

FILED
Court of Appeals
Division II
State of Washington

NO. 51748-5-11
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONALD KINGSLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00352-1

BRIEF IN RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Kingsley was subject to custodial interrogation requiring the provision of *Miranda* rights when E.S.P.'s father Mr. Parker confronted Kingsley about his actions in regards to E.S.P.?

Short Answer: No, Mr. Kingsley was not in custody and Miranda was not required.

II. STATEMENT OF THE CASE

The State charged the defendant with Rape of a Child in the First Degree and Child Molestation in the First Degree, both with special allegations of abuse of a position of trust. CP 158.

Kingsley waived his right to a jury and during the bench trial E.S.P.'s forensic child interview was admitted in evidence as State's Ex. 1. RP 184. Kingsley's conversation with E.S.P.'s father, recorded by means of a covert wire, was also admitted in evidence as State's Ex. 2. RP 239.

On Sept. 6, Det. Smith obtained a wire order to authorize the covert recording of a conversation between Mr. Parker (E.S.P.'s father) and Kingsley. RP 230. The conversation was recorded on Sept. 7, 2017, with Mr. Parker wearing a wire. RP 231, 241–42. The recording was marked State's Exhibit 2 and was admitted in evidence. RP 239.

In the recorded conversation, Kingsley admitted to Mr. Parker that the prior Thursday when he stayed the night at Mr. Parker's house (RP 242),

Kingsley did touch E.S.P. and probably in a way that E.S.P. claimed. RP 254. Mr. Parker pointed out to Kingsley that Kingsley had been “part of the family” 16 plus years. RP 242. Kingsley denied touching E.S.P. at first and claimed he went into their bedroom to get them to quiet down and go to sleep. RP 243–44. Kingsley affirmed that he wanted to continue to be part of the family. RP 244.

Kingsley eventually admitted that he touched E.S.P. “down there” and made full skin contact “down there” and “rubbed” her and put his hands inside her although he didn’t go very far. RP 255. Kingsley told Mr. Parker that he did not intend to hurt E.S.P. or anybody and that he felt bad about it. RP 254, 256. Kingsley affirmed that it only happened with E.S.P. and not with any of Mr. Parker’s other children. RP 256. Kingsley offered that he would get counseling in order to assure Mr. Parker that it was not going to happen later down the road with someone else’s child. RP 256.

The trial court found Kingsley guilty of Rape of a Child in the First Degree, Child Molestation in the First Degree, and guilty of the aggravating factor of abuse of a position of trust. RP 417–18.

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III. ARGUMENT

A. THE DEFENDANT'S CONFESSION TO MR. PARKER WAS NEITHER THE RESULT OF CUSTODIAL INTERROGATION NOR COERSION UNDER *MIRANDA*.

Because of the coercive nature of custodial interrogations, law enforcement officers are required to provide a suspect with Miranda warnings prior to questioning the suspect in a custodial setting. *State v. Rhoden*, 189 Wn. App. 193, 199, 356 P.3d 242 (2015) (citing *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010)).

“Specifically, the requirements of *Miranda* apply where “a suspect endures (1) custodial (2) interrogation (3) by an agent of the State.” *State v. Rhoden*, 189 Wn. App. 193, 199, 356 P.3d 242 (2015) (quoting *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004)).

1. The defendant was not in custody for *Miranda* purposes.

“In *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the United States Supreme Court refined the definition of “custody.” The court developed 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. *Id.* at 441–42, 104 S.Ct. 3138. Washington has adopted this test.” *State v. Heritage*, 152 Wn.2d 210, 217–18 95 P.3d 345 (2004) (citing *State v. Short*, 113 Wn.2d 35, 40, 775

P.2d 458 (1988)).

“[F]reedom of movement, not the atmosphere or the psychological state of the defendant, is the determining factor in deciding whether an interview is “custodial.” *State v. Sargent*, 111 Wn.2d 641, 649–50, 762 P.2d 1127 (1988) (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983)).

Here, Kingsley was not detained in any manner or degree associated with a formal arrest. Kingsley was confronted by his longtime friend Mr. Parker in Mr. Parker’s house. RP 74. In fact, during the conversation, Kingsley even went outside on his own accord to smoke a cigarette. RP 251. Kingsley provides no authority that being confronted by a close friend regarding some wrongdoing requires *Miranda* warnings simply because there is psychological pressure. Kingsley was not in custody for *Miranda* purposes when confronted by Mr. Parker.

Therefore, this Court should affirm.

2. The defendant’s confession to Mr. Parker was not in coerced by law enforcement for *Miranda* purposes.

Psychological appeals to defendant's conscience without more is not coercion for *Miranda* purpose. *See State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984).

Here, Mr. Parker appealed to Kingsley’s conscious to allow Mr.

Parker to rest assured that no other children were hurt by Kingsley's actions. Kingsley pointed out that they had been friends and Kingsley has been part of the family for a long time. These appeals to Kingsley's conscious where there is no evidence Kingsley was emotionally weak or mentally ill or of low intelligence does not constitute coercion for *Miranda* purposes. *Miranda* was designed to protect against the inherently coercive police dominated atmosphere.

Therefore, this Court should affirm the conviction.

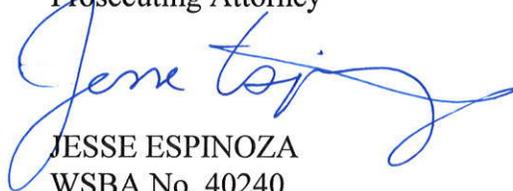
IV. CONCLUSION

Kingsley's confessions were not the result of unlawful custodial interrogation or a two-step process. Therefore, this Court should affirm the conviction.

Respectfully submitted this 15th day of March, 2019.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

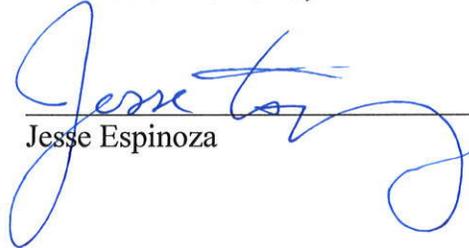


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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Peter B. Tiller on March 15, 2019.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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