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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JIMMY MATUSALEM GARCIA, Defendant and Appellant.	G054032 (Super. Ct. No. 13HF3631) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Conditionally reversed and remanded.

Innocence Legal Team, Patrick Clancy and William P. Daley for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Anthony Da Silva and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The main issue on appeal involves the admissibility of statements obtained from defendant Jimmy Matusalem Garcia during questioning by police prior to advising him of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Defendant also asks that we review the school materials he subpoenaed and which the trial court reviewed and did not disclose to the defense. The Attorney General has no objection to this court reviewing the subpoenaed materials. We find the trial court did not err in admitting defendant's confession into evidence. We reviewed the subpoenaed school records and found the defense should have been given access to the school records. Because we cannot determine on this record whether the failure to reveal that information prejudiced defendant, we will conditionally reverse and remand the matter for further proceedings.

I

FACTS

The first amended information charged defendant with four counts of oral copulation or sexual penetration with a child under 10 years of age (Pen. Code,[1] § 288.7, subd. (b); counts one through four), and two counts of lewd acts on a child under 14 years of age (§ 288, subd. (a); counts five and six). Each of the crimes was alleged to have occurred between August 1, 2011, and October 23, 2013. The alleged victim of the charged offenses was N.P. The jury convicted defendant on all counts. The trial court sentenced defendant to an aggregate term of 30 years to life, consisting of consecutive 15 years to life sentences on counts one and two, concurrent 15 years to life terms on counts three and four, and concurrent six-year terms on counts five and six.

[1] All undesignated statutory references are to the Penal Code.

For purposes of the issues regarding the admissibility of defendant's statements to police, the following facts suffice. Additional facts are included in the discussion below, where relevant.

Defendant moved to suppress statements he made to Orange County Sheriff investigators, contending his statements were involuntary and obtained without compliance with *Miranda*. The trial court conducted an Evidence Code section 402 hearing on the issue. Sergeant Margie Sheehan of the Orange County Sheriff's Department and defendant testified at the hearing. The trial court also viewed the DVD recording of the questioning.

Sheehan, an investigator with the special victim's detail, was on duty on December 9, 2013, and responded to N.P.'s middle school, where Sheehan interviewed N.P. N.P. said she talks to defendant, her stepfather, in English and defendant typically responds in Tagalog. Sheehan had N.P. make a cold call to defendant. During the call, defendant agreed to pick up N.P. at a local park. Sheehan then called defendant's number and left a message for him to pick up N.P. at school instead of the park.

As a result of that telephone call, defendant responded to the school. Sheehan and her partner, Investigator James Christian, greeted defendant upon his arrival. Christian told defendant he was not in any trouble. The deputies met with defendant in a conference room at the school. The deputies were not in uniform. Their firearms were never displayed and they did not threaten defendant.

At the beginning of the questioning, the deputies informed defendant he was free to leave and the conference door was closed to protect his privacy. The door was not blocked. Defendant was also told he did not have to talk with the deputies. Sheehan spoke to defendant in English. Defendant said he was at the school because he received a telephone call from N.P.

Christian told defendant N.P. wants to hurt herself. Defendant did not understand that N.P. had cuts on her legs. Christian then told defendant N.P. wants to commit suicide. Defendant said N.P. accused him of molesting her.

Although it was apparent English was not defendant's first language. Defendant said he speaks English at his job and is spoken to in English there, but Sheehan decided to obtain the services of an interpreter. She told defendant she was getting an interpreter for him because what N.P. said was a "big deal" and "very dangerous." Sheehan contacted the sheriff's department to get a Tagalog interpreter on the telephone to interpret during the questioning. While Sheehan was arranging for an interpreter, Christian told defendant this was not a big deal and he wanted defendant to be at ease to say whatever he wants. Before the interpreter got on the phone, a social worker joined defendant and the deputies in the conference room. Christian told defendant the woman was a social worker.

Once the interpreter was on the cell phone, one of the deputies said, "You said that your daughter said that you molested her. Is that right?"[2] Defendant explained that he had not molested her, but had only attempted to wake her up. Sheehan asked defendant how his finger got inside N.P.'s vagina if she had clothing on and he was waking her up. Defendant said he was shaking N.P. and demonstrated how he had his hands near N.P.'s vagina while he shook her. When asked to explain how that would lead to his finger entering N.P.'s vagina, defendant said he tapped her chest to get her to wake up. When asked if that touching was skin to skin, defendant said he touched on top of N.P.'s clothing.

Defendant was then asked to tell Sheehan about the time he touched N.P.'s breast and put it in his mouth. Defendant said he did not put his mouth on N.P.'s breast. Sheehan told the interpreter to tell defendant they know he put his mouth on N.P.'s breast

[2] The translations were not always verbatim or accurate.

and she wants to know "how that happened and why." Defendant said he did not know when, but it was "a long time ago." He said he was mostly joking with N.P. Sheehan asked if he had N.P.'s nipple in his mouth and shook it as a joke. Defendant said he did not shake it and that they joke around, that N.P. is still like a kid. At one point, defendant admitted he once licked N.P.'s clitoris.

Sheehan made her hands into the rough shape of a vagina and asked defendant to use his fingers to show how he touched N.P. She said N.P. reported his finger entered her and asked if that was right. Defendant said it was. Sheehan said N.P. accused him of putting his mouth on her breast or vagina five to six times a week. Defendant said it probably only happened once or twice. Sheehan asked the interpreter to tell defendant she knew he was not telling the truth and she wants him to be honest with her. The interpreter told defendant: "I know you're not telling the truth. Say it and you're lying. Just tell the truth. We know."

Sheehan asked how many times a week he touched N.P.'s breast or vagina. Defendant said he did not remember. Sheehan then asked if his daughter is a liar. And defendant said, "I don't know. Sometimes."

When asked how many times a week he kissed N.P.'s breast or vagina, defendant said it was "not every week." Sheehan told the interpreter to tell defendant there were other people in the room at the time, including his mother-in-law and two other children. She said she knew he was not telling the truth and she wanted him to be honest with her. Defendant said he was being honest. Sheehan tried to tie defendant down to the number of times he licked or put his mouth on N.P.'s vagina, and asked him if it was five, 10, 20 times, or less. In English, defendant said it was not 20 times. Sheehan asked for an approximate number of times and defendant answered in English, "Approximately like seven." When asked how many times he had N.P. put her hands on his penis, defendant eventually said it happened one time.

Sheehan asked how old N.P. was at the time of these acts. Defendant said she was nine years old and that he stopped before she turned 11 years old. Shortly thereafter, Sheehan had the interpreter advise defendant of his rights pursuant to *Miranda.* The deputies then went back over the same questions asked prior to the advisement.

Sheehan characterized the questioning as calm, with no yelling. At no point did she raise her voice to defendant. Defendant did not say he wanted to leave. Neither did he attempt to leave. During the interrogation, defendant received a number of telephone calls, including one from his wife. He told her N.P. cut her wrist. Christian "stepped in" and said N.P. did not need medical attention and was fine. Defendant also told his wife he would be home soon. Even when the interpreter was on the telephone and translating, there were occasions when defendant would answer a question before the interpreter translated the question.

Defendant testified he was born in the Philippines and came to the United States in 1994, when he was 30 years old. He never had any contact with the police in the Philippines, but he had heard the police would beat up the accused before taking him to jail. Prior to this incident, he had not had contact with police in this country either.

Defendant is not fluent in English, but took English and Tagalog classes in the Philippines. He said he had a hard time with school. He has a maintenance job here. Because he has a Filipino coworker, he speaks English and Tagalog at work. He said he has "issues" with speaking English at work.

Defendant said he did not understand everything N.P. said to him during the cold call, and that he only understood about five to 10 percent of what she said. He said he thought she had been in an accident, but he eventually realized there was no accident. During the phone call, N.P. did not accuse him of molesting her. He remembered that N.P. said she was calling him because the counselor wanted to talk about why she was cutting herself. He added that N.P. "is always making up lies."

When defendant entered the conference room, there were already two people in the room. Sheehan told him to sit down. Defendant did not understand when they began talking to him because he was "confused and rattled." He saw at least one of the deputies' badges, but did not see any guns. Defendant said he was afraid of the police "[b]ecause if they catch you, they will give you a ticket." Defendant said he was afraid he might get arrested, but not because any molestation of N.P. On cross-examination, defendant admitted he was told he was not under arrest and he was no more afraid of Sheehan and Christian than he was of getting a ticket.

Defendant said he understood about 10 percent of what the deputies said to him in English. The interpreter on the telephone spoke Tagalog, but in a different dialect consisting of a mixture of Tagalog and Ilocano. Some of the words used by the interpreter were "very deep or archaic." Defendant said he understood about 15 percent of what the interpreter said. According to defendant, he felt the police forced him to say he put his finger in N.P. by repeating the same question several times.

Defendant said he had difficulty understanding the *Miranda* advisement. He told the officers he understood his rights because he did not know what he was supposed to say. He said he basically said yes to whatever he was asked. Defendant said he did not understand at the time because his mind was "mentally blocked." Defendant admitted he understood the Tagalog advisement he read in the transcript of the interrogation.

After he was advised of his rights and said he understood them, defendant admitting putting his finger in N.P.'s vagina five to seven times, and licking the outside of her vagina five to seven times as well. Additionally, he admitted putting his mouth on her breast five times, licking her nipple once, and putting N.P.'s hand outside of his pants, on top of his penis once. He said N.P. was right when she said it started when she was nine years old and ended before her 10th birthday. He admitted knowing the acts were wrong. Defendant told the deputies he had not been threatened or harassed to make

statements. He promised not to do it again. The deputies then placed defendant under arrest.

The trial court reviewed the DVD of the interrogation and denied the request to suppress defendant's statements. The court found a *Miranda* advisement was not required because defendant had not been in custody, defendant validly waived his rights under *Miranda*, and his statements were voluntary.

II

DISCUSSION

A. *Admissibility of Defendant's Statements*

When the prosecution seeks to introduce the statements a defendant made during questioning by the police, it bears the burden of establishing the statements were voluntarily made by a preponderance of the evidence. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) When a defendant makes a statement to police during questioning and without benefit of a *Miranda* advisement, the prosecution must prove, by a preponderance of the evidence, that the statements were not the product of a *Miranda* violation. (*People v. Gomez* (2011) 192 Cal.App.4th 609, 627.)

1. *A Miranda Advisement Was Not Required*

In deciding whether a *Miranda* warning was required, "we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding '"basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .'"' [Citation.] Having determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 402.) The question of whether an individual was in custody for purpose of requiring a *Miranda* advisement is

a mixed question of law and fact. (*Id*. at p. 401, citing *Thompson v. Keohane* (1995) 516 U.S. 99, 112-113.)

Before law enforcement may interrogate an in-custody suspect, the suspect is entitled to be advised he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires." (*Miranda*, *supra*, 384 U.S. at p. 479.) Merely being asked questions by a law enforcement officer does not trigger the requirement for a *Miranda* advisement. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) An advisement is required only if the individual questioned is in custody at the time of questioning. (*Ibid*.; *Edwards v. Arizona* (1981) 451 U.S. 477, 481-482.)

"Custody is an objective condition." (*People v. Herdan* (1974) 42 Cal.App.3d 300, 306.) When an individual has not officially been arrested, whether the person was in custody is "determined based on how a reasonable person in the suspect's situation would perceive the situation." (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662.) In other words, one is in custody for purposes of requiring a *Miranda* advisement if, under the totality of the circumstances, a reasonable person in the defendant's situation would have the felt he or she was not free to leave. (*People .v Stansbury* (1995) 9 Cal.4th 824, 830.)

As defendant had not been arrested prior to questioning by law enforcement, we must determine whether a reasonable person in his situation would have felt he or she was in custody. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 402.) In doing so, we consider those facts having a bearing on whether a reasonable person would have felt he or she was in custody, including the location where the questioning took place, the length and form of the questioning, and whether the objective indicia of arrest are present (*People v. Herdan*, *supra*, 42 Cal.App.3d at p. 307), as well as "whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police,

whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; . . . whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) In considering the facts surrounding the questioning, "we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest." (*Ibid.*)

The subjective and undisclosed views of the interrogating officers or the defendant are not relevant. (*Stansbury v. California* (1994) 511 U.S. 318, 319, 323.) Therefore, the fact that the officers focused their investigation of defendant—N.P. said defendant molested her— is not determinative of whether he was in custody at the time of questioning. (*Oregon v. Mathiason*, *supra*, 429 U.S. at p. 495.)

Here, the questioning occurred in a school conference room, not in an inherently compulsive location such as a police station. (See *Miranda*, *supra*, 384 U.S. at p. 461.) Before being questioned, defendant was told he was *not* under arrest, was free to leave, and that he did not have to talk with the officers. These facts mitigate in favor of finding he was not in custody at the time. (See *In re Kenneth* (2005) 133 Cal.App.4th 54, 66 [minor taken to police station and told he was not under arrest and can leave at any

time was not in custody]; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1282-1283 [court found no need for *Miranda* advisement where defendant questioned at police station and told he was not under arrest].) Although the door to the office was closed, defendant was told the reason for closing the door was to protect his privacy.

The traditional trappings of arrest were not present. Defendant was not placed in handcuffs and, although the door was closed, the officers did not block the door.

The questioning took place in the afternoon and was not prolonged. It lasted an hour and 15 minutes. The longer the questioning, the more likely courts will find the suspect was in custody at the time. (*People v. Herdan*, *supra*, 42 Cal.App.3d at p. 307, fn. 12.)

Two plainclothes officers conducted the questioning, but no weapons were exposed. Although there was an occasion when Sheehan said she knew defendant was not telling the truth about the *number* of occasions on which he put his mouth on N.P.'s breast or vagina, the tone of the questioning was calm, neither officer got upset, at no point did Sheehan raise her voice, and there was no yelling. Unlike the situation in *People v. Saldana* (2018) 19 Cal.App.5th 432, 459, the questioning was not "persistent, confrontational, and accusatory." The deputies did not utilize classic interrogation techniques such as conveying the questioner's "rock-solid belief the suspect is guilty and all denials will fail." (*Id.* at p. 437.) Neither did they make """an accusation, overrid[e] objections, and cit[e] evidence, real or manufactured, to shift the [defendant's] mental state from confident to hopeless."""" (*Ibid.*)

During the questioning, defendant's phone rang and he was permitted to talk to the caller, his wife. During the call, defendant told his wife he would be home shortly, indicating he did not think he was in custody.

The DVD recording of the questioning confirms our conclusion that prior to the *Miranda* advisement in this matter, a reasonable person in defendant's situation

would not have thought he or she was in custody. Accordingly, we find the trial court did not err in admitting defendant's statements to police prior to being advised of his rights. The objective circumstances surrounding the questioning would not have conveyed to a reasonable person that he or she was not free to leave. The deputies did not create an atmosphere equivalent to formal arrest. (See *People v. Saldana*, *supra*, 19 Cal.App.4th at p. 438.)

2. *Voluntariness*

"In reviewing the trial court's determinations of voluntariness, we apply an independent standard of review, doing so 'in light of the record in its entirety, including "all the surrounding circumstances—both the characteristics of the accused and the details of the [encounter]" . . . .'" (*People v. Neal* (2003) 31 Cal.4th 63, 80.) In other words, we review the """uncontradicted facts to determine independently whether the trial court[]""" properly concluded the defendant's statements were voluntarily made. (*People v. McClary* (1977) 20 Cal.3d 218, 227, disapproved on another ground in *People v. Cahill* (1993) 5 Cal4th 478, 510, fn. 17.) When the evidence is in conflict, we accept those facts favorable to the prosecution and the trial court's determination. (*People v. Belmontes* (1988) 45 Cal.3d 744, 773.) In those situations where the questioning of the defendant has been recorded, as occurred here, "'the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness.'" (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

When a defendant's statement is challenged as being involuntary, and therefore inadmissible, the prosecution bears the burden of establishing the voluntary nature of the statement by the preponderance of the evidence. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) Whether a statement is voluntarily made depends "both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.) "'The ultimate test remains that which has been

the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'" (*Id*. at pp. 225-226.) A defendant's rational intellect and free will may be overcome by either physical intimidation or psychological pressure. (*People v. Maury*, *supra*, 30 Cal.4th at p. 404.)

In determining whether a defendant's statement was voluntarily made, we consider "the totality of all the surrounding circumstances." (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226.) These include "both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, [citation]; his lack of education, [citation]; or his low intelligence, [citation]; the lack of any advice to the accused of his constitutional rights, [citation]; the length of detention, [citation]; the repeated and prolonged nature of the questioning, [citation]; and the use of physical punishment such as the deprivation of food or sleep, [citation]." (*Ibid*., fn. omitted.) Also to be considered is whether law enforcement led the defendant to believe he would receive leniency or some other advantage by confessing. (*People v. Boyde* (1988) 46 Cal.3d 212, 238.)

Here, defendant was no youth at the time of the interrogation; he was 49 years old. The extent of his education is not clear. We know he went to school in the Philippines and had been in the United States for 19 years prior to being questioned in this matter. There was no evidence indicating defendant has low intelligence, notwithstanding his statement to the effect that he had a hard time in school. The questioning lasted an hour and 15 minutes, but he was not detained prior to being advised pursuant to *Miranda*. The questioning was not prolonged and no physical or psychological punishment was used. No promises were made, express or implied. Although "[l]ies told by the police to a suspect under questioning *can* affect the

voluntariness of an ensuing confession" (*People v. Farnam* (2002) 28 Cal.4th 107, 182, italics added), defendant does not contend he was lied to during questioning.

Having viewed the totality of the circumstances surrounding defendant's statements, we conclude his statements were the result of his free will and admissible.

B. *Subpoenaed Material*

The defense subpoenaed N.P.'s school records, in an effort to discover information relating to her veracity. The trial court reviewed in camera the records submitted to the court pursuant to the subpoena. The court stated it obviously would be "fair game" for defendant to obtain material of "any background history of lying or making things up or credibility issues." The court stated it found "absolutely nothing in the documents that touches upon that for that purpose . . . . There is nothing in here concerning any allegations of lying, credibility, false reporting, things along those lines that probably would be relevant in a trial like this." The court then ordered the subpoenaed records sealed.

Defendant asks this court to review the records to determine whether they contain information that should have been revealed to him. The Attorney General does not object to defendant's request. The Attorney General does not challenge the sufficiency of defendant's subpoena duces tecum, but requested that should we find the trial court erred in its decision and the records contained irrelevant information concerning N.P.'s credibility that should have been disclosed to defendant, we permit the filing of a supplemental brief addressing the effect of the information not being revealed to the defense. We directed the parties to submit supplemental letter briefs on the issue of the appropriate remedy and have considered the supplemental briefs submitted by the parties.

We review a trial court's discovery ruling for an abuse of discretion. (*Hill v. Superior Court* (1974) 10 Cal.3d 812, 816.)

"'An accused is entitled to any "'pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense. . . .' [Citation.]" [Citations.]' [Citation.] Documents and records in the possession of nonparty witnesses and government agencies other than agents or employees of the prosecutor are obtainable by subpoena duces tecum. [Citation.] A criminal defendant has a right to discovery by a subpoena duces tecum of third party records on a showing of good cause—that is, specific facts justifying discovery." (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1318.) Education Code section 49076 authorizes access to a student's school records pursuant to a judicial order. Of course, a subpoena duces tecum pursuant to section 1326 is a ministerial act and does not constitute legal process until such time as the court determines the party who subpoenaed the records is entitled to them. (*People v. Blair* (1979) 25 Cal.3d 640, 651.)

At the time the trial court addressed defendant's subpoena duces tecum, it had not yet conducted the hearing on the admissibility of defendant's statements. The court reviewed in camera the school records submitted pursuant to the subpoena duces tecum. N.P. was defendant's accuser. If defendant's admissions to police were suppressed, the trial result would rest on N.P.'s credibility, and a witness's credibility may be attacked by the defendant showing the witness lacks honesty or veracity. (Evid. Code, §§ 785, 786.)

In the present matter, the vast majority of the record submitted pursuant to the subpoena was not material to defendant's case. However, there was one sentence in a second grade (2009-2010 school year) report card that reflected on N.P.'s credibility: "She continues to need reminders about being . . . truthful . . . ." Contrary to the trial court's statement that there was "absolutely nothing in the documents that touches upon" the issue of N.P.'s credibility, this entry precisely relates to N.P.'s credibility, is relevant, and should have been disclosed to the defense. If N.P. needed to be reminded of the need to be truthful, it would be because, at a minimum, she demonstrated lapses in that area. The trial court abused its discretion when it denied defendant access to that portion of N.P.'s school record concerning her need to be reminded to be truthful.

We conditionally reverse the judgment and remand the matter to the superior court. On remand, the court must disclose the subpoenaed material, redacted of all nonmaterial information, to defendant. The defendant must be provided a reasonable period of time in which to investigate the information and demonstrate prejudice from the trial court's failure to provide the information. Thereafter, the trial court must order a new trial if defendant demonstrates a reasonable probability the result would have been different had the information been disclosed. (See *People v. Gaines* (2009) 46 Cal.4th 172, 182-183.) If defendant fails to make a showing of prejudice, the trial court shall reinstate the judgment.

III

DISPOSITION

The judgment is conditionally reversed and the cause remanded for the trial court to disclose to defendant the relevant subpoenaed information, allow defendant the opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. If

such showing is not made, the trial court shall reinstate the judgment.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.