IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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IN THE MATTER OF: E.S., A CHILD.

THE STATE OF NEVADA,

Appellant,

vs.

E.S., A CHILD,

Respondent

Case No.: 82614

OPENING BRIEF

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A. WHETHER THE ORDER SUPRESSING STATEMENTS SHOULD BE REVERSED AND THE MATTER REMANDED FOR FURTHER PROCEEDINGS

SYNOPSIS

Comes now the State and offers the attached Opening Brief to facilitate the position of the prosecution that the request to suppress the statements of E.S. was improvidently granted necessitating appellate review. It is the position of the prosecution that the suppressed statements are "substantially important" to the prosecution, and the court below should consider whether the statements were made knowingly, willingly, and voluntarily when making the decision whether to suppress the statements E.S. provided to law enforcement while at school.

STATEMENT OF THE CASE

The Petition alleging that E.S. committed a sexual assault was filed by the prosecution on December 12, 2019, AA 092, a little over three months after the incident occurred, AA 093, and two days after E.S. was interviewed by law enforcement. Originally E.S. had retained counsel. AA 095, 097-102. Daniel Martinez was appointed June 8, 2020, AA 112, necessitating a measure of time passage as a sampling of the filed pleadings reflect. AA 057-091, 112-118. This matter had been previously set for evidentiary hearing on more than one occasion, continued mutually by both sides, AA 108, 109, 116-118, and a motion to suppress

was not filed by the defense until January 4, 2021, AA 075-082. An opposition was filed January 28, 2021. AA 083-088. The juvenile court convened March 8, 2021 and the statements made by E.S. to law enforcement after being given his Miranda warning and agreeing to speak, specifically being advised he could have a parent present, were ordered suppressed by the court below. AA 057, 071.

On September 27, 2021 this Court found "Good Cause" for full briefing and ordered same. This Opening Brief follows.

STATEMENT OF THE FACTS

That the following occurred is uncontested: A juvenile female and male, E.S., had talked about having a sexual encounter with a specific day/time frame in mind. AA (the interview transcript was admitted by stipulation between the parties after a recording of the interview between E.S. and law enforcement was admitted without objection at the suppression hearing. AA 072, 073, 091) 004, 018, 019, 031. E.S. was supposed to have brought a condom. AA 004, 007, 014. "That – that's what you guys were planning about six months in. You're supposed to get condoms right?" "Yeah". AA 018, 019. At about 2:00 a.m. on the day/night in question E.S. "didn't want to have sex", he "didn't have a condom", and he was "too scared to keep going". AA 004.

Nevertheless, it is the position of E.S. that what transpired was completely consensual. She took her pants off, AA 033, she wanted him "in her", AA 021,

"she didn't revoke consent", AA 031, and she even performed oral sex on him, after the penile/vaginal penetration, to ejaculation, AA 014. Law enforcement asked E.S. about texting between he and the putative victim afterward, the victim texting "I told you no", and E.S. responding, "Well I already had consent so that doesn't matter", AA 025. E.S. did not remember that conversation "exactly", AA 026, his phone was "broken", was in his room, but he acknowledged that the victim would "probably" have those text messages on her phone. AA 026.

Once in the bedroom E.S. locked the door. AA 035. According to law enforcement during the interview a percipient witness heard "arguing" coming from the room, AA 005, which E.S. refuted. AA 005, 020. The witness said the victim sounded "mad and it sounded like you guys were arguing", AA 020, 028, and the witness "heard loud thuds". AA 028. E.S. acknowledged the witness telling him that she heard "thuds". AA 034.

The victim's position is that she was "raped". AA 005. He took her pants off, AA 033, which E.S. refutes. AA 033. Law enforcement told E.S. that the victim reported E.S. had "grabbed her hands and put 'em above her head". AA 032. He acknowledged her hands being above her head, but he never held "her hands". AA 032. E.S. admitted that the victim said "no", but he thought she meant "you can keep going just don't go farther." AA 009-013, 035. He acknowledged that although she said "no", he "already had consent". AA 010.

A.

The defense position is that it is a *per se* violation of *Miranda* for law enforcement to question a 15-year-old child outside the presence of a parent or guardian.

The defense position is, most specifically, that no fifteen-year-old child has the capacity to waive a *Miranda* warning ("No 15-year-old can do that. No, not one." AA 068) and be questioned by law enforcement without the presence of a parent/legal guardian. To do so is a *per se* violation of a proper *Miranda* application. The defense elaborated, "It's for **THAT** reason his rights were not knowingly and intelligently waived. **They cannot be knowingly and intelligently waived without the presence of a guardian, without an adult to help him out, to help him understand. THAT'S** my position, Judge. And **THAT'S** the reason why I'm asking the court to suppress his statements." AA 069 (Emphasis added).

The position of the prosecution, and a position the prosecution should be allowed to properly present and argue to the court below, is simply that the *Miranda* warning was given, in its entirety, with the explicit addition of letting E.S. know that he did not have to answer any questions without a parent or guardian being present. He waived that option, and agreed to speak with law enforcement. AA 002.

The court expressed the need to carefully weigh matters such as the one before the court "on a case by case basis and not make a ruling today that sets

precedence for all cases. We have to look at the totality of the facts and circumstances." AA 070. The court observed that the "parents" of E.S. made "about six complaints or so" "about things that everybody did wrong", alleging wrongdoing by the Sheriff's Office which was investigated internally. All of the complaints were found to lack merit except one. "We have a policy,' the Sheriff's Office says, 'That whenever you go to interview a child, you have to first notify the principal so that the school can do their policy.' The Sheriff's Office failed to do that. And the officer was found in violation of that policy." AA 071. The court noted in its written order that **"The report indicates that another officer claimed to have told the principal about the interrogation, [thus fulfilling the policy] but the principal claimed to have no memory of being notified." AA 091.** The interview was conducted entirely on school campus. AA 064, 086. As a result, it is incongruous to maintain the position that as a matter-of-fact school administration was without notice that law enforcement was present on campus to speak with E.S..

B.

Without an evidentiary hearing the court below suppressed the statements of E.S. because law enforcement failed to notify the school principal, thus failing to notify the parents, prior to questioning.

The court below concluded that: "Therefore, we have to hold police to proper policies and procedures, and they did not do so, **and based on that, I am**

suppressing the statement." (Emphasis added.) AA 071. In the written order the court said:

> At the hearing, the Court did not reach a review of the videotape or a finding on whether the Minor knowingly, intelligently and voluntarily waived his Miranda rights based on the totality of the circumstances. **Instead, the Court held that because the Sheriff's Office found that a violation of NCSO policy and procedures had occurred by the failure to notify the principal of the interrogation, and thus notification to the parents, the interview would be suppressed** (emphasis added).

AA 091. The court specifically acknowledged that there was no review with regard to **"whether the Minor knowingly, intelligently and voluntarily waived his Miranda rights based on the totality of the circumstances."**

Neither the position of the defense, nor the conclusion of the court find support in Nevada law. Prior to the court ruling both the defense and the prosecutor made it clear that if necessary, evidence could be presented at an evidentiary hearing. Defense counsel said: "And if needed, Judge, if you need more information, we can certainly set this matter for an evidentiary hearing", AA 062, 063, "So if you need more information, we can certainly set this matter for an evidentiary hearing, and we can take it from there." AA 063. The prosecutor said, "However, if this Court was interested in listening to the interview, listening to the officers testify in relation to it, that's fine. We can have that hearing", AA 063, and "If the Court wants to hear evidence, that's fine. AA 066. The prosecution pointed out that the voluntary nature of the questioning would be apparent at a hearing,

"And a review of the questioning, the video, and what would come out in testimony would bear that out." AA 067.

ARGUMENT

A.

The position of the defense is without authority.

The defense position was set forth as follows: "It's for **THAT** reason his rights were not knowingly and intelligently waived. **They cannot be knowingly and intelligently waived without the presence of a guardian, without an adult to help him out, to help him understand. THAT'S** my position, Judge. And **THAT'S** the reason why I'm asking the court to suppress his statements." AA 069 (Emphasis added).

In *Ford v. State*, 122 Nev. 796 (2006) the court found that parental notification is nothing more than one factor to consider. It is not the dispositive factor the defense urged the juvenile court to accept. In *Ford*, the appellant's contention, *inter alai*, was "that his statement should have been suppressed because his parents were not notified that he was in custody." *Id*. 801. The court said, "We take this opportunity to clarify our jurisprudence concerning parental notification as a prerequisite to interrogating juveniles suspected of criminal offenses." *Id*. The court in *Ford* continued:

> Our review of the parental notification requirement contained in NRS 62C.010 indicates that its purpose is to accomplish parental

> awareness of a child's custody status, not to impose a legislative mandate precluding interrogations of juveniles without parental notification. NRS 62C.010 does not impose a duty on law enforcement to notify a juvenile's parents as a condition to obtaining a voluntary statement from the juvenile, regardless of the nature of the crime being investigated. Rather, that statute serves only to notify parents that their child is in the custody of the police, and it offers no remedy when police fail to do so.
>
> Going further, nothing in the statute permits the parents of a child in custody to participate in an interview of the child by law enforcement. This is underscored by our recent decision in *Elvik v. State*, in which we recognized that a parent's absence from a custodial interrogation of a juvenile is only a factor within the totality of circumstances concerning the voluntariness of the juvenile's statements. Therefore, we clarify *Shaw* to hold that the objectives of parental notification do not prevent juvenile interrogations in the absence of parental notification, but rather, such information is a factor to be considered in determining the voluntariness of that statement. Consequently, NRS 62C.010 has no bearing on law enforcement decisions to interview juvenile suspects and only limited bearing on whether a juvenile's statement is voluntary.

Id. 802, 803. In *Ford*, the child was at the police station, and was told he was under arrest before being advised of his *Miranda* rights, including "that he could have a parent present during questioning." *Id*.

Lastly, the court in *Ford* referenced *People v. Pogue*, 312 Ill.App.3d 719, 243 Ill. Dec. 926 724 N.E.2d 525, 531-32 (1999) which said, *inter alia*:

> A finding of voluntariness by the trial court will not be reversed on review unless it is against the manifest weight of the evidence. When considering a motion to suppress, it is for the trial court to determine the credibility of the witnesses and to resolve conflicts in the evidence (citations omitted).

What the court in *Pogue* referenced is exactly what should have taken place and didn't. The prosecution is requesting that the order suppressing the evidence be reversed and this matter remanded for the court below to "determine the credibility of the witnesses and to resolve conflicts in the evidence" when "considering [the] motion to suppress".

Newly enacted AB 132, amending Chapter 62C, and going into effect July 1, 2021 (567 days after the charging document had been filed in this case) codifies a *Miranda* warning that mirrors the one provided in the case before the court as the transcript attests. AB 132 added the requirement to the *Miranda* warning that a child be told that "You have the right to have your parent or guardian with you while you talk to me", and E.S. was specifically made aware of that. The officer told E.S., "We can call them they can be part of this conversation if you want, um, it's entirely up to you." AA 002.

Importantly, the *Miranda* requirement was made mandatory when any "peace officer of probation officer" "takes a child into custody pursuant to NRS 62C.010", and "before initiating a custodial interrogation". AB 132. Once taken into custody, NRS 62C.010, the officer is duty-bound to make the attempt, "without undue delay", to notify "the parent or guardian of the child" that the child is in "custody". The "facility" that has custody of the child is then tasked with the responsibility of notifying "a probation officer" and then at least making the

"attempt to notify, if known, the parent or guardian of the child if such notification was not accomplished pursuant to paragraph (a)". Nowhere in the law is parental notification required prior to a child being warned pursuant to *Miranda* and questioned if *Miranda* is waived, as it was in this case.

B.

The position of the court is without authority.

The court below concluded that: "Therefore, we have to hold police to proper policies and procedures, and they did not do so, **and based on that, I am suppressing the statement**." (Emphasis added.) AA 071. In the written order the court said,

> At the hearing, the Court did not reach a review of the videotape or a finding on whether the Minor knowingly, intelligently and voluntarily waived his Miranda rights based on the totality of the circumstances. **Instead, the Court held that because the Sheriff's Office found that a violation of NCSO policy and procedures had occurred by the failure to notify the principal of the interrogation, and thus notification to the parents, the interview would be suppressed** (emphasis added).

AA 091. The court should have received evidence, reviewed that evidence, and determined "whether the Minor knowingly, intelligently and voluntarily waived his Miranda rights based on the totality of the circumstances", as the court referenced not doing. It is exactly what this Court should order.

C.

An evidentiary hearing will make it clear that the appropriate and proper *Miranda* warnings were provided, and that subsequent to that, E.S. provided law enforcement with knowing, intelligent, and voluntary statements.

This Opening Brief follows this Court's conclusion that in fact the prosecution has established good cause (*State v. Brown*, 134 Nev. 837, 838 (2018) the court explained that "Good Cause" mandates that "the State must make a preliminary showing of the 'propriety of the appeal' and that a 'miscarriage of justice' would result if the appeal is not entertained.") in order to have the matter fully briefed.

Only two people know what happened behind the locked door that night. The victim told E.S. "no" and reported being raped. E.S. told law enforcement that although it is true, that the victim said, "no", he thought she meant something else. E.S. also made conflicting statements to law enforcement that bear on his credibility. As an example, although E.S. does not remember "exactly", he admitted that the victim's phone would have a text message from the victim that said words to the effect "I told you no", and he responded by text that he already had consent so that "didn't matter". When the prosecution seeks to admit that evidence through the victim at the evidentiary hearing, the defense will object arguing there is no way to "know" who texted the response. For example: "Were you standing next to him when that texted exchange took place?" Answer: "No".

Question: “Well then how do you know it wasn’t someone else?” Answer: “Well, I guess I don’t.” The statements by E.S. to law enforcement will assist the trier of fact with the determinations the court will be called upon to make. E.S. said his phone was “broken”, in his “room”, and “useless”. AA 026.

Should this matter ultimately proceed to a fact determination, the prosecution will call the victim to testify, as well as her friend, a percipient witness who heard “arguing” and “thuds”, and text messages ostensibly between E.S. and the victim. The prosecution is also in possession of a recovered photo from an Instagram file belonging to E.S. depicting a television news article pertaining to “getting away with rape” suggesting that in North Carolina “once sex has begun, you cannot withdraw consent”. The photo was apparently created September 6, 2019 and sent to E.S. The incident in question occurred that same day.

The statements from E.S. to law enforcement more than three months after that, on December 10, 2019 with regard to the victim not “revoking” consent, the text exchange that he doesn’t “exactly” remember with regard to his already having consent, so that the victim saying “no”, “didn’t really matter”, and the exchange with regard to not having a condom at their prearranged appointment to have sex are all critical when witness credibility is weighed, again, as set forth *supra*.

The victim says she tried to stop E.S. from removing her pants, but he did, and E.S. telling law enforcement that she took her own pants off. The point is that the prosecution should not have to go forward without the statements from E.S. to law enforcement after the reading of *Miranda* and the waiver of same, the issue of voluntariness having never been litigated. "A finding of voluntariness" was neither deliberated nor decided. Witness credibility was never weighed to resolve "conflicts", such as whether the school principal had actual knowledge of E.S. being questioned by law enforcement irrespective of any deficiencies regarding notice. **The purpose of notifying the principal is to notify the parents, however, whether a parent is present is only a factor to consider when weighing voluntariness, and a child's waiver of the *Miranda* warning, it is not required by law.**

CONCLUSION

Because it is not the law in Nevada that a fifteen-year-old cannot be questioned by law enforcement without the presence of a parent or legal guardian; that a fifteen-year-old lacks the capacity to waive the presence of a parent or legal guardian before being questioned by law enforcement; and that a supposed failure to follow a "policy" of informing a school principal prior to providing the *Miranda* warning (and subsequent questioning if the rights established by the *Miranda* decision are waived) renders all Mirandized/waived statements *per se*

inadmissible, this Court should reverse the order of the court below suppressing the statements of E.S., and remand the matter for a determination of voluntariness (that includes whether the statements were "willing", "knowing", and "voluntary") based on controlling authority and the totality of the circumstances. "When a defendant waives his *Miranda* rights and makes a statement during a custodial interrogation, the State bears the burden of proving voluntariness, based on the totality of the circumstances, by a preponderance of the evidence." *Elvik v. State*, 114 Nev. 883, 891 (1998) referencing *Quiriconi v. State*, 96 Nev. 766, 772, (1980).

DATED this 5th day of October, 2021.

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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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14-point font; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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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 October, 2021.

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PROOF OF SERVICE

I, Vanessa Maxfield, Supervising DA Administrator, Office of the Nye County District Attorney, P. O. Box 39, Pahrump, NV 89041, do hereby certify that on October 5th,2021 I caused copies of **APPELLAN'T OPENING BRIEF** to be served via Nevada Supreme Court's E-Flex e-filing system to the following:

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