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June 18, 2015
Court of Appeals
Division III
State of Washington

NO. 32827-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

D.W., Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 14-8-00237-7

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

- A. Was there substantial evidence in the record from which the trial court could have concluded that the confession was voluntary?
- B. Was D.W.'s confession the result of improper influence or coercion?

II. STATEMENT OF FACTS

On October 2, 2014, D.W., the appellant in this matter, was found guilty of two counts Assault in the Second Degree for events that occurred between May 1, 2014, and June 1, 2014. CP 2-3; Report of Proceedings (“RP”)¹ at 546.

On May 31, 2014, P.W. (DOB: 03/29/2014) was taken by ambulance to Kadlec Medical Center after his mother, J.L., called 911. RP at 198-200. J.L. reported P.W. to have difficulty breathing and exhibiting seizure like symptoms. *Id.* at 199. P.W. was admitted to the emergency room and treated by medical staff. *Id.* at 200. On June 2, 2014, doctors performed a full body scan of P.W. because they were unable to identify the cause of the seizures. *Id.* at 245. MRI and x-rays revealed P.W. had numerous fractures in both legs, multiple fractures in his skull, and subdural bleeding in the skull. *Id.* at 245-47, 261-62. The

¹ Unless otherwise indicated, “RP” refers to the Verbatim Report of Proceedings transcribed by Kenneth Beck for hearing and trial dates of September 19, 26, and 30, 2014, and October 1, 2, and 16, 2014, consisting of four volumes, paginated 1-562.

doctors determined the injuries were caused by non-accidental blunt force trauma. *Id.* at 265, 281, 283. Kadlec contacted the Richland Police Department once it was determined that P.W.'s injuries were non-accidental. *Id.* at 22. J.L. and her father, Robert Lanier, were present at the hospital when the officers arrived; D.W. arrived shortly thereafter. *Id.* at 22-23.

J.L., Robert, and D.W. were asked to go to the Richland Police Department to be interviewed. *Id.* Sergeant Ruegsegger transported D.W. to the Richland Police Department. *Id.* Sergeant Ruegsegger did not ask D.W. any questions regarding P.W.'s injuries. *Id.* at 22-24. J.L. was placed in the patrol interview room, Robert remained in the lobby, and D.W. was placed in interview room B. *Id.* at 29, 36-37. Detective Clark arrived at the department and was tasked with interviewing J.L. *Id.* at 36-37. Detective Clark took J.L. to interview room A. *Id.* Detective Benson interviewed Robert and D.W. *Id.* at 29, 49-50. Detective Benson began his interview with D.W. at approximately 10:45 p.m. *Id.* at 30-32. D.W. agreed to have the interview recorded by audio and video. *Id.* at 30. Detective Benson told D.W., “[i]f you get tired, . . . [if you need] something to drink, if you have to go to the bathroom, if you have to be accommodated in any other way, . . . let me know.” RP at 35, 308. Early in the interview, Detective Benson sent a text message to Detective Clark

stating he could hear muffled sounds coming from her interview room. *Id.* at 37. Detective Clark moved her interview with J.L. from interview room A to the patrol interview room so that J.L. could not hear D.W. and vice versa. *Id.* at 36-37. Detective Benson continued his interview with D.W. *Id.* at 38. Detective Benson obtained background information on D.W. and established a timeline of events that occurred in the last couple of days. *Id.* At 11:43 p.m., D.W. requested a drink of water. *Id.* at 38-39. Detective Benson stopped asking questions and left the room to get D.W. a glass of water. *Id.* at 39. Detective Benson returned to the interview room, gave D.W. a glass of water, and told D.W. that he would be back. *Id.*

Detective Benson spoke with Detective Clark when he left the interview room. *Id.* Detective Benson compared the statements given by J.L. and D.W. *Id.* At 12:49 a.m., Detective Benson returned to the interview room to check on D.W. *Id.* at 40-42. Detective Benson asked D.W. if he needed “more water or anything.” *Id.* at 378. D.W. stated that he was okay. *Id.* Detective Benson told D.W. that he needed to speak to the doctor regarding the injuries to P.W. *Id.* Detective Benson informed D.W. that he would return to the interview when he finished speaking to the doctor. *Id.* at 378.

Detective Benson spoke with a doctor at Kadlec regarding the injuries to P.W.; he asked the doctor how the injuries might have been caused. RP at 40-42. Detective Benson returned to the interview room after he spoke to the doctor. *Id.* at 42. Detective Benson asked D.W. how he was doing and D.W. replied “good.” *Id.* at 378. Detective Benson informed D.W. that he had spoken with the doctor and was going to ask D.W. more specific questions regarding the injuries to P.W. *Id.* at 42. Detective Benson explained P.W.’s injuries. *Id.* Detective Benson asked D.W. if the person who caused the injuries to P.W. deserved a second chance. *Id.* at 42-45, 405. D.W. paused and gave a long explanation. *Id.* at 405-08. D.W. broke down and started crying, then confessed to causing the injuries to P.W. *Id.* at 25, 408-14. D.W. stated that neither J.L. nor Robert knew about it, as he would wait until they were gone or he was alone with P.W. *Id.* at 412. D.W. explained and demonstrated on a baby doll, provided by Detective Benson, how he would intentionally grab P.W.’s legs. *Id.* at 408-11. D.W. also explained and demonstrated the head injuries he caused to P.W. *Id.* Detective Benson asked D.W. why he was confessing to harming P.W. *Id.* at 413. D.W. responded that he had an anger problem that he wanted to get fixed. *Id.* D.W. stated “no” when asked if any threats or promises had been made to him. *Id.* Detective Benson informed D.W. that he needed to make some phone calls; he asked

D.W. if he needed any water. *Id.* at 415. D.W. said yes. *Id.* Detective Benson returned to the interview room and gave D.W. paper to provide a written statement and gave D.W. more water. *Id.* at 45-46. D.W. finished writing his statement at 2:40 a.m. *Id.* at 45.

D.W. was charged by Information with two counts of Assault in the Second Degree. CP 2-3. A 3.5 hearing was held on September 19 and 26, 2014, before the Honorable Judge Cameron Mitchell. RP at 5. Judge Mitchell found D.W.'s statements were freely and voluntarily given, and were admissible at trial. *Id.* at 147-53. A bench trial was held September 30, 2014, through October 2, 2014, before the Honorable Judge Carrie Runge. *Id.* at 161. Judge Runge found D.W. guilty of both counts of Assault in the Second Degree. *Id.* at 540-46.

D.W. now appeals his conviction.

III. ARGUMENT

A. THERE WAS SUBSTANTIAL EVIDENCE FROM WHICH THE TRIAL COURT COULD HAVE FOUND D.W.'S CONFESSION TO BOTH BE VOLUNTARY AND NOT THE RESULT OF IMPROPER INFLUENCE OR COERCION.

We review de novo a trial court's conclusion that statements were freely and voluntarily given. *State v. Butler*, 165 Wn. App. 820, 827, 269 P.3d 315 (2012). However, a trial court's determination of voluntariness will not be disturbed on appeal if there is substantial evidence in the

record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988); *see also State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996) (En Banc).

To be admissible, a defendant's statement to law enforcement must pass two tests of voluntariness: (1) the due process test, whether the statement was the product of police coercion; and (2) the *Miranda* test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement.

State v. DeLeon, 185 Wn. App. 171, 200, 341 P.3d 315 (2014) (citing *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991)).

1. D.W.'s due process rights were not violated.

For due process, courts evaluate the totality of the circumstances to determine whether custodial statements were voluntarily given. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (citing *Fare v. Michael C.*, 442 U.S. 707, 724–25, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979)); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Miranda v. Arizona*, 384 U.S. 436, 475–77, 86 S. Ct. 1602 (1966). Factors considered for a juvenile's confession to be voluntary include the juvenile's condition and experience, and the police conduct. *Aten*, 130 Wn.2d at 663. The length of the interrogation and the environment may also be considered by the court as possibly affecting the

juvenile's condition. *Ng*, 110 Wn.2d at 37; *see also State v. Riley*, 19 Wn. App. 289, 295-96, 576 P.2d 1311 (1978).

For the due process test, a statement is not voluntary if there is violence, threats, or promises that influence the juvenile to confess. *DeLeon*, 185 Wn. App. at 202 (citing *U.S. v. Leon Guerrero*, 847 F.2d 1363 (9th Cir. 1988)). Although a court must consider any promises or misrepresentations by interrogating officers, direct or implied promises or threats do not automatically render a confession involuntary. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997) (En Banc). Absent police conduct causally relating to the suspect confessing, there is "no basis for concluding that any state actor has deprived a criminal defendant of the due process of law." *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). The Supreme Court held "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* at 167.

The appropriate remedy for a product of coercion under the due process test is not for dismissal of the case, but for the confession to be suppressed. *DeLeon*, 185 Wn. App. at 200 (citing *U.S. v. Anderson*, 929 F.2d 96, 98 (2d Cir. 1991)).

Regarding the length of the interrogation in this matter, D.W. would have the court believe there was an interrogation of over five hours. Brief of Appellant at 15. However, the facts and the videotape demonstrate that the actual questioning of D.W. was about two one-hour periods. D.W. waited for up to or around an hour before the detective arrived. RP at 23-25; 30. The detective questioned D.W. for about an hour. *Id.* at 38. The detective left for about an hour to interview J.L. and speak to P.W.'s doctor. *Id.* at 40. The detective returned for the second approximate hour of questioning. *Id.* The detective left to get documents for D.W. to write his confession. *Id.* at 47. D.W. wrote his confession, in the room alone for approximately 45 minutes. *Id.* D.W. includes in the interrogation times when no officer was with D.W. Brief of Appellant at 6-7, 15.

The facts demonstrate *Miranda* was done immediately by Detective Benson around 10:37 p.m. RP at 30. The *Miranda* waiver was signed by D.W. within minutes, at 10:43 p.m. *Id.* at 30, 33. Clearly the length of this part of the interview, whether the waiver was voluntary due to the length of the interview, is not an issue.

The facts further demonstrate that the confession was made during the second hour of questioning, three hours into the interview, including the one-hour break between questioning. *Id.* at 41-45. Case law

demonstrates what lengths of interviews are held involuntary. *See Haynes v. Washington*, 373 U.S. 503, 504, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963) (holding that a 16-hour time between arrest and signed confession, plus denial of an attorney upon request, and denial of being allowed to speak to his wife was coercion and made the confession involuntary); *see also Watts v. Indiana*, 338 U.S. 49, 69 S. Ct. 1357, 93 L. Ed 1801 (1949) (six days of confinement with interrogation daily from around 11:30 p.m. to 2:30-3:00 a.m. the next morning, or 5:30 p.m. to 3:00 a.m., by six to eight officers in relay was not voluntary); *see also Fikes v. Alabama*, 352 U.S. 191, 77 S. Ct. 281, 1 L. Ed. 2d 246 (1957) (incarcerated in prison for a week of questioning before confessing made it involuntary). As demonstrated by case examples, this case is nowhere near the oppressive length of interrogation courts have determined make a confession involuntary.

2. D.W.'s confession was voluntary under *Miranda*.

Under *Miranda*, the test is whether the waiver was done voluntarily and intelligently. *Aten*, 130 Wn.2d at 663. Under the *Miranda* test for voluntary and intellectual waiver, factors for juveniles include: age, experience, education, background, intelligence or capacity to understand warnings given, and the nature of those rights. *State v. Harrell*, 83 Wn. App. 393, 401, 923 P.2d 698 (1996). The standard of

proof for the voluntariness of waiving *Miranda* rights is by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). If the waiver is voluntary, the confession is admissible. *Aten*, 130 Wn.2d at 663.

Miranda warnings give the suspect the relevant information required to make a choice to remain silent, or to obtain an attorney. “[T]hereafter the suspect’s choice whether to exercise his privilege to remain silent should ordinarily be viewed as an act of free will.” *Oregon v. Elstad*, 470 U.S. 298, 299, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). Importantly, the test is whether a suspect knew he had the rights, not whether he knew the risks or consequences of talking. *State v. McDonald*, 89 Wn.2d 256, 264, 571 P.2d 930 (1977), *overruled on other grounds by State v. Sommerville*, 111 Wn.2d 524, 530–31, 760 P.2d 932 (1988).

To be voluntary, a confession must be the product of free will and rational intellect. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). The court must consider the condition of the defendant and the conduct of the police. *State v. Rupe*, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984).

In this matter, D.W. was 17 years old, cohabitated with his girlfriend, had a baby, and held a job. RP at 105-07, 120-22. Although he only had a 9th grade education, no evidence was provided regarding his

lack of intellect, only that he had quit school voluntarily. *Id.* at 480-81. D.W. had the intellectual capacity to understand the nature of his *Miranda* rights, and to understand that he had those rights. The police conduct at the time his rights were read included only asking him to voluntarily come to the station to speak to a detective, having him wait for a reasonable period of time for the detective to arrive, and then having a detective read his *Miranda* rights to him after agreeing to be videotaped.

Additionally the officer offered D.W. food, water, the option to use the bathroom, told D.W. to say if he wanted a break or anything else, and was told if D.W. was too tired, the interview would be stopped. RP at 35. D.W. advised the officer he did not want to stop the interview, even if he grew so tired that he fell asleep. *Id.* D.W. advised Detective Benson to wake him up if he fell asleep so he could continue. *Id.* at 35, 128. D.W. advised during the entire “first part” of the interview, which was from the time it started around 10:37 p.m. to approximately an hour later when Detective Benson left to speak to J.L. and the doctor, that Detective Benson was nice and kind. RP at 115, 506-07.

3. D.W.’s confession was not coerced.

There is substantial evidence in the record from which the trial court could have found by a preponderance of evidence that the confession was voluntary. Accordingly, the appellate court should not disturb the

trial court's determination of voluntariness. *Ng*, 110 Wn.2d at 37. However, if the court finds there is not substantial evidence and wants to evaluate the voluntariness of the confession, additional analysis of the evidence on record is below.

Here, like in *U.S. v. Shehadeh*, D.W. came voluntarily to speak to the police. *U.S. v. Shehadeh*, 940 F. Supp. 2d 66, 73 (E.D.N.Y. 2012), *aff'd*, 586 F.App'x 47 (2d Cir. 2014). Similarly, both were advised they were not required to speak, could consult an attorney, and anything said would be used against him. *Id.* Unlike in *Shehadeh* where the suspect was interviewed in close quarters, here D.W. was held in a fairly large room. *Id.* Further, the court found questioning in close quarters was not significant in determining whether the defendant's confession was voluntary. *Id.*; *U.S. v. Anderson*, 929 F.2d at 99. Therefore, here too the court should find the size of the room, which was not "close quarters," is not significant in determining whether D.W.'s confession was voluntary.

Like in *Shehadeh* where the defendant was not under arrest, here too D.W. was not under arrest, was "not handcuffed while he spoke to agents, and by all accounts, the atmosphere in the room was 'relaxed,' 'cordial' and 'professional.'" *Shehadeh*, 940 F. Supp. 2d at 73.

In *Shehadeh*, the officer told the suspect that once he got an attorney, his ability to cooperate with police would be nullified. *Id.* at 75.

The court found since the agent's statement to the defendant was "actually true and not misleading . . . it does not support a finding of undue coercion." *Id.* Similarly here, Detective Benson told D.W. that unless it was determined which of the only two people with access to the baby was abusing him, the baby would not be returned to that environment with the two possible suspects of child abuse. RP at 404. Additionally, the tone and body language of Detective Benson during this part of the interview was cordial, laid back, and not intimidating. Like in *Shehadeh*, here too the court should find that because Detective Benson made a true, not misleading statement, it was neither a threat nor coercion.

Additionally, this case is easily distinguished from *Lynumn* where police told the defendant that if she cooperated, the judge would go easy on her, but if she did not cooperate, her children would be placed in foster homes and her welfare would be taken away even if she were released. *Lynumn v. Illinois*, 372 U.S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). In this case, telling D.W. that law enforcement could not let an abused child go back into a home with two identified potential abusers until the investigation determined who was in fact abusing the baby, was not the same threat as "even if we release you, we will keep custody of the baby from you because you did not cooperate."

Further, this case is distinguishable from *Rogers v. Richmond*, where the suspect was told his wife would be brought in and arrested if he did not confess. *Rogers v. Richmond*, 365 U.S. 534, 535, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961). In this matter, D.W.'s girlfriend, J.L., was also already under investigation, was at the police station, and had no medical issues. In *Rogers*, the wife had nothing to do with the investigation or criminal activity, was at home not being questioned, and had a medical condition. *Id.* at 536. Therefore, D.W. knowing the police were questioning J.L. was not a threat that influenced D.W. to confess.

Additionally, there has been no evidence that D.W. at any time heard J.L. crying. However, even if D.W. heard her in the initial minutes of his interview while she was next door, there is no causal police conduct demonstrated that influenced him to confess hours later. In fact, the detective in the room with D.W. could hear muffled speaking and had J.L. moved across the building, demonstrating his intent was not for D.W. to overhear his girlfriend being interviewed. *Id.* at 37. Per *Colorado v. Connelly*, lacking the necessary element of coercive police conduct being demonstrated, D.W. in this matter overhearing his girlfriend in any manner is not significant to the determination of whether his confession was voluntary. *Colorado*, 479 U.S. at 164.

Regarding D.W.'s allegation that being held for an hour until the detective arrived is part of coercion, D.W. has not provided any evidence that the police action of making him wait for up to an hour before his interview influenced him to confess. Further, in *Ng*, the defendant was arrested and detained in Canada until a Seattle officer arrived. *Ng*, 110 Wn.2d at 34-35. Unlike *Ng*, here D.W. was voluntarily seated at the police station less than or about an hour until the interviewing detective arrived. Similar to *Ng* where the officer read *Miranda* rights to the defendant before starting the interview, here too D.W. was read his *Miranda* rights and juvenile warnings before the interview with the detective started. In *Ng*, the court found substantial evidence that the confession was voluntary by a preponderance of evidence. *Id.* at 38. This was from: 1) the defendant conceded he was advised of his *Miranda* rights; 2) the defendant signed a confession with the statement on it that it could be used against him; 3) *Miranda* rights were read slowly and deliberately; 4) the defendant indicated he understood his rights; 5) the defendant was willing to still make a statement; and 6) an officer read the defendant's rights to him again before he signed the confession. *Id.* at 37-38.

Here too 1) D.W. concedes, and it is videotaped, that he was advised of his *Miranda* rights; 2) D.W. signed a confession with the

statement on it that it could be used against him; 3) *Miranda* rights were read slowly and deliberately; 4) D.W. indicated he understood his rights; and 5) D.W. was still willing to make a statement after acknowledging and waiving his rights. RP at 45, 303, 308. Although in *Ng* the defendant's *Miranda* rights were read a second time before the defendant signed his confession, there is no case law requiring that *Miranda* rights be given more than once for the same interview or incident under these circumstances of waiver. Therefore, like in *Ng*, here too the court should hold there is substantial evidence the waiver of rights was voluntary by a preponderance of evidence.

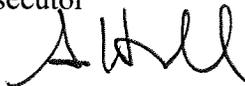
IV. CONCLUSION

There is substantial evidence in the record from which the trial court could have found D.W.'s confession was voluntary. D.W.'s confession was not coerced. The court did not err admitting D.W.'s statement at trial. The conclusion and conviction should be upheld.

RESPECTFULLY SUBMITTED this 18th day of June, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on June 18, 2015.


Courtney Sheaffer
Appellate Secretary