

65964-2

65964-2

No. 65964-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN W.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2011 MAR 23 PM 4:13
MAUREEN M. CYR
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

A. **SUMMARY OF ARGUMENT** 1

B. **ASSIGNMENTS OF ERROR** 2

C. **ISSUE PERTAINING TO ASSIGNMENTS OF ERROR** 2

D. **STATEMENT OF THE CASE** 3

E. **ARGUMENT** 10

 1. **ADMISSION OF BRIAN'S STATEMENTS TO THE DETECTIVES VIOLATED HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF, BECAUSE HE WAS IN "CUSTODY" AT THE TIME OF THE INTERROGATION BUT THE DETECTIVES NEVER READ HIM HIS MIRANDA RIGHTS**..... 10

 a. **A suspect's statements that are the product of custodial interrogation are not admissible at trial unless the suspect receives *Miranda* warnings** 10

 b. **In determining whether a juvenile was in "custody" for *Miranda* purposes, courts must take the suspect's young age into account**..... 12

 c. **Brian was in "custody" at the time of the interrogation because a reasonable 13-year-old in his position would not have felt free to terminate the interrogation and leave** 15

 d. **The adjudication must be reversed** 16

 2. **BRIAN'S STATEMENT TO POLICE WAS INADMISSIBLE BECAUSE IT WAS INVOLUNTARY**..... 18

 a. **A criminal defendant's inculpatory statements made during police interrogation are admissible only if they are voluntary** 18

 b. **Brian's statements to police were involuntary** 21

F. CONCLUSION..... 24

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 9.....	10
Const. art. I, § 3.....	18
U.S. Const. amend. 5.....	10, 11
U.S. Const. amend. XIV	18

Washington Cases

<u>City of Tacoma v. Heater</u> , 67 Wn.2d 733, 409 P.2d 867 (1966)....	11
<u>State v. Braun</u> , 82 Wn.2d 157, 509 P.2d 742 (1973).....	20
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997)	12, 19
<u>State v. Burkins</u> , 94 Wn. App. 677, 973 P.2d 15 (1999).....	20
<u>State v. Daniels</u> , 160 Wn.2d 256, 156 P.3d 905 (2007)	15
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968)	20
<u>State v. D.R.</u> , 84 Wn. App. 832, 930 P.2d 350 (1997).....	13
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	16
<u>State v. Harris</u> , 106 Wn.2d 784, 725 P.2d 975 (1986).....	12
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004)	12
<u>State v. Pierce</u> , 94 Wn.2d 345, 618 P.2d 62 (1980).....	19
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	20
<u>State v. Schoel</u> , 54 Wn.2d 388, 341 P.2d 481 (1959)	11
<u>State v. Setzer</u> , 20 Wn. App. 46, 579 P.2d 957 (1978)	20

State v. Short, 113 Wn.2d 35, 775 P.2d 458 (1989)..... 13

State v. Unga, 165 Wn.2d 95, 196 P.3d 64
(2008) 18, 19, 20, 21, 23

United States Supreme Court

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d
302 (1991) 17, 21

Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed. 317
(1984) 12

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d
476 (1968) 17

California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d
1275 (1983) 12

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705
(1967) 16

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147
L.Ed.2d 405 (2000) 11

Graham v. Florida, ___ U.S. ___, 130 S. Ct. 1022, 176 L. Ed. 2d 825
(2010) 14

Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224
(1948) 15, 22

In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) . 14

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908
(1964) 18, 19

Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1
(2005) 13

Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d
383 (1995) 12

Yarborough v. Alvarado, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) 14, 16

Other Authorities

Barry C. Feld, Criminology: Police Interrogation of Juveniles: An Empirical Study of Policy and Practice, 97 J. Crim. L. & Criminology 219 (2006)..... 14

Tara L. Curtis, Recent Development: Yarborough v. Alvarado: Self-Incrimination Clause Does Not Require Consideration of Age and Inexperience in the Miranda Custody Context, 40 Harv. C.R.-C.L. L. Rev. 313 (2005) 14

A. SUMMARY OF ARGUMENT

Thirteen-year-old Brian W. was interrogated by two police detectives at the police station after police received reports that he had raped two younger boys. Brian had never been questioned by police before and had no prior experience with law enforcement. The one-hour-long interrogation took place in a small room with the door closed. The detectives did not read Brian Miranda¹ warnings.

During the interrogation the detectives confronted Brian with evidence of the crimes—deliberately misrepresenting the strength of the evidence—and made clear they believed he was guilty. But they also assured him he could "walk out of here" and "move on" once he confessed.² They told him they believed he committed the rapes only out of curiosity and that was why they had not booked him into jail—implying he was not legally culpable. They said he needed help and could get it only if he confessed. On the other hand, they said that if he denied the allegations and did not confess, he would have to explain later to a judge why he had lied. After continuous such pressure by the detectives, Brian finally admitted to sexual contact with one of the boys.

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

² 8/03/10RP 99.

Under these circumstances, Brian was in "custody" for Miranda purposes and was therefore entitled to receive Miranda warnings before he was interrogated. Although the detectives told him he could leave at any time and did not have to answer questions, a reasonable thirteen-year-old in his position would not have felt free to terminate the interview and leave. In addition, Brian's confession was involuntary, because it was coerced by the detectives' false assurances and misrepresentations. His inculpatory statements should therefore have been suppressed.

B. ASSIGNMENTS OF ERROR

1. Admission of Brian's inculpatory statements violated his Fifth Amendment right not to incriminate himself.

2. Admission of Brian's inculpatory statements violated the Due Process Clause because they were involuntary.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where police interrogate a suspect in custody, they must first inform him of his Miranda rights. A person is in "custody" for Miranda purposes where a reasonable person in his position would not feel free to terminate the interrogation and leave. If the suspect is a juvenile, the custody determination must be made from the perspective of a reasonable juvenile in the suspect's position. Was

Brian in custody, where a reasonable thirteen-year-old in his position would not have felt free to terminate the interrogation and leave?

2. A suspect's statement is involuntary if it is the product of manipulative or coercive police tactics that under the circumstances prevented the suspect from making a rational decision whether to make a statement. A suspect's youth is relevant in determining whether his statement was voluntary, as is whether the police offered false assurances or promises in exchange for a confession. Was Brian's statement involuntary, where he was only thirteen years old at the time of the interrogation, and police told him he could "walk out of here" and "move on" once he confessed?

D. STATEMENT OF THE CASE

In May 2009, Terrance Holcomb was told by a neighbor that Brian W. was engaging in oral sex with Mr. Holcomb's son M.H. 8/03/10RP 61-62. Thirteen-year-old Brian, who was born on September 23, 1995, was five years older than M.H., who was born on September 29, 2000. CP 43; 8/03/10RP 4.

Mr. Holcomb questioned M.H., who said Brian was making him have oral sex with him. 8/03/10RP 63-64. M.H. said his cousin

nine-year-old K.E. was also involved. 8/03/10RP 64-65. Mr. Holcomb called police. 8/03/10RP 65.

Snohomish County Sheriff Detective Christopher Ferreira telephoned Brian's mother and told her to bring Brian to police headquarters for an interview. 8/03/10RP 82-83. On June 4, 2009, Brian's mother brought him to the police station as instructed. 8/03/10RP 83. Detective Ferreira and his partner Detective Jensen met Brian and his mother in the lobby. 8/03/10RP 83. Detective Ferreira had to use a key card to get into the sheriff's office. 8/03/10RP 83. He explained to Brian and his mother that they did not need a key card to get out of the office. 8/03/10RP 83. He also told Brian that he was not under arrest, that he was free to leave at any time, and that he did not have to answer questions. 8/03/10RP 83-85. Brian and his mother signed a written form indicating he understood that he was not under arrest and that he could leave at any time. 8/03/10RP84-85. Absent objection from Brian, the interrogation was recorded. 8/03/10RP 86; Exhibit 1.

The interrogation lasted for about one hour. 8/03/10RP 87. It took place in a room that was about 10 feet by 10 feet, with the door closed. 8/03/10RP 92; Sub #72 at 2.³ The two detectives sat

³ The trial court's written findings of fact and conclusions of law following the CrR 3.5 suppression hearing were filed after the notice of appeal in this case.

on one side of a table, and Brian and his mother sat on the other side, closest to the door.⁴ 8/03/10RP 93; Sub #72 at 2.

The detectives were aware that Brian was only 13 years old. 8/03/10RP 89. They were also aware that Brian had never been involved with law enforcement before. 8/03/10RP 98. The detectives did not read Brian Miranda warnings. 8/03/10RP 94.

Detective Ferreira told Brian he would not lie to him. 8/03/10RP 94-95. But then he proceeded to do so. The detective told Brian he had been present during M.H.'s interview with the child interview specialist, and that M.H. had said three times that Brian had made him kiss his "wee wee." 8/03/10RP 95. But that was a lie; M.H. never said that. 8/03/10RP 95. The detective also told Brian he had talked to two other children in the neighborhood, but that was also a lie. 8/03/10RP 95-96. The detective made clear to Brian he believed Brian had had sexual contact with M.H. 8/03/10RP 97.

A supplemental designation of clerk's papers has been filed for the document. For the Court's convenience, a copy of the trial court's findings and conclusions is attached as an appendix.

⁴ Brian testified his mother was seated between him and the door, but Detective Ferreira testified Brian was seated right next to the door. 8/03/10RP 94, 109-10. The trial court did not resolve this factual dispute. Sub #72 at 2.

Detective Ferreira made several statements to Brian implying Brian could avoid punishment if he confessed. The detective said:

You can just tell me what happened. We can just get to the heart of it and move on. You're going to walk out of here and go to your history class. You're going to walk out of here when you're done.

8/03/10RP 99. The detective admitted that a person could interpret that statement to mean there would be no negative consequences if Brian confessed. 8/03/10RP 100.

The detective also implied he did not believe Brian deserved punishment. The detective said:

I really think it was a curiosity thing. If I didn't, honestly, I would have called your mother and asked you to come in -- I wouldn't have called your mother and asked to come in. Or went to your house and got you. You would have went [sic] to NYC.^[5] That's not a fun place. I don't think you deserve to go to NYC. If I thought you did, like I said, you'd be booked right now. Curiosity, things happen all the time. Everybody does it.

8/03/10RP 100-01. The detective added, "When you are 13 years old, you are not 23 or 33 or 43, you didn't kill anybody. Nobody got hurt or destroyed." 8/03/10RP 101.

Detective Ferreira also told Brian he needed help and the only way to get help was to confess:

Kids make mistakes. Things happen. The way they get through these things, we take responsibility for them. We get help for them. That's how it works. The only way we can get there, the only way we can get there is for you to be forthright. You leave me everything -- you tell me everything that happened.

8/03/10RP 101.

Finally, the detective told Brian repeatedly that if he did *not* confess, he would later be punished for lying. He said, "You are going to have to explain later why you wanted to lie." 8/03/10RP 102. He added, "you are the one that is going to have to answer for it later, not me." 8/03/10RP 102. He also said, "Your side of the story is never going to come out. You really don't want to be in front of a judge telling him at that point that everything he [sic] said so far is a lie." 8/03/10RP 103.

After about 40 minutes of such pressure from the detectives, Brian indicated he was not comfortable answering the detectives' questions in front of his mother. Sub #72 at 2. His mother left the room. Id. Brian then admitted that some of M.H.'s claims of sexual abuse were correct, although he denied engaging in what K.E. and M.H. referred to as "humping," and denied that anything happened with regard to K.E. Id.

⁵ Denny Youth Center.

Brian was charged in juvenile court with two counts of first degree rape of a child. CP 43-44.

At a CrR 3.5 hearing, Brian testified he did not feel free to leave during the police interrogation. 8/03/10RP 110. He confirmed that he had never been questioned by police before. 8/03/10RP 110. He believed, based on the detectives' statements, that he could leave only after the interrogation was over. 8/03/10RP 110. The detectives also led him to believe that if he admitted to sexual contact, he could avoid punishment or would receive less punishment. 8/03/10RP 111-13. He would not have made a statement if the detective had not said he would have to answer to a judge or would be in trouble later for lying. 8/03/10RP 111.

The juvenile court found Brian's statements to the detectives were admissible. Sub #72. The court found Brian was not in "custody" at the time of the interrogation and therefore no Miranda warnings were required. Id. at 3. The court also found Brian's statements were voluntary. Id.

At the trial, M.H. testified Brian would often visit his neighborhood in Marysville, where Brian's grandparents lived. 8/03/10RP 5-7. According to M.H., Brian touched his penis with his

mouth and hands and put his penis in M.H.'s "back private" many times. 8/03/10RP 10-11. Brian also had M.H. place his mouth on Brian's penis and put his own penis in Brian's "back private." 8/03/10RP 16. This happened when M.H. was six and seven years old but stopped when M.H. was in second grade. 8/03/10RP 13.

K.E., who lived across the street from M.H., testified Brian "humped me, and make me suck his penis." 8/03/10RP 35. According to K.E., Brian also sucked K.E.'s penis and made him hump Brian. 8/03/10RP 37. K.E. explained that "hump" meant to put his penis in Brian's "butt" and "[g]o up and down." 8/03/10RP 37. This happened many times, when K.E. was seven or eight years old. 8/03/10RP 59.

The boys' hearsay statements to the child interview specialist were also admitted at trial. 8/03/10RP 132-37; Exhibits 2 and 3.

At the end of trial, the juvenile court found Brian guilty of count one involving M.H. but not guilty of count two involving K.E. 8/05/10RP 218, 223; Sub #74.

E. ARGUMENT

1. ADMISSION OF BRIAN'S STATEMENTS TO THE DETECTIVES VIOLATED HIS FIFTH AMENDMENT RIGHT NOT TO INCRIMINATE HIMSELF, BECAUSE HE WAS IN "CUSTODY" AT THE TIME OF THE INTERROGATION BUT THE DETECTIVES NEVER READ HIM HIS MIRANDA RIGHTS

- a. A suspect's statements that are the product of custodial interrogation are not admissible at trial unless the suspect receives *Miranda* warnings. The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself."⁶ In Miranda v. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966), the United States Supreme Court fashioned a practical rule to ensure the integrity of the privilege against self-incrimination under the Fifth Amendment:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, the Miranda Court held, a

⁶ Our state constitution article I, section 9 is equivalent to the Fifth Amendment and "should receive the same definition and interpretation as that which has been given to" the Fifth Amendment by the United States Supreme

suspect interrogated while in police custody must be told: he has a right to remain silent; anything he says may be used against him in court; he is entitled to the presence of an attorney if he chooses to talk to police; and if he cannot afford an attorney one will be appointed for him prior to the interrogation if he desires. Id. at 479. The Miranda warnings are a bright-line constitutional requirement independent of the requirement that custodial statements be voluntary in a due-process sense. Dickerson v. United States, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

A suspect's right to be informed of his Fifth Amendment privilege against self-incrimination attaches when "custodial interrogation" begins. Miranda, 384 U.S. at 444. "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. "In-custody interrogation[s]," the Court recognized in Miranda, place "inherently compelling pressures" on persons interrogated and trade on the weakness of individuals. Id. at 455, 467. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques

Court. City of Tacoma v. Heater, 67 Wn.2d 733, 736, 409 P.2d 867 (1966) (citing State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

of persuasion . . . cannot be otherwise than under compulsion to speak." Id. at 461.

This Court reviews de novo a trial court's determination that a suspect was or was not in "custody" for Miranda purposes. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) (citing State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997)); Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

b. In determining whether a juvenile was in "custody" for *Miranda* purposes, courts must take the suspect's young age into account. A person is in "custody" if his "freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed. 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)); State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986) (adopting Berkemer test). The question is 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 (citing Berkemer, 468 U.S. 420 at 440). A person is "in custody" if a reasonable person under the circumstances would have felt he or

she was not at liberty to terminate the interrogation and leave. Thompson, 516 U.S. at 112. The Berkemer test is designed to identify those situations that have the potential to induce the person questioned "to speak where he would not otherwise do so freely." Berkemer, 468 U.S. at 437 (quoting Miranda, 384 U.S. at 467).

Although the Supreme Court has not explicitly held courts must take a suspect's age into account in making the Miranda custody determination⁷, this Court has done so. In State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997), the Court addressed whether police were required to read Miranda warnings before interrogating a juvenile suspect. The Court explained, "[t]he sole question is whether a 14-year-old in D.R.'s position would have 'reasonably supposed his freedom of action was curtailed.'" (quoting State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989)).

The rule announced in D.R. is consistent with the Supreme Court's recognition in other contexts that children are "more vulnerable or susceptible" to influence and pressure than adults. Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Indeed, "developments in psychology and brain

⁷ The question of whether a court must consider a juvenile's age in a Miranda custody analysis is currently pending in the United States Supreme Court in J.D.B. v. North Carolina, No. 09-11121. Oral argument was held on March 23, 2011.

science continue to show fundamental differences between juvenile and adult minds." Graham v. Florida, ___ U.S. ___, 130 S. Ct. 1022, 176 L. Ed. 2d 825, 841 (2010). Since "the very fact of custodial interrogation . . . trades on the weakness of individuals[,] "Miranda, 384 U.S. at 455, weaknesses could not be more evident than in children, who possess "inferior mental capabilities [which] hamper them from understanding their situations and make them especially susceptible to police interrogation procedures." Tara L. Curtis, Recent Development: Yarborough v. Alvarado: Self-Incrimination Clause Does Not Require Consideration of Age and Inexperience in the Miranda Custody Context, 40 Harv. C.R.-C.L. L. Rev. 313, 324 (2005). Their "diminished competence relative to adults increases their susceptibility to interrogation techniques," as the "[s]ocial expectations of obedience to authority and children's lower social status make them more vulnerable than adults during interrogation." Barry C. Feld, Criminology: Police Interrogation of Juveniles: An Empirical Study of Policy and Practice, 97 J. Crim. L. & Criminology 219, 230, 244 (2006). As the Court recognized in In re Gault, "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." In re Gault, 387 U. S. 1, 45, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (quoting

Haley v. Ohio, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948)).

c. Brian was in "custody" at the time of the interrogation because a reasonable 13-year-old in his position would not have felt free to terminate the interrogation and leave. In State v. Daniels, 160 Wn.2d 256, 266-67, 156 P.3d 905 (2007), 17-year-old Daniels was not formally arrested but was questioned for over 90 minutes by two police detectives at the precinct in an 8 foot by 10 foot room. She was not given Miranda warnings until near the end of the interrogation. Id. at 267. The Supreme Court held Daniels was subject to custodial interrogation, because a reasonable person in her position would not have felt free to terminate the interrogation and leave. Id.

Similarly, here, Brian was subject to custodial interrogation. He was not formally arrested but was interrogated by two police detectives at the precinct for one hour in a 10 foot by 10 foot room with the door closed. He was escorted to the room by one of the detectives, who needed a key card to enter the sheriff's office. Although the detectives told Brian he did not have to answer questions and could leave at any time, they also told him he could "move on" and "walk out of here when you're done." 8/03/10RP 99.

They did not read him Miranda warnings. Although Brian's mother was present during most of the interrogation, the involvement of one's parents bringing him to the police station "suggests *involuntary, not voluntary, behavior*" on the youth's part.

Yarborough v. Alvarado, 541 U.S. 652, 671, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (Breyer, J., dissenting). Also, although Brian went home at the end of the interview, "the relevant question is how a reasonable person would have gauged his freedom to leave *during, not after, the interview.*" Id. at 672 (Breyer, J., dissenting).

In sum, a reasonable 13-year-old in Brian's position would not have felt free to resist the authority of the adults surrounding him and terminate the interrogation and leave. He was therefore in custody and Miranda warnings were required.

d. The adjudication must be reversed. The State must prove beyond a reasonable doubt the erroneous admission of the custodial statements did not contribute to the verdict. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Where

the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Id. at 426. But a conviction should be reversed "where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id.

Here, there is a reasonable possibility that Brian's confession was necessary for the court to reach a verdict. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting)). The court found Brian guilty only of count one, involving M.H., and not guilty of count two, involving K.E. Brian confessed only to sexual contact with M.H., not K.E. It is reasonably possible the court relied on Brian's confession in reaching its guilty verdict for count one.

In addition, the untainted evidence, which consisted principally of M.H.'s testimony, was far from overwhelming.

Under these circumstances, admission of Brian's confession was not harmless beyond a reasonable doubt and the adjudication must be reversed.

2. BRIAN'S STATEMENT TO POLICE WAS
INADMISSIBLE BECAUSE IT WAS INVOLUNTARY

a. A criminal defendant's inculpatory statements made during police interrogation are admissible only if they are voluntary. A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the statements, and even if there is ample evidence aside from the statements to support the conviction. Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); U.S. Const. amend. XIV; Const. art. I, § 3.

The term "voluntary" means the statement 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). The question is whether the police officer's tactics were so manipulative or coercive that "they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." Id. (citations omitted). The proper test is whether the officer resorted to tactics that under the

circumstances prevented the suspect from making a rational decision whether to make a statement. Id.

In determining whether a custodial statement is voluntary, the inquiry is whether, under the totality of the circumstances, the statement was coerced. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). The court must determine whether there is a causal relationship between the officers' coercive conduct and the statement. Id. The question is whether the suspect's will was overborne. Id.

The court considers both whether the police exerted pressure on the defendant and the defendant's ability to resist the pressure. Unga, 165 Wn.2d at 101.

"[P]olice conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will." Jackson, 378 U.S. at 389. "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." State v. Pierce, 94 Wn.2d 345, 352, 618 P.2d 62 (1980) (quoting Miranda, 384 U.S. at 476). "'Cajolery' may be defined as a deliberate attempt at persuading or deceiving the accused, with false promises,

inducements or information, into relinquishing his rights and responding to questions posed by law enforcement officers." State v. Davis, 73 Wn.2d 271, 282, 438 P.2d 185 (1968). Police deception alone does not make a statement inadmissible as a matter of law, but is one factor to consider under the totality of the circumstances. State v. Braun, 82 Wn.2d 157, 161, 509 P.2d 742 (1973); State v. Burkins, 94 Wn. App. 677, 695, 973 P.2d 15 (1999) ("Deception alone does not make a statement inadmissible as a matter of law; rather, the inquiry is whether the deception made the waiver of constitutional rights involuntary."). Other factors to consider include whether police made any express or implied promises. Unga, 165 Wn.2d at 101-02. Also relevant are the length and other circumstances of the interrogation. Davis, 73 Wn.2d at 286-87.

The impact of the police conduct or tactics must be determined in relation to the defendant's subjective experience of them. State v. Setzer, 20 Wn. App. 46, 49-50, 579 P.2d 957 (1978). In determining whether the defendant's will was overborne, the court considers the defendant's physical condition, age, mental abilities, and experience. State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984); Burkins, 94 Wn. App. at 694.

The ultimate determination of "voluntariness" is a legal question reviewed de novo. Fulminante, 499 U.S. at 287.

b. Brian's statements to police were involuntary. The police officers' implied promises of leniency combined with the suspect's young age rendered his statements involuntary. Express or implied promises by police can render a suspect's statement involuntary, if there is a causal relationship between the promise and the confession. Unga, 165 Wn.2d at 101-02.

Here, the detectives made several statements implying Brian would receive leniency if he confessed. Detective Ferreira told Brian he could "move on" and "walk out of here" if he confessed. 8/03/10RP 99. The detective expressly acknowledged that a person could interpret that statement to mean there would be no negative consequences if Brian confessed, "depend[ing] on the person." 8/03/10RP 100. A person who is only 13 years old would be more likely than an educated mature adult to believe the detective was promising leniency if he confessed.

The detective also assured Brian that he did not believe he deserved punishment. The detective told Brian he believed he had merely acted out of "curiosity" and did not "deserve to go to NYC."

8/03/10RP 100-01. The detective assured him he "didn't kill anybody" and "[n]obody got hurt or destroyed." 8/03/10RP 101.

Instead of punishment, the detective emphasized that Brian needed help and could get help only if he confessed. He stated, "[k]ids make mistakes. . . . We get help for them." 8/03/10RP 101. But "the only way we can get there is for you to be forthright. . . . [Y]ou tell me everything that happened." 8/03/10RP 101.

Finally, the detective urged that if Brian did *not* confess, he would be punished for lying. The detective said, "You are going to have to explain later why you wanted to lie." 8/03/10RP 102. He warned, "You really don't want to be in front of a judge telling him at that point that everything he [sic] said so far is a lie." 8/03/10RP 103.

In Haley, police interrogated a 15-year-old boy at the police station but did not tell him he had a right to counsel. Haley, 332 U.S. at 598. In considering the voluntariness of the boy's statement, the Supreme Court explained,

when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of

adolescence produces.

Id. at 599.

Here, Brian was only 13 years old when he was interrogated by police. At that "tender" age he was far more susceptible to subtle police tactics than an educated and mature adult. Brian testified that as a result of the detectives' statements, he believed he would receive no or less punishment if he confessed.

8/03/10RP 111-13. He also believed that if he did not confess, he would be worse off. 8/03/10RP 111. He would not have confessed if not for the detectives' implied assurances and threats. 8/03/10RP 111-13. Thus, the detectives' tactics prevented him from making a rational choice whether to confess. Unga, 165 Wn.2d at 102.

Under the totality of the circumstances, Brian's statement was involuntary and should have been suppressed. For the reasons given above, admission of the statement was not harmless beyond a reasonable doubt. The adjudication must be reversed.

E. CONCLUSION

The trial court erred in admitting Brian's statement to police where he was subject to custodial interrogation but did not receive Miranda warnings and where the statement was involuntary. His adjudication must be reversed.

Respectfully submitted this 29th day of April 2011.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant