Supreme Court No. 102328-6
COA No. 84150-5-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

L.D.E.P,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4(b), L.D.E.P. (pseudonym Lucas) asks this Court to review the opinion of the Court of Appeals, *State v. L.D.E.P*, No. 84150-5-I (attached as Appendix 1- 22).

B. ISSUE PRESENTED FOR REVIEW

The Due process test for an involuntary confession is "whether the suspect's will was overborne by the circumstances surrounding the giving of the confession.[1]" The State has a heavy burden of convincing this Court that thirteen-year-old Lucas understood his right to remain silent, right to consult with an attorney and have an attorney present, or that he knowingly and intelligently waived these rights. The child's age informs the court as to whether a child

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[1] *Dickerson v. United States*, 530 U.S. 428, 433-34, 120 S. Ct. 2326, 2330-31 (2000).

in the suspect's position would have felt free to end the interaction and leave. The trial court and a reviewing court have decided *a child voluntarily* confessed without engaging in any totality of the circumstances inquiry and without considering the age of the juvenile, the manner police questioned him, the psychological pressure added by his parents, or even the psychological pressure of being asked for a polygraph. Police interrogation of juveniles is both a significant question of state and federal constitutional law. RAP 13.4(b)(3). And it is also a matter of continuing and substantial public interest should be determined by this Court. RAP 13.4(b)(4). This Court must provide guidance to the lower courts that a juvenile is not a miniature adult who must be treated with special care under the totality of the circumstances. Review is warranted under RAP 13.4(b)(1)(3) and (4).

C. STATEMENT OF THE CASE

1. There is a series of fires in an apartment complex.

When Lucas was 13 years old, he lived in an apartment complex with his parents. CP 108; 2/17/22 RP2 596. There was a fire at the complex. 2/17/22 RP 600. A week later, there were five more fires. 2/15/22 RP 230. Nobody saw how the fires started or who started them. RP 2/15/22 258, 2/14/22 RP 7, 2/17/22 RP 572.[2] Nothing connected Lucas to the fires. RP 2/14/22 179-82.

On second day of fires, Lucas' parents hurried to get home as they communicated with him via voice and video messages. RP 2/14/22 162-63, 2/15/22 350. Lucas walked around the complex taking video and

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[2] The State charged Lucas with seven counts of arson for the six fires. CP 157-58.

messaging his mother capturing the goings on. 2/16/22 RP 372-73.

Some tenants and the apartment manager told Detective Christopher Olsen and Assistant Fire Marshall Stephen Goforth they thought Lucas was involved as he was seen filming the fires. 2/16/22 RP 392; 2/17/22 RP 578.

2. Police interrogate Lucas twice; first in a private room and for three hours at the police station.

On May 18, Detective Olsen and Assistant Fire Marshal Goforth decided to question Lucas. 2/16/22 RP 368, 2/17/22 RP 578. Detective Olsen was armed with his service weapon, his badge, and handcuffs. 2/16/22 RP 369, 543. Fire Marshal Goforth was in official firefighter uniform. *Id.* Detective Olsen staged how to seat everyone to "maintain a noncustodial setting," seating 13-year-old Lucas and his mother towards the

doorway, and the detective and the fire Marshall on the inside. 2/17/22 RP 544.

Detective Olsen then went to Lucas' home and asked him mother permission to question Lucas, and she agreed[3]. RP 2/15/22 343, 2/16/22 378. No one asked Lucas if he consented to be questioned.

Detective Olsen and fire marshall Goforth took Lucas and his mother through a crowd of tenants to an empty private conference room in the building office and closed the door. RP 2/15/22 334, 2/16/22 RP 368, 543. Lucas had never been in any trouble before, had no experience with police. 2/16/22 RP 369. They got Lucas' father, an ex-military pilot, on the phone to listen in. 2/16/22 RP 368-9, 543. Detective Olsen and

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[3] Under RCW 13.40.140(11) a parent cannot waive a 13-year-old's constitutional rights.

Goforth sat about a foot away across a large table from Lucas. 2/17/22 RP 622.

Detective Olsen did not read Lucas his *Miranda* warnings. 2/16/22 RP 371, 400. He was not told he was free to leave; or he could refuse to answer questions; or that anything he said will be used against him in court. *Id.* Detective Olsen did not tell him he could consult an attorney and have one present with him during questioning. *Id.*

At the time, Detective Olsen considered Lucas a person of interest but did not tell him he was a suspect. 2/16/22 RP 399. Detective Olsen told Lucas the interrogation would be recorded but did not tell him it was voluntary. 2/16/22 RP 378; Ex.71-A. With four authority figures in the room Detective Olsen questioned Lucas for 25 to 30 minutes. 2/16/22 RP 400.

At first the questioning was conversational. Detective Olsen asked Lucas what he did on May 16. 2/16/22 RP 372. Lucas explained he ate, played with his cats, did chores, and exercised in the living room. 2/16/22 RP 372-73. And only left the apartment twice when he heard about the fires and send messages about them to his mother. 2/16/22 RP 373, 380. He unequivocally stated he had nothing to do with the fires. Ex.71-A at 17:02.

The tone quickly turned aggressive, confrontational, and emphatic as it challenged Lucas' version of events.

Some of the questions were as follows:

- "My job is to figure out what happened, why it happened and to make sure this doesn't carry on."
- "This is us talking to figure out what happened here!"
- "What's happened has happened. So we need to get to the bottom of that"
- "You know who started these fires"

- "Is there any reason in my investigation that something will come up to show you are involved with the fires, whether is DNA that we collect from the scenes or somebody that has got video of you setting a fire?"
- "I know you don't believe you set a fire but are you absolutely confident you have no involvement in setting these fires."
- "So I am not going to find something later that shows you are involved?"

Ex71A.

Detective Olsen lied that Lucas would not get in trouble if he told the truth, and that police collected Lucas' DNA from the scene, and received video of Lucas starting the fires on the fourth floor. See Ex.71-A at 18:13-33.

Detective Olsen asked Lucas whether there was any reason for him to go to the fourth floor on May 16. 2/16/22 RP 374; Ex.50 at 00:45. Lucas said "no," Detective Olsen insisted he must have and, Lucas said it was possible he was on the fourth floor. 2/16/22 RP 374; Ex.50 at 01:02.

Lucas conceded "the only thing that make it look like I was involved was I was walking up on the fourth floor and there is a camera up there." *Id.* at 18:33-58.

Detective Olsen put accusatory questions emphatically: "Is there any reason you would be on the Fourth Floor prior to that fire happening?" *Id.* at 19:33-40. "But before the fire, is there any reason you would be up there?" EX71A at 19:43-48. "So if you are up there before the fire, why would that be?" Ex71A at 19:49-54.What's worse? When you make the lie, or speaking the truth that may be what you did was wrong? Ex71A at 0:20:49-55.

As Detective Olsen's questions persisted, Lucas guessed someone must have set the fires in different corners of the building so they would meet in the middle. 2/16/22 RP 374; Ex.71-A at 20:44.

At the *end* of the interview Detective Olsen asked Lucas to sign a document stating that his statement has been made freely or voluntarily. "Ex71A at 23:58-24:09.

Detective Olsen asked to see the messages on Lucas's phone. Lucas's mother took his phone and scrolled through it while Detective Olsen watched and recorded copies of the video and audio messages. 2/16/22 RP 335, 343, 380; Ex. 68.

In one audio message Lucas talks about "the fire that I was trying to start in front of her door." 2/16/22 RP 380-81; Ex.68 3:40. And in another audio message, Lucas unwittingly says: "the fires that I tried to start." Ex.68 7:47.

In July, 21, Detective Karen Kowalchyk asked Lucas's father to bring him to the station house for questioning. RP 2/15/22 284. When they arrived,

Detective Kowalchyk was dressed in a police vest, she had a firearm, and badge. 2/16/22 RP 388. Lucas's stayed with him for the first 40 minutes, during which Detective Kowalchyk gave Lucas *Miranda* warnings[4] and read him the juvenile rights. RP 2/15/22 285-86, 2/16/22 385. Lucas and his father were asked to sign a recorded witness statement form. Ex. 51.

Detective Kowalchyk asked Lucas's father to leave, and she interrogated Lucas alone in a closed room for three hours. RP 2/15/22 286, 291. And Lucas gave further incriminating details—that he was "fascinated with fire" and "the crackling noise that fire makes." 2/16/22 RP 386.

The point of the station house interrogation was for Detective Kowalchyk to further question Lucas

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

about the phone messages he sent to his mother on May 16. RP 2/15/22 287. Lucas explained on that day he was scared, panicked, and had a lot of adrenaline, he stuttered and misspoke: "I tend to mess up my words a lot." 2/17/22 RP 617.

Detective Kowalchyk changed tact, "Let's say you didn't do it. Who do you think did it?" Ex.49 at 00:00. Lucas guessed it could have been a group of young people who may have stolen a lighter to "mess with it." Ex.49 00:15-34.

Nobody told Lucas the interrogation was voluntary. 2/17/22 RP 623. He did not understand he did not have to talk to Detective Kowalchyk. 2/17/22 RP 625-26. No one told him he had a right to an attorney. 2/17/22 RP 625-26. After three hours of isolation with Detective Kowalchyk, Lucas said he

wanted to go home and the interview ended. 2/16/22 RP 385.

3. The trial court denies Lucas' motion to suppress and admits all his statements.

The State moved to admit Lucas's statements during the interrogations with Detectives Olsen and Kowalchyk. 2/14/22 RP.

The court summarily concluded Lucas was not in custody and he "gave his statements knowingly, freely, and voluntarily," and his statements were admissible. 2/17/22 RP 650-51; App 23-25.

The court also concluded Lucas was not in custody when Detective Kowalchyk interrogated him alone for three hours in a closed room in the police station, he "knowingly and voluntarily waived his Miranda Rights." 2/17/22 RP 651-52; App. 24.

Notably the trial court did not orally conduct a totality of the circumstances test and the written

findings contain no totality of the circumstances analysis. App. 23-25. The Court of Appeals affirmed without conducting its own de novo review either. App. 1-22.

D. ARGUMENT

Review is warranted to provide guidance that our courts have a responsibility to examine with special care police interrogation of juveniles.

A child's age is an objective circumstance, a court must weigh in a totality of the circusmtances analysis in determining if custodial interrogation occurred. A child's age is readily observable and renders a child particularly susceptible to the coercive techniques of police interrogation. Absent consideration of age, a reliable custodial determination cannot be made.

The trial court and reviewing courts err by summarily determining voluntariness without accounting for a juvenile's age and other factors related

to his age in considering whether the the police questioning was coercive. Neither court considered whether an ex-military father and a mother in a closed room could exert psychological pressure to confess.

The trial court credited the Fire Marshall's faulty recollection that he heard Detective Olsen tell Lucas he was free to leave. But the audio and videos recordings and Detective Olsen's testimony do not bear out that account. On the stand, Detective Olsen could not bring himself to say he told Lucas he was free to leave.

This Court has considered numerous factors in individual cases that can bear upon whether a confession is voluntary, and no single factor controls. The trial court was still required to conduct the totality of circumstances test that took into account Lucas' youth ; but this did not happen. App 23-25.

The Court of Appeal gave short shrift, did not consider youth, and did not conduct de novo its own totality of circumstances test as required, and affirmed. App. 22.

Lucas asks this court to accept review because police interrogation of children is both a significant question of state and federal constitutional law, RAP 13.4(b)(3), and matter of continuing and substantial public interest. RAP 13.4(b)(4). The Court must provide guidance to the lower courts that a juvenile is not a miniature adult and a juvenile's age must be consider under the totality of the circumstances.

1. *Youth is a critical factor in the totality of circumstances.*

"A suspect is in custody for purposes of *Miranda* when 'a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest.' " *State v.*

Rosas-Miranda, 176 Wn. App. 773, 779, 309 P.3d 728 (2013) (*quoting State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).).

"An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak." *Miranda*, 384 U.S. at 461. This is true for adults and children alike: "the very fact of custodial interrogation . . . trades on the weakness of individuals." *Id.* at 455.

But a child is far more susceptible to coercive influences and pressures than a fully-developed adult. *J.D.B. v. North Carolina*, 564 U.S. 261, 272-73, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). "[N]o matter how sophisticated" or mature, a child subject to police interrogation "cannot be compared with an adult in full possession of his senses and knowledgeable of the

consequences of his admission." *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962).

History is "replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. *J.D.B.*, 564 U.S. at 274. Juveniles "are more vulnerable or susceptible to ... outside pressures" than adults. *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005). This Court must answer whether a reasonable 13-year-old in Lucas's circumstances would have felt free to end both interogations and leave.

"Any police interview of an individual suspected of a crime has coercive aspects to it." *J.D.B.*, 564 U.S. at 268 (citations omitted). The pressures of custodial interrogation are "so immense" that they can induce an adult to confess to crimes they never committed. *Id.* at 269. This risk is much higher, "all the more troubling,"

and "all the more acute" when children are subjected to custodial interrogation. *Id.*

If the State seeks to admit a statement made during custodial interrogation, it must establish the accused juvenile "voluntarily, knowingly and intelligently" waived his *Miranda* rights. *J.D.B.*, 564 U.S. at 269-270.

The totality-of-the-circumstances analysis also specifically applies in deciding the admissibility of a juvenile defendant's confession. *State v. Unga*, 165 Wn.2d 95, 103, 196 P.3d 645, 649 (2008) *citing Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

Included in the circumstances to be considered are the juvenile's age, experience, intelligence, education, and background; whether he or she has the capacity to understand any warnings given and his or

her Fifth Amendment rights, and the consequences of waiving these rights. *Id.* State courts have a responsibility to examine confessions of a juvenile with special care. *Id.*

In *F.B.T.*, the Court of Appeals gave lip service to the factors but did not conduct its own de novo totality of the circumstances test and did not consider the age of the juvenile as relevant to whether there was a custodial interrogation. *State v. F.B.T.*, 12 Wn. App. 2d 1031 (2020). (*quoting Fare*, 442 U.S. at 725). The juvenile in *E.E.* met with the same fate.

2. A reviewing court errs if it does not consider a juvenile's age in its custody determination.

The conclusion that a suspect is not "in custody" for *Miranda* purposes is a conclusion of law. *See Rosas-Miranda*, 176 Wn. App. at 779. Appellate courts review "de novo whether the trial court's conclusions of law are supported by its findings of fact." *Id.*

Courts review the validity of a claimed *Miranda* waiver de novo. *State v. Campos-Cerna*, 154 Wn. App. 702, 708, 226 P.3d 185 (2010). Without considering the child's youth the Court of Appeals did not review de novo, and held that where the trial court has determined that a *Miranda* waiver was voluntary, it would not disturb that finding on appeal if the record reflects substantial evidence by which the court could have reached that conclusion. See *F.B.T.*, at *3 *citing State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). Just like in *F.B.T.*, the Court of Appeals erred by refusing to treat this 13-year-old with special care instead of viewing him as a "miniature adult." It did not consider his youth and inexperience in deciding on involuntariness.

Contrary to the Court of Appeal's opinion, Lucas' case is factually similar to *State v. D.R.*, 84 Wn. App.

832, 930 P.2d 350 (1997). App. 19. DR was a 14-year-old boy called into the school principal's office and questioned about alleged incest by a plain-clothes officer. *Id.* at 834. The officer told DR that he did not have to answer questions, but he never informed DR that he was free to leave. *Id.* The appellate court held DR was subject to a custodial interrogation. *Id.* at 838.

The D.R. court emphasized that the "sole question" to consider in deciding if the interrogation was custodial was "whether a 14-year-old in D.R.'s position would have 'reasonably supposed his freedom of action was curtailed.' " *Id.* at 836 (*quoting State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989)).

The D.R. court's conclusion that the interrogation was custodial hinged on the fact that no one told DR he was free to leave. *Id.* at 838. The court identified three other important factors: D.R.'s youth, the "naturally

coercive nature of the school and principal's office environment for children of his age," and the "obviously accusatory nature" of the interrogation. *Id*; *See, State v. E.E.*, 12 Wn. App. 2d 1001 (2020)(unpublished).

Instead of reviewing de novo and analyzing the totality of all the relevant circumstances, the Court of Appeals summarily concluded that because Goforth testified he believed Olsen told [Lucas] he was free to leave at any time and that the interview was voluntary, and his parents believed the interview was voluntary, therefore "substantial evidence supports that finding of fact" that "[Lucas] was not in custody during the interview." App. 19-20.

The Court of Appeals purported to distinguish D.R. because Lucas was questioned in a "community room" inside his apartment complex accompanied by his family believed that Lucas was told he was free to

leave. The Court of Appeals incorrectly refuses to engage in a full-blown totality of all relevant circumstances. App. 18-22. More importantly, it vehemently refuses to even consider that Lucas was anything other than a miniature adult.

This Court should not let Lucas suffer the same fate as E.E., and F.B.T—of being treated as a reasonable person. This Court should accept review and provide guidance that our courts have a responsibility to examine with special care those purported juvenile confessions to police.

3. *The Court should hold that all courts must consider the juvenile's age in deciding whether he waived Miranda.*

Because neither the trial court nor the Court of Appeals actually conducted a totality of the circumstances test, this Court's review is warranted. App. 1-25. Again, whether police coerced a confession

from a juvenile is a matter of substantial public interest. This Court must provide guidance that our courts ought to zealously ensure that children are not prosecuted based on coerced confessions.

In briefing and in oral argument the State urged the Court of Appeals to reject Lucas' argument and apply the reasonable adult person standard from *Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980). Br. of Resp. at 27, 28, 36, 42. The State maintained reasonable person standard had not changed in over 40 years. *Id.* And for authority cited numerous unpublished decisions of the Court of Appeals rejecting the argument that children should be treated differently and applying the deferential reasonable person in *Dutil*. Br. of Resp. 41-42.

Lucas countered that binding precedent of this Court already requires all courts consider that a 13-

year-old is less mature and more vulnerable to police interrogation than an adult. Reply of Appellant at 2 citing *Unga*, 165 Wn.2d at 103 (citing Fare). Lucas noted that in 2011, the Supreme Court also held that children must be treated differently. *Id.* citing *J.D.B.*, 564 U.S. at 274-75. Finally, Lucas noted that in 2023, RCW 13.40.740 made it harder for the State to prove a 13-year-old's statements were voluntary if they did not allow the youth to actually consult with an attorney. Lucas pointed out in 2023, it is no longer enough for the police to give lip service to *Miranda*, and and to tell a teenager they are free to leave to prove their statements were voluntary. The prevailing standard was now that the State must make sure a 13-year-old actually consults with an attorney, and the juvenile expressly waives the right to have an attorney present after being fully informed of all the rights. Thus the

State's burden of proving the waiver was voluntary has steadily heightened since the 40 year-old-Dutil standard. Another relevant factor courts must consider was that the Legislature enacted RCW 13.40.740 to say even if a 13 year old is given *Miranda* warnings he cannot give up his privilege without first consulting with an attorney and then expressly and voluntarily waiving.

From this backdrop and totality police interrogated Lucas without providing him his Miranda warnings. Before escorting the 13-year-old into a private interrogation room, police staged it to "maintain a noncustodial setting"—which is telling of police intent to coerce a child. 2/17/22 RP 544.

The questioning in private closed rooms lasted 25 minutes, and three hours. The three hour interrogation was at the police station. To a 13-year-old, a private

closed room is coercive. The fact that your ex-military father was on the phone and your mother was sitting next to you when questioned could only add psychological pressure to speak.

Moreover a police station is by nature a coercive setting. It is even more coercive after a 13-year-old stews over his seeming confession for a month to try and come up with a sensible explanation for his "slip ups". And on top an expert in polygraph asks the 13-year-old to agree to a polygraph before subjecting him to three more hours of questioning.

Detective Olsen used Minimization and misrepresentation techniques: "What's happened has happened. So we need to get to the bottom of that," while implying that Lucas would not be in trouble if he told the truth, because all police wanted was to make sure the fires stopped happening: "My job is to figure

out what happened, why it happened and to make sure this doesn't carry on."[5]

The police falsely told Lucas they had his DNA from the crime scenes and a video of him starting the fires on the fourth floor. EX 71-A at 18:13-33. The court should not condone lying to a 13-year-old to obtain a confession, while urging him to be truthful. Lying to the suspect about what law enforcement knows about his or her involvement in the crime is particularly repulsive to and totally incompatible with the concept of due process. *See State v. Eskew*, 2017 MT 36, ¶ 17, 386 Mont. 324, 329, 390 P.3d 129 (2017). What's worse is experienced police lying to a 13-year-old while urging him to tell the truth.

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[5] The questioning was strikingly similar to that in J.D.B.: [W]hat's done is done[;] now you need to help yourself by making it right." *J.D.B.*, 564 U.S. at 266.

The use of psychological pressure on the defendant in a coercive setting, including coercive questioning that minimizes the defendant's ability to deny wrongdoing, along with failure to deliver adequate *Miranda* warnings are relevant considerations. *See D.R.*, 84 Wn. App. 832; *see also*, *Unga*, 165 Wn.2d 95.

The court and the court of appeals did not consider whether the accusatory questions overbore the will of a 13-year-old. They did not consider whether Lucas' ex-military father's listening in, while his mother sat next to him was an additional psychological pressure to confess. Additionally, They both adamantly refused to consider Lucas's age and lack of experience with police.

Lucas' parents in a private room put psychological pressure for Lucas to stay put and

answer all the detective's questions. The detective and the fire marshall asked the mother for permission to question Lucas and she came to the apartment and took him for questioning. 2/17/22 RP 619. They got his ex-military father on the phone. Surely no 13-year-old has the gumption to snub police questions, and walk away from his ex-military father and mother in the room. Moreover, during the interview his own mother provided incriminating details. 2/17/22 RP 685. Lucas gave a hypothetical that the person who started the fire lit it on one end of the hallway and then the other so they could meet in the middle. *Id.* His own mother explained Lucas was parroting a conversation he had with his father of a military tactic his father would have taught him. *Id.*

As a practical matter, *Miranda* warnings are of little use to a person who has already confessed. *State*

v. Lavaris, 99 Wn.2d 851, 859, 664 P.2d 1234 (1983). Unless he understood that the giving of *Miranda* rights meant that any prior incriminating statements could not be used against him, accused's subsequent confession could not have been voluntary. *Id.* at 860. Having let the "cat out of the bag", the psychological damage was done; the subsequent Miranda warnings could not undo that damage. *Id.* Moreover advising a suspect of his *Miranda* rights, even if done properly, is not a license to coerce a confession. *State v. Sargent*, 111 Wn. 2d 641, 762 P.2d 1127 (1988).

At the second interview, Lucas had already all but confessed. The police already saw videos where Lucas seemingly confessed to starting some of the fires. Detective Kowalchyk an expert in administering polygraphs asked Lucas to agree to take a polygraph. 2/15/22 RP 284. What was the point of asking a 13-

year-old to consent to a polygraph? 2/15/22 RP 285. This was a psychological ploy in an already coercive police-dominated setting to minimizes his ability to deny wrongdoing—to overwhelm a 13-year-old's will with no experience with this type of questioning, isolated alone in the police station.

In his own words Lucas felt police were in control of the entire thing, asking more and more and more questions; he was being "pinned a little bit" which is why he slipped up. 2/17/22 RP 620-621. Nobody told him he was the prime suspect and that police were collecting evidence to prosecute him. *Id.* At the end of the first interview, Detective Olsen asked Lucas to sign a document stating he made his statements freely or voluntarily. Ex.71A at 23:58-24:09. This is a factor militating against voluntariness.

Because the detective read the words of *Miranda*, as a mere station house formality while Lucas's father was still in the room, this downplayed the meaning. And it rendered *Miranda* meaningless to this 13-year-old. The lip service of *Miranda* downplayed to a youth, inexperienced with police, who was lied to about police having his DNA from the scene and a video of him starting the fire, and the psychological pressure of being asked to consent to a polygraph are all relevant circumstances our courts must consider in the totality analysis. See Ex.71A at 18:13-33.

Exhibit 48 depicts Lucas' will overborne during the second interview. Lucas is in a stream of consciousness was talking himself into a corner trying in vain to explain his seeming confessions. All these are factors that show his statements were not voluntary.

Whether a trial court and a reviewing court can decide without conducting in a totality of circumstances test and without considering the age of a juvenile, is a significant question of state and federal constitutional law. RAP 13.4(b)(3). It is also a matter of continuing and substantial public interest should be determined by this Court. RAP 13.4(b)(4). Review is warranted.

E. CONCLUSION

Lucas respectfully requests this Court to accept review, reverse the court of appeals opinion and offer guidance that our courts have responsibility to examine with special care purported voluntary statements of Juveniles. RAP 13.4(b)(3),(4).

This brief complies with RAP 18.7 and contains 4,871 words.

DATED this 30th day of August 2023.

Respectfully submitted,

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APPENDICES

FILED
8/21/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. L.D.E.P., Appellant.	No. 84150-5-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — 13-year-old L.D.E.P. was charged with seven counts related to six fires set on two different days at his apartment complex. Following a bench trial, the court found L.D.E.P. not guilty of arson in the second degree and reckless burning for a fire started on the first date, but guilty of attempted arson in the first degree in three counts and guilty of arson in the first degree in the remaining two counts for fires set nine days later. L.D.E.P. challenges the denial of his motions to sever counts and his motion to suppress statements made in two different interviews, one that took place at the apartment complex with his family present and another that occurred at the police station. We affirm.

FACTS

In May 2021, 13-year-old L.D.E.P. lived with his parents and younger brother in

an apartment complex in Everett, Washington. The building was four stories tall, with over a hundred units, and an open stairwell in each of the four corners of the building.

On May 7, L.D.E.P. left to take a small load of trash out of the apartment to the dumpster located on the southeast corner of the building, which was something he did regularly. Next to the dumpster was an area where people discarded furniture. L.D.E.P. returned to his apartment and told his father that there was a fire occurring in the "furniture section" of the dumpster. His father instructed L.D.E.P. to stay at the apartment while the father went to look at the dumpster area. The father saw furniture on fire and an older man standing nearby watching it, which he thought was "highly odd."

Several weeks later, a potential witness, a child named A.G., came forward. A.G., who was 10 years old at the time of trial in 2022, testified that while she walked back and forth from her apartment to the laundry room she saw L.D.E.P. throwing trash away at the dumpster. She recognized L.D.E.P. as someone who lived in the complex. For a few seconds she saw him leaning down about six inches away from a couch that was emitting smoke and then walked away.

On May 16, there were five fires at the apartment complex—two in the morning (northeast stairwell and southeast stairwell) and three in the afternoon (doormat outside apartment 426, on the balcony of apartment 407, and the southwest stairwell).

Before there were any indications of any fires, L.D.E.P.'s family left him alone in the morning and ran errands for about 35 to 60 minutes when the first two fires were set. One of the morning fires was set in the stairwell next to L.D.E.P.'s apartment in the northeast corner of the complex. A resident smelled smoke through an open window of

his apartment and tracked the smoke to a cardboard box filled with paper and what looked like pieces of clothing on fire. He put out the fire by stomping on it and using a fire extinguisher as another resident called 911. The fire alarm did not go off during this event.

Assistant Fire Marshal Stephen Goforth responded and investigated. He first investigated the northeast stairwell fire near L.D.E.P.'s apartment noticing a cardboard box with some items around it. He also saw a green and red cloth material and a shirt in the area. He noticed charring and what looked to be a fire pattern on a vertical member of the stairwell railing. He opined that the fire was intentionally set based on the location and materials used to start the fire, reasoning that these materials would not have accidentally, naturally, or spontaneously ignited. He believed the materials were brought to the area with the intent to start a fire.

When he looked around, he saw evidence of what had been another fire in the southeast corner of the complex. Goforth noticed partially burned notebook paper and char marks against the wall. He noted that the origin of the fire was under the baseboard of a wall. He explained that the fire did not spread because the wallboard had fire protection on it, there was not enough fuel, and the fire did not have the right materials to continue. He opined that both fires appeared to have been set by a handheld open flame device, such as "a cigarette lighter, barbecue lighter, some sort of butane lighter," and they were intentionally set. He left after this investigation without having any interaction with L.D.E.P. or his family.

L.D.E.P.'s family returned to the apartment complex, and their neighbors told them there had been a fire in the stairwell and the fire department had been there.

L.D.E.P.'s father spoke to the firefighters in passing but not about "anything serious." Later that afternoon, L.D.E.P.'s family left again and three afternoon fires were set while they were away. The fires were located on the welcome mat outside of apartment 426, in the southwest stairwell between the first and second floor, and on the balcony of apartment 407 on the fourth floor.

The doormat outside apartment 426 was found burned, though the fire was out by the time it was discovered—no one saw how the fire started or who started it. A tenant discovered a burnt cardboard box in the southwest stairwell between the second and third floors. No one saw anyone in the stairwell, and there was no evidence of who or what caused the fire. Finally, the fire on the balcony of apartment 407 was extinguished by a tenant before the fire department arrived. The tenant did not see anyone or anything unusual, or what caused the fire.

The fire alarms went off while L.D.E.P. was home alone. As the fire department responded, L.D.E.P. repeatedly called his family to tell them about the fires and give them updates. L.D.E.P. sent his mother audio and video messages as he ran around the complex capturing the firefighters in action and some of the extinguished fires. A video capturing these messages was admitted as evidence at trial. In one of the messages, L.D.E.P. explained how he was going to try and ask the resident of apartment 426 if he could take a picture of "the fire I was trying to start" in front of her door. In another message, L.D.E.P. told his mom there were fires on a porch, in two staircases and by apartment 426: "that's four fires I tried to start or whoever tried to start." He also told his mother about his conversation with a resident of the complex, "I told her about all of the fires I was trying to get started." He then laughed and stated,

"Her mind was blown."

Goforth was dispatched back to the apartment complex at around 2:00 p.m. to investigate the afternoon fires. He hypothesized that someone set the fire on the fourth floor balcony by igniting flammable materials and tossing them onto the balcony from a nearby walkway. The fire remnants contained a possible backpack with a blue and orange pattern, which was similar to the cloth found in the morning fire. Goforth continued his investigation of the fire outside apartment 426, L.D.E.P.'s former apartment. He saw that there was a welcome mat that appeared to be melted, or something had been burned on top of it, because the char or the area of origin was wider than just the rectangle mat. The apartment 426 resident testified that when she was speaking to an officer about the fire, L.D.E.P. overheard her and appeared really excited and asked, "Oh, really, where? Where? Where is the fire?" L.D.E.P. held his phone in his hand, recording, and asked if he could follow the resident to where the fire was at her apartment. Goforth noticed the burned materials were again white paper and parts of a shirt. All of the fires were started in a similar manner using cardboard, paper, and cloth. Goforth believed the fires were started with an open flame device, such as a lighter. He additionally noticed a burn mark next to L.D.E.P.'s apartment that appeared to have been caused by an open flame handheld device.

Goforth noted that during the investigation, L.D.E.P. was videotaping the fires from close range when no one else did. Goforth had training in conditions and behaviors of juveniles setting fires, and he stated that juveniles older than 12 set fires as a way to draw attention to themselves sometimes when they are struggling with problems at home or at times mental illnesses.

The building manager, assistant manager, and another tenant identified a suspect, Wesley Larson. Larson had a history with the building. He was an unauthorized occupant, smoked in the elevators, parked without a permit, and once used a ladder to climb into someone's apartment. After Larson's car was towed shortly before the May 16 fires, he was angry and stormed into the building office screaming. He told the manager, "you'll get what's coming to you." He told another tenant, "Don't worry, I got something for their ass."

On May 18, Detective Christopher Olsen and Goforth went to speak with L.D.E.P. at the apartment complex for about 20 to 30 minutes. Olsen spoke to L.D.E.P.'s mother before asking if he could speak to L.D.E.P., and she agreed. L.D.E.P., his mother, his brother, Olsen, and Goforth sat around a large table in a large community room in the complex. L.D.E.P.'s father listened in by speakerphone. Olsen sat about a foot away from L.D.E.P. At the time, Olsen considered L.D.E.P. a person of interest but did not tell him he was a suspect. Olsen stated that he did not "remember the exact[] verbiage" he used to tell L.D.E.P. that the interview was voluntary, but he knew that he explained that as a practice. When the State asked Goforth if Olsen explained that the interview was voluntary, Goforth stated, without objection, "Yes, I believe so." Olsen asked L.D.E.P. if he had any problems with Olsen recording the interview. L.D.E.P. said he did not have any problem. L.D.E.P. said he had nothing to hide and was absolutely confident he did not set the fires. Olsen asked to see the messages L.D.E.P. sent his mother. L.D.E.P.'s mother scrolled through L.D.E.P.'s phone while Olsen watched and recorded a copy of the video and audio messages L.D.E.P. sent to his mother. At the end of the interview, L.D.E.P. signed a statement

acknowledging his statements were "made freely, voluntarily, and without threats or promises of any kind" and also acknowledged it verbally. When Olsen asked L.D.E.P. about the statements he made in the messages, L.D.E.P. said that is not what he meant to say.

At trial, L.D.E.P. testified that he did not remember if the interview with Olsen was voluntary. But he also testified that he signed the statement freely, and felt at the time of the interview that it was voluntary. L.D.E.P.'s mother and father also both testified that the interview was voluntary. When the State asked L.D.E.P. if he felt as though he could end the interview, he responded, "At some points, no."

About two months later, Detective Karen Kowalchyk conducted the second interview of L.D.E.P. at the police station. Kowalchyk spent 40 minutes of the three-hour interview speaking to L.D.E.P. and his dad and advising L.D.E.P. of his constitutional rights. L.D.E.P. and his father both signed a written statement acknowledging L.D.E.P.'s right to remain silent and to an attorney. The statement also indicated that L.D.E.P. could exercise his rights at any time and asked if L.D.E.P. understood his rights. Kowalchyk informed L.D.E.P. he could leave the interview at any time. Kowalchyk sat behind a desk and L.D.E.P. sat in a chair in front of the desk with the closed door behind him. At trial, L.D.E.P.'s father testified that L.D.E.P. volunteered for the interview. When asked if anyone asked him if he wanted to do the interview, L.D.E.P. testified, "I had the option if I wanted to do it or not." L.D.E.P. testified he did not know who spoke to him first about the interview, but knew in advance that he was going to the police station to be interviewed. L.D.E.P. testified at trial that he understood he was free to leave the interview. He understood that the interview was

recorded and it could be used against him in court. When the State asked if he understood that he had the right to talk to an attorney, he responded, "I don't think so." But L.D.E.P. also testified that he understood everything that was read to him that day from the form he signed.

During the interview, L.D.E.P. said he used to be fascinated with the crackling and noise of a fire, but that he was no longer interested. He denied any involvement with the fires and suggested that it may have been started by a group of young people who got their mom or dad's lighter and put it down on the ground and messed with it. While offering this theory, L.D.E.P. gestured with his hand as if flicking a lighter. He later claimed he did not know how to use a lighter and only gestured based on what he has seen others do. He conceded in the interview that his statements in the messages to his mother looked "very, very, very suspicious." He explained that words "accidentally slipped out" because he was so shaky with adrenaline. The interview concluded when L.D.E.P. asked to go home.

The State charged L.D.E.P. with arson in the second degree and reckless burning in the second degree for the May 7 fire, and five counts of arson in the first degree for the May 16 fires.

PROCEDURAL HISTORY

Before trial, L.D.E.P. moved to sever his charges into two trials under CrR 4.4. He first proposed severing the two counts related to the May 7 fire from the remaining counts relating to the May 16 fires. The State opposed the motion. L.D.E.P. then proposed in his reply an additional request to sever the May 16 morning fires from the afternoon fires. The court issued a detailed denial to the motions to sever.

About two weeks later, the defense renewed its motions to sever in front of the trial judge during motions in limine, which the court again denied, reasoning that it could separate the acts. The defense again unsuccessfully renewed the motion during trial two days later. L.D.E.P. agreed with the State that the issue was previously decided in a pre-trial motion and L.D.E.P. conceded that it did not have additional evidence to present as to that issue.

The parties proceeded to trial, which incorporated the CrR 3.5 hearing. The trial court made several findings and concluded that L.D.E.P. was not in custody during the time of either interview with detectives, and that L.D.E.P. understood he was participating in the interviews knowingly, voluntarily, and freely. Additionally, the trial court also concluded that L.D.E.P. was read his Miranda rights in the interview at the police station and that he made a knowing and voluntary waiver of those rights. The trial court ruled that the statements L.D.E.P. made in the interviews with the detectives were admissible under CrR 3.5.

L.D.E.P. testified during trial and denied starting the fires. He testified that in the morning of the May 16 fires after his family left, he left his apartment because the fire alarm went off, he smelled smoke in the hallway, and he wanted to call his parents. L.D.E.P. testified that the fire in the morning was in a stairwell near his apartment. L.D.E.P. was asked about the video message he made about apartment 426 where he used the pronoun "I" in talking about having tried to start a fire in front of that unit's door. L.D.E.P. responded that "[i]nstead of 'I,' it would be 'someone.'" He explained that he was scared, panicked and had a lot of adrenaline, which does not help when he stutters sometimes, and how all that tends to mess up his words a lot. L.D.E.P.'s father testified

that when L.D.E.P. gets nervous he gets "really jittery" and "stumbles over his words." L.D.E.P. said the same thing happened in another video message where he unintentionally stated, "The fires I tried to start."

At the end of trial, the court made findings and conclusions. The court found L.D.E.P. not guilty on counts related to the May 7 fire. The court agreed with defense counsel and found L.D.E.P. guilty of the lesser included crime of attempted arson in the first degree for the morning southeast stairwell fire, the afternoon southwest stairwell fire and the fire on the doormat outside apartment 426. The court found L.D.E.P. guilty of arson in the first degree for the morning fire in the northeast stairwell and the fire on the balcony of apartment 407.

L.D.E.P. appeals.

DISCUSSION

Motion to Sever

L.D.E.P. argues that the trial court denied him his right to a fair trial when it denied his motion to sever. L.D.E.P. specifically argues that he was prejudiced by the denial of his motion to sever because the trial court "cumulated evidence and inferred [L.D.E.P.] had a propensity for arson." We disagree.

"Severance" refers to dividing joined offenses into separate charging documents. State v. Bluford, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017) (citing CrR 4.4(b)). A party must generally move for severance pretrial and renew a denied pretrial motion for severance "before or at the close of all the evidence." Id. (citing CrR 4.4(a)(2)). A trial court has broad discretion to grant a severance when it is deemed appropriate or necessary "to promote a fair determination of the guilt or innocence of a defendant."

CrR 4.4(c)(2)(i). CrR 4.3(a)(2) "should be construed expansively to promote the public policy of conserving judicial and prosecution resources." State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998). However, offenses joined under CrR 4.3(a) may be severed if the court determines that a severance will promote a fair determination of the defendant's guilt or innocence of each offense. State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 145 (1990). On appeal, "[t]o establish error, [the defendant] must also show that the prejudicial effect of trying all the counts together outweighed the benefits of joinder." Bluford, 188 Wn.2d at 315.

Defendants seeking severance have the burden of demonstrating that a trial involving multiple counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. Id. at 316. We do not disturb a trial court's decision to grant or deny a severance absent a manifest abuse of discretion. State v. Emery, 174 Wn.2d 741, 752, 278 P.3d 653 (2012). The burden is on the defendant to come forward with sufficient facts to warrant the exercise of discretion in his or her favor. Id. To support "a finding that the trial court abused its discretion, the defendant must be able to point to specific prejudice." Id. (quoting State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982)).

To determine whether the trial court's refusal to sever requires reversal, an appellate court must balance the prejudicial effect of admitting evidence of multiple offenses against the following prejudice-mitigating factors:

> (1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) whether the trial court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of evidence of the other crimes.

State v. Craven, 69 Wn. App. 581, 586-87, 849 P.2d 681 (1993). Misapplication of one prong does not necessarily require reversal. State v. Watkins, 53 Wn. App. 264, 272, 766 P.2d 484 (1989).

The State concedes that the strengths of the counts do greatly vary as there was an eyewitness as to the counts that related to the May 7 fire and only circumstantial evidence as to the counts relating to the May 16 fires. This factor weighs in favor of severance.

Second, the court considers the clarity of defenses as to each count. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). At trial, L.D.E.P. conceded that his defense for all counts was general denial. On appeal he raises a new argument that his defenses were frustrated because he presented other suspect evidence that was different for separate charges. He presented evidence of one suspect for the furniture fire on May 7 and evidence of a different suspect for the May 16 fires. Appellate courts generally will not review an issue, theory, or argument not presented at trial. State v. Thompson, 55 Wn. App. 888, 892, 781 P.2d 501 (1989) (declining to consider a new prejudice argument on appeal that was not raised below in a motion to sever). This is so "the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials." Id. (citing Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)). Also, L.D.E.P. does not provide any argument as to why or how his defenses are frustrated by the fact there is different other suspects for different counts. See RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by reference to the record or citation to authority will not be considered). We decline to consider this new argument raised on appeal.

Because the defense of general denial is the same for all counts, this factor weighs against severance.

Third, the court considers the instructions to the jury to consider each count separately. Russell, 125 Wn.2d at 63. There was no concern of needing to instruct a jury to consider each count separately because L.D.E.P. had a bench trial. The court was required to make factual findings, and it is presumed the trier of fact in a juvenile adjudication will consider evidence for its proper purpose and will not consider inadmissible evidence. State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002). This factor weighs against severance.

Fourth, the court considers the admissibility of evidence of other charges even if not joined for trial. Russell, 125 Wn.2d at 63.

The court that first heard the motion to sever found that this factor weighed against severance because the evidence would have been cross-admissible through res gestae. The "res gestae" exception to the rule prohibiting admission of evidence of other offenses permits the admission of evidence of other crimes or misconduct where it is a link in the chain of an unbroken sequence of events surrounding the charged offense in order for a complete picture be depicted for the jury. State v. Acosta, 123 Wn. App. 424, 442, 98 P.3d 503 (2004).

As to severing the morning May 16 counts from the afternoon May 16 counts, L.D.E.P. argues the evidence supporting the morning counts were much weaker than the evidence supporting the afternoon counts. This ignores the similarities between the morning and afternoon fires. Both morning and afternoon fires used cardboard, paper, and cloth materials. There was also a blue and orange t-shirt used for both the morning

and afternoon fires. Additionally, each of the fires were started using an open handheld flame device. L.D.E.P. also had a personal connection to the afternoon fire in front of apartment 426, his family's previous apartment, and the morning fire in the stairwell next to L.D.E.P.'s current apartment. L.D.E.P.'s own statements connected himself to both the morning and afternoon fires. In one of the messages L.D.E.P. left for his mom, he listed the fire on the "porch," two on a staircase, and the fire in front of apartment 426 and said, "that's four, four fires I tried to start, or whoever tried to start."

However, we are not persuaded that res gestae supports the cross-admissibility of the evidence related to the May 7 fire with the evidence supporting the May 16 fires. There is no link in the chain of an unbroken sequence of events between the May 7 fire and the May 16 fires. This factor weighs against severing the morning May 16 fires from the afternoon fires, but weighs in favor of severing the May 7 counts from the May 16 counts.

Nevertheless, "[e]ven if separate counts would not be cross-admissible in separate proceedings, this does not as a matter of law state sufficient basis for the requisite showing by the defense that undue prejudice would result from a joint trial." State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992) (citations omitted). This is especially true in a bench trial where the court is aware of separating the counts.

The trial court properly held that the judicial economy outweighed any possible prejudice in this case. The trial court found there was an overlap of eight witnesses, four of whom were civilians, two of whom had material witness warrants issued for their arrest and detention, and one of whom was a minor child.[1]

[1] L.D.E.P. does not assign error to these findings and, thus, they are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

We conclude that L.D.E.P. has not met his burden of demonstrating that a bench trial involving all the counts was so manifestly prejudicial as to outweigh the concern for judicial economy warranting reversal in a case where the court found L.D.E.P. not guilty of the counts related to the May 7 fire.

CrR 3.5 Motion to Suppress

All persons have constitutional rights when they are subject to custodial interrogation, and the State cannot admit an accused's statements unless there were "procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); U.S. CONST. amends. V, VI, XIV; CONST. art. 1, §§ 3, 9. The Miranda rule applies when the interview or examination is a custodial interrogation by a state agent. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing State v. Sargent, 111 Wn.2d 641, 649-53, 762 P.2d 1127 (1988)). Where people are interrogated while in police custody, they must be informed of their right to remain silent, anything may be used against them in court, they are entitled to an attorney, and, if they cannot afford an attorney, one will be provided for them. Miranda, 384 U.S. at 479. These principles apply to children. See In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) abrogated on other grounds by Allen v. Illinois, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986).

To determine if a person is in custody, the court utilizes an objective test—"whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). This test also applies to juveniles. See id.

Under RCW 13.40.140(11), a parent can only waive a child's rights if the child is under the age of 12. L.D.E.P. notes that children are particularly vulnerable to police interrogation, and their competence relative to adults increases their susceptibility to interrogation techniques. (citing Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 244 (2006). L.D.E.P. asks this court to hold that children must consult with an attorney before waiving their Miranda rights. L.D.E.P. is essentially asking this court to apply RCW 13.40.740 to this case despite the fact it was not yet in effect at the time of L.D.E.P.'s interviews with detectives.

RCW 13.40.740(1), which became effective on January 1, 2022, provides that children cannot knowingly, intelligently, and voluntarily waive their Miranda rights until they have consulted with an attorney. This protection is so important that the mandatory attorney consultation cannot be waived under any circumstance. RCW 13.40.740(2).

L.D.E.P. argues that this court should apply the new statute to L.D.E.P.'s matter despite the fact the interviews occurred before the new law went into effect. However, L.D.E.P. fails to present any retroactive analysis. "As a general rule, courts presume that statutes operate prospectively unless contrary legislative intent is express or implied." State v. Humphrey, 139 Wn.2d 53, 60, 983 P.2d 1118 (1999). RCW 10.01.040 requires courts to presume criminal statutes, or amendments to criminal statutes, apply prospectively only unless the legislature expressly states otherwise. State v. Bass, 18 Wn. App. 2d 760, 787, 491 P.3d 988 (2021).

L.D.E.P. cites to State v. Jefferson, 192 Wn.2d 225, 249, 429 P.3d 467 (2018) to support his position, but the Washington Supreme Court in Jefferson held that GR 37, which was not in effect at the time of the challenged voir dire, was not retroactive despite the fact that GR 37 attempts to address the very issue raised in Jefferson—unconscious bias in jury selection. The court nevertheless modified the Batson test, which was designed to determine whether a peremptory strike was impermissibly racially motivated. Jefferson, 192 Wn.2d at 231 (citing Batson v. Kentucky, 476 U.S. 79, 92-93,106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)). However, a court modifying a court-created test does not support applying a criminal statute retroactively when the legislature has not expressed such intent.

Regardless, RCW 13.40.740 only applies when a juvenile is in custody, which is not the case here. This is not to say courts should treat children the same as adults in their analyses. Under the current legal framework of applying an objective test, considering a reasonable person in a suspect's position inherently requires consideration of the fact a person is a child and not an adult. Courts must still consider the child's "age, experience, intelligence, education, and background; whether he or she has the capacity to understand any warnings given and his or her Fifth Amendment rights, and the consequences of waiving these rights." State v. Unga, 165 Wn.2d 95, 103, 196 P.3d 645 (2008) (citing Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979)). "[C]ourts have a responsibility to examine confessions of a juvenile with special care." Id. at 103. "Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level

of comprehension may a court properly conclude that the Miranda rights have been waived." State v. Mayer, 184 Wn.2d 548, 556, 362 P.3d 745 (2015) (citations omitted).

Next, in appealing the trial court's CrR 3.5 ruling, L.D.E.P. makes several challenges to the court's findings of fact.

"[F]indings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record." Broadaway, 133 Wn.2d at 131. "'Substantial evidence' is evidence sufficient to convince a fair-minded person of the truth of the finding." State v. Hardgrove, 154 Wn. App. 182, 185, 225 P.3d 357 (2010) (citations omitted). After reviewing whether the trial court's findings are supported by substantial evidence, this court then makes "a de novo determination of whether the trial court derived proper conclusions of law from those findings." State v. Piatnitsky, 170 Wn. App. 195, 222, 282 P.3d 1184 (2012) (quoting State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)). Credibility determinations are the province of the trial court and will not be disturbed on appeal. Id. (citing State v. Radcliffe, 139 Wn. App. 214, 220, 159 P.3d 486 (2007)).

A. Interview in the community room

L.D.E.P. first contends that he was in custody when Olsen interviewed him in the community room of the apartment complex and was not informed of his Miranda rights. We disagree.

L.D.E.P. first challenges the trial court's finding of fact 4 that L.D.E.P. was aware he was free to leave from the first interview. The interview took place in the apartment complex's large community room with L.D.E.P.'s mother and brother by his side and his father present through speakerphone. Olsen asked L.D.E.P.'s mother if Olsen could

speak with him. L.D.E.P. and his family were on the side of the room with direct access to the doorway and Olsen and Goforth were on the inside of the room. Goforth testified that Olsen told L.D.E.P. he was free to leave at any time. Substantial evidence supports finding of fact 4.

L.D.E.P. next challenges the court's finding of fact 5 that the interview was voluntary. L.D.E.P. testified at trial that he did not remember if he was told the interview was voluntary, and that at some points he did not feel he could end the interview. However, Olsen and Goforth testified that Olsen told L.D.E.P. the interview was voluntary. L.D.E.P.'s mother and father also both testified that the interview was voluntary. L.D.E.P. also acknowledged the interview was voluntary by signing his name to a statement indicating the interview was voluntary. Goforth testified that Olsen did not coerce L.D.E.P. into speaking. The interview was recorded with L.D.E.P.'s permission and nothing in the interview suggests intimidation or coercion by Olsen or expressions of fear or confusion by L.D.E.P. Although L.D.E.P. testified that at times he did not feel free to leave, other evidence disputed that and this court does not disturb credibility determinations. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), abrogated on other grounds by State v. Crossguns, 199 Wn.2d 282, 505 P.3d 529 (2022).

L.D.E.P. cites State v. D.R., 84 Wn. App. 832, 930 P.2d 350 (1997) to argue that he was in custody. In that case, the juvenile defendant was not informed he was free to leave, was interviewed in the principal's office of his school, and the interrogation was accusatory. Id. at 838. Unlike the juvenile in D.R., in the instant case, L.D.E.P. was in

his apartment complex accompanied by his family, and was informed that he was free to leave.

We conclude that substantial evidence supports the court's findings and the findings support the court's conclusion that L.D.E.P. was not in custody during the interview.

B. Interview in police station

L.D.E.P. challenges the court's finding of fact 8 that L.D.E.P. came to the police station to be interrogated by Kowalchyk and he understood the interrogation was voluntary. L.D.E.P. also challenges finding of fact 9 that L.D.E.P.'s father was present for half the interrogation with Kowalchyk. L.D.E.P. challenges finding of fact 12 that L.D.E.P. agreed to participate in the interrogation, that he knowingly and voluntarily waived his Miranda rights, that he understood what was going on, that he understood he could have an attorney, and that he understood he did not have to stay and could leave at any time. L.D.E.P. also challenges finding of fact 13 that L.D.E.P. understood he was free to leave the interrogation and gave his permission to be questioned.

The interrogation took place inside a room in the Everett Police station. L.D.E.P. sat closest to the door and Kowalchyk was on the other side of a desk opposite of L.D.E.P. L.D.E.P.'s father testified that L.D.E.P. volunteered for the interview. Olsen observed a live video feed of the interview from another room.

The State concedes that the record does not support the trial court's finding that L.D.E.P.'s father was present for half the interrogation.[2] The interview lasted three

[2] Wash. Court of Appeals oral argument, State v. L.D.E.P., No. 84081-9-I (July 18, 2023), at 14 min., 35 sec., *video recording by* TVW, Washington State's Public Affairs network, https://tvw.org/video/division-1-court-of-appeals-2023071122/?eventID=2023071122.

hours and L.D.E.P.'s father remained in the room for about 40 minutes. However, substantial evidence supports the other findings of fact.

When asked if anyone asked him if he wanted to do the interview, L.D.E.P. testified, "I had the option if I wanted to do it or not." L.D.E.P. testified he did not know who spoke to him first about the interview, but knew in advance that he was going to the police station to be interviewed. Kowalchyk spent 40 minutes speaking to L.D.E.P. and his dad and advising L.D.E.P. of his constitutional rights. Kowalchyk testified that she read L.D.E.P. his constitutional rights and his juvenile rights. L.D.E.P. and his father both signed a City of Everett Police Department Recorded Witness Statement form.[3] At trial, L.D.E.P. testified that he understood everything that was read to him from this form despite answering "I don't think so" when asked if he understood that he had the right to

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[3] The form signed by L.P. and his father stated:

Do you understand this statement is being recorded? Yes _X_ No___

CONSTITUTIONAL RIGHTS:

_____, do you understand that you have the right to remain silent? That any statement you make can and will be used as evidence against you in a court of law? (If you are under the age of 18, your statement may be used against you in a Juvenile Court prosecution for a juvenile offense and may also be used against you in an adult court criminal prosecution if the Juvenile Court decides that you are to be tried as an adult).

That you have the right at this time to an attorney of your own choosing, to have him present and to consult with him before and during any questioning or the making of any statement, and at all other stages of these proceedings? That if you desire but cannot afford an attorney of your own choosing, one will be appointed for you at public expense?

That you may exercise your rights at anytime?

Do you understand these rights?

Knowing these rights, are you willing to talk to the police at this time?

talk to an attorney. L.D.E.P. testified that he understood he was free to leave the interview. The interview ended when L.D.E.P. said he was done and wanted to go home.

This court reviews a trial court's findings of fact for substantial evidence to "'determine only whether the evidence most favorable to the prevailing party supports the challenged findings, even if the evidence is in conflict.'" DeVogel v. Padilla, 22 Wn. App. 2d 39, 48, 509 P.3d 832 (2022) (quoting Thomas v. Ruddell Lease-Sales, Inc., 43 Wn. App. 208, 212, 716 P.2d 911 (1986)). Here, the evidence most favorable to the State supports the challenged finding.

We conclude that substantial evidence supports the trial court's findings which in turn support the court's conclusions that L.D.E.P. was not in custody and that his statements made to Kowalchyk were admissible.

We affirm.

Coburn, J.

WE CONCUR:

Hazelrigg, ACJ

Smith, C.J.

21-8-00180-31
FNFCL 98
Findings of Fact and Conclusions of Law
12436805

Filed in Open Court
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By _____
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,
Plaintiff,
v.
[redacted]
Respondent

No. 21-8-00180-31

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON 3.5 HEARING

This matter came before the court on February 17, 2022 for a 3.5 hearing during a bench trial.

This court considered the testimony of the witnesses, the exhibits introduced into evidence, and the arguments of counsel, and applied the standard that the state must prove all elements of the offense(s) by proof beyond a reasonable doubt. The court makes the following findings of fact and conclusions of law:

I. Findings Of Fact

1. On May 18th, 2021, the respondent was interview by Detective Olsen and Assistant Fire Marshal Goforth at the Cascadian Apartment Complex.
2. This interview was done in an open room in the leasing office at the Cascadian Apartment Complex where the respondent lived with his family. It was not an interrogation room.
3. The respondent's mother was present in the room, along with the respondent's younger brother. The respondent's father was present over the phone. Both Det. Olsen and Asst. Fire Marshal Goforth were present in the room, and they were all sitting at a large table.
4. The respondent was aware that he was free to leave the room at any time. The respondent gave permission to do the interview with his parents present.

5. The respondent gave his statements knowingly, freely, and voluntarily.
6. The respond was not in custody for the interview on May 18th, 2021, with detective Olsen and Asst. Fire Marshal Goforth.
7. On July 19th, 2021, the respondent was interview by Detective Kowalchyk at the Everett Police Department in Everett, WA.
8. The respondent and his father voluntarily came to do the interview. The respondent understood that this interview was voluntarily.
9. The respondent's father was present during the first half of this interview then left, leaving the respondent with only Det. Kowalchyk in the interview room.
10. Detective Olsen was watching the interview but was not present in the room.
11. The respondent was read his Miranda Rights while his father was still present in the room. The respondent and his father both signed the Miranda Rights form waiving his rights to speak with Det. Kowalchyk.
12. The respondent agreed to participate in the interview and knowingly and voluntarily waived his Miranda Rights. The respondent indicated that he understood what was going on, he understood that he could have an attorney, and he understood that he did not have to remain at the location and could leave whenever he wanted.
13. The respondent understood that he was free to leave the interview and gave his permission to do to the interview. When the respondent asked to leave the interview, he was allowed to leave.
14. The interview with Det. Kowalchyk was approximately three hours.
15. The respondent was not in custody during the interview with Det. Kowalchyk on July 19th, 2021.

II. Conclusion of Law

1. This court has jurisdiction over this proceeding.
2. On May 18th, 2021, the respondent was not in custody at the time of the interview that took place with Det. Olsen and Asst. Fire Marshal Goforth at the Cascadian Apartment Complex. The respondent understood that he was participating in the interview knowingly, voluntarily, and freely. The respondent's statements made to Det. Olsen and Asst. Fire Marshal Goforth are admissible under CrR 3.5.
3. On July 19th 2021, the respondent was not in custody while being interviewed by Det. Kowalchyk at the Everett Police Dept. The respondent understood that he was knowingly, voluntarily, and freely participating in the interview. The respondent was read his Miranda rights and made a knowingly and voluntary waiver of those rights. The respondent's statements made to Det. Kowalchyk are admissible under CrR 3.5.

DATED this 24 day of May, 2022.

Judge

HAYLEY G BIGONI, WSBA #: 55404
Deputy Prosecuting Attorney

EMILY J. HISKES, WSBA #: 44805
Attorney for Respondent

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84150-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ petitioner

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Washington Appellate Project

Date: August 30, 2023

WASHINGTON APPELLATE PROJECT

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