92214-4

Supreme Court No. (to be set)
Court of Appeals No. 45833-1-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
B.J.C.
Appellant/Petitioner

Cowlitz County Superior Court Cause No. 13-8-00274-7
The Honorable Judge Gary Bashor

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner B.J.C., the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

B.J.C. seeks review of the Court of Appeals opinion entered on August 25, 2015. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Would a reasonable 13-year-old feel free to terminate an interrogation and walk away from police who separate him from his family and accuse him of lying?

ISSUE 2: Should the trial court have suppressed thirteen-year-old B.J.C.'s involuntary confession, extracted without benefit of *Miranda* warnings?

ISSUE 3: Does Washington's sex-offender registration requirement violate substantive due process as applied to juvenile offenders?

ISSUE 4: Did the sentencing court exceed its statutory authority by imposing more than 150% of the term for the more serious of two offenses that comprised the same criminal conduct?

IV. STATEMENT OF THE CASE

B.J.C. had recently turned thirteen when two police officers knocked on the door of his apartment. RP 25. The officers directed him to leave the apartment and his adult caregivers. RP 16. The officers asked the boy to lead them to a place where they could talk. RP 20-21.

B.J.C. took the officers to the courtyard area of his apartment complex. RP 52. The officers asked him about alleged sexual contact with a seven-year-old relative he had recently babysat. RP 53. When B.J.C. denied any sexual contact, the officers said they did not believe him. RP 54. They claimed they already had information from the alleged victim that contradicted his statement. RP 54, 70-71. After that, B.J.C. said that he had taken a shower with the child. CP 54-56. The officers elicited more and more detail from him. RP 54-56. At one point, an officer asked B.J.C. specifically if he had put his penis in the alleged victim's mouth and he said yes. RP 74.

The officers did not read B.J.C. his *Miranda* rights. RP 17.[1] They never asked him if he wanted to talk to his parents or to an attorney. RP 17-18. They did not tell him that what he said could be used to prosecute

[1] The officers did tell B.J.C. he could terminate questioning. RP 18.

him for a crime.[2] RP 17-18. Instead, the officers told B.J.C. that they had no intention of arresting him. RP 12, 21.

The state charged B.J.C. with two counts of rape of a child in the first degree and one count of child molestation in the first degree. CP 1-2. The two rape counts were based exclusively on the information in B.J.C.'s confession.[3] *See* RP 70-74, 77-100, 119-24, 139-208.

Each of the counts derived from an alleged series of events taking place during a period of a few minutes in the bathroom at the alleged victim's home. RP 54-57.

B.J.C. moved to suppress his statements, arguing that they were not voluntary and that he was subjected to custodial interrogation without the benefit of *Miranda.* CP 3-10. The court admitted the statements. CP CP 43. The court recognized that it would be reasonable for a thirteen year old to believe he was in custody, but refused to suppress the statements. CP 43. The court found dispositive the fact that B.J.C. had chosen the location of the interrogation. CP 43.

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[2] B.J.C. did not have any prior convictions. CP 22.

[3] One rape count was dismissed because the state did not present any independent evidence of the *corpus delicti* of the offense. CP 22. During trial, however, the alleged victim said for the first time that B.J.C. had put his penis in her mouth, allowing the second count to go forward. RP 96.

The court found B.J.C. guilty of one count of rape of a child and one count of child molestation. CP 22. The court ordered B.J.C. to register as a sex offender. CP 30. The court sentenced B.J.C. to two consecutive terms of fifteen to thirty-six weeks' confinement. CP 27.

B.J.C. appealed, and the Court of Appeals affirmed his conviction and sentence. CP 34; Opinion, pp. 1, 12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that B.J.C.'s confession was involuntary. The Court of Appeals decision conflicts with U.S. Supreme Court precedent. Furthermore, this case raises significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(1), (3), and (4).

To be voluntary, a confession must be the product of rational intellect and free will. *State v. Sargent*, 111 Wn.2d 641, 660, 762 P.2d 1127 (1988). In cases involving juveniles, "the greatest care must be taken" to ensure that any confession is voluntary. *Application of Gault*, 387 U.S. 1, 55, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *see also State v. Unga*, 165 Wn.2d 95, 103, 196 P.3d 645 (2008).

Voluntariness includes not only freedom from coercion, but also assurance that the confession "was not the product of ignorance of rights

or of adolescent fantasy, fright or despair." *Gault*, 387 U.S. at 55.[4] A juvenile's statement to the police is likely involuntary if the juvenile does not understand that it could be used in court to support criminal charges. *State v. Tim S.*, 41 Wn. App. 60, 64, 701 P.2d 1120 (1985).

Voluntariness is analyzed under the totality of the circumstances, including the length and location of the interrogation, the maturity and education of the accused, and the failure of police to advise the accused of his/her rights. *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). In cases involving children, the absence of a child's parents during interrogation is also relevant. *See e.g. Gault*, 387 U.S. at 56.

B.J.C.'s statement to the police was not voluntary.

He did not have any prior convictions. CP 22. He was thirteen years old at the time of his interrogation. RP 25. The officers isolated him from his adult caregivers. RP 16. They assured him that they were not there to arrest him. RP 12, 21. They did not warn him that he was at risk of criminal prosecution, that his statements could be used against him, or that he had the right to an attorney. RP 12, 21.

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[4] Research has "cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *Id.* at 52; *See also e.g.* Joshua A. Tepfer, Laura H. Nirider, Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 Law & Psychol. Rev. 53, 56 (2007).

Examining the totality of the circumstances, B.J.C.'s statements to the police were not voluntary. *Williams*, 507 U.S. at 693-94; *Gault*, 387 U.S. at 56. Considering his age, the isolation from other adults, the lack of *Miranda* warnings, and the officer's assurance that he would not be arrested, B.J.C. did not know that his statements could be used to convict him of a crime. This mitigates a finding of voluntariness. *Tim S.*, 41 Wn. App. at 64. B.J.C.'s confession was not the product of rational intellect and free will but of inexperience, immaturity, and ignorance of his rights. *Gault*, 387 U.S. at 55; *Sargent*, 111 Wn.2d at 660.

The Supreme Court should accept review and hold that B.J.C.'s statements to the police were not voluntary. *Williams*, 507 U.S. at 693-94. This case raises significant constitutional issues that are of substantial public interest. Furthermore, the Court of Appeals decision conflicts with the holdings of *Gault* and *Williams*. RAP 13.4(b)(1), (3), and (4).

B. The Supreme Court should accept review and hold that police should have administered *Miranda* warnings prior to extracting B.J.C.'s custodial confession. The Court of Appeals decision conflicts with U.S. Supreme Court precedent. Furthermore, this case raises significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(1), (3), and (4).

The Fifth Amendment prohibits the admission of evidence that is the fruit custodial interrogation without the benefit of *Miranda* warnings. *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010).

Unwarned custodial statements are presumptively involuntary. *Id.* Questions reasonably likely to elicit an incriminating response constitute interrogation. *State v. Godsey*, 131 Wn. App. 278, 285, 127 P.3d 11 (2006).

A juvenile is "in custody" for *Miranda* purposes if a reasonable person of the same age would not have felt free to terminate the interrogation and leave. *J.D.B. v. N. Carolina*, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011). The juvenile's age informs the analysis because a reasonable child can feel pressured to submit to police interrogation even when a reasonable adult would feel free to go. *Id.* at 2403. Indeed "events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Id.* (internal citation omitted).

B.J.C. was in custody during his interrogation. A reasonable thirteen year old would not have felt free to leave. *J.D.B.*, 131 S.Ct. at 2402. Two officers interrogated B.J.C. away from the adults in his home. RP 16. The officers did not *Mirandize* him.[5] RP 17. When B.J.C. answered their questions in a way that they did not like, the officers

[5] The officers told B.J.C. that he could stop answering questions at any time. RP 18. But they did not tell him that he could walk away. RP 17-18. Nor did they tell him that he had the right to an attorney, that he could be charged with a crime, or that his statements could be used against him in court. RP 17-18.

confronted him with contrary information and indicated that they thought he was lying. RP 54, 70-71.

Under these circumstances, a reasonable thirteen-year-old would not have felt entitled to terminate the interrogation and walk away. *J.D.B.*, 131 S.Ct. at 2402. The officers exerted their authority over B.J.C. in a manner to which a middle-schooler is trained to submit. Just as a young teen is not free to walk away from the principal's office when being disciplined, a reasonable thirteen-year-old would have felt constrained to cooperate and answer the officers' questions. B.J.C. was in custody during his interrogation by the police. *J.D.B.*, 131 S.Ct. at 2402.

The Supreme Court should accept review and hold that B.J.C. was subjected to custodial interrogation without the benefit of *Miranda* warnings. *Hickman*, 157 Wn. App. at 772. The Court of Appeals decision conflicts with *J.D.B.* Furthermore, this case raises significant constitutional issues that are of substantial public interest. RAP 13.4(b)(1), (3), and (4).

C. The Supreme Court should accept review and hold that the trial court violated B.J.C.'s right to substantive due process by ordering him to register as a sex offender. The Court of Appeals decision conflicts with U.S. Supreme Court precedent. Furthermore, this case raises significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(1), (3), and (4).

Due process guarantees the fundamental right to travel. *Aptheker v. Sec'y of State*, 378 U.S. 500, 505, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986); U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 3. The right to travel includes the right to travel within a state. *State v. Enquist*, 163 Wn. App. 41, 50, 256 P.3d 1277 (2011). The constitution also guarantees a fundamental right to freedom of movement. *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997). That right is rooted in due process and the First Amendment freedom of association. *Id.*

A statute that burdens the fundamental rights to travel and to freedom of movement is subject to strict scrutiny. *Macias v. Dep't of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 273, 668 P.2d 1278 (1983); *J.D.*, 86 Wn. App. at 508. A state law implicates the right to travel if it indirectly burdens exercise of that right by creating "any classification which serves to penalize the exercise of the right." *Soto-Lopez*, 476 U.S. at 903 (internal citations omitted). A statute burdening a

fundamental right cannot survive strict scrutiny unless it is narrowly tailored to meet a compelling state interest. *Lawrence v. Texas*, 539 U.S. 558, 593, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *J.D.*, 86 Wn. App. at 508.

The right to travel is one of the few rights so fundamental that statutes burdening it are subject to facial overbreadth challenges. *Sabri v. United States*, 541 U.S. 600, 610, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (*citing Aptheker* 378 U.S. 500). Litigants may challenge an overbroad statute even if it could constitutionally be applied to them. *Id.*

Governmental intrusions into fundamental rights may not sweep unnecessarily broadly: "precision must be the touchstone of legislation affecting freedoms." *Aptheker*, 378 U.S. at 508, 514 (internal citation omitted). A statute is not narrowly tailored if other reasonable ways to achieve the state's purpose would impose a lesser burden on constitutionally protected activity. *Soto-Lopez*, 476 U.S. at 909-10.

The sex offender registration requirements place a burden on the fundamental rights to travel and to freedom of movement. RCW 9A.44.130; RCW 9A.44 132. The registration statute requires that an offender with a fixed residence register the address at which s/he spends a

majority of the week.[6] RCW 9A.44.128(5) (defining "fixed residence" as the place where the person spends the majority of the week); RCW 9A.44.130(4). A registered sex offender with a fixed address cannot travel away from home for more than three nights. By leaving home for more than three days, the person would likely be at risk of criminal prosecution.[7] RCW 9A.44.132.

The purpose of the registration scheme "is to assist law enforcement agencies' efforts to protect their communities against re-offense by convicted sex offenders." *State v. Pray*, 96 Wn. App. 25, 28, 980 P.2d 240 (1999), *review denied,* 139 Wn.2d 1010 (1999). Assuming this is a compelling interest, the statute nonetheless violates substantive due process because it is not narrowly tailored to meet that aim. *Aptheker,* 378 U.S. at 508.

1. The requirement that juveniles register as sex offenders is not narrowly tailored because it burdens a fundamental right without considering the "relevant characteristic" of youth.

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[6] A person without a fixed residence must register as a transient and check in with the county sheriff once a week. RCW 9A.44.128(9); RCW 9A.44.130(5).

[7] The statute does not make clear whether a person with a fixed address may re-register temporarily at a place s/he stayed while traveling. The statutory scheme does not anticipate re-registration unless the person has changed or lost his/her fixed residence. *See* RCW 9A.44.130(4)-(5). Even if temporary re-registration were permitted by the statute, the requirement would still place a burden on the rights to travel and to freedom of movement. Accordingly, the statute would need to be narrowly tailored to meet a compelling state interest.

Legislative discrimination affecting fundamental rights must be correlated to a person's "*relevant* characteristics." *Soto-Lopez*, 476 U.S. at 911 (italics in original). A statute is not narrowly tailored if it "excludes plainly relevant considerations" in its burden of a fundamental right. *Aptheker*, 378 U.S. at 514.

The requirement that juveniles register as sex offenders is not narrowly tailored because it covers offenders who are neither dangerous nor likely to reoffend. The requirement rests on the assumption that any youth convicted of a sex offense will pose a danger to society. This assumption is unwarranted, and cannot support the registration scheme for juvenile offenders.

Research demonstrates that people who commit sex offenses as juveniles have very low recidivism rates. *See e.g.* Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 13 (2013); L. Chrysanthi, et al, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses,* 17 Widener L. Rev. 127, 149 (2011); Richard A. Paladino, *The Adam Walsh Act As Applied to Juveniles: One Size Does Not Fit All*, 40 Hofstra L. Rev. 269, 290-92 (2011).

Several large studies, for example, have found that adjudication for a juvenile sex offense does not make a person statistically more likely to

commit a sex offense as an adult. See Halbrook, 65 Hastings L.J. at 13-14 (*citing* Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 Psychol. Pub. Pol'y & L. 89, 101 (2008); Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 Sex Abuse 107, 107 (2007); Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study*, 26 Just. Q. 58, 58 (2009); Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 Criminology & Pub. Pol'y 507, 529 (2007)).

Nonetheless, Washington all juveniles adjudicated for sex offenses are required to register as sex offenders and face criminal prosecution if they fail to do so.[8] RCW 9A.44.130(a)(1); RCW 9A.44.132.

Empirical evidence does not support the legislative assumption that all juveniles convicted of sex offenses pose a danger to society. Indeed, the available evidence suggests the opposite. Nonetheless, the statutory scheme requires registration even by youth who are not dangerous or at

[8] Some people adjudicated guilty for sex offenses as juveniles may later move for relief from the registration requirements after a period of time has passed. RCW 9A.44.143. This fact does not alter the analysis regarding whether the sex offender registration scheme is narrowly tailored during the period when they are required to register.

risk of reoffense. The statute is not precise enough to justify the burden it places on the fundamental rights to travel and freedom of movement. *Aptheker,* 378 U.S. at 514.

The lower court violated B.J.C.'s right to substantive due process by ordering him to register as a sex offender absent any indication that he was actually dangerous or likely to commit future sex offenses. *Soto-Lopez*, 476 U.S. at 911; *Aptheker*, 378 U.S. at 514. The requirement that B.J.C. register as a sex offender must be stricken from his judgment and sentence. The case must be remanded for entry of an order making clear that B.J.C. is exempt from Washington's registration requirement.

2. The requirement that juveniles register as sex offenders is not narrowly tailored because there is no "evidentiary nexus" between its purpose and effect.

To qualify as narrowly tailored, "there must be an evidentiary nexus between a law's purpose and effect." *J.D.*, 86 Wn. App. at 508. The Washington juvenile sex offender registration scheme is not narrowly tailored because it lacks an evidentiary nexus: the registration requirement does not serve its stated goal of protecting the public. *Id.*

A Washington-specific study has found that the sex offender registration requirements have no statistically significant effect on recidivism. Nor do registration requirements increase public safety. Molly J. Walker Wilson, *The Expansion of Criminal Registries and the*

Illusion of Control, 73 La. L. Rev. 509, 523 (2013) (*citing* Donna D. Schram & Cheryl Darling Milloy, Wash. State Inst. for Pub. Pol'y, *Community Notification: A Study of Offender Characteristics and Recidivism* (1995)). Numerous other studies have reached the same conclusion. *Id.* at 523-24; *see also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?,* 54 J.L. & Econ. 161 (2011) (finding that sex offender registration may actually increase recidivism); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?,* 54 J.L. & Econ. 207 (2011).

Research focusing on juveniles has similarly determined that sex offender registration for young people has no effect on reducing their already low recidivism rates. *Id.* at 15 (*citing* Elizabeth J. Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism*, 20 Crim. Just. Pol'y Rev. 136, 136 (2009); Elizabeth J. Letourneau & Kevin S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sex Offenders*, 20 Sexual Abuse: J. Res. & Treatment 393, 403 (2008)).

The requirement that juveniles register as sex offenders is not narrowly tailored because there is no "evidentiary nexus between [its] purpose and effect." *J.D.*, 86 Wn. App. at 508. Because of this, the registration requirement violates substantive due process on its face as

applied to juvenile offenders. It impedes the rights to travel and to freedom of movement even though there is evidence that it does not promote any state interest. *Aptheker,* 378 U.S. at 508, 514; *Soto-Lopez*, 476 U.S. at 909-10. The order for B.J.C. to register as a sex offender must be stricken. *Id.*

3. The Supreme Court should accept review.

The Court of Appeals decision conflicts with *Aptheker* and *Soto-Lopez.* Furthermore, this case raises significant constitutional issues that are of substantial public interest. The Supreme Court should accept review and invalidate the order requiring B.J.C. to register as a sex offender. RAP 13.4(b)(1), (3), and (4).

D. The Supreme Court should accept review and hold that the trial court violated the 150% rule for juvenile dispositions. This case raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(4).

Generally, sentences for multiple juvenile dispositions run consecutively. RCW 13.40.180(1). However, when two or more offenses arise from a single act or omission, the court is limited to a total sentence of not more than 150% of the term imposed for the most serious offense. RCW 13.40.180(1)(a).

Offenses arise from a "single act or omission" if they comprise the "same criminal conduct" under the test applied in the adult context. *State*

v. Contreras, 124 Wn.2d 741, 748, 880 P.2d 1000 (1994). Two offenses encompass the same criminal conduct if they have the same criminal intent, involve the same victim, and are committed at the same time and place. RCW 9.94A.589(1)(a).

In determining whether multiple offenses require the same criminal intent, the sentencing court "'should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next....'" *State v. Garza-Villarreal*, 123 Wn.2d 42, 46-47, 864 P.2d 1378 (1993) (*quoting State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). The word "intent" refers not to the *mens rea* element of the offense, but to the actor's overall criminal purpose. *See e.g. Contreras*, 124 Wn.2d at 748. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter,* 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The court exceeded its authority by sentencing B.J.C. to two full consecutive dispositions. The two adjudications arose from a single act or omission. RCW 13.40.180(1)(a). Both offenses involved the same victim and occurred in the same place over the course of a few minutes. The actions involved a single criminal purpose: sexual gratification. The court

erred by refusing to limit B.J.C.'s disposition to 150% of the term imposed for the most serious offense. RCW 13.40.180(1)(a).

The Supreme Court should accept review and hold that the trial court exceeded its authority by sentencing B.J.C. to twice the term imposed for the most serious offense. This case presents an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(4).

VI. CONCLUSION

The Supreme Court should accept review, reverse B.J.C.'s convictions, and order his statements suppressed. In the alternative, the court should vacate the disposition order, relieve B.J.C. of the obligation to register, and remand for imposition of no more than 150% of the penalty of the more serious offense.

Respectfully submitted September 8, 2015.

BACKLUND AND MISTRY

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

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and I sent an electronic copy to

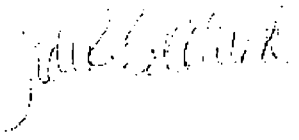
Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 8, 2015.



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APPENDIX:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. B.J.C., Appellant.	No. 45833-1-II UNPUBLISHED OPINION

SUTTON, J. — BJC[1] appeals his adjudications for first degree child rape and first degree child molestation. He argues that the trial court (1) violated his right against self-incrimination by admitting his confession, (2) violated his right to due process by requiring him to register as a sex offender, and (3) abused its discretion by imposing a sentence greater than 150 percent of the maximum for his conviction on his most serious offense. We hold that the trial court (1) properly admitted BJC's confession, (2) did not violate BJC's due process rights by requiring him to register as a sex offender, and (3) did not abuse its discretion in sentencing BJC. Therefore, we affirm.

FACTS

A seven year old female, CC,[2] alleged that BJC sexually assaulted her. After a child forensics specialist interviewed CC, two police officers, Rich Fletcher and Dave Voelker, went to

[1] BJC is a minor; therefore, we use initials to maintain confidentiality.

[2] We use the minor victim's initials to protect the victim's privacy. Gen. Order 2011-1 of Division II, *In re the Use of Initials of Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App.), *available at* http://www.courts.wa.gov/appellate_trial_courts/.

BJC's home, a second floor apartment, to speak with him. BJC came to the door at the officers' request.

While BJC stood in the doorway, the officers identified themselves, told BJC that a complaint had been filed against him, and asked if he would voluntarily answer questions. Fletcher asked BJC if there was somewhere else they could speak, and the three of them walked downstairs into a courtyard adjoining his apartment building. Fletcher told BJC that he could stop the questions at any time and BJC said he understood. Fletcher assured BJC that he did not intend to arrest him. Both officers knew that BJC was 13 years old at the time of their interview.

Although Fletcher considered giving BJC the *Miranda*[3] warning, he did not do so. The officers were dressed in civilian clothes with jackets that covered their guns, handcuffs, and police badges. They did not place BJC in handcuffs or have any physical contact with him or threaten him. The officers' tones were conversational without raised voices.

Once the officers and BJC were in the courtyard, Fletcher explained the allegations to BJC. BJC first denied that he had touched CC and suggested that CC had fabricated the allegations. The officers told BJC that they did not believe him, and BJC began to confess to portions of CC's allegations. Fletcher confronted BJC and said that they knew he was not divulging the entire series of events based on what CC had said, and in response BJC slowly admitted to all of the allegations. BJC divulged information that neither CC's interview nor any other evidence suggested had occurred. The conversation between the officers and BJC lasted 30-40 minutes.

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

The State charged BJC with two counts of child rape and one count of child molestation. BJC moved to suppress the statements he made to Fletcher and Voelker. After a CrR 3.5 hearing, the trial court ruled that BJC's statements were admissible because he made them voluntarily and he was not in custody at the time he confessed. The trial court found BJC guilty of one count of first degree child rape and one count of first degree child molestation.[4]

The trial court required BJC to register as a sex offender and sentenced him to two consecutive terms of the standard range sentence for each crime. The trial court ruled that RCW 13.40.180(1) did not apply to limit BJC's sentence to 150 percent of the maximum sentence of BJC's most serious offense, first degree child rape. BJC appeals.

ANALYSIS

I. THE TRIAL COURT PROPERLY ADMITTED BJC'S CONFESSION

BJC argues that the trial court violated his right against self-incrimination by admitting his confession because he involuntarily confessed without first receiving a *Miranda* warning. We disagree.

A. Standard of Review

The Fifth Amendment guarantees the right against self-incrimination. U.S. CONST. amend. V. Article 1, section 9 of the Washington Constitution, which also guarantees the right against self-incrimination, is co-extensive with the Fifth Amendment. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

[4] Because the State's second charged count of child rape was based solely on BJC's confession, the trial court ruled that the State failed to prove that count of first degree child rape under the corpus delecti rule.

When reviewing a trial court's CrR 3.5 ruling, we decide whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law, which we review de novo. *State v. Russell*, 180 Wn.2d 860, 866-67, 330 P.3d 151 (2014). Substantial evidence is evidence sufficient to persuade a fair-minded person of its truth. *Russell*, 180 Wn.2d at 866-67. Unchallenged findings of fact are verities on appeal. *State v. Bonds*, 174 Wn. App. 553, 563, 299 P.3d 663, *review denied*, 178 Wn.2d 1011 (2013).

BJC assigns error to the trial court's determination that his confession was voluntary and the product of rational intellect and free will, that he was not subjected to custodial interrogation without *Miranda* warnings, and that therefore his statements to Fletcher and Voelker are admissible. Although he does not specifically list the paragraphs he claims are erroneous, these assignments of error point to paragraphs four, five, six, and eight of the trial court's findings of fact and conclusions of law. Paragraph four stated that "it may be reasonable for a thirteen year old child to believe they were in custody as it would take a rather bold move to walk away from the police, but the statements were not made while [BJC] was in custody." Clerk's Papers (CP) at 43. Paragraph five stated that "[BJC] chose the location the conversation [between he, Fletcher, and Voelker] would take place, which shows the questioning was not done in custody and makes the statements voluntarily made." CP at 43. Paragraph six stated that "[BJC] did not have his free will inhibited by [Fletcher and Voelker]." CP at 43. Finally, paragraph eight states the trial court's ultimate conclusion, that BJC's confession is admissible.

BJC's assignments of error do not appear to challenge the trial court's remaining paragraphs in its findings of fact and conclusions of law: (1) paragraph two, that BJC's conversation with Fletcher and Voelker lasted 30-45 minutes, (2) paragraph three, that the

conversation was cordial, and (3) paragraph seven, that Fletcher's and Voelker's interaction with BJC was not combative or confrontational. Because BJC did not challenge these three findings or conclusions, they are verities on appeal.

The trial court did not err in admitting BJC's confession.

B. BJC Was Not in Custody

BJC argues that the trial court erred in admitting his confession because he was in custody when Fletcher and Voelker questioned him in the courtyard and they did not give him the *Miranda* warning before he confessed. We disagree.

We review a trial court's determination whether a defendant was in custody de novo as a question of law. *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). A self-incriminating confession made while a suspect is subject to custodial interrogation is not admissible unless officers provided a *Miranda* warning before the confession. *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014), *cert. denied*, 135 S. Ct. 950 (2015). A person is in custody for the purposes of the *Miranda* warning requirement when a reasonable person in the suspect's position would believe that he or she is in police custody to the degree associated with a formal arrest. *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). We determine whether a person is in custody by the totality of the circumstances. *Rosas-Miranda*, 176 Wn. App. at 779. A juvenile's age informs our custody analysis so long as the interrogating officer knew the juvenile's age at the time of the interview. *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310 (2011).

Based on the totality of the circumstances, substantial evidence supports the trial court's findings of fact and conclusions of law in paragraphs four and five that BJC was not subject to

custodial interrogation. Fletcher and Voelker asked BJC if he would voluntarily answer some questions. They also asked BJC if there was somewhere else they could speak other than at the front door of the apartment, and, in response, BJC took them downstairs to an open courtyard adjoining his apartment building. The officers were dressed in civilian clothes with their badges and guns covered. BJC agreed to talk to the officers and Fletcher told BJC that he could cease the questioning at any time. BJC replied that he understood. Fletcher told BJC that they would not arrest him. The officers did not place BJC in handcuffs or have any other physical contact with him. Under these circumstances, a reasonable person would not have believed that he was under police custody to the degree associated with a formal arrest. Thus, BJC was not subject to custodial interrogation, and the officers were not required to give him the *Miranda* warnings for his confession to be admissible.

C. BJC Confessed Voluntarily

BJC also argues that the trial court erred in ruling his confession was admissible because his inculpatory statements to Fletcher and Voelker were not voluntary. We disagree.

We review for substantial evidence a trial court's ruling that a confession was voluntary by a preponderance of the evidence. *State v. Rafay*, 168 Wn. App. 734, 757-58, 285 P.3d 83 (2012), *review denied*, 175 Wn.2d 1023 (2013), *cert. denied*, 134 S. Ct. 170 (2013) (explaining that our Supreme Court has rejected independent appellate review of the record in a confession case). A confession is admissible in court if it was made voluntarily and was not the product of coercion or improper inducement; voluntariness is determined by the totality of the circumstances. *Unga*, 165 Wn.2d at 100-01. Washington courts have a "responsibility to examine confessions of a juvenile with special care." *Unga*, 165 Wn.2d at 103. Relevant factors in the totality of the

circumstances analysis include the person's age, maturity, experience, intelligence, education, background, physical condition, mental health, whether the person has the capacity to understand the police's warning, the interrogation's location and length, any police coercion, and whether the police told the juvenile that he or she has the right to remain silent. *Unga*, 165 Wn.2d at 101, 103.

Based on the totality of the circumstances, substantial evidence in the record supports the trial court's findings of fact and those findings in turn support the trial court's conclusions of law in paragraphs five and six that BJC's confession was voluntarily. After Fletcher and Voelker identified themselves to BJC, he agreed that they could ask him questions and he led the officers downstairs to the courtyard. Fletcher informed BJC that he could cease the questioning at any time and BJC said that he understood. The officers did not threaten BJC and their tone was conversational. As the trial court found in paragraphs two and seven, which BJC does not challenge, BJC's interaction with Fletcher and Voelker lasted 30-40 minutes and was "not combative or confrontational in nature." CP at 43. The challenged findings are supported by substantial evidence in the record and the totality of the circumstances demonstrate that the trial court did not err in concluding that BJC's confession was voluntary, and therefore, BJC's statements were admissible.

II. RCW 9A.44.130 DOES NOT IMPAIR THE CONSTITUTIONAL RIGHT TO TRAVEL

BJC argues that the trial court's order requiring him to register as a sex offender must be reversed because the sex offender registration statute, RCW 9A.44.130, violates the substantive due process rights of juveniles on its face and as applied to him. Specifically, BJC argues that the sex offender registration statute burdens his fundamental right to travel. We disagree.

We review the constitutionality of a statute de novo. *State v. Smith*, 185 Wn. App. 945, 952, 344 P.3d 1244, *review denied*, 352 P.3d 187 (2015). To demonstrate facial unconstitutionality, BJC must show that no set of circumstances exist in which RCW 9A.44.130 could be applied constitutionally. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). To demonstrate that RCW 9A.44.130 is unconstitutional as applied to him, BJC must show that the statute is unconstitutional in the context of his actions or intended actions. *Moore*, 151 Wn.2d at 668-69. Both a facial and as-applied challenge require BJC to show that RCW 9A.44.130 impairs a constitutional right. *Smith*, 185 Wn. App. at 952. BJC argues that this statute burdens his constitutional right to travel.

The right to travel, including travel within a state, is a fundamental right under the United States Constitution; impairing the right to travel cannot be deprived without due process of law. *Smith*, 185 Wn. App. at 953; U.S. CONST. amends. V, XIV. A state law implicates the right to travel when it "actually deters such travel and where deterring travel is the law's primary objective." *Smith*, 185 Wn. App. at 953. A state law also implicates the right to travel when the law uses a classification to penalize the exercise of that right. *Smith*, 185 Wn. App. at 953. BJC argues that RCW 9A.44.130 prevents him from traveling away from home for more than three nights. We have already rejected this argument in *Smith*. 185 Wn. App. at 953-54.

RCW 9A.44.130 requires convicted sex offenders, including juvenile sex offenders, to register with the sheriff for the county of the person's residence. "[I]t is well established that the term 'residence' as used in RCW 9A.44.130 means 'a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.'" *Smith*, 185 Wn. App. at 954 (quoting *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999)). No language in

RCW 9A.44.130 prevents BJC from traveling outside the state or within the state. *Smith*, 185 Wn. App. at 953. The statute does not require BJC to provide notice of intent to travel from his residence; the statute requires that he register only when he *changes* his residence or becomes transient. RCW 9A.44.130(4), (5). Thus, RCW 9A.44.130 is not unconstitutional on its face. *Smith*, 185 Wn. App. at 954.

BJC has not demonstrated that RCW 9A.44.130 actually deters him from traveling or penalizes him for exercising his right to travel. BJC's facial constitutional and as-applied challenges fail.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO LIMIT BJC'S SENTENCE

Lastly, BJC argues that the sentencing court erred by not limiting his sentence to 150 percent of the term for first degree child rape, his most serious offense, because he argues that his two adjudications constitute a "single act" under RCW 13.40.180(1)(a). We disagree.

The issue is whether BJC's adjudications for first degree child rape and first degree child molestation constitute the "same criminal conduct" under RCW 9.94A.589(1)(a) for sentencing purposes. A juvenile's disposition for two or more offenses must run consecutively unless "the offenses were committed through a single act or omission." RCW 13.40.180(1)(a). In that case, the total sentence the trial court may impose is limited to 150 percent of the term imposed for the most serious offense, here first degree child rape.[5] RCW 13.40.180(1)(a). The trial court ruled that because BJC's two adjudications did not constitute the same criminal conduct, the 150 percent

[5] If the offenses were *not* committed through a "single act or omission," the total sentence may not exceed three hundred percent of the imposed sentence for the most serious offense. RCW 13.40.180(1)(b).

limit in RCW 13.40.180(1)(a) did not apply to the trial court's sentence for BJC's most serious offense. Because this decision involves a factual inquiry, we review the trial court's application of the facts to the law for abuse of discretion. *State v. Kloepper*, 179 Wn. App. 343, 357, 317 P.3d 1088, *review denied*, 180 Wn.2d 1017 (2014). When the record supports only one conclusion on the same criminal conduct issue, the trial court abuses its discretion at arriving at a contrary result, but if either conclusion is supported adequately by the record, the trial court properly exercised its discretion. *State v. Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013).

We analyze the phrase "single act or omission" in RCW 13.40.180(1)(a) in the same manner as we analyze the phrase "same course of conduct" in the Sentencing Reform Act,[6] because both focus on the defendant's objective criminal intent. *State v. Contreras*, 124 Wn.2d 741, 748, 880 P.2d 1000 (1994). Two offenses against a single victim constitute the "same criminal conduct" if they (1) involved the same criminal intent, (2) occurred at the same time, and (3) were committed at the same place. *Kloepper*, 179 Wn. App. at 356-57; RCW 9.94A.589(1)(a). Both BJC and the State agree that BJC's offenses occurred at the same time and place and involved the same victim.

To determine whether BJC's two adjudications constitute the same criminal conduct, we focus on whether defendant's intent, viewed objectively, changed from one crime to the next and whether one crime furthered the other. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). We construe the phrase "the same criminal conduct" in RCW 9.94A.589(1)(a) narrowly to disallow most claims that multiple offenses constitute the same criminal conduct.

[6] Sentencing Reform Act of 1981, ch. 9.94A RCW.

Graciano, 176 Wn.2d at 540. The defendant bears the burden of proving that his adjudications were part of the same criminal conduct. *Graciano*, 176 Wn.2d at 538.

In *Grantham*, the defendant committed two separate rapes that we held were not the "same criminal conduct" because he committed one rape before beginning the second, he had the "presence of mind" to threaten the victim, he used new physical force to obtain compliance and accomplish the second rape, and the victim asked him to stop and take her home between the two rapes. *Grantham*, 84 Wn. App. at 859. Under these facts, we held that the trial court properly found that Grantham, after he completed one act, "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." *Grantham*, 84 Wn. App. at 859. Because Grantham chose to proceed, he formed a new intent to commit the second act. *Grantham*, 84 Wn. App. at 859.

Like Grantham, BJC "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act" between the commission of his offenses. *Grantham*, 84 Wn. App. at 859. According to Fletcher's testimony, BJC said that he stopped one sex act before beginning another because CC told him to stop each time. Instead of stopping, BJC re-positioned CC and decided to commit a different sexual act. The trial court, under these facts, properly concluded that BJC's offenses did not constitute the same criminal conduct. Therefore, the trial court did not abuse its discretion by declining to limit BJC's sentence to 150 percent of the maximum sentence for his most serious offense, first degree child rape.

CONCLUSION

We affirm BJC's adjudications, holding that the trial court properly admitted his confession, the sex offender registration statute does not impair BJC's fundamental right to travel, and the trial court did not abuse its discretion in sentencing BJC.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

J.
LEE, J.

BACKLUND & MISTRY

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