

A05-1277

STATE OF MINNESOTA
IN THE SUPREME COURT

State of Minnesota,

Respondent,

vs.

Burhan M. Farrah,

Appellant.

APPELLANT'S BRIEF

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Appellant.

PROCEDURAL HISTORY

1. November 20, 2003: Offense date.
2. November 21, 2003: Complaint filed in Hennepin County District Court charging Appellant with one count of fourth degree criminal sexual conduct in violation of Minn. Stat. § 609.345, Subd. 1(b), Subd. 2; § 609.101, Subd. 2; and § 609.109, Subd. 7.
3. April 20, 2004: Trial court found Appellant incompetent to proceed to trial.
4. September 23, 2004: Trial Court found Appellant competent to proceed to trial.
5. December 14, 2004: Trial Court found probable cause on an amended complaint charging Appellant with criminal sexual conduct in the fourth degree, in violation of Minn. Stat. § 609.345, Subd. 1(b), Subd. 2; § 609.101, Subd. 2; and § 609.109, Subd. 7; kidnapping, in violation of Minn. Stat. § 609.25, Subd. 1(2), 2(2); and false imprisonment, in violation of Minn. Stat. § 609.255, Subd. 2.

6. February 28, 2005: Jury trial began with the Honorable Phillip D. Bush presiding. The trial court held a *Rasmussen* hearing on the admissibility of Appellant's statements and ruled that Appellant's statements were admissible.

7. March 8, 2005: The jury found Appellant guilty of criminal sexual conduct in the fourth degree. The jury returned verdicts of not guilty on the charges of kidnapping and false imprisonment.

8. March 29, 2005: At sentencing, the Honorable Phillip D. Bush presiding, the court imposed the guideline sentence of one year and one day, stayed the sentence and placed Appellant on probation for five years with various conditions, including that Appellant serve 120 days at the Hennepin County Adult Corrections facility.

9. June 27, 2005. Appellant filed Notice of Appeal.

10. August 29, 2006. The Court of Appeals held that the district court did not err when it admitted Appellant's statement and when it admitted the complaining witness's prior statements as substantive evidence.

11. December 20, 2006. This Court granted Appellant's petition for review.

LEGAL ISSUES

ISSUE: Did the trial court err when it denied Appellant's motion to suppress his statement when he was interrogated without an interpreter and he clearly and unequivocally invoked his right to counsel while being advised of his Miranda rights?

RULING BELOW: The trial court ruled that the statement was admissible. The Court of Appeals affirmed the trial court's ruling.

APPOSITE AUTHORITY: *Edwards v. Arizona* 451 U.S. 477 (1981); *State v. Hannon*, 636 N.W.2d 796 (Minn. 2001); Minn. Stat. § 611.32, Subd. 2.

ISSUE: Did the trial court err when it found that Appellant knowingly and intelligently waived his *Miranda* rights even though he was not provided an interpreter, was intoxicated and had a history of mental illness?

RULING BELOW: The trial court ruled that the statement was admissible. The Court of Appeals affirmed the trial court's ruling.

APPOSITE AUTHORITY: *Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Mitjans*, 408 N.W.2d 824 (Minn. 1987); *State v. Marin*, 541 N.W.2d 370 (Minn. Ct. App. 1996)(*review denied* February 27, 1996).

ISSUE: Should this Court exercise its supervisory powers and hold that statements intentionally obtained from suspects in violation of the Interpreter Statutes must be suppressed?

RULING BELOW: The trial court and the Court of Appeals were not asked to make a ruling.

APPOSITE AUTHORITY: *State v. Scales*, 518 N.W.2d 587 (Minn. 1994); *State v. Mitjans*, 408 N.W.2d 824 (Minn. 1987)

ISSUE: Did the trial court err when it admitted the victim's prior inconsistent statements as substantive evidence when the statements were not consistent with her sworn trial testimony and were inadmissible hearsay?

RULING BELOW: The trial court ruled that the victim's prior statements were admissible as substantive evidence. The Court of Appeals affirmed the trial court's ruling.

APPOSITE AUTHORITY: Minn. R. Evid. 801(d)(1)(B); *State v. Nunn*, 561 N.W.2d 902 (Minn. 1997); *State v. Bakken*, 604 N.W.2d 106 (Minn. Ct. App. 2000)

STATEMENT OF THE CASE

Appellant Burhan M. Farrah was charged in Hennepin County with criminal sexual conduct in fourth degree in violation of Minn. Stat. § 609.345, Subd. 1(b), Subd. 2; § 609.101, Subd. 2; § 609.109, Subd. 7; kidnapping in violation of Minn. Stat. § 609.25, Subd. 1(2), 2(2); and false imprisonment in violation of Minn. Stat. § 609.255, Subd. 2. Before trial, Appellant challenged the admissibility of the statement he made during a custodial interrogation as an *Edwards* and *Miranda* violations. The District denied Appellant's suppression motion.

Following a jury trial, the Honorable Phillip D. Bush presiding, Appellant was found guilty of criminal sexual conduct in fourth degree in violation of Minn. Stat. § 609.345, Subd. 1(b), Subd. 2; § 609.101, Subd. 2; § 609.109, Subd. 7. At sentencing, the trial court imposed the presumptive guideline sentence but stayed execution of the sentence and placed Appellant on probation for five years on various conditions. The Court of Appeals affirmed Appellant's conviction. This Court granted review. Appellant appeals from the judgment of conviction.

STATEMENT OF FACTS

The charges in this case stemmed from an incident in the parking lot of an apartment building at [REDACTED] in Plymouth, Minnesota. The victim, C.J.B. was outside taking out the garbage when she had an encounter with Appellant.

Testimony of C.J.B.

C.J.B., the victim, testified that on November 20, 2003, she was taking out the garbage. (T. 173)¹ On the first trip she didn't see anybody walking around or any cars running. (T. 174) On her second trip out, a man grabbed her. (T. 175) She was wearing a black tank top and long pants. It was cold and she was not planning on being outside long. (T. 176) She had the key to the apartment door with her. (T. 178)

The man grabbed her left arm as she was walking toward the door. (T. 178-9) He grabbed her with both of his hands and pulled her into a car. She tried to hit him with her hands. (T. 179) The man pushed her into the car by her shoulders. (T. 181) He then got into the car. She was lying down in the back seat and he got on top of her. He didn't say anything. (T. 182) There was a beer can in the cup holder in the front seat. (T. 184)

He tried touching her breasts. (T. 182) He touched her on top of her clothes. Both his hands touched her breasts. She tried to get him off of her by pushing him away. He tried putting his hands up underneath her tank top from the bottom, but she pushed his hand away. (T. 183-4) She told him to stop. She got out of the car by sitting up and pushing him off. She then climbed out of the car. (T. 184) She ran from the car and

¹ "T" refers to the trial transcript which includes the testimony that was the basis of Appellant's pre-trial motions.

asked a woman for help. (T. 185) She told the woman that a man tried to rape her. She stayed with the woman who told C.J.B. to get into her car. (T. 188)

While she was with the woman, she saw that the man had gotten out of the car and had walked north away from the building. (T. 189) The police then arrived. (T. 191) She spoke to one officer alone in the squad car. She was worried about her dad and wanted to go back to her apartment. (T. 192) She went with the officer to her apartment where she gave a taped statement. (T. 193) She didn't want to tell her father, Keith Roska, about the incident. (T. 241)

At trial, C.J.B. admitted that she didn't remember that she had told the officer that the man tried to kiss her or that he touched her butt. (T. 195) She didn't remember telling the officer that the man almost hit her with his car as he was pulling into the parking lot. She testified that she didn't talk to her grandmother about the incident but she did talk to her friend Felicia Reed about it. (T. 195)

C.J.B. did not know the man who touched her. (T. 187). She described him as having dark skin, taller than she was, and wearing black pants. She would not recognize him if she saw the man again and she didn't see the man in the courtroom. (T. 180)

C.J.B. remembered giving the police officer a recorded statement and had a chance to review the statement before trial. (T. 200-201) In her statement, C.J.B. told the officer that the man almost hit her as he pulled into the parking lot and that he apologized to her. (T. 203) She told the officers that the man grabbed her tightly by her left arm and started dragging her across the parking lot. (T. 204) She was struggling to get away but the man dragged her to the car. (T. 205) She told the officers that the man

pulled her into the car but couldn't remember which side. (T. 206) He then pushed her onto the back seat and locked the door. (T. 207) He was on top of her and she was struggling. She got away by sitting up and unlocking the door. (T. 208, 230)

Upon continued defense questioning of C.J.B. about her prior statement, she told the officer that the man's voice sounded messed up, that he stuttered and had an accent, but she couldn't describe the accent. (T. 225) She didn't remember the officer checking her arm for any injuries. (T. 226) She told the officer that she wasn't injured and she didn't see any bruises or scratches on herself. (T. 227) She remembered telling the officer that after she got out of the car she started running around. (T. 230) She ran to a woman as she approached the apartment door. (T. 232) She had her key to the apartment door but she didn't use it to go inside. (T. 233) She told the officer that the man was carrying a beer can, but never mentioned that there was a beer can in the cup holder inside the car. (T. 235) She also never told the officer that the man tried to reach under her tank top (T. 236)

C.J.B. smokes one or two times a week. (T. 239) She started smoking when she was fourteen years old. (T. 238) She has told her friend Felicia Reed that she smokes a few times. (T. 239)

Testimony of Nancy Humburge

Ms. Humburge lived in an apartment at [REDACTED] in Plymouth during November 2003. (T. 248-9). On the day of the incident, Ms. Humburge was getting back from Target. It was dark outside. (T. 250) She parked at the south end of the lot next to the building. She gathered her bags and walked down to the platform by the door.

(T. 251) C.J.B. was there and asked her to call 911 because she was just raped. (T. 252) C.J.B. was just standing by the door looking into the building through the glass. (T. 253-4). She didn't run up from the parking lot. (T. 264) She was wearing a little t-shirt and her hands were up to her chest. (T. 255) She was outside of her car when she called 911, but they went into the car and locked the doors. (T. 257)

Ms. Humburge didn't see the man because she never got close to him, but she saw him walk through the parking lot. (T. 258) He had a beer can in his hand and was walking and drinking at the same time. She had seen the man in the building before but she did not know him. (T. 260)

C.J.B. appeared confused. She may have been in shock. (T. 261) She was not crying or screaming. She was quiet. (T. 274) She didn't remember smelling cigarette smoke on C.J.B. (T. 261)

Testimony of Mary Vaccaro

Ms. Vaccaro is C.J.B.'s grandmother. (T. 277) C.J.B. considers her to be a mother figure. (T. 282) C.J.B. is in special education classes and her memory isn't too good. (T. 283) On November 20, 2003, Ms. Vaccaro was living in New Prague. She talked to C.J.B. by phone. C.J.B. was crying and sounded upset. Over Appellant's objection, Ms. Vaccaro testified about the conversation over the phone. During the call C.J.B. told her that she was raped. (T. 285) C.J.B. explained that a man dragged her to a vehicle in the parking lot of her apartment and put his hands on her breasts and her "fanny". (T. 286) Ms. Vaccaro thought the incident with C.J.B. occurred right before the phone call. (T. 287)

Testimony of Felicia Reed

Ms. Reed is a friend of C.J.B. They have known each other since the third grade. (T. 293) They are in different schools now so they talk on the phone daily and instant message each other as well. (T. 295) During one phone call, C.J.B. told her that a man tried to rape her a few days earlier. (T. 297) C.J.B. related that she didn't know the man and he almost hit her in the parking lot. He was also drunk. He grabbed her and brought her back into his car and started to touch and kiss her. He tried to take her clothes off. (T. 297) Appellant objected to the testimony about the substance of the phone call. (T. 285)

Ms. Reed was interviewed by the detectives about a year after the incident. (T. 300) During that interview, Ms. Reed told the detectives that C.J.B. tried to run inside to get away from the man and that the man tried to take her clothes off. Ms. Reed also told the detectives that C.J.B. told her father about the incident. (T. 301) Ms. Reed told the detectives that C.J.B. wasn't happy but she wasn't sad either and that she hadn't notice any changes in C.J.B. over the year. (T. 304)

Ms. Reed and C.J.B. have talked about C.J.B. smoking. C.J.B. told Ms. Reed that she has tried cigarettes one time. (T. 305-6)

Testimony of Keith Roska

Mr. Roska is C.J.B.'s father. On November 20, 2003, C.J.B. lived with him in Plymouth, MN. (T. 314) That evening, C.J.B. was on the phone and he was watching T.V. (T. 316) She left to take the garbage out and was gone for about twenty minutes. (T. 317) C.J.B. came back with a police officer. The officer told him what happened and

took C.J.B into another room for an interview. C.J.B. indicated she would be more comfortable if she talked to the officer in another room. (T. 320) C.J.B. has never talked to her father about the incident. (T. 321)

Testimony of Officer Kevin Wilson

On November 20, 2003, Officer Wilson received a call from dispatch and entered the Harbor Lane parking lot from the south. As he pulled in, he saw Officer Topp securing Appellant. (T. 349) He then found C.J.B. in a car in the south end of the parking lot. (T. 352) She was dressed in a short sleeved shirt and long pants. It was cold out. (T. 353) He interviewed her initially in the back seat of the squad. (T. 354) When he talked to her he could tell that she had some developmental issues. She wasn't crying but she seemed flustered. (T. 355) The officer checked her for injuries and didn't see any. (T. 364)

Over Appellant's objection, Officer Wilson testified that C.J.B. told him that a vehicle almost pulled into the parking lot and almost hit her. A man got out of the vehicle and apologized for almost hitting her. After she threw the garbage into the dumpster, the man approached her and asked for her name. She replied and the man grabbed her arm and pulled her into the back seat of his car. He got in the car and lay on top of her. (T. 356) He kissed her on the neck and face and touched her breasts; he also touched her groin area and buttocks. She was able to push him off and unlock the door. She got out of the car, ran to the main entrance and asked a woman there to call 911. She told the officer that she wasn't touched under her clothes. (T. 357) She described the

man as black with a moustache, black jacket, pants and shirt; and he was also carrying a beer. (T. 358)

While he was talking to her, she became concerned about her father and wanted to go up to her apartment. (T. 359) He took her up to her apartment and explained to her father what had happened. He then took a taped statement from her. Her father wasn't present during the statement. (T. 360) The taped statement was played to the jury. (T. 361) Appellant noted, for the record, his continuing objection to the statement being played to the jury. (T. 389)

Testimony of Officer Robert Topp

Officer Topp responded to the call and saw a person who matched the aired description of the suspect. (T. 397) The officer was in a marked squad without the siren or lights activated. He saw the individual look back and then put his hands in the air. (T. 400) The officer parked his car and approached the individual, Appellant Burhan M. Farrah. He found a nearly empty beer can in his pocket. (T. 402) Appellant was cooperative. He did not run or resist the arrest. (T. 412)

Officer Topp had Appellant sit in his squad car. He asked for Appellant's identification and Appellant responded in English. (T. 404) Appellant appeared confused. He appeared intoxicated. The officer could smell an odor of alcohol on Appellant, who swayed when he walked. (T. 405) The officer took Appellant downtown and interviewed him. (T. 406)

Appellant told the officer that he had consumed five 24 ounce beers before he was arrested. (T. 415) Officer Topp did not determine Appellant's blood alcohol content

because he didn't see the need for it. (T. 408) The officer agreed that he could have waited until Appellant had sobered up before he conducted an interview. (T. 418)

Through the officer, the State offered Appellant's recorded interrogation which was published to the jury. A transcript of the interrogation was passed out to the jury. Appellant noted his objection to the statement being introduced into evidence. (T. 407) The officer testified that he had a little difficulty understanding what Appellant said but he felt that Appellant understood. The officer had difficulty understanding Appellant because of his accent. English was not Appellant's first language. (T. 417)

The officer had access to an interpreter but didn't think it was needed. (T. 409) The officer never offered the services of an interpreter to Appellant, and Appellant never asked for an interpreter. (T. 418)

Testimony of Hashim Mohamed

At trial, Mr. Mohamed was called to testify by Appellant. He is Appellant's cousin. (T. 447) Mr. Mohamed helped Appellant enter the United States in 1999 or 2000. (T. 449, 456) Appellant was living with his mother and follows the Islamic faith. Appellant was not allowed to drink in his mother's home. (T. 451) Appellant went to school but never finished. He completed either the eighth or the tenth grade in Somalia. (T. 458)

Testimony at the *Rasmussen* Hearing

Appellant had challenged the admissibility of his statement at a pre-trial *Rasmussen* hearing. Officer Topp was the sole witness called during that hearing. At the scene where Appellant was arrested, the officer observed that Appellant showed signs of

intoxication. (T. 26) Appellant had a strong odor of alcohol on this breath and he had poor balance. (T. 33) Appellant admitted drinking five cans of 24 ounce Colt 45 malt liquor. (T. 34) The officer did not have Appellant do any breath tests for alcohol. (T. 40)

Appellant had a strong accent. (T. 27) Despite Appellant's accent, the officer felt Appellant understood him and that the officer understood Appellant. Appellant did tell the officer that he had difficulty speaking English during the *Miranda* advisory. (T. 27) The officer did not offer Appellant the services of an interpreter. (T. 36) The officer did not feel it was necessary. (T. 39) The officer did note that Appellant had difficulty understanding him because the officer noted "[a]ny question I felt that he had trouble understanding in regards to his language interpretation, I would either repeat it or more fully explain to him." (T. 39)

A transcript of the *Miranda* warning was entered as an exhibit during the hearing. (T. 29) The transcript indicates the following exchange during the *Miranda* advisory:

Q: Do you understand those rights?

A: Okay. Little, yeah.

Q: What, what don't you understand? Cause I need to explain it before I can even ask you any questions

A: You know, you ask me uh, if you want a lawyer. You can take the lawyer.

Q: Right

A: That's where it is.

Q: Yep, if you want a lawyer you can have him here before I talk to you or you can contact 'em-

A: Okay, I think I will to lawyer. I can imagine little (inaudible)

Q: What's that?

A: I can imagine little (inaudible) what, you know, what he's, what he told me and just, you, what happened and you're police guy, you know.

Q: Yeah

A: What they're, you know, what happened anyway.

Q: Yep, but before I talk to you about that, you need to understand these, that you do have the right to talk to a lawyer first. Do you understand that?

A: Like even if I don't have a lawyer (inaudible).

(S.T.² 3)

The court noted that the transcript accurately reflected what was on the *Scales* tape at that point³. (T. 80).

After the hearing, the trial court ruled that Appellant did not clearly and unequivocally invoke his right to an attorney during the interrogation so it was appropriate for the officer to continue questioning. The trial court found “when one listens to the tape for the first time without the benefit of the transcript or knowing that – what words are about to be said, after having reviewed it, uh, I understand and see how a reasonable person in the situation of the officer would not be clear as to what was said...” (T. 80)

The trial court also found that Appellant freely and voluntarily waived his *Miranda* rights. (T. 82) The trial court noted that “while there is an accent and clearly English is Mr. Farrah’s second language, uh, that there is occasional difficulty in understanding what he is saying, there is an occasional difficulty in understanding a

² “S.T.” refers to Scales transcript located in the district court file.

³ While the trial court found that the transcript was accurate, the tape itself was admitted into evidence during both the suppression hearing and the trial.

number of things said in the *Scales* tape by people who are English speakers for the first time.” (T. 82) In the end, the trial court concluded that the State carried its burden to establish a valid *Miranda* waiver. (T. 82-83)

ARGUMENT

Violation of the Interpreter Statute

Appellant was handicapped in communication. The officer violated the interpreter statute by failing to provide him with an interpreter. A person is handicapped in communication when, “because of difficulty speaking or comprehending the English language, [he] cannot fully understand the proceedings or any charges made against the person.” Minn. Stat. § 611.31(b) (2004). The legislature has determined that the State of Minnesota’s policy is that the “constitutional rights of persons handicapped in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings.” Minn. Stat. § 611.30 (2004). The policy recognizes that interpreters are needed to “avoid injustice and to assist persons handicapped in communication in their own defense.” *Id.* The legislature codified the procedures for obtaining interpreters in Minn. Stat. §§ 611.30-611.34 (hereafter referred to as the “Interpreter Statute”).

Both the interview tape and the trial record demonstrate that Appellant was handicapped in communication. Appellant had difficulty understanding the officer and the officer had difficulty understanding Appellant. The first page of *Rasmussen* exhibit #3 notes at the top that “Burhan Farrah extremely hard to understand. Mostly inaudible”. The trial court noted in its *Rasmussen* ruling that “while there is an accent and clearly English is Mr. Farrah’s second language, uh, that there is occasional difficulty in understanding what he is saying, there is an occasional difficulty in understanding a number of things said in the *Scales* tape by people who are English speakers for the first

time.” (T. 82) Officer Topp testified that Appellant spoke with a thick accent and that English was clearly not his first language. (T. 417) Even the prosecutor noted that Appellant “speaks with a heavy accent.” (T. 79) Mr. Mohamed noted that “[o]ne fact that we see as a family is that people are speculating Burhan knows English very well, which is not true.” (T. 455) Appellant was handicapped in communication because of his difficulty understanding and speaking English.

Because Appellant was handicapped in communicating in English, the officer was required to provide him with an interpreter when he interviewed him. “Following the apprehension or arrest of a person handicapped in communication for an alleged violation of a criminal law, the arresting officer... shall immediately make necessary contacts to obtain an interpreter at the earliest possible time at the place of detention.” Minn. Stat. § 611.32, Subd. 2 (2004)(emphasis added). By his own admission, the officer had difficulty communicating with Appellant. It is undisputed that an interpreter was available. (T. 409) However, the officer decided an interpreter was not necessary for the interrogation. By his actions, the officer intentionally violated Minn. Stat. § 611.32 when he interrogated Appellant without an interpreter.

This Court must consider how the police officer’s intentional violation of the Interpreter Statute of a person handicapped in communication should be considered in determining whether Appellant clearly and unequivocally invoked his right to an attorney and whether he validly waived his *Miranda* rights.

I.

APPELLANT CLEARLY AND UNEQUIVOCALLY INVOKED HIS RIGHT TO AN ATTORNEY AND THE OFFICER VIOLATED THAT RIGHT BY CONTINUING THE INTERROGATION.

The trial court erred when it found that Appellant did not clearly and unequivocally invoke his right to counsel. “If an accused asserts his right to counsel, interrogation must cease unless the accused initiates further communication, exchanges or conversation with police and validly waives his earlier request for the assistance of counsel.” *State v. Hannon*, 636 N.W.2d 796, 804 (Minn. 2001); *See Edwards v. Arizona* 451 U.S. 477, 484-85 (1981). Appellant was subject to a custodial interrogation because he was arrested, handcuffed, transported to the police station and questioned. *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998).

“The determination of whether a suspect invoked his right to counsel is an objective inquiry.” *State v. Munson*, 594 N.W.2d 128, 139 (Minn. 1999). For the request to be unequivocal a suspect “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer, in the circumstances, would understand that statement to be a request for an attorney.” *Hannon* at 804 (internal citations omitted). Appellate courts “will uphold a district court’s factual determination of whether a defendant invoked the right to counsel unless it was clearly erroneous.” *State v. Risk*, 598 N.W.2d 642, 647 (Minn. 1999).

Appellant clearly and unequivocally invoked his right to counsel when he said, “[o]kay, I think I will to lawyer. I can imagine little (inaudible).” The statement was a clear, unequivocal statement that a reasonable officer should have understood to be a

request for an attorney. In *Munson*, the court held that the statement “I think I’d rather talk to a lawyer” was a sufficiently clear that a reasonable officer would have understood that it was a request for an attorney. *Munson*, 594 N.W.2d at 139. As in *Munson*, the fact that the officer in this case responded by reiterating that Appellant had to waive his right to have an attorney before they could talk indicates that the officer understood Appellant’s statement to be an invocation of Appellant’s right to counsel. *See Id.* Appellant clearly and unequivocally invoked his right to counsel.

On this issue, the Court of Appeals failed to consider the officer’s intentional violation of the Interpreter Statute. The Court of Appeals correctly stated that the standard is an objective inquiry, but also noted that “the ever-broadening diversity of linguistic backgrounds among both police and suspects threatens the objective nature of that inquiry.” *State v. Farrah*, 2006 WL 2473655, at 3 (A05-1277, August 29, 2006)(included in the appendix). The Court of Appeals noted that the “evaluation of what a ‘reasonable officer under the circumstances’ would do is increasingly challenging.” *Id.* at 3. To the contrary, an objectively reasonable officer would have followed the Interpreter Statute and provided Appellant with an interpreter during the custodial interrogation. It is objectively unreasonable for a police officer to violate Minnesota statutes. An objectively reasonable officer interrogating a person handicapped in communication would have followed Minnesota law and obtained an interpreter.

The trial court incorrectly characterized the continued questioning as a permissible clarification of an equivocal request for an attorney. *See Risk*, 598 N.W.2d at 642. The transcript indicates that if there was any confusion about what Appellant said it was the

result of Appellant being interrogated without an interpreter. The prosecutor noted “[h]e [the interrogating officer] never said he was easy to understand or that he spoke without an accent. The court has listened to the tape. He speaks with a heavy accent.” (T. 79). The district court remarked that when “one listens to the tape for the first time without the benefit of a transcript or knowing that – what words are about to be said, after having review it, uh, I understand and see how a reasonable person in the situation of the officer would not be clear as to what was said...” (T. 80). The trial court’s finding underscores that any ambiguity as to what Appellant said was because of his handicap in communication, not that the statement itself was equivocal.

Finally, if there is any ambiguity as to what Appellant said to the officer, the State was responsible for that ambiguity by intentionally violating the Interpreter Statute and bears the consequence for that ambiguity. In *Munson*, this Court found that an inaudible *Scales* tape was the State’s fault and that “the adverse consequences of a factually deficient record must fall on the state.” *Munson* at 143. In this case, the State was responsible for providing Appellant with an interpreter, but the State intentionally violated the Interpreter Statute. The consequences of the State’s failure to provide an interpreter should fall on the State, not the Appellant.

The trial court and the Court of Appeals have created an unreasonable standard based on whether a person is handicapped in communication or not. The statement made by Appellant and the statement made by the defendant in *Munson* are nearly the same. The only difference was that the defendant in *Munson* spoke English as a first language.

In this case the officer chose to interrogate Appellant without an interpreter. A reasonable officer would have abided by Minnesota law and called for an interpreter. The continued questioning by the officer was necessary because of the language barrier, not because Appellant's request for an attorney was unclear or equivocal. The district court's finding that Appellant's request for an attorney was equivocal was clearly erroneous given Appellant's language limitations, the lack of an interpreter in violation of Minn. Stat. § 611.32, Subd. 2, and his clear and unequivocal request to have an attorney present.

II.

APPELLANT COULD NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS MIRANDA RIGHTS BECAUSE HE WAS NOT PROVIDED AN INTERPRETER, HE WAS INTOXICATED AND HE IS MENTALLY ILL.

The district court improperly found that Appellant knowingly and voluntarily waived his *Miranda* rights. A state may not introduce a defendant's in-custody statements absent the defendant's voluntary, knowing, and intelligent waiver of his or her constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In the ordinary case, the State is deemed to have met its burden under *Miranda* if it can show that the warning was given and that the defendant stated that he or she understood the rights. *State v. Linder*, 268 N.W.2d 734, 735 (Minn. 1978). But where there is evidence indicating that the waiver was not knowing, intelligent and voluntary, the trial court must determine whether, considering all the circumstances, the waiver was effective. *State v. Vu*, 339 N.W.2d 897, 898 (Minn. 1983).

The appellate courts independently review whether the state has established by a preponderance of the evidence that a defendant validly waived his or her constitutional rights. *State v. Williams*, 535 N.W.2d 277, 286 (Minn. 1995). Whether a statement was voluntarily given depends on a subjective inquiry into the totality of the circumstances. *Vu* at 897-98. Relevant factors include the defendant's experience and ability to comprehend. *State v. Jungbauer*, 348 N.W.2d 344, 346 (Minn. 1984). While this Court has not considered the issue, the Court of Appeals has held that a violation of the interpreter statute is not grounds for suppressing the statement, but the violation is

relevant to determine whether Appellant invoked his right to counsel and knowingly and intelligently waived his *Miranda* rights. *Marin* at 374.

Appellant did not have the ability to comprehend the *Miranda* warning. Appellant has limited experience with the courts. When Appellant was questioned he had had some prior contacts with the police officers, but there is no indication that he has previously been subject to a custodial interrogation. A Rule 20 report indicates that Appellant did not finish high school in Somalia and did not complete a G.E.D. course in Minnesota.

Appellant admitted he drank five 24 ounce beers before he was arrested. The arresting officer observed obvious signs of intoxication, but chose not to determine his blood alcohol content. Appellant was interrogated without an interpreter as argued above. The trial court reviewed the Rule 20 report and noted that Appellant was able to talk to the psychologist without an interpreter about his personal history. However, there is a difference between being able to answer simple questions about a person's personal history and understanding one's Constitutional rights. Furthermore, the trial court did not consider that Appellant was hospitalized in October 2003 for mental health reasons and off his medication. He was discharged from the hospital with a diagnosis of schizophrenic disorder and alcohol dependency.

The facts in Appellant's case are very similar to the facts in *Marin* but are in fact stronger. In *Marin*, the Court of Appeals found that the defendant stated several times that he did not understand his rights; had difficulty expressing himself; and the officer had difficulty understanding the defendant. The Court of Appeals held that the defendant did not knowingly and intelligently waive his rights. *Marin*, 541 N.W.2d at 374. While

Appellant eventually waived his *Miranda* rights, the transcript indicated that there were twenty-three questions and answers between Appellant and the officer about his right to an attorney. (S.T. 2-4). Appellant told the officer at the beginning of the interview that he didn't speak English and he told the officer that he understood his rights "a little" the first two times they were read to him. (S.T. 2-3). The situation in Appellant's case is stronger than the facts in *Marin* for suppression because he was intoxicated and has a well-documented history of mental illness. Furthermore, the officer intentionally violated the Interpreter Statute by failing to provide Appellant with an interpreter when an interpreter was available. The State did not prove by a preponderance of the evidence that Appellant validly waived his constitutional rights. The trial court erred when it found that Appellant knowingly and intelligently waived his *Miranda* rights.

The Trial Court's Error was not Harmless

The trial court's failure to suppress Appellant's statement as an *Edwards* or a *Miranda* violation was not harmless error. "The essence of *Miranda* is that unless the prosecution establishes compliance with the procedural safeguards designed to protect fifth and sixth amendment rights, statements of the accused during a custodial interrogation are constitutionally inadmissible." *State v. Crisler*, 285 N.W.2d 679, 681 (Minn. 1979). An invalid waiver of one's constitutional rights requires reversal and remand for a new trial if admission of the resulting statements does not constitute harmless error. *Chapman v. California*, 386 U.S. 18, 20-22 (1967).

The constitutional harmless error analysis "is not a matter of analyzing whether a jury would have convicted a defendant without the error, but rather whether the error

reasonably could have impacted upon the jury's decision." *State v. Caulfied*, 722 N.W.2d 304, 314 (Minn. 2006). "When determining whether a jury verdict was surely unattributable to an erroneous admission of evidence, the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, and whether it was effectively countered by the defendant." *Id.*

It was not harmless error for the trial court to allow Appellant's statement to be admitted into evidence. The statement was presented to the jury through the police officer. The taped interview was played to the jury, and the jury was provided transcripts while the tape was played. The statement was not lost among other evidence.

Appellant's statement would have been highly persuasive to the jury. During the interrogation, Appellant initially denied anything happened between him and C.J.B., but toward the conclusion Appellant told the officer that C.J.B. would say that he "rubbed her." (S.T. at 13) In addition, Appellant contradicted himself on whether C.J.B. was smoking or not. The State questioned the reasonableness of Appellant's statement along with his veracity and credibility. *See State v. Al-Naseer*, 690 N.W.2d 744, 750 (Minn. 2005)(finding that error in admitting defendant's statement was not harmless when the State used defendant's statement to try to persuade the jury that defendant was not telling the truth). In addition, Appellant asked to speak to an attorney during his interrogation, which juries may view as a badge of guilt. *Id.* The State offered Appellant's statement during its case in chief then argued in closing argument that Appellant's statement was not credible. The State used Appellant's statement as a persuasive piece of evidence.

Appellant did not testify, he exercised his right to remain silent, so the statement was not effectively counter by the defendant.

In this case, there was not overwhelming evidence of guilt. Because the jury acquitted Appellant of the kidnapping and false imprisonment charges the jury must have found C.J.B.'s testimony not credible enough to return guilty verdicts on those charges. Given the questionable credibility of C.J.B., and the arguments of the State that Appellant was not credible, the trial court's error in admitting Appellant's statement was not harmless error.

III.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS AND HOLD THAT STATEMENTS INTENTIONALLY OBTAINED IN VIOLATION OF THE INTERPRETER STATUTE WILL RESULT IN SUPPRESSION OF THAT STATEMENT.

In the alternative, or in addition to the argument above, this Court should exercise its supervisory powers and exclude statements, and any evidence derived from the statements, taken by law enforcement officials who intentionally violate the Interpreter Statute, as in this case. While this Court can rule directly on whether there was a *Miranda* or *Edwards* violation, given the importance of complying with the Interpreter Statute, this Court should provide a remedy for intentional violations of the statute. This Court has the supervisory power to create procedures to insure the fair administration of justice. *See State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967). This Court has “the primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters and this includes the issue of the admissibility in criminal trials of evidence obtained in violation of statutes.” *State v. Mitjans*, 408 N.W.2d 824, 830 (Minn. 1987)(internal citations and quotations omitted).

This Court has warned law enforcement officers about the importance of the Interpreter Statute in the past. In *State v. Vu*, 339 N.W.2d 897(Minn. 1983), though affirming the admission of a statement, this Court sent the message that in the future “in the case of recent immigrants who appear to have some difficulty with a new language, the police and the trial court would be wise to engage an

interpreter before interrogation so that this issue need never arise again in Minnesota." *Id.* at 898 (emphasis added).

In *Mitjans*, this Court again warned law enforcement that when a person is handicapped in communications they should comply with the Interpreter Statute. *Mitjans* at 831. This Court further advised law enforcement to record the statement and provide a copy of the statement to defendant in their own language. *Id.* This Court specifically warned that “[i]n the future, prudent police investigators who wish to reduce substantially the risk of subsequent suppression of statements taken from suspects with language handicaps are advised to comply with the statutory requirements and to consider seriously the use of either or both of the two other techniques.” *Id.*

In prior decisions this Court has not suppressed statements obtained in violation of the Interpreter Statute. This Court noted that “the legislature did not express or imply any intent that statements obtained in violation of the statute automatically should be excluded in subsequent criminal proceedings and we do not judicially adopt such a rule.” *Mitjans* at 830.

In *State v. Dominguez-Rodriguez*, 563 N.W.2d 245 (Minn. 1997), this Court again recognized that the Interpreter Statutes did not create new constitutional rights so that violations of the statute did not justify suppression of the statements. *Id.* at 253. This Court also declined to exercise its supervisory powers and exclude a statement taken by a defendant in violation of the Interpreter Statute. *Id.* at 256. However, in *Dominquez-Rodriquez* this Court noted that a

bilingual officer had acted as a translator; the officer was not involved in the case; the officer had been used by law enforcement as a translator before; and that there was a witness available to monitor the interrogation. *Id.* at 257. This Court concluded that the officers “did not deliberately ignore our prior directives.” *Id.*

In contrast, the officer in Appellant’s case was not bilingual. The officer was not able to communicate with Appellant in Appellant’s own language. While the interrogation was recorded, it was not translated into Appellant’s own language. Finally, and most importantly, the officer intentionally violated the Interpreter Statute. The officer deliberately ignored this Court’s prior warnings and directives.

Given the ever-broadening diversity of police and suspects, insuring that law enforcement officials follow the Interpreter Statute is even more important. The Minnesota Legislature clearly announced a policy requiring that interpreters be provided to individuals handicapped in communication to protect their constitutional rights. When the officer intentionally interrogated Appellant without an interpreter he disregarded the State’s policy, this Court’s prior warnings, and Appellant’s constitutional rights. This Court needs to make clear that the remedy for intentionally failing to comply with the Interpreter Statute will be suppression of the statement, as this Court has warned in the past.

In considering whether indigent defendants charged with misdemeanor level offenses should be provided attorneys, this Court held “[W]e are persuaded that the possible loss of liberty by an innocent person charged with a

misdemeanor, who does not know how to defend himself, is too sacred a right to be sacrificed on the altar of expedience. Any society that can afford a professional prosecutor to prosecute this type of crime must assume the burden of providing adequate defense, to the end that innocent people will not be convicted without having facilities available to properly present a defense.” *Borst*, 278 Minn. at 399, 154 N.W.2d at 894-5.

The same principle applies to interpreters. The importance of interpreters is too critical to an individual who is handicapped in communication and brought into the criminal justice system to tolerate an intentional violation of the Interpreter Statute. The individual’s constitutional rights can not be protected, and the State’s policy can not be enforced if law enforcement officials intentionally violate the Interpreter Statute, and that is too great a sacrifice in the name of expedience or convenience. This Court should exercise its supervisory powers and hold that if law enforcement officials intentionally violate the Interpreter Statute that the evidence obtained as a result of that violation will be suppressed.

IV.

THE TRIAL COURT ERRED WHEN IT ADMITTED C.J.B.'S PRIOR INCONSISTENT STATEMENT INTO EVIDENCE AS SUBSTANTIVE EVIDENCE.

The trial court erred when it allowed C.J.B.'s statements to be admitted as substantive evidence. "Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). However, a prior statement by the witness is not hearsay if the declarant testifies at trial and is subject to cross examination about the statement and the prior statement is consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness. Minn. R. Evid. 801(d)(1)(B). "Amended Rule 801(d)(1)(B) only applies to prior statements that are consistent with the declarant's trial testimony and that are helpful in evaluating the credibility of the declarant as a witness. Thus, when a witness' prior statement contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule." Minn. R. Evid. 801(d)(1)(B) 1989 comm. Cmt.

In her trial testimony, C.J.B. described that Appellant touched her breasts over her clothing. In her interview in the police car C.J.B. told the officer that Appellant touched her breasts, buttocks and groin area. Later, in her taped statement to the police officer, C.J.B. alleged that Appellant touched her breasts and her butt and that he was kissing her.

(C.J.B.S at 4)⁴. C.J.B. told Ms. Vaccaro that Appellant touched her breasts and her fanny. C.J.B.'s statements offered through other witnesses contained assertions that C.J.B. did not testify to at trial. These assertions all went to an essential element of the offense, whether there was sexual contact. The trial court erred when admitted all these inconsistent statements as substantive evidence without any consideration as to whether they were prior consistent statements. Moreover, C.J.B.'s statements elicited from other witnesses were not consistent and should not have been admitted as substantive evidence.

The trial court's error in admitting the statements was not harmless. On appeal, a district court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Mayhorn*, 720 N.W.2d 776, 782 (Minn. 2006). "Reversal is required for the erroneous admission of evidence when the admission of that evidence likely influenced the jury to convict." *Id.* All of C.J.B.'s statements were offered to prove the most important and contested allegation of the criminal sexual conduct charge- touching of the breast, buttocks or groin area. The statements did not relate to a charge for which Appellant was acquitted. The jury heard the live testimony from C.J.B. and four of C.J.B.'s prior statements as substantive evidence about the single allegation of criminal sexual conduct. There is no way to know if the jury credited one statement and disregarded others. Admitting the statements likely substantially influenced the jury verdict. The trial court erred when it admitted C.J.B.'s prior inconsistent statements as substantive evidence and the error was not harmless.

⁴ C.J.B.S. refers to the victim's transcribed taped statement located in the district court file.

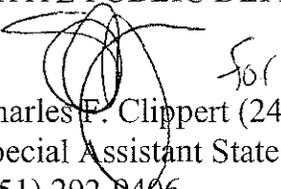
CONCLUSION

Minnesota's legislature and appellate courts have rightly expressed concern that people handicapped in the English language have competent, independent interpretation when being interrogated to ensure their constitutional rights are honored. In this case the police intentionally violated the Interpreter Statute. The intentional violation of the Interpreter Statute in this case resulted in the violation of Appellant's constitutional rights to remain silent, to assistance of counsel and to be free from an unfair and improperly influential interrogation process. The trial court and the Court of Appeals erred when they denied Appellant's motion to suppress his statement. In the alternative, or in addition to suppressing Appellant's statement, this Court should exercise its supervisory powers and exclude Appellant's statement to ensure that law enforcement officials abide by the statute in the future.

In addition, the trial court erred when it admitted C.J.B.'s prior inconsistent statements as substantive evidence. Accordingly, Appellant respectfully requests that his conviction be reversed outright or, in the alternative, that the conviction be reversed and this matter be remanded for a new trial at which his custodial statement and C.J.B.'s prior inconsistent statements are excluded.

Respectfully submitted,

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