

FILED

AUG 27 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 286070

COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Respondent

v.

KEVIN EUGENE GRENZ, Appellant

BRIEF FOR RESPONDENT

Attorney for Respondent
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Whitman County
Prosecuting Attorney
Byron Bedirian,
Chief Deputy Prosecutor
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A. ISSUES

- 1. Were the Defendant's statements voluntarily?**
- 2. Does the failure to enter written findings and conclusions require remand or reversal?**
- 3. Does the Defendant raise any reviewable additional grounds?**

B. STATEMENT OF THE CASE

On December 1, 2008, Sheriff Brett Myers was investigating a reported sexual abuse case wherein the Defendant, Kevin Grenz was identified as the suspect. Sheriff Myers had gone to Farmington Washington in an attempt to contact the Defendant, and noticed him walking down the street. 9/30/09 RP at 9. Sheriff Myers was driving an unmarked police car and, without using any emergency lights, he pulled over and walked up to the Defendant. Sheriff Myers told him that he had some questions that he needed to ask him, and asked if the Defendant would be willing to speak with him. *Id.* at 10. The Defendant indicated that he would be happy to talk, and he invited the sheriff into his mother's home. *Id.* at 11. Sheriff Myers obtained permission from the Defendant's mother to use her house. *Id.*

Sheriff Myers knew the Defendant had a hearing impairment, and had been in contact with him about six times prior to this incident. *Id.* at 31. During

the previous contacts, the sheriff did not have problems communicating with the Defendant.

The Defendant and Sheriff Myers sat down about three feet apart and they were facing one another the entire time that they spoke. *Id.* at 12-13, 32. When they spoke, the Defendant would watch Sheriff Myers' lips, and Sheriff Myers spoke loudly, slowly and deliberately. *Id.* at 24. Before the sheriff asked any questions, he explained to the Defendant that he had no obligation to speak with him and that he was not under arrest. *Id.* at 13, 30. The Defendant appeared to understand this and replied by saying that he would speak to Sheriff Myers. *Id.* Additionally, Sheriff Myers explained to the Defendant that he could get into trouble and could be facing additional criminal charges. *Id.* at 31.

Sheriff Myers then began to explain to the Defendant that he wanted to talk to him about new allegations of sexual contact that were different and more serious than those in a previous case that involved the Defendant and the same victim. *Id.* at 14, 18. The Defendant replied in part by saying that he could not get in trouble for this because it would be double jeopardy. *Id.* at 15. The Defendant spoke for five or ten minutes after the sheriff explained the new

allegations. *Id.* at 27. The sheriff had repeatedly explained to the Defendant that he was there to discuss new allegations sexual abuse. The Defendant proceeded to make statements to the effect that he had gone too far and that after his wife was unable to provide for the attention that he needed he turned his affection and physical needs towards the victim. *Id.* at 34, 35.

Throughout the conversation it appeared to Sheriff Myers that the Defendant understood him, and the Defendant's answers were on point. *Id.* at 22, 24. If the Defendant indicated that he did not hear or understand Sheriff Myers, the sheriff would restate or rephrase the question. *Id.* at 35. This conversation lasted for about t 10 to 15 minutes and ended when the Defendant indicated that he wanted to speak to his attorney. *Id.* at 21, 23.

Subsequently, the Defendant was charged and went to trial on one count of Child Molestation in the First Degree. Before trial a CrR 3.5 hearing was held and the trial court found that the Defendant's statements to Sheriff Myers were admissible. *Id.* at 54

C. ARGUMENT

1. The Defendant's statements were voluntary and not affected by a mental infirmity or his hearing impairment.

"A custodial interrogation involves express questioning or its functional

equivalent initiated after a person is in custody or otherwise significantly deprived of his freedom." *State v. Hawkins*, 27 Wn.App. 78, 81-82, 615 P.2d 1327 (1980). "Custody for Miranda purposes is narrowly circumscribed and requires 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest'" *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992), *citing*, *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S.Ct. 1136, 79 L.Ed.2d (1984). "Miranda warnings were intended '[t]o dissipate 'the overbearing compulsion . . . caused by isolation of a suspect in police custody,'" *Post*, 118 Wn.2d at 609, *citing*, *Minnesota v. Murphy*, 465 U.S. 420, 429-430, 104 S.Ct. 1136, 79 L.Ed.2d (1984). A trial court's determination of custodial status is reviewed de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

The questioning in this case was noncustodial, as the Defendant was not placed in a situation associated with formal arrest. The Defendant was questioned in his mother's home, a place where he occasionally stays. 9/30/09, RP 22, 29 Questioning in a defendant's home is generally noncustodial because the comfort of one's home is deemed to abrogate the coercive environment that *Miranda* addresses. See 2 Wayne R. LaFave, et al., *Criminal Procedure*, §

6.6(e), at 742 n. 67 (3d ed. 2007). Here, the Defendant was in a familiar, comfortable surrounding and was not isolated in a law enforcement environment. The sheriff made no show of authority, and never ordered the Defendant to comply with his wishes. 9/30/09 RP 9-12, 13, 20, 30. The sheriff was invited into the home after the Defendant indicated that he would be willing to answer questions. *Id.* at 11. The Defendant made statements after the sheriff told him that he was there to discuss new allegations for which the Defendant could be punished. The sheriff had also made it clear that the Defendant had no obligation to speak with him, and that he was not under arrest. 9/30/09 RP, at 13, 18, 34.

These factors, and others weigh in favor of a finding that the Defendant's statements were voluntary. "To determine voluntariness, the inquiry is whether, considering the totality of the circumstances, the confession was coerced." *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). This analysis includes an examination of the defendant's age, physical condition, experience with the police, mental abilities, use of drugs, the conduct of the police, the duration of the questioning, and the environment of the questioning. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996);

State v. Trout, 125 Wn.App. 403, 414, 105 P.3d 69 (2005). A defendant's mental disability at the time of a confession is also considered, but, "[t]he mental subnormality of an accused does not automatically render his or her confession inadmissible; instead, it is merely one factor to be considered with all others bearing on the question of voluntariness." *State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985), citing *People v. Lara*, 67 Cal. 2d 365, 432 P.2d 202 62 Cal. Rptr. 586 (1967). A trial court's determination that a confession was voluntary will not be disturbed on appeal if there is substantial evidence in the record from which the trial court could have found it to be voluntary by a preponderance of the evidence. *Aten*, 130 Wn.2d at 664.

Even if the Defendant was suffering from a mental infirmity at the time of questioning, his statements were voluntary. The Defendant in *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), claimed that her statement was involuntary because of she suffered from a mental disability and was medicated. *Aten*, 130 Wn.2d at 663. In finding that the confession was voluntary, the Court considered that the defendant was "calm subdued, purposeful and oriented to her surroundings and herself. She spoke clearly, had no trouble expressing her self and showed no sign of being sedated." *Id.* at 664. Further,

the court did not find any evidence that the investigating officers, "deliberately exploited her mental condition to obtain her statement or acted in a way that would overcome her will to resist giving a statement." *Id.* at 665. In the present case, the Defendant was oriented, responded to the sheriff in a manner that indicated a comprehension of the questions, and was also calm and purposeful. The sheriff was not coercive in any manner, and as soon as the Defendant requested an attorney, the sheriff stopped talking to him. Under *Aten*, even if the Defendant in the present case had a mental defect at the time of questioning, the aforementioned factors show that his statements were voluntary.

In *State v. Ortiz*, 104 Wn.2d 479, 706 P.2d 1069 (1985), a defendant who the court described as "moderately retarded" made statements to the police after being arrested. In finding that the statements were voluntary the Court noted that, "[t]he dispositive fact here was that the admission by petitioner was completely unsolicited. Absolutely nothing was said in the car before petitioner made his admission. We hold that in this situation the fact that the petitioner was moderately retarded is irrelevant to the issue of voluntariness" *Ortiz*, 104 Wn.2d at 484-485. If a 'moderately retarded' defendant can make

voluntary statements in a police car after being arrested, the statements in this case should also be considered voluntary. Here, there is no evidence of a mental infirmity other than the concern expressed in court after charges were filed. The Defendant invited the sheriff into the home of his step mother, he was not in custody, he was told that he did not have to talk with the sheriff, and he was advised that the sheriff was talking about new allegations for which the Defendant could receive further punishment. While the Defendant's statements were not unsolicited, the situation was arguably less coercive than that in *Ortiz*. The Defendant was in familiar surroundings, and had been told that he did not need to speak with the sheriff. Further, there was no indication that the Defendant was suffering from a mental defect at the time of questioning. As such, the statements should be considered to have been made voluntarily.

There is also ample evidence that the Defendant understood the sheriff's questions. The sheriff testified that he had contact with the Defendant on about six prior occasions. 9/30/09 RP at 31. During those times he was aware of the Defendant's hearing impairment and he had been able to communicate with him. *Id.* The sheriff also testified that he was articulating his words, talking in a louder than normal volume, and talking slower when he spoke to the

Defendant. *Id.* at 32. During the time the sheriff was speaking with the Defendant about the new allegations, they were about three feet apart, facing one another, and the Defendant would watch the sheriff's lips. *Id.* at 12-13,23-24. The Defendant's responses to the sheriff's questions demonstrated an understanding of what he was being asked. *Id.* at 22. The record shows that the efforts made by the sheriff to communicate with the Defendant were successful, and that the Defendant heard and understood the sheriff before making his statements.

2. There was no prejudice caused by the late entry of findings and conclusions.

This case should not be remanded or reversed because the trial court's oral ruling is sufficient for appellate review. "[A]lthough the failure to submit written findings and conclusions pursuant to CrR 3.6 is error, the error is considered harmless where the trial court's oral findings are sufficient to permit appellate review. *State v. Riley*, 69 Wn.App. 349, 352-353, 848 P.2d 1288 (1993). In the present case, the trial court was very detailed in making its oral findings and conclusions. See 9/30/09 RP 48-55. After noting that there is a requirement to enter specific findings of fact and conclusions of law, the trial court orally pronounced its findings and conclusions. *Id.* For example, the trial

court found that the sheriff had prior contacts with the Defendant and was able to communicate with him. *Id.* 49-50. Specific findings were made regarding the sheriff's initial contact with the Defendant and the Defendant's response. *Id.* at 50-51. Findings were made about how the Defendant and sheriff were situated when they spoke, and how the sheriff explained that he wanted to talk to him about new allegations of sexual abuse that were different from the prior allegations. *Id.* at 51-52. The court went on to make findings that the Defendant understood the sheriff's questions, and that he was not in custody. *Id.* at 53-54. Ultimately, the court concluded that the Defendant's statements were admissible. *Id.* at 54. The specific and detailed oral findings and conclusions provide an adequate basis for appellate review.

Additionally, findings have been entered since the Defendant's opening brief. These were neither tailored to meet the appellate issues nor do they prejudice the Defendant. See State's Supplemental Designation of Clerk's Papers (Findings and Conclusions, Sub No. 76, expected to be labeled CP 183-186). The findings and conclusions were entered on June 21, 2010, and with the exception of a redaction of surplus language in paragraph 32 of the findings of fact, they are identical to the proposed findings and conclusions filed

on November 17, 2009. See CP 176. As such, the content was established long before the Defendant's opening brief was filed and it was not tailored to meet any appellate issues that have been raised.

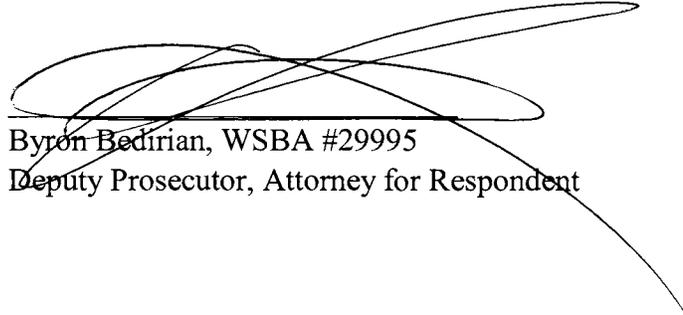
3. The Defendant fails to raise any additional reviewable issues.

The Defendant's additional grounds for review should not alter the trial court's ruling. The Defendant raises issues as to the credibility of the State's witnesses. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The Defendant's statement goes on to challenge the constitutionality of his incarceration and arrest. After the Defendant requested an attorney the sheriff did not arrest him and left the house. 9/30/09 RP at 2. Additionally, no evidence was gathered after the Defendant was held in jail. Lastly, the Defendant raises the issue of the voluntariness of his statements. This has been addressed above.

D. CONCLUSION

Based upon the above, the State respectfully requests that this Court affirm the ruling of the lower court and deny the Defendant's appeal.

Submitted this 26th day of August, 2010

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Byron Badirian, WSBA #29995
Deputy Prosecutor, Attorney for Respondent

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STATE OF WASHINGTON,
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Appellant,

Court of Appeals No. 286070
No. 09-1-00058-6

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF SPOKANE)

JENNIFER GRIFFIN, being first duly sworn, deposes and says as follows: That on **the 26th day of August, 2010** I caused to be mailed in the United States Post Office at Colfax, Washington, with postage fully prepaid thereon, a full, true and correct copy(ies) of the original **APPELLANT'S BRIEF** on file herein to the following named person(s) at the following address(es):

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DATED this 26th day of August, 2010.

Jennifer Griffin

Jennifer Griffin

SIGNED before me this 26th day of August, 2010 by Jennifer Griffin.



Darlene M. Lee

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