96491-2

NO. 77514-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

I.H.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY, JUVENILE DIVISION

The Honorable Roger Rogoff, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner I.H.[1] asks this Court to grant review of the court of appeals' unpublished decision in State v. I.H., No. 77514-6-I, filed October 8, 2018 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

Both this Court and the United States Supreme Court recognize children are different than adults and must be treated differently in the criminal justice system. I.H. was 14 years old when he was interrogated by police, shirtless, in the middle of the night, without an adult present. I.H. had no prior experience with the police.

1a. Is this Court's review warranted under RAP 13.4(b)(3) and (4) to determine whether juveniles can validly waive their Miranda[2] rights when they do not have an attorney, parent, or other adult advocate present during custodial interrogation?

1b. Is this Court's review warranted to determine whether the nearly 40-year-old decision in Dutil v. State, 93 Wn.2d 84, 606 P.2d 269 (1980), is incorrect and harmful?

[1] The court of appeals granted I.H.'s RAP 3.4 motion to change the case title and use only his initials in the body of the court's opinion.

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

2. Is this Court's review also warranted under RAP 13.4(b)(3) to determine whether I.H.'s confession was inadmissible under the traditional totality of the circumstances test?

C. STATEMENT OF THE CASE

I.H. was only 14 years old, with no prior criminal history or experience with law enforcement, when he was alleged to have stabbed Camille Jones on October 31, 2016. CP 4-7, 175-76. The trial court found I.H. guilty of first degree assault under RCW 9A.36.011(1)(a), by use of a deadly weapon and by force or means likely to produce great bodily harm. CP 183-84.

James was at her Federal Way home with her boyfriend, Jeffrey Bakker, on Halloween night in 2016. RP 136-38. She had been handing out Kit Kats and Reese Peanut Butter Cups to trick-or-treaters. RP 138-39, 200. Around 10 minutes to 9:00 p.m., someone rang James's doorbell several times in quick succession. RP 139-40. James and Bakker were watching television in the living room, which does not have a view of the front door. RP 137-39, 157-58. James agreed to answer the door. RP 158.

By the time James opened the door, no one was there. RP 140. James saw someone through the glass in the door as she closed it, so she opened the door again. RP 140. James held the candy bowl out to the teenager on her doorstep. RP 140, 163-64. The teen looked up at James

with his hands behind his back, reached out, and stabbed her in the chest. RP 140-42, 163-64. James twisted away and slammed the door. RP 140-42.

Bakker, who did not see the attack, called 911. RP 160-67. Police and medical personnel responded within minutes and James was transported to Harborview. RP 143. The suspect was gone from the scene by the time the police arrived. RP 141-42, 201. James recovered from a three-centimeter stab wound to her ribs and returned to work after two weeks. RP 144, 261, 273. James was shown two initial photomontages. RP 146. She identified an individual in one but was not confident about her choice. RP 146-47, 152-53, 276-78.

On November 1, 2016, I.H. told a friend at school that he stabbed someone on Halloween. RP 182-83. The friend subsequently told his father, who called the police. RP 190, 275. Several police came to I.H.'s home late in the evening on November 3. RP 66-67, 75, 279. They woke I.H. up, handcuffed and arrested him, and then transported him to the police station, shirtless. RP 75-77. I.H. was detained in a holding cell before being moved to an interrogation room, where he was shackled to the floor, still shirtless. RP 44-45, 76-77, 82-83. I.H.'s mother followed him to the police station but was not allowed to see him before or during the subsequent interrogation. RP 38-39, 67.

Detectives Kris Durell and Matthew Novak conducted a recorded interrogation of I.H., beginning at 12:29 a.m. on November 4. RP 33, 44-45; Ex. 4, 9. Durell read I.H. his Miranda rights rapidly, without any pause between the rights:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. If you're under the age of 18, anything you say can be used against you in a Juvenile Court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if you are to be tried as an adult.
>
> You have the right at this time to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements.
>
> Do you understand each of these rights as I've explained them to you?

RP 50; Ex. 4; Ex. 9, at 3-4. In response, I.H. answered only, "Yeah." RP 50. Durell did not clarify or provide any additional explanation of the rights. RP 50-51, 61-62; Ex. 9, at 3-4. When asked, "Having these rights in mind, do you wish to talk with us now," I.H. responded, "Um okay." RP 50; Ex. 9, at 4. I.H. then signed a waiver of his Miranda rights. RP 51. No attorney, parent, or any other interested adult was present when I.H. did so. RP 67.

The detectives questioned I.H. at length about his family, school, home, and friends. Ex. 9. Durell eventually asked I.H. if he knew why he

was there. Ex. 9, at 29. I.H. responded, "No." Ex. 9, at 29. Durell followed up, asking I.H., "If you thought really hard about it, could you think of anything you might a told someone that would make the police wanna talk to you?" Ex. 9, at 29. I.H. said it might be the stories he made up to frighten his classmates. Ex. 9, at 29-30. Novak eventually told I.H., "You know why you're here." Ex. 9, at 31. I.H. responded, "Yeah, I do," and Novak instructed him, "Okay? So tell us." Ex. 9, at 31.

After further pressure from Durell, I.H. said, "Ok, yeah: I-I-I stabbed someone." Ex. 9, at 32. I.H. did not remember who, "just a old woman, uh I don't know, 40s, uh glasses." Ex. 9, at 32. I.H. later described her as a white woman "in her 40s or uh 30s maybe." Ex. 9, at 37. I.H. said "[s]he answered the door when I rang the doorbell and then I stabbed her uh because she didn't have the candy I wanted, and so I got mad, and so I just stabbed her." Ex. 9, at 32. He said she was handing out "Reeses and Kit Kats" in a green bowl, though the bowl was later identified as purple. Ex. 9, at 45; RP 311-12. I.H. explained, "And then um I walked into her house and she made me some-she made me some meatloaf." Ex. 9, at 32.

I.H. described the house as one in a nearby neighborhood. Ex. 9, at 32-33. I.H. identified the wrong house on a map. Ex. 9, at 43-44; RP 302-03. When asked how he got there, he explained, "Uh I used my stealth and then uh I unlock my stealth skills from my little inventory . . . ." Durell

chastised I.H., "So this isn't actually a video game." Ex. 9, at 33. I.H. responded, "I know, it's real life . . . what's the difference? I'm just kidding." Ex. 9, at 33. I.H. then explained he ran the woman's doorbell "multiple times, like fa-four or five times," "it took her a while to answer the door," and "then uh took out my-my eight-inch stainless steel Good Cook butcher knife." Ex. 9, at 34-35, 60. I.H. said afterwards he threw the knife "into like this pond place." Ex. 9, at 35.

When asked if he was making the story up, I.H. responded, "Yeah," explaining, "Because I just want to go home. I'm just kidding. I'm not making this up." Ex. 9, at 46. When asked why he did it, I.H. said, "I just did it. I felt like I was just possessed by a demon or something." Ex. 9, at 48. He explained, "I feel like it wasn't really me." Ex. 9, at 50. And, finally, when asked what happens when you stab someone, I.H. answered, "Uh just uh they bleed and it could be fatal at times." Ex. 9, at 51. The interrogation ended at 1:48 a.m., over an hour after it began. Ex. 9, at 62.

Before trial, defense counsel objected to the admission of I.H.'s confession. CP 39-168. Counsel argued I.H. did not knowingly, intelligently, and voluntarily waive his Miranda rights and confess, because of his young age and because no interested adult was present during his interrogation. CP 44-54. The trial court admitted I.H.'s confession into evidence, concluding he "was properly advised of his Miranda warnings

prior to making any statements, waived his rights explicitly, and made all statements voluntarily." CP 187. The court expressed concern about juveniles' ability to competently waive their constitutional rights, but noted "Miranda doesn't require a deep understanding of the rights." RP 116.

After the detectives obtained a confession from I.H., James identified him in a photomontage. RP 147, 205-07. Inside the apartment where I.H.'s lived with his mother and sisters, police found a hooded sweatshirt near I.H.'s belongings that matched James's description of the suspect's clothing. RP 145, 306. Police also collected a knife from a suitcase near I.H.'s belongings. RP 296-97, 304. DNA on the knife blade matched both I.H. and James. RP 240-42.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS WARRANTED FOR THIS COURT TO DETERMINE WHETHER JUVENILES CAN VALIDLY WAIVE THEIR MIRANDA RIGHTS WITHOUT AN INTERESTED ADULT PRESENT.

"'[C]hildren are different.'" State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting Miller v. Alabama, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). I.H. argued below that more than a simple reading of Miranda warnings should be required when the police interrogate juveniles, who are particularly susceptible to false confessions and the coercion inherent in every custodial interrogation.

I.H. was 14 years old, had no prior experience with the police, and had been held back a grade when he was interrogated by the police, shackled to the floor, shirtless, in the middle of the night in November of 2016. I.H. contended on appeal that his Miranda waiver was not valid and his confession not voluntarily given where he did not have an attorney, parent, or interested adult present during his interrogation to help him and explain his rights. Br. of Appellant, 11-29. He asked for a new trial, at which his confession was excluded. Br. of Appellant, 32.

The court of appeals rejected I.H.'s argument, rotely applying this Court's nearly 40-year-old decision in Dutil. Opinion, 7-8. In Dutil, this Court rejected the argument that "under no circumstances can the rights of a juvenile be waived without the aid of a parent, guardian or counselor." 93 Wn.2d at 87. Instead, this Court applied the traditional "totality of the circumstances" test to juveniles over the age of 12:

> "Under the totality of circumstances approach, the determination of whether a knowing and intelligent waiver has been made is the responsibility of the juvenile judge, who is presumably experienced in handling juvenile cases and who has the child and other witnesses before him, as well as the facts pertaining to the child's age, intelligence, education and experience."

Opinion, 8 (quoting Dutil, 93 Wn.2d at 89). Despite I.H.'s lengthy discussion of why juveniles should be treated differently, the court of

appeals' analysis began and ended with Dutil: "We adhere to the Washington Supreme Court decision in [Dutil]." Opinion, 7.

The time has come for this Court to reevaluate whether the traditional totality of the circumstances test still suffices when juveniles, particularly those as young as I.H., are subjected to custodial interrogation. The research and the law have evolved since Dutil. This Court's review is therefore warranted under RAP 13.4(b)(3) and (4).

"Any police interview of an individual suspected of a crime has 'coercive aspects to it.'" J.D.B. v. North Carolina, 564 U.S. 261, 268, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977)). "Even for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely.'" Id. at 269 (quoting Miranda, 384 U.S. at 467). The Supreme Court has recognized the pressures of custodial interrogation are "so immense" they can induce a frighteningly high percentage of adults to confess to crimes they never committed. Id. This risk is even higher, "all the more troubling," and "all the more acute," when juveniles are subjected to custodial interrogation. Id.

The State bears the burden of showing an individual made a knowing, intelligent, and voluntary waiver of his Miranda rights. Id. at

269-70. Courts traditionally consider the totality of circumstances in deciding the admissibility of a juvenile's confession. State v. Unga, 165 Wn.2d 95, 103, 196 P.3d 645 (2008). "Included in the circumstances to be considered are the individual's age, experience, intelligence, education, background, and whether he or she has the capacity to understand any warnings given, his or her Fifth Amendment rights, and the consequences of waiving these rights." Id.

However, the U.S. Supreme Court has repeatedly held in recent years that youth are different and must be treated differently in the criminal justice system, in part because of significant neurological differences that impact their ability to make rational decisions. See, e.g., Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (juveniles cannot be sentenced to death); Graham v. Florida, 560 U.S. 48, 79, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (juveniles cannot be sentenced to life without parole for nonhomicide crimes); Miller, 567 U.S. at 479 (juveniles cannot be sentenced to mandatory life without parole for any offense).

The Supreme Court has specifically recognized that youth are different in the context of confessions. In J.D.B., the court held the age of a child subjected to police interrogation is relevant to the Miranda custody analysis. 564 U.S. at 264-65. "[C]hildren generally are less mature and

responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to . . . outside pressures than adults; and so on." Id. at 272 (citations omitted) (internal quotation marks omitted). The Court noted this comes as no real surprise, given the "limitations on [juveniles'] ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent." Id. at 273. Put simply, "children cannot be viewed simply as miniature adults," and courts must so recognize. Id. at 274.

This Court has repeatedly recognized the same reality in its own recent cases. In State v. O'Dell, 183 Wn.2d 680, 691, 358 P.3d 359 (2015), this Court held the "particular vulnerabilities" of adolescence can significantly diminish a youthful offender's culpability. Psychological and neurological studies "reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure," which may persist well past an individual's eighteenth birthday. Id. at 692 (footnotes omitted).

In Houston-Sconiers, this Court held the Eighth Amendment requires courts have complete discretion "to consider the mitigating qualities of youth," even in the context of mandatory sentence

enhancements. 188 Wn.2d at 19, 24-25, 34. Most recently, this Court held sentencing juveniles to life without parole constituted cruel punishment under our state constitution. State v. Bassett, __Wn.2d__, __P.3d__, 2018 WL 5077710, at *9 (Oct. 18, 2018). This Court emphasized "states are rapidly abandoning juvenile life without parole sentences, children are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence." Id.

These recent cases demonstrate a sea change in how courts treat youthful offenders. Courts have long paid lip service to the idea that children are not just miniature adults. But now courts recognize the constitution requires that children be treated differently. Children's maturity and developmental differences must be taken into account, including their heightened susceptibility to the inherent coercion of custodial interrogation.

Miranda held "there need not be a 'station house lawyer' immediately available to talk to a suspect prior to any police interrogation." Mayer, 184 Wn.2d at 558 (quoting Miranda, 384 U.S. at 474). However, given the significant difference between children and adults, more must be required to extract a voluntary confession from a child. An attorney, parent, or adult advocate must be present when the police interrogate juveniles.

Alternatively, juveniles must at least consult with counsel before being interrogated or waiving their Miranda rights. The "station house lawyer" rule of Miranda should not apply to children.

Consistent with the evolving case law, research demonstrates an adult's presence or consultation with an attorney is a prerequisite for voluntariness, particularly where the juvenile is 14 years or younger, as here. "Issues of reading comprehension are critical to a general understanding of the Miranda warnings. Equally important is the specific knowledge of vocabulary words used in these warnings." Richard Rogers et al., The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis, 32 LAW & HUM. BEHAV. 124, 125 (2007) (footnote omitted). Miranda warnings may prove problematic even for adults because of the uncommon words used. Id.

Police organizations even recognize juveniles' limited ability to understand their Miranda rights, "which can require a tenth-grade level of comprehension." INT'L ASS'N OF CHIEFS OF POLICE (IACP), REDUCING RISKS: AN EXECUTIVE'S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION 7 (2009) [hereinafter REDUCING RISKS]. IACP recommends simplifying Miranda warnings for juveniles, like telling them, "If you cannot pay a lawyer, we will get you one here for free," instead of the language used in I.H.'s case, "If you cannot afford to hire a lawyer, one

will be appointed to represent you before questioning if you wish." Id. IACP likewise recommends informing juveniles, "You have the right to stop this interview at any time," instead of "[y]ou can decide at any time to exercise these rights," as in I.H.'s case. Id.

Multiple studies show juveniles 14 years and younger do not properly understand their Miranda rights and lack the competence to exercise them.[3] In fact, "nearly all" youth—more than 90 percent—waive their Miranda rights, a rate higher than adults. Barry C. Feld, Behind Closed Doors: What Really Happens When Cops Question Kids, 23 CORNELL J. L. & PUB. POL'Y 395, 429 (2013). Feld explains: "From childhood on, parents teach their children to tell the truth—a social duty and a value in itself." Id. The inherent compulsion of the interrogation room is amplified by numerous other pressures on children:

> [The] social pressure to speak when spoken to and to defer to authority. Justice personnel suggested that juveniles waived to avoid appearing guilty, to tell their story, or to minimize responsibility. Some thought they waived because they did not expect severe sanctions or believed that they could mitigate negative consequences. Others ascribed waivers to naive trust and lack of sophistication. Others attributed waivers to a desire to escape the interrogation room—the compulsive pressures Miranda purported to dispel.

[3] See, e.g., Barry C. Feld, Police Interrogation of Juveniles: An Empirical Study of Policy and Practice, 97 J. CRIM. L. & CRIMINOLOGY 219, 314-15 (2006); Jodi Viljoen et al., Adjudicative Competence and Comprehension of *Miranda* Rights in Adolescent Defendants: A Comparison of Legal Standards, 25 BEHAV. SCI. & L. 1, 2, 9 (2007).

Id. at 429-30 (footnotes omitted). All these reasons demonstrate youth often do not understand the ramifications of waiving their Miranda rights and talking to the police. An interested adult, such as an attorney or parent, would help children navigate these treacherous waters.

Massachusetts provides perhaps the best example of judicially created safeguards for children subjected to custodial interrogation—the so-called "interested adult" rule. Commonwealth v. Smith, 28 N.E.3d 385, 388 (Mass. 2015). Specifically, Massachusetts requires more than just Miranda warnings for a valid waiver by a juvenile. Commonwealth v. A Juvenile, 449 N.E.2d 654, 130-31 (Mass. 1983). "[I]n most cases [the State] should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights." Id. at 134. For children under 14, "no waiver can be effective without this added protection." Id. For children 14 years and older, "there should ordinarily be a meaningful consultation with the parent, interested adult, or attorney to ensure that the waiver is knowing and intelligent." Id. A waiver will be valid without such consultation only if the State can demonstrate the youth

has a "high degree of intelligence, experience, knowledge, or sophistication."[4] Id.

Again, police organizations recognize "[j]uveniles may be especially vulnerable to the pressures of interrogation, which can cause them to give involuntary or even false confessions." REDUCING RISKS, supra, at 6. For instance, a study of 340 wrongfully convicted people found that 42 percent of the juveniles studied had falsely confessed, compared with only 13 percent of adults. Id. An experimental study asked both adults and juveniles to sign a false confession and found a significant majority of juveniles did so without uttering a single word of protest. Id. Given these risks, IACP recommends several best practices, including "involve[ing] a 'friendly adult' in the juvenile interrogation process and to allow him or her meaningful opportunities to privately consult with the juvenile throughout the interrogation." REDUCING RISKS, supra, at 8.

Over 50 years ago, the U.S. Supreme Court recognized "[a] lawyer or an adult relative or friend [could give a juvenile] the protection which his

[4] Several other states also have heightened requirements for juveniles subjected to custodial interrogation. See, e.g., COLO. REV. STAT. § 19-2-511 (2002) (juvenile statements admissible only when made with a parent or guardian present and after both the juvenile and adult have been apprised of the juvenile's Miranda rights); CONN. GEN. STAT. § 46b-137 (2012) (same for children under 16); MONT. CODE ANN. § 41-5-331 (2009) (juveniles younger than 16 may waive their Miranda rights only if a parent or guardian agrees and, if not, only with advice of counsel); IND. CODE § 31-32-5-1 (2018) (children may waive their constitutional rights only when an attorney, parent, or custodian joins the waiver); VT. STAT. ANN. tit. 3, § 51.09 (1997) (children may waive their constitutional rights only with the agreement of their attorney, after both have been informed of the consequences of waiver).

own immaturity could not." Gallegos v. Colorado, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962). The cases, research, and legislation discussed above make clear that the framework established by Miranda does not sufficiently protect the rights of children in custodial interrogations. Science and constitutional considerations support the conclusion that no waiver should be accepted from a 14-year-old child unless he or she has been provided with an attorney—or at least a competent and unconflicted parent or interested adult—who can understand the warnings and give advice.[5]

At the time he was subjected to custodial interrogation, I.H. was 14 years old. RP 74. He was in eighth grade, after being held back a year. RP 74. He has an individualized education program (IEP) for his learning difficulties. RP 74. He did not know his own address. Ex. 9, at 2. He had never been arrested before, had no prior experience with the police, and had never had an attorney before. RP 80.

[5] See, e.g., Ellen Marrus, Can I Talk Now?: Why Miranda Does Not Offer Adolescents Adequate Protections, 79 TEMP. L. REV. 515, 528 (2006) ("[I]t would be easier for the courts and for law enforcement personnel to adhere to a bright-line per se rule rather than the amorphous totality of the circumstances test."); Feld, Police Interrogation, supra, at 314-15 (urging courts and legislatures to adopt additional protections for juveniles aged 15 years and younger); Hillary B. Farber, The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?, 41 AM. CRIM. L. REV. 1277, 1309 (2004) ("The mandatory, non-waivable right to counsel in the pre-interrogation setting is the soundest method of ensuring that juveniles receive the constitutional protections they are entitled to."); Thomas Grisso, Juveniles' Capacities to Waive *Miranda* Rights: An Empirical Analysis, 68 CALIF. L. REV. 1134, 1143 (1980) (recommending "per se exclusionary rules" to protect children, particularly those under age 15, from involuntary confessions).

Several police officers came to I.H.'s house late at night and awoke him from sleep. RP 75-76. He was handcuffed, arrested, and transported to the Federal Way police station, where he was initially detained in a holding cell. RP 65-67, 75-77. I.H. was then moved to a cramped interrogation room, where the detectives began their questioning. Ex. 4; RP 33, 44. The interrogation began after midnight, at 12:29 a.m., and lasted over an hour, until 1:48 a.m. Ex. 9, at 1, 62. I.H. remained shirtless and shackled to the floor throughout the entire interrogation. RP 58-59; Ex. 4. He was tired, cold, nervous, and fidgety. RP 35, 58, 81-83; Ex. 4.

Detective Durell read I.H. his Miranda rights rapidly, in a monotone voice, without any pause between the rights. RP 50-51; Ex. 4; Ex, 9, at 3-4. These rights included sophisticated phrases like "juvenile court prosecution," "adult court criminal prosecution," "[a] lawyer will be appointed to represent you," and "[y]ou can decide at any time to exercise these rights." Ex. 9, at 3-4. Durell did not provide any additional explanation of these rights. RP 61. He did not take time to ensure I.H. understood his rights or explain them in a more understandable fashion. RP 61. Durell acknowledged he did not know whether I.H. read his rights or not. RP 62. The video of the interrogation suggests I.H. did not and he was not encouraged to do so. Ex. 4.

When asked if he understood his rights, I.H. said only, "Yeah." Ex. 9, at 4. Durell did not inquire any further into I.H.'s understanding of his

rights. Ex. 9, at 4. When asked if he wished to talk to the detectives, I.H. responded, "Um okay." Ex. 9, at 4. He then signed a written waiver of his Miranda rights, without any further discussion. Ex. 9, at 4; RP 51. Both Durell and Novak admitted they did not ask about I.H.'s ability to read, his overall comprehension, or any learning disabilities. RP 37-39, 61-62.

At no point before or during the interrogation did I.H. consult with an attorney. Ex. 4; RP 67. No attorney, parent, or other interested adult was present during the interrogation. Ex. 4; RP 38-39, 67. Both detectives were aware that I.H.'s mother was at the police station during the interrogation, but never allowed I.H. to speak with her. RP 38-39, 67. I.H. waived his Miranda rights and confessed without any advice or clarification from an interested adult. Even if the interrogation complied with the letter of Miranda, it did not comply with the spirit of Miranda, which is designed to "protect the individual against the coercive nature of custodial interrogation." J.D.B., 564 U.S. at 270. More protection is necessary with juveniles, especially those as young as I.H.

This Court should grant review to determine whether, contrary to the decades-old decision in Dutil, the law now demands an interested adult rule for juvenile interrogations.

2. THIS COURT'S REVIEW IS ALSO WARRANTED TO DETERMINE WHETHER I.H.'S CONFESSION WAS ADMISSIBLE UNDER THE TRADITIONAL TOTALITY OF THE CIRCUMSTANCES TEST.

Even if this Court does not adopt an interested adult rule, I.H.'s confession should have been excluded under the traditional totality of the circumstances test. Under that test, I.H. did not validly waive his Miranda rights or voluntarily confess, including his age and comprehension level, lack of prior experience with the police, the time and duration of the interrogation, as well as the rapid reading of his Miranda rights, without any further clarification.

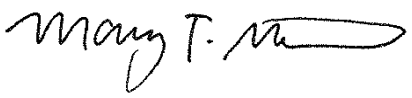
E. CONCLUSION

For the reasons discussed, this Court should grant review, adopt an interested adult rule for juvenile interrogations, and reverse I.H.'s conviction.

DATED this 6th day of November, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. I.H., B.D. 07/09/02, Appellant.	)	No. 77514-6-I UNPUBLISHED OPINION FILED: October 8, 2018

SCHINDLER, J. — The juvenile court found I.H. guilty of assault in the first degree in violation of RCW 9A.36.011(1)(a). I.H. contends the waiver of his Miranda[1] rights was not valid and the court erred in concluding the statements to the police were knowing, intelligent, and voluntary. We affirm but remand to correct a clerical error in the order on disposition.

FACTS

On October 31, 2016, Camille James and her boyfriend Jeffery Bakker took turns answering the front door for Halloween trick-or-treaters. At approximately 9:00 p.m., the doorbell rang several times, "very fast and very repetitive." But when James opened the door, no one was there. After shutting the door, James "saw a figure" through the

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

window and opened the door. A young black male, later identified as 14-year-old I.H., was standing at the door "wearing dark jeans and a grey and black hoody."

I.H. was "standing in front of [James] with his arms behind his back and his head down." James said the boy looked up and they "made eye contact." When James held out the bowl of candy, I.H. stabbed James on her right side with a knife and ran away. At first, James thought I.H. punched her, but she "felt a sharper pain and I knew that I had been stabbed."

Bakker called 911. The medics arrived quickly. James remained at Harborview Medical Center for approximately three days. Federal Way Police Department detectives showed James three different photomontages. James did not recognize anyone in two of the photomontages. James "picked somebody out" in the third photomontage but she "wasn't positive" if it was the person who stabbed her.

The next day on November 1, I.H. told his friend C.S. that "he stabbed somebody." C.S. "didn't really believe him" at first. C.S. found an article about a stabbing and sent it to I.H. on Facebook. Later that afternoon, his guitar teacher talked about "something on the news about a stabbing on Halloween." C.S. later told his father that I.H. stabbed someone on Halloween.

C.S.'s father called 911 on November 3 to report the stabbing and the police interviewed C.S. At approximately midnight on November 3, the police arrested I.H. I.H. was asleep and wearing pants but no shirt. The police placed I.H. in an interrogation room and put shackles on his ankles.

Detective Kris Durell read I.H. Miranda[2] rights and juvenile warnings. Detective

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

Matthew Novak and Detective Durell interviewed I.H. for approximately an hour and a half. The interview was audio and video recorded.

I.H. told the detectives he went to school at "Sequoia" and took classes in science, language arts, math, physical education, social studies, and Digitech, a class for programming and "typing and writing codes."

I.H. told the detectives he was at home on Halloween and "watch[ed] Netflix" with his mom and sisters. Detective Durell asked about what I.H. told his friend C.S. at school. I.H. admitted he "stabbed someone." I.H. described the person he stabbed as a white woman who "had glasses and . . . looks like she was in her 40s or . . . 30s." I.H. said he had the knife "behind my back." I.H. said the woman was handing out "Kit Kats and Reeses." I.H. said he "stabbed her . . . because she didn't have the candy I wanted, and so I got mad, and so I just stabbed her."

I.H. stood up and showed the detectives how he took out his "eight-inch stainless steel Good Cook butcher knife" and stabbed the woman once "in her stomach." After she "screamed," he left. I.H. said, "[W]hen you stab someone," they "bleed and it could be fatal at times."

I.H. told the detectives he "threw [the knife] into . . . this pond." I.H. said he was wearing a "zip up hoodie" that had "gray . . . around the torso and then the sleeves were . . . all black." I.H. said the sweatshirt was "hanging up" in his bedroom.

The detectives submitted an affidavit in support of a warrant to search the condominium. A judge authorized the search. When the police executed the search warrant, they found a black and grey sweatshirt and a "large Good Cook knife" in "a suitcase" near the bed where I.H. slept.

The police showed James a photomontage that included I.H. James identified I.H. as the young man who stabbed her. James was "100 percent" confident.

Washington State Patrol Criminal Laboratory (WSPCL) forensic examiner Rebecca Neyhart tested the DNA[3] on the Good Cook knife. The DNA matched the DNA profiles of I.H. and James.

The State charged I.H. in juvenile court with assault in the first degree in violation of RCW 9A.36.011(1)(a) and (c). The State alleged that I.H., "with intent to inflict great bodily harm, did assault Camille James with a deadly weapon and force and means likely to produce great bodily harm or death, to wit: a stab wound, and did inflict great bodily harm upon Camille James." I.H. pleaded not guilty.

I.H. filed a motion to suppress the statements he made to the police. The court held a CrR 3.5 hearing. Detective Novak, Detective Durell, and I.H. testified at the hearing. The court admitted into evidence and reviewed the audio and video recording of the November 4 interview.

Detective Durell testified that I.H. did not "ever appear to be confused about his rights" and "agree[d] to talk." Detective Durell said I.H. did not "do anything to indicate that he wished to invoke his rights." Detective Durell testified that I.H. "talked about liking to read" and said he "read Robert Mills . . . and nonfiction." Detective Durell said that when I.H. was "telling [him] the details of this incident," I.H. "appeared to just be replaying the incident kind of detached from it."

I.H. testified that he "was asleep" when the police "woke me up" and "took me to the police station." I.H. testified he believed he "could tell [the detective] that . . . [he] didn't understand all of" his rights but he did not say anything because he "just wanted

[3] Deoxyribonucleic acid.

to . . . get on with it." I.H. did not "remember being cold" in the interview room and said he "wore shorts and a tee shirt to school that day."

On cross-examination, I.H. testified that he was "honest with" the detectives when he talked to them. When asked whether he was "honest when you said that you stabbed . . . James," I.H. testified he was "honest about some of it."

The court ruled I.H. knowingly, intelligently, and voluntarily waived his Miranda rights and his statements were admissible at trial. The court entered written CrR 3.5 findings of fact and conclusions of law.

The court found that I.H. was subject to a custodial interrogation. The court found I.H. "was properly advised of his Miranda warnings prior to making any statements, waived his rights explicitly, and made all statements voluntarily." The findings state that the detectives asked "primarily open-ended questions," that I.H. answered the questions "clearly," and that I.H.'s actions and answers "demonstrated that he was articulate . . . and able to understand detectives' questions." The findings state, "The court finds that there were no threats or promises made by the detectives, that [I.H.] was not forced in any way to speak with them, and that the conditions under which [I.H.] spoke did not render the statements involuntary." The findings state I.H. "testified that being shirtless did not make him cold or uncomfortable." The court found that the police shackled I.H.'s ankles to the floor but left his hands "unrestricted." The court "did not observe any physical discomfort during the course of [I.H.]'s interrogation."

James, C.S., Detective Durell, WSPCL forensic examiner Neyhart, and Dr. Heather Evans testified during the fact-finding hearing. The court admitted the audio

and video recording of the police interview with I.H. and a transcript of the recording into evidence.

WSPCL forensic examiner Neyhart testified that the DNA found on the Good Cook knife matched the DNA profiles of James and I.H. Neyhart said it is "7.3 octillion times more likely that the observed major profile was a result of a mixture of [I.H.] and Camille James than it having originated from [I.H.] and an unrelated individual selected at random." Dr. Evans testified that James sustained a "three-centimeter laceration" of the fifth rib on her right side.

I.H.'s sister S.H. and a defense investigator testified for the defense. S.H. testified I.H. was at home on October 31 and they watched television. S.H. said I.H. went to bed at "9:00, 9:15" p.m. and when she went downstairs to "get some water" at "around 11:00, 11:30" p.m., she "saw [I.H.] . . . sleeping."

The defense investigator testified that local news articles described the victim of a stabbing on Halloween and included photographs of a "treat-or-trick bowl" with "Reese's and Kit Kats." On cross-examination, the investigator admitted the articles did not describe the race, height, or clothes of the victim or "say anything about her wearing glasses."

The court found I.H. guilty of assault with a deadly weapon with the intent to produce great bodily harm or death in violation of RCW 9A.36.011(a).

ANALYSIS

I.H. contends his waiver was not valid because a parent, attorney, or other interested party was not present during the police interview. I.H. cites a number of out-

of-state cases and studies to argue the court should "adopt additional safeguards" and require the presence of a parent or advocate during police interrogation of a juvenile.[4] We adhere to the Washington Supreme Court decision in Dutil v. State, 93 Wn.2d 84, 606 P.2d 269 (1980).

It is well established that before conducting a custodial interrogation, the police must advise a suspect of (1) the right to remain silent and provide notice that anything said to the police might be used against him, (2) the right to consult with an attorney prior to answering any questions and have the attorney present for questioning, (3) counsel will be appointed for him if requested, and (4) he can end questioning at any time. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In In re Gault, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), the United States Supreme Court held the constitutional privilege against self-incrimination under Miranda applies with equal force to juveniles. RCW 13.40.140(8) also states that a juvenile "shall be accorded the same privilege against self-incrimination as an adult." Under RCW 13.40.140(11), a parent or guardian "shall give any waiver" for a child under 12 years of age. By contrast, a juvenile who is "at least twelve years of age" may waive his rights without the consent of a parent. RCW 13.40.140(11), (10).

In Dutil, the petitioners argued that a parent or advocate must be present for any juvenile to be "deemed capable of knowingly and intelligently waiving his rights." Dutil, 93 Wn.2d at 86. Citing RCW 13.40.140(10) and (11),[5] the Washington Supreme Court

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[4] I.H. also cites King County Code (KCC) 2.62.020(A). KCC 2.62.020(A) prohibits only the "department of adult and juvenile detention . . . from allowing custodial interrogation and the waiver of any Miranda rights until after a juvenile consults with an attorney" and "[t]he consultation may not be waived." (Emphasis added.)

[5] The statutes cited in Dutil were former RCW 13.40.140(9) and (10) (1977). Although the subsection numbers changed, the language of the statute has not changed.

disagreed:

> The legislature has found that a child under 12 is incapable of intelligently waiving his rights in a juvenile proceeding, but it has chosen to leave that question to be determined upon the facts of the individual case, where the juvenile is closer to the age of majority.

Dutil, 93 Wn.2d at 91, 94. The Supreme Court held the "totality of circumstances test" applies to juveniles over the age of 12. Dutil, 93 Wn.2d at 93-94.

> Under the totality of circumstances approach, the determination of whether a knowing and intelligent waiver has been made is the responsibility of the juvenile judge, who is presumably experienced in handling juvenile cases and who has the child and other witnesses before him, as well as the facts pertaining to the child's age, intelligence, education and experience.

Dutil, 93 Wn.2d at 89.

I.H. also contends substantial evidence does not support the conclusion that he knowingly, intelligently, and voluntarily waived his Miranda rights.

"[C]hallenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal." State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). If the findings are supported by substantial evidence, we review de novo whether the findings of fact support the conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

The State must prove voluntariness by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). The court determines whether a juvenile knowingly and voluntarily waived his Miranda rights by considering the "totality of the circumstances." Fare v. Michael C., 442 U.S. 707, 724-25, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979); State v. Jones, 95 Wn.2d 616, 625, 628 P.2d 472 (1981).

> "The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."

Jones, 95 Wn.2d at 625 (quoting Fare, 442 U.S. at 725). A voluntary statement is one that is the product of the defendant's own free will and judgment. State v. Unga, 165 Wn.2d 95, 102, 196 P.3d 645 (2008).

"Any police interview of an individual suspected of a crime has 'coercive aspects to it.' " J. D. B. v. North Carolina, 564 U.S. 261, 268, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977)). A confession induced by threats or promises that overbear the defendant's will constitute coercion and the court must exclude it. Unga, 165 Wn.2d at 101-02. We may conclude I.H. waived his Miranda rights if the totality of the circumstances surrounding the interrogation show " 'an uncoerced choice and the requisite level of comprehension.' " State v. Mayer, 184 Wn.2d 548, 556, 362 P.3d 745 (2015)[6] (quoting Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

Substantial evidence supports the finding that shackling I.H.'s ankles was not significant to finding voluntariness. The unchallenged findings support the court's

[6] Internal quotation marks omitted.

conclusion that I.H. knowingly, intelligently, and voluntarily waived his Miranda rights. O'Neill, 148 Wn.2d at 571. The court found that although the detectives "did not pause after each right" was read to I.H., the detectives read I.H. his Miranda rights and juvenile warnings "in a normal conversational tone and pace." The unchallenged findings state that I.H. "answered 'yes' when asked if he understood" his rights "and 'yes' when asked if he was willing to speak to detectives." The video shows I.H. is attentive and talkative throughout the interview. The unchallenged findings state that I.H. understood the detectives' questions and "answered clearly." The video shows I.H. answered the detectives' questions clearly and articulately and informed the detectives when he did not understand a question. The court noted that I.H. "was held back a grade" but found that he was an "articulate" 14-year-old who "enjoyed reading graphic novels." The court found that "[t]here was nothing tricky about the interrogation." The court found that the detectives did not pressure I.H., raise their voices, or suggest "knowledge of information that they did not actually possess."

I.H. assigns error to only the following finding of fact:

> During the interrogation, Respondent's ankles were shackled to the floor while his hands were unrestricted. Given the nature of the crime of which Respondent was accused, this fact is not significant to a finding of voluntariness.

There is no dispute that assault in the first degree is a serious violent crime. Although his ankles were shackled, the video shows I.H. was not "cold or uncomfortable" and his hands are unrestrained. I.H. stands up without difficulty to show the detectives how he stabbed James.

Because the totality of the circumstances surrounding the interrogation show an uncoerced choice and the requisite level of comprehension, we conclude the court did

not err in concluding I.H. knowingly, intelligently, and voluntarily waived his Miranda rights.

However, even if we assume error, the admission of statements in violation of Miranda is harmless if we are convinced beyond a reasonable doubt that a reasonable trier of fact would have reached the same result without the error. Mayer, 184 Wn.2d at 566. "[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). An error is harmless beyond a reasonable doubt if the untainted evidence is so overwhelming that it necessarily leads to the same outcome. Mayer, 184 Wn.2d at 566.

We conclude beyond a reasonable doubt that without regard to I.H.'s confession, the court would have reached the same conclusion and found that I.H. assaulted James with a deadly weapon with the intent to produce great bodily harm.

James accurately identified the grey and black sweatshirt I.H. was wearing when he stabbed her. When the police showed James the photomontage with I.H., she was "100 percent" confident that he was the person who stabbed her with a knife on Halloween. C.S. testified that I.H. said that he stabbed somebody. The police seized a black and grey sweatshirt and located an eight-inch "Good Cook" butcher knife next to I.H.'s bed. WSPCL forensic scientist Neyhart testified that the DNA on the knife matched the DNA profiles of I.H. and James. The court found the eight-inch knife "is a significant weapon" and concluded there "was no other possible intent in this particular case . . . other than to cause great bodily harm to Ms. James."

I.H. contends and the State concedes we should remand to correct an error in the order of disposition. We accept the concession as well taken. The State charged I.H. with assault in the first degree under RCW 9A.36.011(1)(a) and (c). The court found I.H. guilty of assault with a deadly weapon with the intent to produce great bodily harm or death in violation of RCW 9A.36.011(1)(a). However, the order on disposition states that I.H. is guilty of "Assault in the First Degree, pursuant to RCW 9A.36.011(1)(a)(c)." We remand to correct the clerical error in the order on disposition. See CrR 7.8(a); RAP 7.2(e); State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

We affirm the conviction but remand to correct the clerical error in the order on disposition.

Schindler, J.

WE CONCUR:

Chun, J.

Applewick, C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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