FILED
JUN 19, 2015
Court of Appeals
Division III
State of Washington

32722-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER J. COMO, JR.,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Page No.

United States Supreme Court Cases

Page No.

Other State Cases

Court Rules

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the superior court abuse its discretion in admitting the Defendant's statements after a CrR 3.5 hearing and absent any renewed objection? Is the determination of voluntariness supported by substantial evidence in the record?
2. Should this Court review an unpreserved claim of error regarding LFO's? Does the record sufficiently demonstrate the Defendant's ability to earn $50/mo?

IV. STATEMENT OF THE CASE

On appeal, the Defendant characterizes the detective's expressed disinterest in incriminating the Defendant as an "implied promise" and "misrepresentation of legal consequences" which coerced his confession.

Appellant's Brief at 9, 12. He also challenges for the first time on appeal the imposition of legal financial obligations. Appellant's Brief at 14.

The Defendant Alexander Como was convicted by jury of rape of a child in the second degree. CP 22, 57.

On Halloween of 2012, the Defendant had sexual intercourse with C.D., who was then 13 years old and intoxicated. RP 7, 45, 48-50, 56. C.D. was living with her grandparents, who adopted her and her sister when their mother became addicted to methamphetamine. RP 36. The Defendant was 25 years old. RP 7, 10, 48. He knew C.D.'s family, and he knew her age. RP 51, 66, 74-76.

After that first encounter, the Defendant engaged in sexual intercourse with C.D. twice a week for two months. RP 50-51. When the Defendant became abusive in December of 2012, C.D. ended the relationship. CP 43; RP 53.

In February 2013, C.D. disclosed the sexual abuse to Detective Goodwater. RP 38, 61. A few days later, the Defendant came to the police station, together with C.D.'s father, in order to make accusations against C.D.'s new boyfriend. RP 9, 13, 41, 44, 62. He arrived at the police station early in the morning after wakening at 5 a.m.. RP 23, 62.

The Defendant spoke with the detective alone. RP 7. The

detective advised the Defendant that he was not in custody and was free to leave. RP 8. And in fact the Defendant did leave at the culmination of the interview. RP 10. The Defendant was not restrained. RP 8, 10. He was not under the influence of any intoxicating substance and appeared oriented and mentally stable. RP 11-12. He alleged that C.D. and her new 18 year old boyfriend were having an inappropriate relationship. RP 7.

The Defendant was aware that C.D. had accused him of sexual abuse. RP 6-7. Initially he denied having had a sexual relationship with her. RP 66. The detective employed a ruse to see how the Defendant would react: saying that clothing C.D. had worn in a previous sexual encounter with the Defendant appeared to be stained with semen. RP 12, 16, 69. The Defendant reacted by confessing. RP 38, 62, 70. He admitted having sex with C.D. nine or ten times, in his apartment and the last time at Pioneer Park. RP 70. He then left the police station through a back door in order to avoid C.D.'s father. RP 11, 13.

In the pretrial CrR 3.5 hearing, the Defendant challenged the voluntariness of his confession, claiming that he had been exhausted after not sleeping for four days. RP 20. In cross-examination, the prosecutor brought out that the Defendant told the detective that he had woken up at 5 a.m. that morning, indicating that he had slept the night before and made

his statement within hours of waking. RP 23. In that hearing, the court also heard testimony regarding the detective's ruse. RP 12-13. The court found the confession to be voluntary and admissible. CP 3-5; RP 24-25.

At trial, defense counsel did not renew the challenge to the Defendant's confession. In a brief cross-examination, counsel did, however, elicit a few specific statements the detective made in the tape recorded interview. RP 78-80. Counsel questioned the detective about rapport-building statements. RP 79. And the detective acknowledged that he had told the Defendant that he was not interested in getting him into trouble. RP 80.

In closing argument, defense counsel argued that the jury could infer from the detective's nonjudgmental and disinterested demeanor during the interview that he had told the Defendant that he did not care about child rape so long as it was consensual and they used contraception. RP 108. Counsel also suggested that the jury should assume that the portion of the interview the jury did not view would have shown police harassment. RP 108-09, 112-13.

Prior to sentencing, a SSOSA evaluation and a presentencing investigation were filed with the court providing significant background information on the Defendant. CP 28-36, 42-51.

The Defendant graduated from high school where he reportedly functioned "above the curve." CP 30. His SILS test suggests the Defendant "well may be capable of academic and vocational successes beyond his past level of attainment." CP 34.

The Defendant worked at Taco Bell from May 2007 to September 2008 and then at Macy's from Christmas 2008 to September 2011. CP 30. Both jobs ended due to tardiness. CP 30, 46.

The Defendant was attending community college in a culinary arts program until he was charged with this offense. CP 30. At that point, he left school and indulged in video and card games. CP 31. He was also using marijuana and stolen morphine daily. CP 48.

The Defendant intended to become an English teacher; he still intends to write novels. CP 30, 46. The Defendant informed the psychologist that if he were released on a SSOSA, he expected that he could make money doing odd work for his father's wealthy girlfriend at her orchard. CP 32.

The Defendant had been living with his father, who condoned his sleepovers with the victim. CP 43, 47. The paternal influence on the Defendant is apparent. Like his father, he abuses drugs. CP 47-48. Like his father, the Defendant is a conspiracist. CP 46, 48, 52, 55; RP 141-45.

The father receives financial support from his romantic partners. CP 30, 32. The Defendant also manipulates romantic partners. CP 43 ("threatened to kill himself over the breakup and also told [C.D.] that he had '[ ] cancer' and needed her support.") The father has not worked since the 1980's, relying instead on disability. CP 29-30. Like his father, the Defendant is also seeking disability income. CP 30.

While seeking work as a condition of being on unemployment, the Defendant would tell potential employers that he had physical limitations. CP 30. In 2011, complaining of bursitis, arthritis, and hypothyroidism, he began to seek disability benefits – unsuccessfully. CP 30. The psychologist found these to be "rather implausible medical limitations." CP 35.

At sentencing, the court imposed legal financial obligations (LFO's) of $3178.65. CP 61. This amount includes the SSOSA evaluation fee and polygraph, the DNA collection fee, the mandatory crime victims fee, and other standard costs. CP 60-61. After release, the Defendant shall pay his LFO's at a rate of $50 per month. CP 61.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEFENDANT'S CONFESSION, THE VOLUNTARINESS OF WHICH IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Defendant alleges that his confession was involuntary and, therefore, inadmissible at trial. A decision involving the admission of evidence lies within the sound discretion of the trial court and will not be reversed unless an abuse of discretion can be shown. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In this case, the court admitted the evidence after a CrR 3.5 hearing. CP 3-5. A confession is admissible if the state can show by a preponderance of the evidence that it was voluntarily made considering the totality of the circumstances. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008); *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). The trial court's determination of voluntariness will not be disturbed on appeal if it is supported by substantial evidence in the record. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

In this case, the Defendant arrived uninvited, was free to leave, and

did leave on his own. Because the Defendant was free to leave, the interview was not custodial and the requirement for a Miranda advisement was not triggered. *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

Initially, the Defendant argued that he was sleep deprived at the time of his confession. RP 20. This was contradicted by his own recorded statement to the detective that morning that he had only just woken at 5 a.m.. RP 23, 62.

At the CrR 3.5 hearing, the court also heard testimony about the ruse. As the Defendant correctly acknowledges, a ruse will not render a confession involuntary. Appellant's Brief at 13, n.4. A confession has been held to be voluntary even when police misstated the law about the admissibility of evidence[1], misrepresented polygraph results[2], misrepresented DNA evidence[3], misstated that a co-suspect named him as the triggerman[4], and concealed the fact that the victim had died[5].

The test for voluntariness in the presence of deception is whether the state's behavior overbears the defendant's will to resist and "bring[s]

---

[1] *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973).
[2] *State v. Keiper*, 493 P.2d 750 (Or. App. 1972).
[3] *State v. Burkins*, 94 Wn. App. 677, 973 P.2d 15 (1999).
[4] *Commonwealth v. Baity*, 237 A.2d 172 (Pa. 1968).
[5] *People v. Smith*, 246 N.E.2d 689 (Ill. App. 1969), *cert. denied*, 397 U.S. 1001, 90 S.Ct. 1150, 25 L.Ed.2d 412 (1970).

about confessions not freely self-determined." *State v. Braun*, 82 Wn.2d at 161-62 (quoting *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). In this case, the ruse was not even that DNA evidence implicated the Defendant, but only that there may be DNA evidence to test. Such information cannot be said to overbear the Defendant's will to resist.

The other information before the court (RP 6-13, 62-71, 76-78) was that the Defendant was an adult who showed up of his own accord with an agenda. He was free to come and go, was so informed, and sat closest to the exit. He was not under the influence of any intoxicating substance, claimed to be well rested, and appeared oriented and mentally stable. There were no other parties to the recorded interview who may have been influencing him; C.D.'s father was present in the waiting area to support the Defendant. RP 13. The Defendant felt sufficiently comfortable with the detective to share his carpal tunnel syndrome. He was relaxed, open, affable, easy going, and easy to talk to. RP 77. The detective made him no promises. The interview lasted 45-50 minutes.

Considering the totality of the circumstances, the court's determination is well supported by this record.

The Defendant does not challenge the CrR 3.5 finding based on

any evidence or argument presented to the court at that time. Nor did the Defendant ask the court to revisit its ruling prior to the detective testifying. Therefore, the court's reliance on its finding is justified. Because the court determined after a full hearing that the confession was voluntary, and because the confession was relevant, the court did not abuse its discretion.

The Defendant argues that, in determining the correctness of the trial court's ruling, it is appropriate for the appellate court to examine the record made *after* the trial court's ruling. Appellant's Brief at 13, n.3. It is not. Nor is this the holding in *State v. Brousseau*, 172 Wn.2d 331, 340, 259 P.3d 209 (2011).

In that case, the defendant Brousseau complained that the court could not find a 7 year old child victim to be competent to testify unless it first subjected her to pretrial examination. *State v. Brousseau*, 172 Wn.2d at 334. The supreme court disagreed. *State v. Brousseau*, 172 Wn.2d at 335. It was sufficient to rely on other witnesses' pretrial testimony which established the necessary criteria. *State v. Brousseau*, 172 Wn.2d at 337.

It is true that the opinion discusses the child's testimony at trial. *State v. Brousseau*, 172 Wn.2d at 338-39. This does not demonstrate that information arising *after* the court's ruling can be used to invalidate a court's ruling already made. Instead, this only shows that it may be

appropriate to look at the entire record for a factor which is in flux. "A child found competent at one point in time may become incompetent at trial." *State v. Brousseau*, 172 Wn. 2d at 348. Competency "may be challenged at any time." *State v. Brousseau*, 172 Wn.2d at 341. But the burden is "on the party objecting to the child's competency as a witness" and "the issue becomes how a party must present the challenge." *State v. Brousseau*, 172 Wn.2d at 342. Brousseau "did not renew his objections to the J.R.'s testimony." *State v. Brousseau*, 172 Wn.2d at 339.

The voluntariness of a *completed* confession, however, will not fluctuate. And the defense did not ask to revisit the court's ruling based on any new evidence or argument.

The trial court's ruling admitting evidence is reviewed for abuse of discretion. It is not an abuse of discretion to fail to consider information or argument that was not presented to the court.

The Defendant challenges the voluntariness of his confession based on the following portion of the detective's testimony.

> Q. You also made the point of telling him that you weren't interested in getting him into trouble, correct?
>
> A. I believe I stated something along that.

RP 80. The detective explained that when people tell him things that most

people would find repulsive or condemnable, he has to put on a pleasant, non-judgmental face. RP 68-69 ("I've seen things that make me want to go home and shower, and I have to pretend that it's okay"). He establishes rapport with interviewees, befriends them, because if they feel he can relate to them, they will want to talk to him. RP 69.

In closing argument, defense argued that the detective said he was not interested in the child rape so long as it was consensual and the parties used contraceptives. RP 108. But this argument is not supported by the record.

On appeal, the Defendant argues that the detective's statement (that he wasn't interested in getting the Defendant into trouble) is tantamount to an "implied promise to Mr. Como [that], 'You won't get into trouble for having sex with this beautiful woman as long as it was consensual.'" Appellant's Brief at 13. It is a quite a leap to interpret a promise of immunity from a statement of impartiality. The interpretation is implausible.

There is no error in the admission of the confession.

B. THE COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS IS WELL SUPPORTED IN THE RECORD.

The Defendant raises this challenge for the first time on appeal,

relying on *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Appellant's Brief at14. In *State v. Blazina*, this Court held that it is **not error** to **decline** to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. *State v. Blazina*, 182 Wn.2d at 832-33. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." *State v. Blazina*, 182 Wn.2d at 833. The decision to review is discretionary on the reviewing court under RAP 2.5. *State v. Blazina*, 182 Wn.2d at 832. And the "Court of Appeals properly declined discretionary review" in that case. *State v. Blazina*, 182 Wn.2d at 834.

The *Blazina* court opted to use its discretion in a single case in order to highlight for trial courts the need to attend more closely to this issue at sentencing. The *Blazina* case does not reject RAP 2.5(a) and does not overrule *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014). Consistent with *Blazina*, it is not error to decline to hear a challenge to the finding of ability to pay which is raised for the first time appeal.

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The concerns raised on appeal are necessarily those that

were in the record below, i.e. that the Defendant had not been working and had physical complaints. Because this information existed in the record, there is no reason defense counsel could not have objected to the imposition of LFO's at the sentencing hearing … except for those so well stated in the *Duncan* opinion.

In *State v. Duncan*, the court held that it would not review a challenge to LFO's made for the first time on appeal. The decision appropriately balances the efficient use of judicial resources with fairness. As the *Duncan* opinion explains, at imposition, the State's burden of proof is so low that it can be met by a single reference in a presentence report in which the defendant described himself as employable. *State v. Duncan*, 180 Wn. App. at 250, (citing *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013)). That burden is met here.

The Defendant argues that there is insufficient support in the record for the trial court's finding of Mr. Como's ability to pay. Appellant's Brief at 17, 20. This is untrue. Before imposing sentence, the judge emphasized that he had "read Dr. Page's psychological report [and] reviewed the Presentence Investigation and recommendation." RP 147. These sentencing memoranda more than sufficiently demonstrate the court's individualized investigation into the Defendant's ability to pay.

The Defendant had been gainfully employed for several years. By his own admission, he lost those jobs due to tardiness. He did not lose those jobs due to any health condition. He worked in customer service. In other words, he was not limited to employment in the field of manual labor. Even if the court believed that the Defendant suffered from arthritis, this would not mean that he could not find work in customer service.

The Defendant has not alleged, much less established, that any medical professional has evaluated him as being disabled to any degree. To the contrary, the psychological report described his medical complaints as "rather implausible." CP 35. The report places the alleged condition of hypothyroidism in quotation marks (CP 30), possibly because a low thyroid should cause weight gain where the Defendant is somewhat slim. CP 28 ("6' at 153 pounds"). The report described the Defendant's "histrionics" and "feigned emotionality." CP 28. It found the Defendant to be "opportunistic, [ ] overwhelmingly insincere, disingenuous, manipulative, [ ] conspicuously not taking responsibility," and "transpicuous in his efforts to [ ] evoke sympathy and [ ] manipulate." CP 32. In other words, the only source of information on the Defendant's disability is not a credible source.

Even if his claims of disability were credible, this does not render him unable to work or unable to earn $50 a month. At the same time that the Defendant had been applying for disability, he had been attending college in the culinary arts. He had a goal of finding employment. Even with the conviction, nothing stops him from continuing his pursuit of this and other vocations, including his goals of teaching (adults) and writing.

The Defendant is young. He has ambition and intelligence. He is able to pay $50 a month toward his court costs when he is released. The court's finding is well supported in the record.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: June 18, 2015.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

David N. Gasch <gaschlaw@msn.com> Alexander J. Como, Jr., #374586 - LEGAL MAIL – Coyote Ridge Corrections P.O. Box 769 Connell, WA 99326	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 18, 2015, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**