

65964-2

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NO. 65964-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

B.L.W. (DOB: 09/23/1995),

Appellant.

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDING PARTY

The State of Washington, respondent, asks that the disposition of the trial court be affirmed.

II. OFFENSE COMMITTED BY APPELLANT

The juvenile was found guilty of first degree rape of a child.

III. DISPOSITION OF TRIAL COURT

The trial court imposed a special sexual offender disposition alternative (SSODA) imposing 20 days confinement, 24 months community supervision, 80 hours community service, a \$100.00 victim compensation fee, and suspended a 36 week commitment to the Juvenile Rehabilitation Administration (JRA).

IV. STANDARD DISPOSITION RANGE

The standard disposition for the offense is 15 to 36 weeks commitment to JRA, \$0-\$500 fine, and \$100 crime victim fee.

V. FACTS

A. THE CRIME.

M.H. (DOB: 09/19/2000) has lived with his parents in Marysville, WA, his entire life. His cousin K.E. (DOB: 12/23/1999) has lived across the street since 2006. Brian W.'s grandmother has lived across the street from M.H. since 2001. Brian began playing with the younger M.H. and K.E. in 2006, when Brian visited his

grandmother; Brian continued playing with M.H. and K.E. through September 2008. Brian (DOB: 09/23/1995) is five years older than M.H. and four years older than K.E. RP 4-8, 32-35, 60-61, 73-74, 201-205.

In May of 2009, M.H.'s father was told by a neighbor that Brian was having oral sex with M.H. He spoke with M.H. who confirmed that Brian had been making M.H. and K.E. do sex with Brian. M.H.'s father contacted K.E.'s mother and called the police. RP 61-65, 74-77, 82.

M.H. testified that Brian had oral and anal sex with him a lot, that the sex started when M.H. was six and stopped around the second grade, just before he turned eight years old in September 2008. K.E. also testified that Brian had oral and anal sex with him. K.E. said the sexual abuse happened when he was seven or eight years old. K.E. turned seven in December 2006; and nine in December 2008. RP 10-14, 35-38, 56, 59.

Detective Christopher Ferreira contacted Brian's mother, who was aware of the allegations, and asked if she would come in with Brian for an interview. Brian and his mother came to the Sheriff's Office on June 4, 2009. Detectives Ferreira and Jensen met Brian and his mother in the lobby and gave them visitor passes

to the Sheriff's Office. Detective Ferreira explained to Brian and his mother that while he needed to use a card to get into the office they did not need a card to get out of the office; that the meeting was voluntary, that they were free to leave at any time, and that Brian did not have to answer any questions. Detective Ferreira then went over a non-custodial interview form with Brian and his mother informing them that Brian was not under arrest and that he could leave at any time. The form included Brian's name, date of birth, and the date and time of the interview. Both Brian and his mother signed the non-custodial interview form. Brian was not read his Miranda¹ rights. The detectives were aware of Brian's age and that he had no prior involvement with law enforcement. CP 66-67, Exhibit 7—Non-Custodial Interview Form (attached as Appendix A to Respondent's Brief); CP 82—Findings of Fact and Conclusions of Law 3.5 Hearing; RP 82-85, 89, 91-93, 96, 98.

The interview was recorded with Brian's consent and lasted 67 minutes. The interview room was 10'x10' with a table and four chairs. Brian and his mother sat on the side of the table closest to the door; Detectives Ferreira and Jensen sat on the opposite side away from the door. Brian was not placed under arrest and he was

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

not handcuffed or restrained in any manner. During the interview Brian was told several times that he was not under arrest, that he was free to leave and that he was going to walk out when the interview was over. Approximately 45 minutes into the interview Brian indicated that he was uncomfortable speaking in front of his mother and asked her to leave the interview room. Brian then confessed to having oral sex with M.H. At the conclusion of the interview Brian and his mother walked out of the Sheriff's Office and Brian went back to school. Brian was not arrested. CP 66-67, Exhibit 1—Statement of Brian W.; CP 83—Findings of Fact and Conclusions of Law 3.5 Hearing; RP 85-87, 89, 91, 93-94, 100, 114-115.

Detective Ferreira's theme during the interview was that Brian needed to tell the truth. Detective Ferreira clearly communicated to Brian that he did not believe Brian's denials that he had done anything of a sexual nature with M.H. and K.E. Detective Ferreira used both ruse and deception during the interview. CP 66-67, Exhibit 1—Statement of Brian W.; CP 83—Findings of Fact and Conclusions of Law 3.5 Hearing; RP 94-97, 101-103.

Brian testified at the CrR 3.5 hearing. Brian said that before the recording started Detective Ferreira told him he could leave when the interview was done. Brian said that he thought things would go smoother for him if he made a statement. RP 110-114.

B. PROCEDURE.

Brian was charged with two counts Rape of a Child in the 1st Degree. CP 43-44.

The case proceeded to adjudication. Hearings regarding CrR 3.5, competency, and child hearsay were conducted on August 3, 2010, during the adjudication. The court found that Brian's statements to Detective Ferreira were admissible; Brian was not in custody at the time of the interview and the statements were made voluntarily. CP 82-84—Findings of Fact and Conclusions of Law 3.5 Hearing; RP 122-127.

The court found M.H. and K.E. competent to testify and found the statements made by M.H. to his father, by K.E. to his mother, and the statements made by both to the child interview specialist, Amanda Harpell-Frand, were admissible. CP 66-67, Exhibits 2 and 3—CD dated 5/2/09, CD dated 6/3/09; CP 71-78—Findings of Fact and Conclusions of Law Finding M.H. and K.E.

Competent to Testify and Admissible Hearsay; RP 175-181, 185-195.

The court found Brian guilty on count one involving M.H. The court acquitted him on count two involving K.E. finding: ... “there is not sufficient evidence in the record that would allow the Court to find beyond a reasonable doubt that any act of sexual intercourse occurred between [Brian] and [K.E.] during the charging period” CP 68-70; RP 218-223.

C. DISPOSITION.

The trial court imposed a (SSODA) including 20 days confinement, 24 months community supervision, 80 hours community service, a \$100.00 victim compensation fee, and suspended a 36 week commitment to JRA. CP 12-32.

VI. ISSUES RAISED ON APPEAL

A. Whether Brian was in custody at the time of his interview with Detective Ferreira requiring police to advise him of his Miranda rights?

B. Whether Brian’s statements to Detective Ferreira were made voluntarily?

VII. ARGUMENT

A. BRIAN WAS NOT IN CUSTODY WHEN HE WAS INTERVIEWED BY DETECTIVE FERREIRA.

Brian claims that his statements to police should have been suppressed under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Miranda requirements are only applicable when there has been custodial interrogation by a state agent. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). In the present case it is not disputed that Brian was interrogated, that Detective Ferreira was a state agent, and that Miranda warnings were not given. The only question is whether Brian was in custody.

The test for custody is objective: “whether a reasonable person in the individual’s position would believe he or she was in police custody to a degree associated with formal arrest.” Lorenz, 152 Wn.2d at 36-37. A child’s age is relevant to the objective test of whether a suspect has been taken into custody. J.D.B. v. North Carolina, 131 S.Ct. 2394, 2406, 79 USLW 4504 (2011). The trial court’s determination of “custody” is reviewed *de novo*. Lorenz, 152 Wn.2d at 36. In this context, “*de novo* review” means applying the legal standard to the facts found by the trial court. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), review

denied, 149 Wn.2d 1025 (2003). The appellate court does not review the trial court's determinations on credibility or the weight given to evidence. State v. Swan, 114 Wn.2d 613, 666, 790 P.2d 610 (1990), cert. denied, 513 U.S. 985 (1991). Even when constitutional issues are involved, the trial court's credibility determinations will not be overturned on appeal. Id.

Brian relies on State v. D.R., 84 Wn. App. 832, 930 P.2d 350, review denied, 132 Wn.2d 1015 (1997). There, this court held that a student was subjected to "custodial interrogation" when he was questioned at school in the assistant principal's office by a police officer. The most critical factor supporting this conclusion was that the student was not told that he was free to leave. D.R., 84 Wn. App. at 838.

D.R. examined two Oregon cases: State ex rel. Juvenile Dep't v. Killitz, 59 Or. App. 720, 651 P.2d 1382 (1982), and State ex rel. Juvenile Dep't v. Loreda, 125 Or. App. 390, 865 P.2d 1312 (1993). Both cases involved interrogations of students by police officers in the principal's office. In Killitz, the officer did nothing to "dispel the clear impression communicated to defendant that he was not free to leave." The court therefore concluded that the student was in "custody." D.R., 84 Wn. App. at 837, quoting Killitz,

651 P.2d at 1384. In contrast, in Loredo the student was told that he was not under arrest and could leave if he wanted to. The court therefore held that the student was not in custody and that Miranda warnings were not required. D.R., 84 Wn. App. at 837, citing Loredo, 865 P.3d at 1313-14. The D.R. court concluded that the “most significant difference” between Killitz and Laredo was whether the suspect was told that he was free to leave. Because the juvenile in D.R. did not receive this advice, the court concluded that he was in “custody” and Miranda warnings were required. D.R., 84 Wn. App. at 838.

In the present case, the evidence on this point was undisputed. Brian testified that that before the recording started Detective Ferreira told him he could leave when the interview was done. RP 110-113. Detective Ferreira testified that he told Brian and his mother the meeting was voluntary, that they were free to leave at any time, and that Brian did not have to answer any questions; he went over a non-custodial interview form with Brian and his mother that informed them that Brian was not under arrest and that he could leave at any time; and during the interview Brian was told several times that he was not under arrest, that he was free to leave and that he was going to walk out when the interview

was over. CP 66-67, Exhibit 7; RP 83-86, 100. The trial court found that Brian was not in custody; he was told that he was not under arrest, he was not placed in handcuffs or restrained, and he was told that he was free to leave. CP 82-84—Findings of Fact and Conclusions of Law 3.5 Hearing; RP 125-126.

In light of the trial court's determination that Brian was not under arrest and was told he was free to leave, the court correctly determined that he was not in custody.

B. BRIAN'S STATEMENTS TO DETECTIVE FERREIRA WERE MADE VOLUNTARILY.

The correct test for voluntariness is whether, under the totality of the circumstances, the confession was coerced. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997) citing Arizona v. Fulminante, 499 U.S. 279, 285, 111 S.Ct. 1246, 1251, 113 L.Ed.2d 302 (1991); State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984) (under the totality of circumstances test of voluntariness; circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police). The totality-of-the-circumstances analysis specifically applies in deciding the admissibility of a juvenile defendant's confession. State v. Unga, 165 Wn.2d 95, 103, 196 P.3d 645

(2008). Courts have a responsibility to examine confessions of a juvenile with special care; 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. Unga, 165 Wn.2d at 103.²

The totality-of-the-circumstances test specifically applies to determine whether a promise was made or there was an exertion of any improper influence, and if such was made, whether a confession was coerced by an express or implied promise or by the exertion of any improper influence. Unga, 165 Wn.2d at 101-102; Broadaway, 133 Wn.2d at 132. The test is whether the defendant's will was over borne by the promise, i.e., there must be a direct causal relationship between the promise and the confession. Unga, 165 Wn.2d at 102; Broadaway, 133 Wn.2d at 132.

A police officer's psychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of

² Respondent has no objection to Brian's citation to social science and cognitive science authorities, at page 14 of Appellant's Brief, to the extent the citations are for the proposition that there are fundamental differences between juvenile and adult minds. J.D.B. v. North Carolina, 131 S.Ct. at 2403, fn 5 (citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions). However, because these studies were not presented to the trial court, Respondent objects to these authorities being considered for any other purpose.

the suspect's own balancing of competing considerations, the confession is voluntary.”

Unga, 165 Wn.2d at 102 (citing Miller v. Fenton, 796 F.2d 598, 605 (3d Cir.1986) (the question is whether the interrogating officer's statements were so manipulative or coercive that they deprived the suspect of his ability to make an unconstrained, autonomous decision to confess); accord United States v. Miller, 984 F.2d 1028, 1031 (9th Cir.1993)).

In the present case Brian has not assigned error to any of the findings of fact entered following the CrR 3.5 hearing. Failure to assign error to the trial court's findings on the voluntariness of a confession leaves them verities on review. Lorenz, 152 Wn.2d at 36; Broadaway, 133 Wn.2d at 131. The dispositive question on appeal is whether the unchallenged findings support the conclusion. State v. Burkins, 94 Wn. App. 677, 695, 973 P.2d 15 (1999). Challenged findings are verities if supported by substantial evidence in the record. Broadaway, 133 Wn.2d at 131. The trial court found no threats or promises were made and no coercion was used to obtain Brian's statements or to overcome his free will; Brian's statements to the detectives were voluntarily made, not the

product of threats, promises or coercion of any kind. CP 82-84—
Findings of Fact and Conclusions of Law 3.5 Hearing; RP 126-127.

The record contains substantial evidence supporting the trial court's determination of voluntariness. Detective Ferreira interviewed Brian in the presence of his mother. Brian was repeatedly told that he was not under arrest, that he did not have to answer any questions, and that he was free to leave at any time. Brian and his mother were seated closest to the door. During the interview Brian indicated that he did not feel comfortable talking in front of his mother and asked her to leave the interview room; she left the room. At the CrR 3.5 hearing Brian disputed the size of the room, that he was seated closest to the door, and whether Detective Ferreira was wearing a firearm. The trial court found Detective Ferreira's testimony more credible. There was substantial evidence supporting the trial court's findings.

Additionally, Brian's statements that he thought things would go smoother for him and he would receive less punishment if he confessed do not vitiate the voluntariness of his statements. Brian was given a SSODA with a significant reduction from the standard disposition range. Even if Brian may have been mistaken about the consequences of his decision to speak to Detective Ferreira, it does

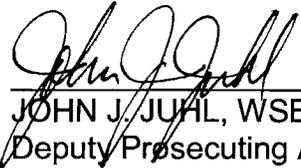
not affect the voluntariness of his choice to do so. A defendant's mistake about, or ignorance of, the full consequences of his decisions to speak with the police does not vitiates their voluntariness. State v. Heggins, 55 Wn. App. 591, 598-599, 779 P.2 285 (1989) (citing Connecticut v. Barrett, 479 U.S. 523, 530, 107 S.Ct. 828, 833, 93 L.Ed.2d 920 (1987)). The record supports the trial court's determination of voluntariness; Brian's confession was properly admitted.

VIII. CONCLUSION

For the reasons stated above the conviction should be affirmed.

Respectfully submitted on July 19, 2011.

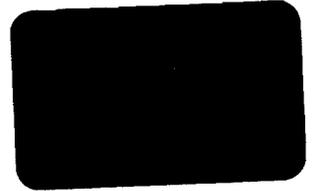
MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

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Attorney for Respondent



Snohomish County Sheriff's Office
Non-Custodial Interview Form



Event # Sob 9-09293

Date: 06/04/2009 Time: 1125

Name: WHITE, BRIAN LAWRENCE

DOB: 09/23/1995

NOT UNDER ARREST, UNDERSTAND ?

YES / NO

CAN LEAVE AT ANY TIME, UNDERSTAND ?

YES / NO

ABLE TO UNDERSTAND AND ANSWER QUESTIONS ?

YES / NO

CURRENTLY UNDER A DOCTOR'S CARE ?

YES / NO

CURRENTLY TAKING ANY MEDICATIONS ?

YES / NO

If yes, what kind ? _____

CURRENT EMPLOYMENT ? NORTH MOUNT SCENE, EVERETT

Michele White

Signature: x Brian White

Witness: [Signature] #1047

Case No. 09-8-01617-8

Plf's)

) Exhibit No. 7

Def't's)

Marked for Identification

Admitted

for 3-5 hrs

Rejected

Lilla Korst-Gatlin

Deputy Clerk