the burden of going forward is a question of law. Accordingly, our review is de novo. *Id.* at 784.

B. Law

Section 18-1-804(4), C.R.S. 2010, defines intoxication as "a disturbance of mental or physical capacities resulting from the introduction of any substance into the body." A person is involuntary intoxicated "when he or she takes a substance pursuant to medical advice, does not know that he or she is ingesting an intoxicant, or ingests a substance which is not known to be an intoxicating substance." *Id.* at 780. If a person is involuntarily intoxicated, that person cannot be criminally responsible for his or her conduct. *See* § 18-1-804(3), C.R.S. 2010; *Garcia*, 113 P.3d at 780.

To justify submission of an instruction on the affirmative defense of involuntary intoxication to the jury, a defendant must offer some credible evidence showing: (1) the introduction of a substance into the body; (2) which was not known to be an intoxicant, which the defendant did not know could act as an intoxicant, or which was taken pursuant to medical advice; (3) that caused a disturbance of mental or physical capacities; and (4) that resulted in the defendant's lack of capacity to conform his or her conduct to the requirements of law. *Garcia*, 113 P.3d at 783.

C. Application

Here, although defense counsel told the jury during opening statements that, after defendant switched seizure medications in July 2006, his "perception," "thinking," and "judgment" changed, opening statements are not evidence. *See People v. Davis*, ___ P.3d ___, ___ (Colo. App. No. 07CA1320, May 27, 2010) (*cert. granted* Dec. 20, 2010). Accordingly, to the extent defendant relies on this language in opening statements to support his contention that the trial court should have given an instruction on involuntary intoxication, we will not consider that source.

Defendant's wife testified that defendant began taking the medication Topamax approximately two months before the killing, and that after he began taking the new medication he was "quieter, was "distracted," and "would forget things." She stated further that he was pensive and depressed, adding, "[A]t times he [would] ask me a question and then, right after, he would ask me the same question, like he didn't ask me before."

In rejecting defendant's request for a jury instruction, the trial court found the following:

> I've been reading the *People v. Garcia* case while listening to counsel and reviewing the four-pronged test stated in *Garcia* for sending such an issue to the jury for its consideration.
>
> First of all, as the Court notes, the defendant must offer proof which constitutes some credible evidence of the condition, and that credible evidence has to show four things: 1) the introduction of a substance into the body. We do have that. This was a substance that was introduced in the body starting sometime two to four months prior to the occurrence here; 2) which is not known to be an intoxicant or which the defendant did not know could act as an intoxicant or which was taken pursuant to medical advice. We have the last prong was taken pursuant to medical advice.
>
> The third prong is caused a disturbance of mental or physical capacities. There's no evidence this caused a disturbance of his capacities. He continued to work. He continued to do his normal everyday activities and was doing so on the morning of this [incident].
>
> And resulted in the defendant's lack of capacity to conform his or her conduct to the requirements of law. There's no credible evidence, even some credible evidence, that he has the lack of capacity to conform his conduct to the requirements of law.

Garcia defines "disturbance" as "any departure from normal," and "disturb" as "to break in on; interrupt." 113 P.3d at 783 (quoting *Webster's New World College Dictionary* 399 (3d ed. 1996)).

Based on the wife's testimony, we conclude that defendant presented some evidence of a disturbance of his mental capacities. However, like the trial court, we fail to see how her testimony provided some evidence indicating that the disturbance resulted in defendant's lack of capacity to conform his conduct to the requirements of the law. Moreover, defendant admitted during his police interrogation that he did not tell anyone of his plans to kill his coworker because if he had, then "they [would have] call[ed] the police." This indicates that he had the capacity to understand that his plan did not conform to the requirements of the law.

Defendant's reliance on *People v. Turner*, 680 P.2d 1290 (Colo. App. 1983), for a different result is misplaced. In *Turner,* the defendant argued that his intoxication was involuntary because he had not been warned of the side effects of his migraine medication, and his past experiences with the drug led him to believe only that the medication would cause him to become fatigued or sleepy. He stated that he felt "foggy," he lacked physical coordination, his vision was abnormal, and he did not know where he was or what he was doing during most of the evening of the offense. 680 P.2d at 1291-92.

Here, in contrast, defendant did not provide evidence that he was not warned of potential side effects or that his past experience with the drug led him to believe he would experience particular symptoms. Furthermore, there is no indication that defendant did not know where he was or what he was doing at the time he committed the offense.

Accordingly, the trial court did not err in denying defendant's request for an involuntary intoxication instruction.

The judgment is affirmed.

JUDGE LOEB concurs.

JUDGE FOX concurs in part and dissents in part.

JUDGE FOX concurring in part and dissenting in part.

I join the portion of the majority decision addressing the affirmative defense of involuntary intoxication. Because the prosecution did not carry its burden of proof to show that defendant's *Miranda* waiver was made "knowingly and intelligently," *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), I must dissent.

The United States Supreme Court supplies the requisite warnings that must be provided to an accused before any questioning:

> [T]he person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has *a right to the presence of an attorney, either retained or appointed.*

Id. (emphasis added); *accord People v. Jiminez*, 863 P.2d 981, 984 (Colo. 1993).

The prosecution has the burden of proving waiver by a preponderance of the evidence. *People v. May*, 859 P.2d 879, 882 (Colo. 1993). The validity of a waiver is determined, in part, by whether it was made with a full awareness of the nature of the right being abandoned and of the consequences of the decision to abandon it. *Id.*

On the record before us, and concerning the limited issue of defendant's right to counsel, I conclude defendant could not have "knowingly and intelligently" waived a right he did not understand.

In reaching my conclusion, I rely on *People v. Aguilar-Ramos*, 86 P.3d 397 (Colo. 2004), where our supreme court determined that language problems between a Spanish-speaking suspect and an officer precluded the defendant's ability to understand his *Miranda* rights and to sufficiently waive them. In that case, the defendant was picked up by the police in connection with a kidnapping and sexual assault. *Id.* at 398. A detective presented the defendant with a printed *Miranda* rights form in Spanish and read the defendant his rights in Spanish. The detective asked the defendant if he understood those rights. *Id.* The defendant asked, "What does it mean yes. If I want my attorney . . . . How . . . how . . . can I put down here?" *Id.* at 398-99. The detective responded, "O.K. The . . . question is, do you understand these rights that I have explained. Answer yes or no." *Id.* at 399. The defendant then made incriminating statements that he later sought to suppress.

According to a certified court interpreter, the detective's lack of proficiency in Spanish rendered him unable to effectively

communicate with the defendant. *Id.* He told the accused he had the right to "carry" silent, rather than the right to "remain" silent, used a word with two meanings in describing the right to counsel, and failed to respond to the defendant's question regarding the right to have counsel present. *Id.* Further, the detective had received only one or two years of Spanish language instruction during high school, conceded that during the interrogation he had struggled with several words, and did not hear the defendant's request for information about how to obtain an attorney. *Id.* In addition, the defendant had only three years of schooling in Mexico, had been in the country illegally for only fifteen days when he was arrested, was fearful that the police would beat him, and claimed he had not understood the warnings read to him. *Id.* at 399-400.

The trial court ordered suppression of these statements. *Id.* at 402. The supreme court agreed, noting that although the defendant frequently responded "yes" when asked if he understood his rights, he also interjected "yes" or "yeah" throughout the reading of the *Miranda* form and at other inappropriate moments, such that his affirmation could not be taken as a serious indicator of comprehension. *Id.* Considering the totality of the circumstances

surrounding the interrogation, the court concluded that the defendant did not understand his rights sufficiently to waive them. *Id.*; *see also People v. Mejia-Mendoza*, 965 P.2d 777, 781-82 (Colo. 1998) (affirming a lower court ruling granting the motion to suppress the statements of a Spanish-speaking defendant who was charged with murder, where the officer providing the *Miranda* warning acknowledged that Spanish was not his first language and where there were too many errors and ambiguities, and too much confusion to save the *Miranda* warning and make it effective).

Here, Sanchez made it clear that he was concerned that an attorney would be expensive. New Mexico State Police Officer MM, who interrogated Sanchez, agreed that the lawyer would want money for his services. Although he mentioned, in a rapid and cursory manner, that one could be assigned, he obtained no assurance that Sanchez understood either the word "assigned" or the American concept of court-appointed counsel. The concept of a court-appointed counsel is a foreign notion to a non-English-speaking, unsophisticated person. *See, e.g., People v. Redgebol*, 184 P.3d 86, 98 (Colo. 2008). The officer could have easily cured the deficiency by simply asking Sanchez whether he understood

what "se le assignará" (which the officer used for "will be assigned") meant, and explaining as necessary, right after he said those words and before he proceeded to interrogate Sanchez. *See, e.g.*, *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

As Sanchez's counsel pointed out during the suppression hearing, and as the record, including a video-tape of the interrogation, reflects, there are numerous mistakes in the translation. *See People v. Al-Yousif*, 49 P.3d 1165, 1169-71 (Colo. 2002) (conducting a de novo review of a video-taped examination in assessing whether a *Miranda* waiver was "knowing and intelligent"). Although Sanchez may have understood the other components of the *Miranda* warning, the record does not reflect that the prosecution met its burden of proving that Sanchez understood "that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444. Sanchez knew he could hire one – although the expense was clearly an issue for him – but the prosecution failed to meet its burden of showing that Sanchez understood that the court would provide an attorney if he could not afford one, and, with that understanding, knowingly waived the right.

The "one will be assigned" warning given here provided much less information than the warnings given in other jurisdictions. These jurisdictions have concluded that non-English-speaking criminal suspects had not validly waived their *Miranda* warnings, thus rendering their custodial statements inadmissible, where those warnings were administered in their native language but in a constitutionally faulty manner. *See United States v. Perez-Lopez*, 348 F.3d 839, 848-49 (9th Cir. 2003) (concluding that Spanish *Miranda* warnings were defective where they failed to inform the suspect that he could receive an appointed attorney if he was indigent and emphasizing that thoroughness and clarity are especially important when communicating with uneducated defendants); *United States v. Higareda-Santa Cruz*, 826 F. Supp. 355, 359-60 (D. Or. 1993) (finding the advisement pertinent to the appointment of counsel faulty where the Spanish *Miranda* rights card was probably written by a person who knew Spanish only as a second language and, as translated, the card stated, "In case that you do not have money, you have the right to petition an attorney from the court."); *People v. Diaz*, 140 Cal. App. 3d 813, 822, 189 Cal. Rptr. 784, 789 (1983) (holding that a warning, administered in

Spanish, stating that "[i]f you cannot get a lawyer, one can be named before they ask you questions," did not comply with *Miranda* because the defendant was never advised that he had the right to appointed counsel if he could not afford one).

Moreover, the record reflects that the police officer who provided the *Miranda* warning was not schooled in Spanish, although he learned Spanish in the home. The district attorney himself volunteered that the officer was not a certified interpreter. The record also suggests that Sanchez, who spoke only Spanish, was uneducated. There was no evidence that he had prior experience with U.S. law enforcement. *See Kaiser*, 32 P.3d at 484 (experience with the criminal justice system is relevant, as is the defendant's age, experience, education, background, and intelligence); *see also Redgebol*, 184 P.3d at 98 (recognizing that cultural differences can affect the validity of a *Miranda* warning).

Sanchez's counsel repeatedly objected to the effectiveness of the officer's efforts to translate the *Miranda* warnings into Spanish. At the suppression hearing Sanchez's counsel cross-examined the interrogating officer about multiple errors in the translation. Defense counsel even suggested that the trial court examine the

transcript and the DVD recording of the interrogation, but because the trial judge did not speak Spanish, the trial court could not assess the translation.

In addition to the language errors specifically highlighted by defense counsel, there are other significant errors – errors that rendered the interrogating officer's later testimony inaccurate. I cannot ignore the errors, or the deficient *Miranda* warning, especially because appellate courts have an enhanced role in examining a trial court's application of law in the arena of constitutional rights. *See Al-Yousif*, 49 P.3d at 1169; *People v. Matheny*, 46 P.3d 453 (Colo. 2002).

On the record before us, I find error in the trial court's legal determination that Sanchez's waiver was knowing and intelligent. Sanchez could not waive a right he did not understand. I would reverse.