IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

ARTHUR LEE SEWALL, JR.,

Respondent.

CASE NO: 79437

APPELLANT'S OPENING BRIEF

Appeal From Grant of Motion to Dismiss
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. ARTHUR LEE SEWALL, JR., Respondent.	CASE NO: 79437

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JURISDICTIONAL STATEMENT

NRS 177.015(2) provides jurisdiction to entertain an appeal from the grant of a suppression motion.

ROUTING STATEMENT

Routing of this appeal is submitted to the Supreme Court's discretion, as NRAP 17 expresses no presumption of retention or assignment to the Court of Appeals in an appeal from the granting of a motion to dismiss.

STATEMENT OF THE ISSUE

1. Whether the District Court erred in granting Respondent's Motion to Suppress Illegally Obtained Statements.

STATEMENT OF THE CASE

The State charged Arthur Sewall (hereinafter referred to as "Respondent") with Murder with Use of a Deadly Weapon by way of Indictment on March 16, 2018. I Appellant's Appendix ("AA") 1-3. Respondent moved to suppress his confession on October 19, 2018. I AA 67-88. Then, the State opposed on November 21, 2018. I AA 89-175. Respondent replied on December 21, 2018. I AA 176-99. On January 18, 2019, and March 8, 2019, the District Court held a Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964) hearing. I AA 197 – II AA 343. After the hearing, Respondent supplemented his Motion to Suppress Illegally Obtained Statements on May 21, 2019. II AA 344-66. The State opposed on June 10, 2019. II AA 367-83. On June 13, 2019, July 11, 2019, and August 20, 2019, the District Court held hearings related to Respondent's request to suppress his statement. II AA 384-402. Then, the District Court verbally ruled on Respondent's motion on August 20, 2019. II AA 398.

On August 20, 2019, the State filed Notices of Appeal within the District Court and this Court. Then, on September 16, 2019, the District Court issued an order suppressing much of Respondent's voluntary statements. II AA 403-10. According to the Order, the District Court properly determined that Respondent's statements were voluntary, and that Respondent did not invoke his right to an

attorney. II AA 409. However, the District Court granted the Motion to Suppress on the narrow issue that Respondent was entitled to his Miranda warnings because Respondent reasonably believed he was going to jail and that the Detectives failed to correct his statements. Id. Therefore, the District Court excluded his statements made after page 39 of the surreptitious recording. II AA 409.

On October 4, 2019, the State filed its Point and Authorities in Support of Propriety of Appeal. Respondent filed his Opposition on October 17, 2019. On November 7, 2019, this Court filed an Order Directing Full Briefing after exercising its discretion to entertain this appeal.

STATEMENT OF THE FACTS

The State's opposition to the motion to suppress summarized the largely undisputed underlying facts of the case as follows:

> On May 8, 1997, at approximately 9:42 am, Nadia Lynn Iverson was discovered on the cement floor of a duplex unit under major renovation at 1226 Reed Place, Las Vegas. The unit's walls had been stripped down to the framing studs and openings for doors and windows were not entirely covered, leaving the unit unsecured. The majority of the other duplexes in the Marble Manor complex were in much the same state. Homicide Detectives Chandler and Hardy responded to the scene, as well as Crime Scene Analyst Yolanda McClary.
>
> A spent .357 projectile was recovered on the floor in the unit. However, no cartridge case was found, suggesting that the murder weapon could have been a revolver.
>
> It appeared that Nadia had been shot at that location as there was a large amount of blood pooled under her body and the bottoms of her bare feet were covered in the fine, gray dust and no blood. Nadia's

pants had the same dust on both knees. She also had abrasions to her forehead and nose.

On May 9, 1997, Deputy Medical Examiner Dr. R. Bucklin performed the autopsy on the body of Nadia Iverson and determined the cause of death to be a gunshot wound to the back of her head. Dr. Bucklin indicated that the shot in the back of Nadia's head was a contact wound with the bullet traveling upward toward the front of the head and exiting in the vicinity of the left eyebrow. Dr. Bucklin determined the manner of death to be homicide. A sexual assault kit was administered by Crime Scene Analyst McClary during the autopsy.

During the initial investigative stages, detectives learned Iverson had been in Las Vegas for only a few months. She drove out from Pennsylvania with her boyfriend Gregory Viaslisin in late January or early February 1997. Once here, they both fell into using drugs. When Viaslisin went to jail, Iverson had to fend for herself, resorting to prostitution to acquire drugs. It appears all of her time in Las Vegas was spent in and around the area of Downtown/Fremont Street.

In March 1997, Las Vegas Metropolitan Police Officer Arthur Sewall resigned from the police department as criminal charges against him were imminent. Sewall was accused of coercing downtown area prostitutes into having sex with him in exchange for his overlooking drug or paraphernalia issues and not taking his victims to jail in exchange. Some of the sexual encounters occurred after Sewall's shift had ended and he was in his own clothes and vehicle. He also was caught on video extorting sex after being set up by internal affairs.

Sewall was originally charged with First Degree Kidnapping, Sexual Assault, and Oppression Under Color of Law. After a preliminary hearing, Sewall ultimately pled guilty to two counts of Oppression Under the Color of Law, received five years of probation and a short jail sentence. As part of his probation intake, Sewall provided Parole & Probation officials with a DNA sample.

On July 28, 1999, Sewall was arrested by the San Diego Police Department after soliciting an undercover female detective on the street for sex. Impounded from Sewall's vehicle upon his arrest was a Ruger .357 revolver with serial number 571-87579. Sewall also had his Metro gun registration card for this same weapon which contained additional descriptive information that the gun was a model SP-101, chrome in color with a 3 inch barrel. This gun was destroyed by the San Diego

> Police Department years later. This same revolver had been impounded from Sewall for safekeeping in 1995 when Metro responded to a domestic disturbance call involving Sewall. It was later released back to him. Sewall's 1999 San Diego arrest resulted in his probation being revoked. He was sent to prison to serve out the remainder of his sentence.
>
> In April 2017, Metro Forensic Scientist Anya Lester examined the expended bullet recovered on the cement floor at the scene. She determined the bullet to be consistent with a .357 but not to the exclusion of a .38 or 9mm bullet. Other screening factors favor the bullet being a .357. The bullet passed through Iverson's head, which also suggests a powerful cartridge. Anya Lester was also able to provide a list of common firearms manufactured with rifling characteristics similar to those present on the bullet to include, but not limited to, INA, Ruger, Smith & Wesson and Taurus.
>
> On April 4, 2017, detectives received a CODIS Hit Notification Report of a match between Sewall's DNA and the suspect DNA found on vaginal and rectal swabs taken at Nadia's autopsy and from the interior surface of the buttock area of Nadia's pants.
>
> On April 12, 2017, detectives surveilled Sewall as he discarded some chewing tobacco from his mouth onto the ground. They recovered the chewing tobacco and it was later impounded to be used as the surreptitious standard for Sewall during later comparisons. On June 1, 2017, Forensic Scientist Cassandra Robertson examined the DNA evidence in this case. She identified Sewall's DNA found on the vaginal and rectal swabs taken from Iverson at autopsy. His DNA was also found in a stained area on the inside buttock area of Iverson's pants.

I AA 90-92.

On January 11, 2018, Respondent arrived at his apartment complex when two Reno police officers approached him and introduced themselves as officers. I AA 202-3. They also mentioned that there were some Las Vegas Investigators that wanted to talk to Respondent. Id. At that moment, Cold Case Investigators Hefner

and O'Kelley approached, introduced themselves, and asked if Respondent would willingly accompany them to the Reno police station. I AA 204. The Investigators were willing to comply with any request to have the conversation at Respondent's apartment. I AA 223. However, Respondent voluntarily accompanied the Reno police officers to their station. I AA 204. Even though Respondent rode in a vehicle with the officers, he rode in the front passenger seat. I AA 204.

While at the station, Respondent was placed in an interview that was typically used for interviewing victims. There was a couch and some toys in the room. I AA 47. One Investigator described the room as "soft" in comparison to "hardened rooms" where a suspect is normally handcuffed to the table. II AA 301. During the interview, Respondent was closest to the exit, and the Investigators sat across from him. I AA 48. When Respondent was brought to the station, and while he was in the interview room, he was never placed in handcuffs nor formally under arrest. I AA 115.

The Investigators were clear with Respondent that he was free to leave at any time. I AA 106-107. At any point during the conversation, Respondent had the ability to say that he was done, especially if he felt uncomfortable. I AA 116. Moreover, Respondent was never prevented from leaving, nor were any weapons drawn upon him during the entirety of the interview. II AA 266, 303.

At one point during the questioning, Respondent stated that it was from his perspective that he would be "layin' up in a jail cell" that night. I AA 142. The Investigators were honest when they responded that the Reno officers had the ability to arrest him, but only because Respondent failed to register as an ex-felon. Id. The Investigators also explained to Respondent that the decision to arrest him was of the sole discretion of Reno, as Respondent was in their jurisdiction. I AA 142, II AA 310. Moreover, the Investigators were not sure if Respondent was going to be arrested for this separate charge, as they did not work for the Reno Police Department. I AA 216. Still, Respondent was free to leave when he confessed to,

> engaging Iverson in sex for money. During their sexual encounter, Iverson was shot. [Respondent] could not account for why his gun was out or pointed at Iverson. He knew she was shot in the head and he immediately fled the scene.

I AA 92. Additionally,

> [a] buccal swab was obtained during the interview and a confirmatory DNA match was later found with the evidence from autopsy and Nadia's clothing.

Id.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Respondent's Motion to Suppress Illegally Obtained Statements. First, Respondent was not in custody when he began

to make comments about possibly going to jail on the night of the questioning. The record shows that Respondent was free to leave at any point in time during the questioning. Additionally, the Investigators were honest when they informed Respondent about a potential misdemeanor charge stemming from his failure to register. Since the Investigators had no jurisdiction or decision-making authority to arrest Respondent, he was still free to terminate the questioning and leave the room.

Second, the Investigators never denied Respondent an opportunity to call his wife or family. According to the testimony at the Jackson v. Denno hearing, it was not clear if Respondent wanted to make a phone call before or after giving a statement. However, as the interview progressed, Respondent clearly desired to make a phone call after making a statement.

Finally, the remaining factors in determining custody tip in favor of the State. The site of the interrogation was not intimidating and was not a traditional suspect interrogation room. Next, Respondent confirmed that he was at the station voluntarily and was never denied the opportunity to leave. Additionally, Respondent confirmed that the Investigators were pleasant towards him and were not intimidating. Moreover, Respondent was never formally arrested prior to the questioning, nor was he immediately arrested for the allegations in this case. Accordingly, Respondent was not in custody when he gave his confession and the

District Court erred in granting Respondent's motion, in part, as to statements made after page thirty-nine (39) of the Surreptitious Report. Therefore, the District Court erred and reversal is warranted.

ARGUMENT

I. THE DISTRICT COURT ERRED IN SUPPRESSING RESPONDENT'S STATEMENT BECAUSE RESPONDENT WAS NOT "IN CUSTODY"

When Respondent confessed to the underlying crime, he was never "in custody" for purposes under Miranda v. Arizona, 384 U. S. 436 (1966). Based upon analysis of several factors, the scales tip in the State's favor and the District Court erred in determining that Respondent was not "free to leave".

To comport with the Fifth Amendment to the Constitution of the United States, and the right against self-incrimination contained therein, an individual must be given Miranda warnings before his statement may be used against him in the State's case-in-chief. Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005). However, this requirement only applies when the individual is subject to custodial interrogation. Id. Absent custody, no Miranda warnings are needed. Id. "'Custody' for Miranda purposes means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel at liberty

to terminate the interrogation and leave." Id. (quoting Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 465 (1995)) (internal quotation marks omitted); see also Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) overruled in part by Rosky, 121 Nev. at 190, 111 P.3d at 694.

"[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review." Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). In Carroll, the court explained how it reviews such inquiries:

> The proper inquiry requires a two-step analysis. The District Court's purely historical factual findings pertaining to the "scene-and action-setting" circumstances surrounding an interrogation [are] entitled to deference and will be reviewed for clear error. However, the District Court's ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo....
>
> For this standard of review to function properly, "trial courts must exercise their responsibility to make factual findings when ruling on motions to suppress."

Carroll v. State, 371 P.3d 1023 (2016); quoting Rosky 121 Nev. at 190-91, 111 P.3d at 694-95 (quoting In re G.O., 191 Ill. 2d 37, 727 N.E.2d 1003, 1010, 245 Ill. Dec. 269 (Ill. 2000)). Moreover, where "the trial court's determination that a defendant was not improperly induced to make the statement [to police] is supported by substantial evidence, . . . such a finding will not be disturbed on appeal." Id., quoting Barren v. State, 99 Nev. 661, 664, 669 P.2d 725, 727 (1983).

"Miranda warnings are "required when a suspect is subjected to a custodial interrogation." Archanian v. State, 122 Nev. 1019, 1038, 145 P.3d 1008, 1021 (2006). A defendant is "in custody" for purposes of Miranda if he or she has been formally arrested or his or her freedom has been restrained to "the degree associated with a formal arrest so that a reasonable person would not feel free to leave." State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998).

"Custody is determined by the totality of the circumstances, 'including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of the questioning.'" Carroll, 371 P.3d at 1032, citing Taylor, 114 Nev. at 1081-82, 968 P.2d at 323. Importantly, an "individual is not in custody for Miranda purposes if the Police are merely asking questions at the scene of the crime or where an individual questioned is merely the focus of a criminal investigation." Carroll, 371 P.3d at 1032 (internal citations omitted).

A. Site of Interrogation

This Court has determined that the site of interrogation is a relevant factor for the determination of whether or not an individual is "in custody". Most recently, in Carroll, this Court discussed distinctions between the circumstances of Carroll, where the court found a suspect was in custody, and those in Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997), where the court found a suspect was not in custody.

This Court recognizes that the mere fact of questioning a suspect in a Police station "does not automatically mean that [a suspect] was in custody." Silva, 113 Nev. at 1370, 951 P.2d at 594. Instead, the length of time of the questioning, whether the Police withheld food or drink from a suspect, or made promises to the suspect; all of which are factors which can indicate custodial status. Id. at 1370, 951 P.2d at 594. The position of the parties in the interview room relates to whether a suspect is in custody for the court. If the room is small and the suspect is the furthest from the door, the "environment" suggests custody, according to the court. Carroll, 371 P.3d at 1032. In addition, if detectives do not allow an individual to use their phone or refuse to let them leave upon request to do so, the individual is more likely to be deemed in custody for purposes of Miranda. Id. Finally, if detectives promise to investigate aspects of a suspect's claim, it is suggestive of custodial status, according to the court. Id.

In the instant case, the questioning of Respondent lasted approximately two (2) hours. II AA 273, 302. Next, when the Investigators and Respondent first sat down, the Investigators asked Respondent to turn off his cellphone. I AA 213, 303. However, Respondent was able to keep his phone on his person. Id. Additionally, the Investigators turned off their personal cellphones so that they would not be interrupted. I AA 213. This is common during questioning, because even when

phones are on silent, they can still vibrate and cause noise. I AA 214. Moreover, during the questioning, Respondent was never denied food or water.

Focusing on the interview room itself, the room was structured as more of an "office waiting area" instead of a suspect interrogation room. During the Grand Jury hearing, Investigator O'Kelley testified that the room was one used for interviewing victims. I AA 47. Inside the room were some toys, a couch, and the room was designated to make a person feel comfortable. Id. This description of the room was confirmed at the Jackson v. Denno hearing. I AA 206.

Investigator Hefner stated the interview room was not a "hardened room". II AA 301. Typically, "hardened rooms" had a table where a person could be handcuffed to said table or to the side of the room. Id. The room Respondent was in was more of a "soft interview room where [the Reno Police Department did] sensitive interviews of, maybe, young victims of crimes or family members…" Id. Moreover, the placement of the Investigators and Respondent was not one that would suggest that Respondent was in custody. Investigator O'Kelley stated that himself and Investigator O'Kelley were sitting opposite from the door at a round table. I AA 48. Respondent was closest to the door nor was he handcuffed to the table. Id. compare with Carroll v. State, 132 Nev. 269, 282, 371 P.3d 1023, 1032

(2016) (This Court noted that the room was "very small', that Carroll was placed furthest from the exit.).

The fact that the interview took place at the Reno Police Department Station does not support a finding that Respondent was "in custody" for purposes of Miranda. In Silva v. State, this Court analyzed California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517(1983). The court in Beheler held that, "Miranda rights need not be provided simply because the questioning took place at the police station or because [defendant] was the person the police suspected of the crime." Beheler at 1125, 103 S.Ct. at 3520. Moreover, the Beheler Court noted that the defendant had voluntarily accompanied the Police to the station. Id. at 1123, 103 S.Ct. at 3519. Additionally, this court noted that the defendant in that case was informed, at the very beginning of when Silva gave his statement, that he was not under arrest. Silva, 113 Nev. 1365, 1370, 951 P.2d 591, 594 (1997). Therefore, this Court determined that Silva was not in custody at that particular moment. Id. This case is applicable to the one at hand, and for the reasons stated above, Respondent was not in custody.

Turning next to an issue brought up in the underlying pleadings, Respondent claims that the Investigators denied his request to call his wife. This assertion is belied by the record and transcripts as Respondent fails to understand the context surrounding this request. Respondent indicated to the Investigators that he wanted

to call his wife, but he was not clear as to whether he wanted to call before or after making a statement.

> A: I need to talk to my wife. Is that possible? Because once again and the way that I see this scenario playing out – I'm going to end up in a jail cell tonight.
> Q: What – n- now you're sayin'…
> A: Even though I'm here voluntarily…
> Q: Right. But to say to talk to your wife before you talk to us or I'll give – I'll give you my cellphone and you can tal (unintelligible) – or use or you got your own (unintelligible) – that is an absolute promise that you'll get to talk to her. Nobody's gonna be hooking and booking you without lettin' you be, you know, treated decently.
> …
> Q: …The guarantee with you is that you get that opportunity to talk with your wife about it regardless. I promise. As a man, I promise.

I AA 145-6. As the conversation progressed, it was clear that Respondent meant to call his wife after making a statement.

> Q1: Are you sayin' that you'd like to talk to you wife before you go on – before you make any decision? I mean the only issue, I mean, Dean's right, we'll let you talk to your wife. Uh, we'll let you w- talk to your wife quite a bit after we're done. Um...
> Q: We're not gonna put a time limit.
> Q1: I - the only reason I mention - I'm saying anything right now about that and your wife is that (unintelligible) that's hit her - w- what's...
> A: Well it's gonna hit her like it's hitting me.
> Q1: Yeah - yeah and I don't think she's gonna be able to - to give you much help. I think she's just gonna add to your - your stress and your burden right now. You follow what I'm saying?
> A: I understand what you're saying.
> Q: Yeah so let - let's get it over and done with and there's no, I mean, literally not a time limit on how much time you (unintelligible)

> talk with her. We'll let you do that. And that's simple. I mean, again the date, time, location, who's present and (unintelligible) we'll just let you explain it. And we won't even interrupt you unless we think we need to interrupt you. We're gonna let you lay it out.

I AA 146-8. Even though one of the Investigators testified that he did not wish for Respondent to use his phone before making a confession, it does not negate the fact that the Investigators denied him the ability to make a call. II AA 261. State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998); See Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). As shown *supra*, the case at hand is distinguishable and the site of the interrogation does not indicate that Respondent was in custody.

B. Objective indicia of arrest.

This Court has stated that the objective "indicia of arrest" comprise of the following:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Carroll, 371 P.3d at 1033, *citing* Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1.

According to State v. Taylor,

> An individual is not in custody for purposes of *Miranda* where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process,[1] or where the individual questioned is merely the focus of a criminal investigation.[2]

114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998). Additionally, the Police Officer's or suspect's subjective view does not determine if the suspect is in custody. Id. at 1082, 968 P.2d at 323; See Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

i. Respondent voluntarily accompanied the Investigators, was free to leave at any point, and was not under a formal arrest.

First, Respondent confirmed that his presence and his responses were voluntary. I AA 115, 145. Moreover, even though Respondent rode in a vehicle with Reno Police Officers, one Investigator testified that Respondent rode in the front passenger seat. I AA 204. Next, Respondent was not forced to have a discussion at the station. As confirmed by one of the Investigators, if Respondent wanted to have the discussion at his apartment, the Investigators would have accommodated that request I AA 223. Additionally, Respondent understood that if he did not want to

[1] See Garcia v. Singletary, 13 F.3d 1487, 1489 (11th Cir.1994).
[2] See United States v. Jones, 21 F.3d 165, 170 (7th Cir.1994).

speak with the Investigators at any point, all he had to say was "I'm done talking". I AA 126.

Second, the Investigators informed Respondent that he was free to leave on numerous occasions throughout the questioning. During the initial questioning, one of the Investigators stated, "this is all voluntary and you get tired of it or you wanna go, you know, you just let us know and we've got to accommodate it." I AA 106-7. Then later in the interview, the Investigator made it again clear that, "my partner told you that if you feel uncomfortable, like, we're, you know, tryin' to twist your words or do whatever and you feel like you're done then…" I AA 116. Additionally, Respondent was not formally under arrest, nor was he placed in handcuffs. I AA 115.

Next, the District Court did discuss its concerns with Respondent making statements regarding spending the night in jail. According to the District Court, the sole factor that weighed in favor for the defense was the issue of the misdemeanor warrant and that the Investigators mentioned said warrant.[3] II AA 393. Within the

[3] The State notes that the District Court also found that the following factors weighed in favor of the State to show that Respondent was not in custody. First, when the Officers had their first encounter with Respondent, it was at his apartment so he was not in custody. II AA 392. Next, the District Court stated that there was nothing coercive or custodial about the interview room; the court went as far as to call it "pleasant". Id. Then, the court noted that Respondent was able to keep his phone. Id.

Order Granting in Part Respondent's Motion to Suppress Statement, the District Court concluded:

> [Defendant] was entitled to his *Miranda* warnings because he stated that he reasonably believed he was going to jail and Detectives failed to correct his statement. Defendant first stated that he believed he was going to jail that night at page 39 of the surreptitious record. Instead of contradicting him, Detectives told him that Reno police could arrest him for his failure to register as an ex-felon.

II AA 409.

The Investigators could not offer any contradiction or confirmation that Respondent would be arrested at the conclusion of the interview. The Investigators were honest that they were not sure what would happen as they did not work for the Reno Police Department. I AA 216. Moreover, Respondent was properly informed that there was a possibility, but the Investigators could not be sure. I AA 216. Additionally, Investigator Hefner explained that the decision whether to arrest Respondent, or not, was the sole discretion of the Reno Police Department. I AA 142; II AA 310. Respondent was in their jurisdiction. II AA 310. To answer otherwise, or give incorrect assurances, would have been deception on the Investigator's part.

Moreover, there was no evidence produced as to when the Reno Police Department made the decision to arrest Respondent. The testimony produced at the evidentiary hearing was that during a briefing session prior to the questioning, the

Reno Police Department understood it had the ability. I AA 223. However, it was never made clear as to when that warrant was created or when Respondent would be arrested. Id.

Additionally, the Investigators were clear that if Respondent gave a confession, he would go to jail that night. I AA 151. However, Respondent was still free to leave because he could make the conscious decision to not give a confession and then exit the interview room. At no point did Respondent convey that he wanted to leave. Accordingly, at no point during the questioning was Respondent under arrest.

Furthermore, no one would have reasonably believed that they were under arrest or not free to leave if placed within Respondent's situation. In People v. Minjarez, 81 P.3d 348 (Colo. 2003), the Supreme Court of Colorado was presented with a situation where the Detective in that case obtained an arrest warrant for the defendant and had a plan to execute the warrant upon arrival at the defendant's location. Id. at 351. Upon meeting the defendant at the local Children's Hopsital, the Detectives first spoke with defendant in an interview room. Id. Instead of arresting the defendant before questioning, the Detective waited until after defendant made his confession. Id.

The Supreme Court of Colorado stated that they had made it clear that,

> A court may not rest its conclusion that a defendant is in custody for *Miranda* purposed upon a "a policeman's unarticulated plan."[4] In other words, a police officer's knowledge, intentions, or beliefs are only relevant to a custody determination to the extent that they affect how a reasonable person in the defendant's position would evaluate his situation. *See id.* The mere existence of an arrest warrant, a police officer's undisclosed plan to take a suspect into custody, or a police officer's firm but unstated belief in the defendant's culpability do not, by themselves, establish that a defendant is in custody for *Miranda* purposes.[4] These factors are relevant "only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Id.* at 464–65, 86 S.Ct. 1602 (quoting *Stansbury,* 511 U.S. at 325, 114 S.Ct. 1526).

Id. at 353–54. The Supreme Court of Colorado determined that the:

> trial court overemphasized the legal significance of the warrant" and that the trial court made the incorrect finding that "because the officers had a warrant in their possession that they intended to execute that evening, their testimony that they would 'allow the Defendant to leave the room any time he wished and just arrest him later in incredible as a matter of law.'

Id. at 355. Ultimately, the court determined that the defendant was in custody, but this was based upon the significant amount of additional factors that led to the creation of a formal arrest. Id. at 357.

A case in Utah has a similar holding in respect to an officer's unexpressed intention to arrest a suspect after interrogation. See State v. Reigelsperger, 400 P.3d 1127, 1139-40. (Utah Ct. App. 2017), cert. denied, 20170579, 2017 WL 6804711

[4] People v. Matheny, 46 P.3d 453, 464 (2002); quoting *Stansbury v. California*, 511 U.S. 318, 323–24, 114 S.Ct. 1526 (1994).

(Utah 2017) ("In addition, the detectives' intent to arrest [defendant] had not been communicated to him…An unarticulated plan to arrest a suspect has no bearing on whether a suspect is 'in custody at a particular time…'"); quoting Berkemer v. McCarty, 46 U.S. 420, 442, 104 S.Ct. 3138 (1984).

Following this same line of logic, the fact that the Reno Police Department had the ability to arrest Respondent should bear little to no weight when considering the totality of the circumstances. The Investigators in this case could not say with certainty that Respondent was to be arrested, as Respondent was not in their jurisdiction at that time. Moreover, Respondent was still free to leave the interview room before giving his confession. Therefore, the record is clear that Respondent was free to leave at any point during the questioning and was voluntarily present at the station.

ii. Respondent was free to move, was never physically restrained, and was permitted to leave the room.

Respondent had the ability to move about freely in the room, as evidenced by the condition of the room. Even though Respondent did not take any breaks from the questioning, he still had the ability to make such request. I AA 214. Respondent was never prevented from leaving. II AA 266. At one point, Respondent even requested to use the restroom. II AA 302. Investigator Hefner accompanied him, but only

because he also had to use the restroom. Id. Still, there were no weapons drawn upon Respondent nor was he handcuffed. II AA 303.

iii. Respondent freely responded to questions.

Not only did Respondent voluntarily accompany detectives to the Police station, he voluntarily answered the questions. As noted *supra*, Respondent's responses were voluntary Respondent then answered the officer's questions freely. I AA 115, 145. These facts support a finding that Respondent was not in custody. Rosky, 121 Nev. at 193, 111 P.3d at 696.

iv. The atmosphere was not police-dominated and there was no use of strong-arm tactics.

The Investigators never raised their voices at or threatened the Respondent, which was confirmed when Respondent's confession was recorded:

> Q2: I also wanted to clarify Art, uh, would it be fair to say that we'd been decent with you? We haven't pressured you, we haven't intimidated you, yelled at you, been mean to you, threatened you in any way?
> A: That is correct.

I AA 172. This created an environment that was not police dominated.

Additionally, the Investigators did not engage in strong-arm tactics. The State first notes that the Investigators were honest about what potentially could happen with the misdemeanor warrant. Next, even though the Investigators suggested that there were jurisdictions that would test fire a firearm before destroying it, the

purpose of saying so was to inform Respondent the possibility that his weapon had been test fired. However, this should bear no weight about the determination of whether Respondent was in custody. See Oregon v. Mathiason, 429 U.S. 492, 495–96, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977) (Officer's false statement about discovering Mathiason's fingerprints at the scene had "nothing to do with whether respondent was in custody for purposes of the Miranda rule.")

v. Respondent was not arrested by the Las Vegas Metropolitan Police Department at the conclusion of the interview.

The only factor that weighed in favor of custodial status was that Reno Police Department Officers, after the interview, arrested Respondent on his failure to register as an ex-felon. Still, this was an arrest that was made independent from the facts of this case.

Respondent was taken into custody after he gave his confession, but this was not under the Las Vegas Metropolitan Police Department. I AA 215-6. Instead, the Reno Police Department took him into custody for being an ex-felon who failed to register as an ex-felon. I AA 216. This arrest was unrelated to the reason why Respondent was present in the first place. Based on an examination of all of the circumstances, Respondent was not in custody when he spoke to detectives. Therefore, the factors tipped in favor of the State for a finding that at no point during the questioning was Respondent in custody.

C. The Length of the Interview was Short and Form of the Questioning Methodical.

The length and form of the questioning also indicated that Respondent was not in custody. As stated *supra*, the interview was not long, and the questioning was methodical. II AA 273. The Investigators never threatened Respondent, which was confirmed during the voluntary statement. I AA 172. The discussion was not heated, and they were all having a conversation. I AA 246. Finally, unlike the defendant in Carroll, Respondent did not experience a series of questioners. At no time during the questioning were the Investigators aggressive. Therefore, the length and form of questioning also suggest that Respondent was not "in custody" for purposes of Miranda.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the District Court's grant in part of the Motion to Suppress Illegally Obtained Statements be REVERSED.

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Dated this 5th day of December, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,175 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of December, 2019.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 5, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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