No. 112,329

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

v.

NORMAN C. BRAMLETT
Defendant-Appellee

BRIEF FOR THE APPELLANT

Interlocutory Appeal from the District Court of Jefferson County, Kansas
The Honorable Gary L. Nafziger, Judge
District Court Case No. 13-CR-187

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NATURE OF THE CASE

The State timely filed an interlocutory appeal of the Magistrate Court and District Court's ruling suppressing the Defendant's statements to law enforcement because the statements were made without a Miranda warning and were not freely made.

ISSUES ON APPEAL

I. Was the Defendant's confession to law enforcement properly excluded by the District Court due to law enforcement's failure to issue a warning of rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966)?

II. Was the Defendant's statement also properly excluded as being involuntarily made?

FACTUAL AND PROCEDURAL BACKGROUND

On July 19, 2014, Detective Sergeant Kirk Vernon of the Jefferson County Sheriff's Department was contacted by the Kansas Department for Children and Families regarding a report of child sexual abuse. (R. Vol. I, 12). Det. Vernon was informed the alleged victim was M.P.B. (D.O.B. XX/XX/2003) and the alleged suspect was her paternal grandfather, the Defendant Norman C. Bramlett. (R. Vol. I, 12).

Det. Vernon met with M.P.B.'s parents on July 23, 2013. M.P.B.'s father advised Det. Vernon that he and his wife were told by M.P.B. that the Defendant had fondled her breasts and vaginal area when she and her brother had been on an overnight visit to the Defendant's home. (R. Vol. I, 12). Det. Vernon was advised M.P.B. made the same disclosure to the D.C.F. social worker. (R. Vol. I, 12).

On July 25, 2013, Det. Vernon met with M.P.B. at the Jefferson County Sheriff's Office. (R. Vol. I, 12). M.P.B. advised Det. Vernon the incidents occurred when she would spend overnight visits at the Defendant and his wife home in Grantville, Kansas.

(R. Vol. I, 14). M.P.B. advised the Defendant began inappropriately touching her around May 24, 2013. (R. Vol. I, 14).

M.P.B. reported that the incidents would follow a similar pattern each time; M.P.B. would fall asleep in her grandmother's room around 8:00 pm and the Defendant would then move her to the couch around 9:00 pm when he was getting ready for bed. (R. Vol. I, 14). When the Defendant would move M.P.B. to the couch, M.P.B. reported he would tell M.P.B. goodnight and then begin rubbing her breasts and/or vaginal area. (R. Vol. I, 14). M.P.B. advised this would happen nearly every time the Defendant would move her to the couch and the Defendant would go back and forth between rubbing her breasts and vagina, or sometimes both at the same time. (R. Vol. I, 14). M.P.B. reported the Defendant touched her this way at least three times but probably not more than five times during the month of June, 2013. (R. Vol. I, 14).

On July 30, 2014, Det. Vernon contacted the Defendant on his cell phone and advised the Defendant he was conducting an investigation in which the Defendant's name had come up. (R. Vol. I, 15; R. Vol. II, 5-6). Det. Vernon told the Defendant he believed the Defendant had some information which would be of assistance in his investigation. (R. Vol. I, 15; R. Vol. II, 5-6). Det. Vernon also advised the Defendant the investigation was very sensitive in nature and did not want to discuss the investigation with the Defendant over the phone. (R. Vol. I, 15; R. Vol. II, 5-6).

Det. Vernon requested the Defendant come to the Jefferson County Sheriff's Office and speak to him at his earliest convenience. (R. Vol. I, 15; R. Vol. II, 5-6). When the Defendant repeated the phrase "earliest convenience," Det. Vernon replied in the affirmative and added within the next day or so. (R. Vol. I, 15). Det. Vernon

reported the Defendant became agitated and asked why Det. Vernon needed to speak with him. (R. Vol. I, 15). Det. Vernon advised again he did not wish to speak about it over the phone. (R. Vol. I, 15; R. Vol. II, 5-6).

The Defendant then asked Det. Vernon if he need to bring an attorney with him to the meeting. (R. Vol. I, 15). Det. Vernon told the Defendant he could not advise him on that question. (R. Vol. I, 15). The Defendant calmed down a bit, and told Det. Vernon he would be to the Sheriff's Office in an hour. (R. Vol. I, 15; R. Vol. II, 6).

The Defendant arrived at the Sheriff's Office at approximately 11:28 am on July 30, 2014. (R. Vol. I, 15). Det. Vernon would later testify that the Defendant came to the Sheriff's Office in his own vehicle without any assistance from police. (R. Vol. II, 6). Det. Vernon met the Defendant in the lobby, introduced himself, and escorted the Defendant to an interview room. (R. Vol. I, 15). Prior to entering the interview room, Det. Vernon had initiated the interview room's video recording equipment. (R. Vol. I, 15).

Once inside the interview room, Det. Vernon collected the Defendant's biographical data. Det. Vernon advised the Defendant he believed the Defendant knew why he had been asked to come to the Sheriff's Office. (R. Vol. I, 15). The Defendant advised he did not know why. (R. Vol. I, 15).

The Defendant and Det. Vernon then went on to discuss the Defendant's prior employment history; family members and volunteer work. (R. Vol. I, 15). The Defendant advised he is a former generation manager for Westar Energy. (R. Vol. I, 15). Det. Vernon also discussed with the Defendant his knowledge of computers and if he had ever visited any pornographic websites. (R. Vol. I, 16). When Det. Vernon asked if there

was anything on the Defendant's computer which he should be concerned about, the Defendant replied that there would be some materials on his computer he would be embarrassed by, but nothing inappropriate. (R. Vol. I, 16).

The conversation with Det. Vernon then turned to the allegations made by M.P.B. (R. Vol. I, 16). Det. Vernon explained to the Defendant that he had been informed of a situation that had occurred at the Defendant's home involving M.P.B. (R. Vol. I, 16). Det. Vernon advised he wanted to know what the Defendant's frame of mind was when this "situation" had occurred. (R. Vol. I, 16).

Det. Vernon asked the Defendant if some inappropriate touching had occurred with his granddaughter over her clothes. (R. Vol. I, 16). The Defendant acknowledged inappropriate touching had occurred. (R. Vol. I, 16). When Det. Vernon asked what was going on in the Defendant's mind when this happened, the Defendant replied he did not know, but advised his behavior never went any further than just touching. (R. Vol. I, 16). Det. Vernon then asked if this behavior had occurred with any of the Defendant's other grandchildren, to which the Defendant replied it had, but only to the same extent as with M.P.B. (R. Vol. I, 16). The Defendant confirmed he had touched M.P.B. five or six times over a period of four to six months. (R. Vol. I, 16). The Defendant confirmed he had touched M.P.B. on her breasts, but denied having touched her in her vaginal area. (R. Vol. I, 16).

The Defendant also confirmed all the incidents took place at his home, usually when he would be putting M.P.B. to bed. (R. Vol. I, 16).

At this time, Det. Vernon advised he now needed to read the Defendant his Miranda rights. (R. Vol. I, 16). After reading the Defendant his rights, the Defendant

asked Det. Vernon if what he had already told him could be held against him. (R. Vol. I, 16). Det. Vernon advised the Defendant that it could. The Defendant also asked what he could be charged with. (R. Vol. I, 16). Det. Vernon advised the decision would be up to the County Attorney, but that charges could be indecent liberties or aggravated indecent liberties with a child. (R. Vol. I, 16). The Defendant asked Det. Vernon if those were felonies, and Det. Vernon advised they were. (R. Vol. I, 16). The Defendant then advised Det. Vernon if he was going to arrest and charge him, the Defendant did not wish to say anything else. (R. Vol. I, 16). Det. Vernon then advised the Defendant that he was no longer free to go and was going to be placed under arrest. (R. Vol. I, 16). The Defendant then reaffirmed he did not wish to say anything else. (R. Vol. I, 16). The Defendant was then placed under arrest without incident. (R. Vol. I, 16).

Det. Vernon would later testify his conversation with the Defendant lasted approximately forty-eight (48) minutes. (R. Vol. II, 7)

On July 31, 2013, the Defendant was charged with a single count of Aggravated Indecent Liberties with a Child in violation of K.S.A. §§ 21-5506(b)(3)(A) and (c)(3). (R. Vol. I, 6).

On March 10, 2014, after several continuances and prior to a preliminary hearing being held, the Defendant filed a "MOTION FOR SUPPRESSION OF CONFESSION." (R. Vol. I, 19). In the motion, the Defendant requested the Court suppress his confession to Det. Vernon on the grounds that the confession was not voluntarily given and because the Defendant was not advised of his constitutional rights. (R. Vol. I, 19).

First Suppression Hearing

The Magistrate Court convened for a motions hearing on March 31, 2014. (R. Vol. I, 39).

At this hearing, the State called Det. Vernon as its only witness. (R. Vol. II, 2). After recapping the events which led to his involvement, Det. Vernon testified about his interview with the alleged victim. (R. Vol. II, 4). Det. Vernon testified this interview took place at the Jefferson County Sheriff's Department in an interview room. (R. Vol. II, 4). When asked if there was "special" room for interviewing victim's, the Detective replied there was not and he used "the same room regardless of whom [he] was speaking with." (R. Vol. II, 4).

Det. Vernon then testified about his contact with the Defendant. (R. Vol. II, 6-8). After confirming the interview was recorded, the recording of the interview with the Defendant was admitted without objection. (R. Vol. II, 7-8).

Defense counsel was then allowed to voir dire the Detective regarding his phone conversation with the Defendant. (R. Vol. II, 8-9). Det. Vernon was questioned several times about why the allegations against the Defendant were sensitive. (R. Vol. II, 9). Det. Vernon testified that he considered the information sensitive regardless of the setting, but that conducting an in-person conversation with the Defendant would allow him to gauge the Defendant's responses and reactions to any allegations. (R. Vol. II, 9).

When Det. Vernon was questioned during this voir dire as to his belief in the Defendant's guilt, Det. Vernon testified that he was not certain the Defendant was guilty at the time he called him; only that an accusation had been made by M.P.B. (R. Vol. II, 10).

Det. Vernon was then asked the following:

Q: If Mr. Bramlett had not come into the station as requested, would you have gone and arrested him?

A: That day, absolutely not.

(R. Vol. II, 12).

After more questioning about the process the Detective had undertaken during his investigation, the State published the video to the Court. (R. Vol. II, 15).

Prior to the completion of the video, counsel for the Defendant requested the tape be stopped and stated he believed there was sufficient evidence presented for the Court to rule on the Defendant's motion. (R. Vol. II, 18). The State objected, and requested the video be played in its entirety. (R. Vol. II, 18). The Defense responded by advising the Court that all it needed to see was that the Defendant incriminated himself and that he did so without being given a Miranda warning. (R. Vol. II, 19-20). The State disagreed, and requested the Court hear the State's entire presentation of evidence before making a ruling. (R. Vol. II, 20).

The Magistrate Court declined to do so and held in favor of the Defendant. (R. Vol. II, 21).

On April 3, 2013, the State filed a notice of interlocutory appeal from the Magistrate Court's ruling to the District Court. (R. Vol. I, 20). The State would submit a written response to the Defendant's motion to suppress on July 16, 2013. (R. Vol. I, 23-33).

Second Suppression Hearing

The District Court convened for a hearing on the State's appeal on July 25, 2013. (R. Vol. III, 3). The State again called Det. Vernon as its sole witness. (R. Vol. III, 3).

Det. Vernon again testified to the events leading him to his contact with the Defendant. (R. Vol. III, 3-5). Det. Vernon testified that he called and spoke with the Defendant on July 30, 2014 about 10:30 am. (R. Vol. III, 5). Det. Vernon testified that he explained to the Defendant that his name had come up in an investigation and he needed to visit with him. (R. Vol. III, 5)

Det. Vernon testified that the Defendant repeatedly made inquiry about why Det. Vernon needed to see him. (R. Vol. III, 6). Det. Vernon testified he repeatedly declined to discuss the allegations over the phone as they were sensitive in nature. (R. Vol. III, 6). Det. Vernon requested the Defendant come to see him at the Sheriff's Office at his convenience, within the next day or two. (R. Vol. III, 6). Det. Vernon testified that he did not tell the Defendant that he was required or had to meet with him. (R. Vol. III, 15).

The Defendant agreed to meet the Detective in one hour. (R. Vol. III, 6).

Upon questioning by the Court, Det. Vernon testified that he did consider the Defendant to be a suspect at the time they spoke, but did not tell the Defendant he was a suspect or that he was the focus of his investigation. (R. Vol. III, 6).

Det. Vernon testified the Defendant arrived at the Sheriff's Office at approximately 11:28 am. (R. Vol. III, 7). Det. Vernon met the Defendant in the lobby and escorted him to an interview room where recording equipment was already running. (R. Vol. III, 7). Det. Vernon described the Sheriff's Office as first by entering a lobby area. (R. Vol. III, 15-16, 19). The lobby has a wooden door with an electronic "FOB" lock which leads to the administrative area with staff offices. (R. Vol. III, 15). In the administrative area near the Detective's Offices is a wooden door which requires a "FOB" key for entry and egress. (R. Vol. III, 18-19). At either end of this hallway is a

door. (R. Vol. III, 18). One of the doors leads from the administrative area into the hallway. (R. Vol. III, 19). The other door is a large steel door leading to the Jefferson County Jail, which is attached to the Sheriff's Office. (R. Vol. III, 19).

Det. Vernon testified that the Defendant was not restrained in handcuffs at this time and that Det. Vernon was the only officer present during the interview. (R. Vol. III, 7). Det. Vernon testified that the Defendant retained his wallet; keys; and cell phone during the interview. (R. Vol. III, 7). Det. Vernon testified that the door to the interview room was neither locked nor shut during his conversation with the Defendant. (R. Vol. III, 7-8).

Det. Vernon would testify that his entire encounter with the Defendant was very cordial and cooperative. (R. Vol. III, 12).

After establishing the interview was recorded, the State admitted and published the interview recording for the District Court. (R. Vol. III, 8-10; R. Vol. IV). The Court viewed approximately 38 minutes of the interview with the Defendant before concluding the recording. (R. Vol. III, 10).

After viewing the video, the Court inquired of the Detective regarding the Defendant asking the Detective if he should bring an attorney with him to the interview. (R. Vol. III, 11). Det. Vernon testified that the Defendant had asked if he needed to bring an attorney when they had their initial phone conversation, but that the Detective had told the Defendant that decision was his and the Detective could not advise him on that subject. (R. Vol. III, 12).

Det. Vernon was then questioned about the Defendant's mental state during the interview. (R. Vol. III, 13). Det. Vernon testified that he learned the Defendant was a

high school graduate; gave no indication that he did not understand Det. Vernon's questions; and advised Det. Vernon he was not under the influence of any alcohol. (R. Vol. III, 13-14).

Det. Vernon also testified that at no time did the Defendant request to speak to anyone outside of the interview room. (R. Vol. III, 14).

Det. Vernon testified that prior to meeting with the Defendant, his investigation had not reached a point where a decision could be made regarding the filing of criminal charges. (R. Vol. III, 14).

On cross-examination, Det. Vernon was again questioned about the Defendant requesting counsel. (R. Vol. III, 17). Specifically, Defense Counsel asked the Detective if he had specifically advised the Defendant that he did not need an attorney. (R. Vol. III, 17). Det. Vernon testified that he never advised the Defendant he did not need counsel; only that was not a decision Det. Vernon could advise him about. (R. Vol. III, 17). Det. Vernon further testified on cross-examination that he could have gone to interview the Defendant at his home, but chose not to. (R. Vol. III, 17).

The Detective was then questioned by the Court as to why a Miranda warning wasn't issued prior to beginning questioning. (R. Vol. III, 20). Det. Vernon testified that he did not consider the interview an interrogation and the purpose of the interview was to gather information about the allegations made by M.P.B. (R. Vol. III, 20-21). Det. Vernon also testified this was not a "blanket interview" of all persons with knowledge of the incident, but that there was a specific purpose for the Defendant's interview. (R. Vol. III, 20).

The State argued first regarding the voluntariness of the Defendant's statements. (R. Vol. III, 23). The State began to recite the six (6) factor test cited in the State's response before being interrupted by the District Court. (R. Vol. III, 23). The District Court did not feel that being requested by police to come and speak with them lent credence towards a voluntary statement. (R. Vol. III, 23-24). The District Court also took significant issue with the fact that the door leading from the interview room hallway to the administrative area of the Sheriff's Department was locked. (R. Vol. III, 25-29).

The State maintained first, that the Defendant was not in custody when initially questioned. (R. Vol. III, 24). The State also maintained that there was not a single factor indicating the Defendant's statements were the product of coercion based on the recording and testimony presented. (R. Vol. III, 25-30).

The Defense argued that Det. Vernon lied to him about needing an attorney, and had he been advised over the phone that he needed counsel, the Defendant would have invoked his right to remain silent. (R. Vol. III, 30).

The Court found the interview was "very polite, was very courteous, and very professional." (R. Vol. III, 31). However, the Court took issue with the fact that the interview was conducted at the Jefferson County Sheriff's Department, which is connected to the Jefferson County Jail which has locked doors. (R Vol. III, 28; R. Vol. III, 31). The Court also took issue that the Defendant had been "summon[ed]" by Det. Vernon to the interview. (R. Vol. III, 31). The Court also reasoned that while Det. Vernon was the only questioning officer, other law enforcement officers must have been present at the Sheriff's Office at the time of the interview. (R. Vol. III, 31). The Court found there were no physical restraints or drawn weapons present, nor were there guards

stationed at the door. (R. Vol. III, 31). However, the Court did find the Defendant was "locked in." (R. Vol. III, 31).

The Court also found the interview was an interrogation because the Defendant was a suspect. (R. Vol. III, 32). The Court again took issue with the Defendant being "summon[ed]" to the law enforcement center by a police officer. (R. Vol. III, 32). The Court also took note that the Defendant asked if he needed counsel, but was advised by Det. Vernon that he "couldn't be advised on that matter." (R. Vol. III, 32).

The District Court then found the Defendant was eventually arrested at the conclusion of the interview. (R. Vol. III, 32).

The District Court stated that it understood the need for an investigating officer to establish a dialogue with someone being questioned, but took issue with the Defendant's case because Det. Vernon was performing "direct, on point questioning in regarding the elements of the offense with which the defendant was suspected and which the defendant was charged." (R. Vol. III, 32-33).

The District Court held "the statements up to until the point that [the Defendant] was given his Miranda Warning was not voluntary and not freely given and violated the Miranda Warning requirement – and for that reason, should be suppressed." (R. Vol. III, 33).

When the State requested clarification about the Court's ruling regarding whether the statement was found to be coerced, the Court stated "I didn't say it was coerced. I said it wasn't voluntary, and I said it was in violation of Miranda." (R. Vol. III, 33). When pressed again for clarification regarding the District Court's ruling, the District Court later state "I don't think it was coerced. I think [the Defendant] was in custody,

and I think he wasn't advised of his Miranda Rights." (R. Vol. III, 34-35). When the State requested the Court's ruling on whether the Defendant's statements could be used for impeachment purposes, the Court did not issue a clear ruling, but again reiterated that the statements were not voluntarily made because the Defendant was not advised he did not have to give a statement. (R. Vol. III, 36-37).

Authorities and Argument

I. The Defendant was not subject to a custodial interrogation and Det. Vernon was not required to advise the Defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966) prior to beginning *any* questioning.

The District Court held the Defendant's statements to Det. Vernon should be suppressed because the Defendant was in custody and therefore should have been issued a Miranda warning prior to any interrogation. (R. Vol. III, 31-35).

The District Court erred in suppressing the Defendant's statements due to the failure of Det. Vernon to advise the Defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966) because the District Court's ruling was not supported by substantial, competent evidence. Neither the United States Supreme Court nor the Kansas appellate courts have held law enforcement must give the Miranda advisement prior to any questioning of any person. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977). See also State v. Taylor, 231 Kan. 171, 172, 673 P.2d 989, 991 (1982). A Miranda warning is only required when a Defendant is (1) in custody *and* (2) subject to interrogation. State v. Morton, 286 Kan. 632, 639, 186 P.3d 785, 791, (2008) cert. denied, Kansas v. Morton, 555 U.S. 1126 (2009) (citing United States v. Ritchie, 35 F.3d 1477, 1485 (10th Cir. 1994). Here, taking into account all circumstances surrounding the Defendant's

interrogation, the Defendant's contention that he was in custody for Miranda purposes when questioned is not supported by substantial competent evidence.

Standards of Appellate Review

Kansas Appellate Courts use a bifurcated standard when reviewing a district court's ruling on a motion to suppress. See State v. Garcia, 297 Kan. 182, 187, 301 P.3d 658, 662 (2013). The Supreme Court in previous cases has stated "a motion to suppress evidence usually presents a mixed question of fact and law, prompting the use of a dual standard of review. The facts underlying the district court's decision on a suppression motion are reviewed under a *substantial competent evidence standard*, but the ultimate legal conclusion to be drawn from those facts is reviewed *de novo*." Id. (citing State v. Summers, 293 Kan. 819, 825, 272 P.3d 1, 7 (2012)) (emphasis added).

The substantial competent evidence standard "refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion." State v. Schultz, 289 Kan. 334, 340, 212 P.3d 150, 154 (2009).

When the facts of a case are not in dispute, the appellate court exercises unlimited de novo review of the District Court's legal conclusion. State v. Edgar, 296 Kan. 513, 519-20, 294 P.3d 251, 256-57 (2013).

Jurisdiction

The Kansas Court of Appeals retains jurisdiction to hear the State's appeal pursuant to K.S.A. § 22-3603, which permits the State to appeal the suppression of a confession by the District Court. Furthermore, the District Court's order suppressing of the Defendant's confession to law enforcement substantially impairs the State's ability to prosecute this case.

The Kansas Supreme Court has held Kansas appellate courts should not take jurisdiction of the prosecution's interlocutory appeal from every run-of-the-mill pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved." State v. Newman, 235 Kan. 29, 35, 680 P.2d 257, 262 (1984). An interlocutory appeal is only permitted when the exclusion of evidence by District Court order places the State in a position where the ability to prosecute the case is "substantially impaired." Id.

The State is required to make a showing to the appellate court that the order suppressing evidence in the case has substantially impaired the continued prosecution of case. Newman, 235 Kan. at 35, 680 P.2d at 262.

The Kansas Supreme Court has more recently found that "in order to determine whether a trial court order substantially impairs the State's ability to prosecute a case, the evidence available to the State must be assessed to determine just how important the disputed evidence is to the State's ability to make out a prima facie case." State v. Sales, 290 Kan. 130, 140, 224 P.3d 546, 552 (2010).

Here, the evidence against the Defendant is the statement made by M.P.B. and the Defendant's confession. (R. Vol. I, 12-14, 16). There is no physical evidence of sexual assault or any eyewitnesses to the alleged crimes. Further, there are no corroborating witnesses to the alleged crimes. The only two persons with knowledge of the offenses are the Defendant and a young child.

The Defendant's confession is a vital piece of evidence without which the prosecution of the State's case is substantially impaired. Without the Defendant's confession, the sole witness is a ten year old child. As the history of any jurisdiction's

sexual assault trial's would establish; the prosecution of any so called "he said, she said" sexual assault case is difficult even under the best of circumstances. Without physical or some other form of corroborating evidence, a jury would be left to decide the merits of the State's case solely on one witness.

The exclusion of the Defendant's statements poses a significant impairment to the State's making of a prima facie case, and as such, this Court retains jurisdiction to hear the State's interlocutory appeal.

Authorities

The Fifth Amendment to the United States Constitution and Section 10 of the Kansas Bill of Rights guarantees the right or person against self-incrimination, which includes the right to counsel during a *custodial interrogation* and the right to refuse to answer questions by police. State v. Morton, 286 Kan. 632, 639, 186 P.3d 785, 790-91, (2008) (emphasis added) cert. denied, Kansas v. Morton, 555 U.S. 1126 (2009). See also State v. Ninci, 262 Kan. 21, 34, 936 P.2d 1324, 1375 (1997). The purpose of the Miranda warning is to reduce the risk of coerced confessions. State v. Jones, 283 Kan. 186, 192, 151 P.3d 22, 29-30 (2007) overruled on other grounds, State v. Nelson, 291 Kan. 475, 243 P.3d 343 (2010). See also State v. Fritschen, 247 Kan. 592, 597, 802 P.2d 558, 561 (1990) (holding the Miranda "Court was concerned with the especially coercive atmosphere inherent to custodial interrogations).

The State is prohibited from using a defendant's statements stemming from a "custodial interrogation" unless the State is able to demonstrate the use of "procedural safeguards to secure the defendant's privilege against self-incrimination." Jones, 283 Kan. at 192, 151 P.3d at 29-30. The term interrogation "refers not only to express

questioning but also to any words or actions on the part of police that the police should know are reasonable likely to elicit an incriminatory response from the suspect." State v. Lewis, 258 Kan. 24, 35, 899 P.2d 1027, 1034 (1995),

Kansas law recognizes a distinction between custodial interrogations and investigatory interrogations. State v. Taylor, 234 Kan. 401, 405, 673 P.2d 1140, 1144 (1983).

Custodial interrogation has been described by Kansas appellate courts as "the questioning (or its functional equivalent) of person by law enforcement officers, initiated and conducted while such persons are held in legal custody or are otherwise deprived of their freedom of action in any significant way." State v. Jones, 283 Kan. 186, 194, 151 P.3d 22, 30-31 (2007) (citing State v. Price, 233 Kan. 706, 712, 664 P.2d 869, 873-74 (1983)). See also State v. Jacques, 270 Kan. 173, 185-86, 14 P.3d 409, 419-420 (2000). If a custodial interrogation occurs, the Miranda warnings are required. State v. Taylor, 231 Kan. 171, 172, 673 P.2d 989, 991 (1982).

Investigatory interrogation has been defined as "the questioning of persons by law enforcement officers in a routine manner in an investigation and where such persons are not in legal custody or deprives of their freedom of action in any significant way." State v. Jones, 283 Kan. 186, 194, 151 P.3d 22, 30-31 (2007) (citing State v. Price, 233 Kan. 706, 712, 664 P.2d 869, 873-74 (1983)). See also State v. Jacques, 270 Kan. 173, 185-86, 14 P.3d 409, 419-420 (2000). An investigatory interrogation does not require the issuance of a Miranda warning prior to questioning. State v. Taylor, 231 Kan. 171, 172, 673 P.2d 989, 991 (1982).

The Court has been extremely clear in the past that police are not required to "administer Miranda warnings to everyone whom they question." Jones, 283 Kan. at 192, 151 P.3d at 30 (citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). A Miranda warning is required "only when there has been such a restriction on a person's freedom to render him "in custody." Id. These procedural "safeguards against self-incrimination established by Miranda-do not exist outside 'custodial interrogation.'" State v. Morton, 286 Kan. 632, 639, 186 P.3d 785, 794-95, (2008) (citing United States v. Ritchie, 35 F.3d 1477, 1485 (10th Cir. 1994). See also State v. Fritschen, 247 Kan. 592, 597, 802 P.2d 558, 561 (1990) (holding "Miranda only applies if the interrogation was custodial").

The standard for determining whether an interrogation is custodial is objective, based upon how a reasonable person in the suspect's position would have understood that situation. State v. Fritschen, 247 Kan. 592, 603, 802 P.2d 558, 565 (1990). The subjective understanding of either the person being questioned or the questioning officer has no bearing on whether an individual is found to be in custody at the time of the challenged questioning. See Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (holding the "only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"). See also Stansbury v. California, 511 U.S. 318, 323 (1994) (holding "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned").

A District Court is required to examine all circumstances surrounding the interrogation when a statement is challenged on Miranda grounds. Stansbury, 511 U.S. at 322. The United States Supreme Court has found two inquiries are essential to a

determination if an individual is in custody for Miranda purposes. First, "what were the circumstances surrounding the interrogation?" Thompson v. Keohane, 516 U.S. 99, 112 (1995). Second, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave?" Id. Given those two inquiries, a District Court must then resolve "the ultimate inquiry . . . was there a 'formal arrest or restraint on freedom of movement' of the degree associated with formal arrest?'" Thompson, 516 U.S. at 112 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). The District Court's decision must be based on facts supported by substantial, competent evidence. State v. Morton, 286 Kan. 632, 640, 186 P.3d 785, 791 (2008).

To resolve the first inquiry, a District Court is required to make findings of fact based on substantial, competent evidence. State v. Morton, 286 Kan. 632, 640, 186 P.3d 785, 791 (2008). The Kansas Supreme Court has established an eight (8) factor test to aid in the analysis concerning the circumstances surrounding the interrogation.

(1) When and where the interrogation occurred;
(2) How long it lasted;
(3) How many police officers were present;
(4) What the officers and defendant said and did;
(5) The presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door;
(6) Whether the defendant is being questioned as a suspect or a witness;
(7) How the defendant got to the place of questioning, that is, whether he came completely on his own in response to a police request or was escorted by police officers; and
(8) What happened after the interrogation-whether the defendant left freely, was detained, or was arrested.

Morton, 286 Kan. at 640, 286 P.3d at 791 (quoting State v. Jones, 283 Kan. 186, 195, 151 P.3d 22, 31 (2007)).

The factors are to be used as framework for the District Court's analysis, and not rigidly or mechanically treated as if each factor bears equal weight. Morton, 286 Kan. at 640, 286 P.3d at 791. Each case is decided on a case-by-case basis and is required to be analyzed by its own facts and circumstances. Id. The importance of each factor may vary depending on the facts of the case. Id. See also State v. Jones, 283 Kan. 186, 195, 151 P.3d 22, 31 (2007).

Argument

(1) When and where the interrogation occurred.

It is not factually in dispute here that the Defendant was questioned at the Jefferson County Sheriff's Department. (R. Vol. III, 6). Det. Vernon reported and testified he contacted the Defendant by phone and asked him to come to the Sheriff's Office for an interview. (R. Vol. III, 5).

The Detective's request of the Defendant was just that; a request. This was not a situation where any threat, express or implied, was used by law enforcement to obtain the Defendant's attendance at a police interview. Det. Vernon advised the Defendant his name had come up in an investigation and the Detective wished to speak with the Defendant at his convenience. (R. Vol. III, 6). When the Defendant asked what the Detective meant by at his convenience, Det. Vernon advised within the next day or two. (R. Vol. I, 15; R. Vol. II, 5-6).

The Defendant was called at approximately 10:30 am and told the police he would be to the police station in an hour. (R. Vol. III, 5-7). The Defendant arrived at the police station by approximately 11:30 am. (R. Vol. III, 5-7).

In making its finding that a Miranda warning was required, the District Court took issue with the request by police to come and speak with them, reasoning that no person would feel free to decline such a request by police. (R. Vol. III, 23-24). The District Court's reasoning does not comport with either Supreme Court precedent or Kansas law.

The United States Supreme Court has held an interview does not automatically become custodial and thus require a Miranda warning prior to questioning "simply because the questioning takes place in the station house." Oregon v. Mathiason, 429 U.S. 492, 495 (1977). The Kansas Supreme Court recognized the reasoning of the Mathiason decision in State v. Jones, 283 Kan. 186, 151 P.3d 22 (2007) reasoning that police are not required to issue a Miranda warning to every person they come into contact with during the course of an investigation. State v. Jones, 283 Kan. 186, 192-93, 151 P.3d 22, 32-33 (2007).

Det. Vernon testified that the interview took place in an interview room where he would normally question all persons; including the alleged victim in this instance. (R. Vol. I, 12; R. Vol. II, 4).

That the investigating officer here requested the Defendant meet him at a police station does not by itself, or when taken in combination with all other circumstances, support the Defendant's contention and the District Court's ruling that the questioning of the Defendant was custodial. The District Court's ruling that no reasonable person would feel free to decline a request to speak with an officer during the course of an investigation is not supported.

(2) How long the interview lasted.

The video recording showed the interview lasted a total of 39 minutes before the Defendant was escorted from the interview room. (R. Vol. IV). The Defendant was told he was no longer free to leave at approximately 31 minutes. (R. Vol. IV).

(3) How many police officers were present during the interview.

The video recording unequivocally shows and the Court specifically found that Det. Vernon was the only person to question the Defendant and was the only person present in the interview room. (R. Vol. III, 31; R. Vol. IV).

(4) What the officers and defendant said and did during the interview.

The video recording shows that Det. Vernon and the Defendant had a very cordial and cooperative conversation. (R. Vol. IV). Det. Vernon never threatens or uses any derogatory or intimidating language in his conversation with the Defendant. (R. Vol. IV). Det. Vernon would also testify that he felt the entire interview was very affable. (R. Vol. III, 12).

The Defendant is also very cooperative with Det. Vernon and very responsive to his questions regarding the accusations made by M.P.B. (R. Vol. IV).

Det. Vernon also testified that at no time did the Defendant request to speak to anyone outside of the interview room. (R. Vol. III, 14). However, the Detective also testified the Defendant retained his keys; wallet; and cellular telephone until he was placed under arrest. (R. Vol. III, 7).

(5) The presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door.

Det. Vernon testified that at no time was the Defendant restrained in any way prior to his arrest. (R. Vol. III, 7). The Defendant kept his wallet; keys; and cellular telephone on his person at all times during the interview. (R. Vol. III, 7). Further, there were no guards present at the door to the interview room nor were there any weapons drawn at the time the Defendant was questioned. (R. Vol. III, 7). Det. Vernon testified the door to the interview room remained open while the interview was taking place. (R. Vol. III, 7).

During the Detective's testimony, he described the layout of where the Defendant was questioned in the interview room. (R. Vol. III, 7, 15-16, 18-19). In finding the interview to be custodial, the District Court took issue with two different underlying facts:

First, the interview took place in a police station where other officers were present. (R. Vol. III, 31).

Second, the District Court took issue with the fact that the hallway doors outside the interview room required keys for entry and egress. (R. Vol. III, 25-29, 31). Det. Vernon testified that the door leading from the interview room hallway to the administrative area of the Sheriff's Office required an electronic "FOB" key for both entrance and exit. (R. Vol. III, 7, 15-16, 18-19). The District Court found this fact to mean the Defendant was "locked in." (R. Vol. III, 31).

Kansas Court's in their analysis custodial and non-custodial interrogations have noted that the presence of a secured door which requires an electronic key to be "buzzed"

in an out of an area in a police station. In State v. Deal, the defendant raised this same factor arguing he was in custody for Miranda purposes. State v. Deal, 271 Kan. 483, 497-98, 23 P.23 840, 852 (2001) overruled on other grounds, State v. Davis, 283 Kan. 569, 576-77, 158 P.3d 317, 322-23 (2006). Specifically, the defendant contended his statements should have been suppressed due to a Miranda violation because "although he was never in handcuffs, he was placed in a locked room and could not leave without being "buzzed" out." Id.

The Kansas Supreme Court found this argument unpersuasive, when this factor was taken into consideration along with the other circumstantial factors. The Court found that "Deal willingly followed the officers to the Lenexa Police Department; (2) Deal was free to leave at any time and although the detectives never told him that he was free to leave, Deal never asked if he was free to leave; (3) Deal was never handcuffed or placed under arrest; (4) Deal never asked to make any phone calls or asked for anyone else to be present; and (5) Detective Carmack testified that if Deal had asked to leave, he would have allowed him to do so." Deal, 271 Kan. at 498, 23 P.2d at 852-53.

Here, the fact the Defendant was also in an area he would have to be buzzed in and out of, when analyzed in total with the other factors present, does not support the District Court's ruling.

Further, there was nothing akin to actual restraint present here. The fact that the interview took place in a police station with other officer's present does not automatically translate to a custodial situation as the District Court reasoned in its decision.

None of the other officers present at the Sheriff's Office were present in the interview room. Additionally, if the presence of other peripheral officers in a police

station during an investigation was indicative of custodial versus investigative questioning, police would have to Mirandize every person who comes near a police station. The United States Supreme Court has already addressed this issue in Oregon v. Mathiason, 429 U.S. 492 (1977), finding that Miranda's bright line rule does not extend as far as the District Court held here. Mathiason, 429 U.S. at 495 (holding just because questioning takes place at a police station does not convert it into a custodial situation requiring a Miranda warning and that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime").

This reasoning by the District Court is not logical nor does it comport with established United States Supreme Court precedent. See Mathiason, supra. See also Beckwith v. United States, 425 U.S. 341, 345-46 (1976) (held an interview does not automatically become custodial and thus require a Miranda warning prior to questioning "simply because the questioning takes place in the station house").

(6) Was the defendant is being questioned as a suspect or a witness.

There is no dispute here that the Defendant was being questioned as a suspect, as well as being the focus of the investigation. In making its suppression ruling, the District Court questioned the Detective regarding this fact, and took issue with it in making its ruling. (R. Vol. III, 32-33).

However, being a suspect does not make an interrogation custodial. See Beckwith v. United States, 425 U.S. 341, 345-46 (1976) (holding "the failure to give Miranda warnings did not render inadmissible statements made by the defendant to

Internal Revenue Service agents during a noncustodial interview"). In Beckwith, the suspect argued he should have been issued a Miranda warning because he was under investigation by the Internal Revenue Service. Beckwith, 425 U.S. at 346. The Supreme Court declined to extend an automatic Miranda requirement to any person who is considered a suspect or is under investigation and then questioned by police. Id. Specifically, the Court found that extending Miranda requirements that far would "would cut (the) Court's holding in that case completely loose from its own explicitly stated rationale." Id. at 345.

(7) How the defendant got to the place of questioning, that is, whether he came completely on his own in response to a police request or was escorted by police officers.

It is also not in dispute that the Defendant was requested to come to the police station for questioning and not escorted by officers. (R. Vol. III, 6). Specifically, the Defendant was told he did not need to come into the police station immediately. (R. Vol. III, 6). There were no threats of any kind made in securing his attendance. Additionally, the Detective testified clearly at the first suppression hearing that had the Defendant declined the request, he would have continued with his investigation as there were insufficient grounds for the Defendant's arrest at that time. (R. Vol. II, 12).

(8) What happened after the interrogation-whether the defendant left freely, was detained, or was arrested.

It is also not factually in dispute that the Defendant was arrested upon the conclusion of the interview with police. (R. Vol. III, 32).

Conclusion

While no one factor is determinative, taking all factors into account here, the circumstances of the Defendant's interrogation indicate a non-custodial environment and

an objective person in the Defendant's situation would have felt free to terminate the encounter with law enforcement. The Defendant was not questioned by law enforcement while in "legal custody" or at a time when the Defendant was "deprived of [his] freedom of action in any significant way." See Jones, supra.

The Defendant was questioned by law enforcement in a routine manner and during the course of an investigation. See Jones, supra.

The Defendant was asked, not summoned, to attend a law enforcement interview. The interview lasted 39 minutes prior to the Defendant being escorted from the interview room and placed under arrest. The Defendant was questioned by a single officer during what the District Court described as a "very polite, was very courteous, and very professional" interview. The Defendant was not restrained in any way prior to his arrest, nor was there any indication of guards, drawn weapons or other factors equivalent to actual restraint. The Defendant came to the station on his own at the request of an officer. Finally, the Defendant was arrested at the end of the encounter.

All factors taken together show the interview with the Defendant was non-custodial and thus a Miranda warning prior to questioning was not required. While each case is to be determined on a case by case basis, the factors present here do align with similar situations dealt with by the Kansas appellate Courts where an interview has been held non-custodial:

> See State v. Jones, 283 Kan. 186, 151 P.3d 22 (2007) overruled on other grounds, State v. Nelson, 291 Kan. 475, 243 P.3d 343 (2010) (interview found to be non-custodial where, although defendant was under subpoena and was arrested after the interview, defendant came to the interview voluntarily; officers told him defendant he was not in custody and that the interview was voluntary; defendant was not restrained or threatened; and, defendant was initially questioned as a witness).

See State v. James, 276 Kan. 737, 79 P.3d 169 (2003) (interview found to be non-custodial where defendant went to police station voluntarily; defendant was initially questioned as a witness; officer told defendant he was not under arrest; defendant was not restrained; defendant had access to cell phone and pager; and, defendant was arrested at end of interview on outstanding Missouri warrant).

See State v. Deal, 271 Kan. 483, 23 P.3d 840 (2001) (overruled on other grounds, State v. Davis, 283 Kan. 569, 158 P.3d 317 (2006) (interview found to be non-custodial where defendant willingly followed officers to police station; defendant was free to leave at any time even though he was not told this and was in a room he had to be "buzzed" out of; defendant never asked to leave; defendant was never handcuffed or arrested; defendant did not ask to make any phone calls or request the presence of anyone else; and questioning officer testified that had defendant asked to leave he would have been allowed to do so).

See State v. Jacques, 270 Kan. 173, 14 P.3d 409 (2000) (first interview at police station was found to be non-custodial, where defendant was free to go; interview took place in interview room; officers drove defendant to police station; defendant left freely after the interview; interview lasted over 2 hours; and the defendant was not a suspect).

See State v. Heath, 264 Kan. 557, 957 P.2d 449 (1998) (interview found to be non-custodial where defendant went to the police station voluntarily to be interviewed and defendant waited unrestrained in waiting room prior to interview).

See State v. Ninci, 262 Kan. 21, 936 P.2d 1464 (1997) (first hour of interview found to be non-custodial where defendant was not Mirandized for the first hour of his interview; defendant came to police station voluntarily; defendant was left alone in the station lobby for ten (10) minutes before being interviewed; defendant was interviewed in an interview room; two officer's were present, but one left the room often; defendant's driver's license was taken by law enforcement for biographical information; conversation with defendant was cordial; defendant was a suspect, but was told police were trying to clear him and would "cut him loose" at the interview's end; defendant was not restrained in any way; no guards were present outside the interview room door; and the defendant's driver's license was returned to him upon his request).

See State v. Fritschen, 247 Kan. 592, 802 P.2d 558 (1990) (interview found to be non-custodial where defendant voluntarily went to police station to be interviewed; defendant was informed he was not under arrest and was free to leave; only two officers were present; officers did not yell at or threaten defendant; defendant was not handcuffed or restrained; officers started to take defendant home at one point; and the officers told defendant he could consult a lawyer and they would honor such a request).

The District Court erred in its legal conclusions. The circumstances surrounding Det. Vernon's interview with the Defendant was non-custodial. The State established by the facts and circumstances during the evidentiary hearing that a Miranda warning was not required before the Defendant was questioned. The facts relied on by the District Court in its ruling are not supported by substantial competent evidence lacked substantial evidence. The suppression of the Defendant's statements should be reversed.

II. The Defendant's statements were not involuntarily made.

In addition to finding that the Defendant's confession to law enforcement should be suppressed for want of a Miranda warning, the District Court held the Defendant's statements were involuntarily made because he was not advised he had a right to not make a statement. (R. Vol. III, 36-37). The District Court specifically found that (1) no evidence of coercion on the part of law enforcement, (2) but that the statement was not given freely. (R. Vol. III, 33-35).

A pre-trial statement by a defendant is held involuntary "if elicited either through coercion or derived from a custodial interrogation without the benefit of Miranda warnings and a knowing and intelligent waiver of the privilege against self-incrimination." State v. Mooney, 10 Kan.App.2d 477, 480, 702 P.2d 328, 330 (1985).

However, as recited earlier, the Defendant was not in custody for Miranda purposes and the warning was not necessary here. Therefore, absent some finding of coercion, the State carried its burden in showing the Defendant's statements were freely and voluntarily made. State v. Sharp, 289 Kan. 72, 80, 210 P.3d 590, 597 (2009) (holding "coercive police activity is a *necessary predicate* to the finding that confession

is not voluntary") (quoting Colorado v. Connelly, 479 U.S. 157, 167 (1986) (Brennan, J. dissenting) (emphasis added).

Standards of Appellate Review

Kansas Appellate Courts use a bifurcated standard when reviewing a district court's ruling on a motion to suppress. See State v. Garcia, 297 Kan. 182, 187, 301 P.3d 658, 662 (2013). The Supreme Court in previous cases has stated "a motion to suppress evidence usually presents a mixed question of fact and law, prompting the use of a dual standard of review. The facts underlying the district court's decision on a suppression motion are reviewed under a *substantial competent evidence standard*, but the ultimate legal conclusion to be drawn from those facts is reviewed *de novo*." Id. (citing State v. Summers, 293 Kan. 819, 825, 272 P.3d 1, 7 (2012)) (emphasis added).

The substantial competent evidence standard "refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion." State v. Schultz, 289 Kan. 334, 340, 212 P.3d 150, 154 (2009).

When the facts of a case are not in dispute, the appellate court exercises unlimited de novo review of the District Court's legal conclusion. State v. Edgar, 296 Kan. 513, 519-20, 294 P.3d 251, 256-57 (2013).

The determination of whether a confession is involuntary is a legal conclusion over which an appellate court exercises de novo review. State v. Sharp, 289 Kan. 72, 80, 210 P.3d 590 (2009).

Jurisdiction

As stated previously, The Kansas Court of Appeals retains jurisdiction to hear the State's appeal pursuant to K.S.A. § 22-3603, which permits the State to appeal the

suppression of a confession by the District Court. Furthermore, the District Court's order suppressing of the Defendant's confession to law enforcement substantially impairs the State's ability to prosecute this case.

The Kansas Supreme Court has held Kansas appellate courts should not take jurisdiction of the prosecution's interlocutory appeal from every run-of-the-mill pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved." State v. Newman, 235 Kan. 29, 35, 680 P.2d 257, 262 (1984). An interlocutory appeal is only permitted when the exclusion of evidence by District Court order places the State in a position where the ability to prosecute the case is "substantially impaired." Id.

The State is required to make a showing to the appellate court that the order suppressing evidence in the case has substantially impaired the continued prosecution of case. Newman, 235 Kan. at 35, 680 P.2d at 262.

The Kansas Supreme Court has more recently found that "in order to determine whether a trial court order substantially impairs the State's ability to prosecute a case, the evidence available to the State must be assessed to determine just how important the disputed evidence is to the State's ability to make out a prima facie case." State v. Sales, 290 Kan. 130, 140, 224 P.3d 546, 552 (2010).

Here, the evidence against the Defendant is the statement made by M.P.B. and the Defendant's confession. (R. Vol. I, 12-14, 16). There is no physical evidence of sexual assault or any eyewitnesses to the alleged crimes. Further, there are no corroborating witnesses to the alleged crimes. The only two persons with knowledge of the offenses are the Defendant and a young child.

In addition to the jurisdictional arguments made previously in this brief, the District Court further substantially impaired the State's case by making a finding that the Defendant's statements to law enforcement were not made freely. This has the effect of rendering the Defendant's statements completely useless, even if the Defendant were to take the stand and testify inconsistently.

From the State's research, the only exception for using illegally obtained statements is in rebuttal for impeaching a defendant's inconsistent testimony. Harris v. New York, 401 U.S. 222, 223-24 (1971). However, this case appears only to address statements obtained in violation of Miranda; not statements found not to have been freely made. The United States Supreme Court has found that while the Harris decision allows for the State's use of statements made in violation of Miranda for impeachment, the use of any statement obtained as a result of police coercion is strictly prohibited. New Jersey v. Portash, 440 U.S. 450, 459 (1977). See also Kansas v. Ventris, 556 U.S. 586, 592-93 (2009) (Stevens J., dissenting).

As stated previously, the exclusion of the Defendant's statements poses a significant impairment to the State's making of a prima facie case, and as such, this Court retains jurisdiction to hear the State's interlocutory appeal.

Authorities

A statement is deemed involuntary if it is "[n]ot the product of an essentially free and unconstrained choice by [its] maker." Culombe v. Connecticut, 367 U.S. 568, 602 (1961). See also State v. Walker, 283 Kan. 587, 596, 153 P3d 1257, 1266 (2007). Some Federal appellate courts have described the inquiry into a statements voluntary or involuntary nature as "whether the authorities overbore the defendant's will and critically

impaired his or her capacity of self-determination." State v. Sharp, 289 Kan. 72, 81, 210 P.3d 590, 597 (2009) (citing United States v. Lopez, 437 F.3d 1059, 1064-65 (10th Cir. 2006); United States v. LeBrun, 363 F.3d 715, 725 (8th Cir. 2004)).

A statement may be deemed involuntary only if there is evidence of "coercive police activity." State v. Sharp, 289 Kan. 72, 80, 210 P.3d 590, 597 (2009) (holding "coercive police activity is a *necessary predicate* to the finding that confession is not voluntary") (quoting Colorado v. Connelly, 479 U.S. 157, 167 (1986) (Brennan, J., dissenting) (emphasis added). See also Sharp, supra (recognizing the "United States Supreme Court has used a 'coerced confession' interchangeable with an 'involuntary' one") (citing Arizona v. Fulminante, 499 U.S. 279, 288 (1991)).

In determining whether a statement was coerced, Kansas appellate courts require the prosecution to prove by a preponderance of the evidence that the confession was not coerced based upon the *totality of the circumstances*. State v. Walker, 283 Kan. 587, 596-97, 153 P3d 1257, 1266-67 (2007) (emphasis added).

A statement may be found "involuntary" due to psychological as well as physical coercion. Rogers v. Richmond, 365 U.S. 534, 540 (1961). Promises as well as threats can be deemed coercive. State v. Sharp, 289 Kan. 72, 81, 210 P.3d 590m 597-98 (2009). Further, even a showing that a defendant "received and understood his Miranda rights" is insufficient to support a voluntariness finding. State v. Prince, 227 Kan. 137, 143, 605 P.2d 563, 569 (1980).

To assist in making a determination into if the statement was coerced; the Kansas Supreme Court has promulgated the following list of non-exclusive factors to be considered:

(1) The accused's mental condition;
(2) The manner and duration of the interrogation;
(3) The ability of the accused to communicate on request with the outside world;
(4) The accused's age, intellect, and background;
(5) The fairness of the officers in conducting the interrogation; and
(6) The accused's fluency with the English language.

State v. Lane, 262 Kan. 373, 385, 940 P.2d 422, 431 (1997).

The aforementioned factors "are not to be weighed against one another on a balance scale, with those favorable to a free and voluntary confession offsetting those tending to the contrary. Instead, the situation surrounding the giving of a confession may dissipate the import of an individual factor that might otherwise have a coercive effect." State v. Sharp, 289 Kan. 72, 81, 210 P.3d 590m 597 (2009) (citing Brady v. United States, 397 U.S. 742, 754 (1970)).

Even after a District Court takes into account each of the voluntariness factors, "a single factor or a combination of factors considered together may inevitably lead to a conclusion that under the totality of circumstances a suspects will was overborne and the confession was not therefore a free and voluntary act." Sharp, 289 Kan. at 81, 210 P.3d at 597 (citing Green v. Scully, 850 F.2d 894, 902 (2nd Cir. 1988)).

If a defendant's statement is found to not have been made freely, the statement cannot be used for *any purpose* by the prosecution at trial. New Jersey v. Portash, 440 U.S. 450, 459 (1977) (emphasis added). See also Mincey v. Arizona, 437 U.S. 385, 398 (1978).

However, if a statement is excluded for a Miranda violation, the statements may still be used by the State for impeachment purposes. See Harris v. New York, 401 U.S. 222, 223-24 (1971). In Harris, the United States Supreme Court found that statements

excluded on the basis of a Miranda violation are admissible to impeach a defendant's testimony even though those same statements are not admissible in the State's case in chief. Harris, 401 U.S. at 224-26.

Specifically, the Supreme Court stated "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from risk of confrontation with prior inconsistent utterances." Harris, 401 U.S. at 223-24. The Kansas Supreme Court recognized the ruling in Harris in State v. Osbey, 213 Kan. 564, 573-74, 517 P.2d 141 (1973), overruled on other grounds, State v. Banks, 260 Kan. 918, 928, 927 P.2d 456, 462-63 (1996).

Argument

The District Court erred in making a finding that the Defendant's statements to law enforcement were not freely made as the Defendant was not in custody at the time the statement was made *and* District Court also held there was no evidence of coercion on the part of police.

As stated previously, "coercive police activity is a *necessary predicate* to the finding that confession is not voluntary." State v. Sharp, 289 Kan. 72, 80-81, 210 P.3d 590, 597 (2009) (quoting Colorado v. Connelly, 479 U.S. 157, 167 (1986) (Brennan J., dissenting) (emphasis added).

Analyzing the totality of the circumstances using the factors test enunciated in State v. Lane, 262 Kan. 373, 385, 940 P.2d 422, 431 (1997), there is no factual evidence that the Defendant was coerced into making a statement.

(1) The Defendant's mental condition.

From Det. Vernon's testimony and the video recording of the interview, the Defendant's mental condition was clear and cohesive. (R. Vol. III, 13-14; R. Vol. IV). The Defendant was able to understand and answer all of Det. Vernon's questions relatively quickly and with similar clarity. (R. Vol. III, 13-14; R. Vol. IV).

The Defendant spoke of no mental illness or instability during the time Det. Vernon gathered his biographical information. (R. Vol. III, 13-14; R. Vol. IV). Det. Vernon testified that he learned the Defendant was a high school graduate and gave no indication that he did not understand Det. Vernon's questions. (R. Vol. III, 13-14; R. Vol. IV).

Finally, the Defendant advised he was not under the influence of any alcohol at the time the interview took place. (R. Vol. III, 13-14; R. Vol. IV).

(2) The manner and duration of the interrogation.

The Defendant was interviewed at an interview room in the Jefferson County Sheriff's Office. (R. Vol. III, 7). The interview lasted approximately 39 minutes before the Defendant was escorted from the interview room and placed under arrest. (R. Vol. IV).

As the District Court stated, the interview was "very polite, was very courteous, and very professional." (R. Vol. III, 31). Det. Vernon did not use any coercive tactics; derogatory language; or other disapproved of police tactics.

Det. Vernon is dressed in plain-clothes during the interview, and was the only officer present for any questioning. (R. Vol. III, 31; R. Vol. IV).

(3) The ability of the Defendant to communicate on request with the outside world.

Det. Vernon testified the Defendant retained his keys; wallet; and cellular telephone for the duration of the interview. (R. Vol. III, 7). While the Defendant never requested to contact any specific person, the Defendant was very clearly able to communicate with the outside world without any barriers presented by law enforcement. (R. Vol. III, 14).

(4) The Defendant's age, intellect, and background.

The Defendant advised Det. Vernon during the interview that he was a high school graduate and former employee of Westar Energy. (R. Vol. I, 15; R. Vol. III, 13-14 R. Vol. IV). Specifically, the Defendant advised Det. Vernon that he was a former generation manager for Westar Energy. (R. Vol. I, 15; R. Vol. IV). The Defendant also advised Det. Vernon he is well versed in the use of computers. (R. Vol. I, 15; R. Vol. IV).

(5) The fairness of the officers in conducting the interrogation.

The Defendant took significant issue, as did the Court to a lesser degree, with the fact the Defendant asked Det. Vernon if he needed counsel with him at the interview. The Defendant went so far as to accuse Det. Vernon of being dishonest in that regard. (R. Vol. III, 11, 17, 30, 32).

However, Det. Vernon testified that when asked this question, he advised the Defendant that he could not give the Defendant advice on that subject and that the decision to bring counsel with him was solely the Defendant's to make. (R. Vol. III, 17). Armed with that information, the Defendant chose to travel to the Sheriff's Office at a time of his own choosing without counsel. (R. Vol. III, 6). Det. Vernon never assured

the Defendant he did not need counsel or discourage him from bringing one with him to the interview.

There is not a shred of evidence contained anywhere in the record which indicates Det. Vernon used coercive tactics or methods. There is also no evidence that the Defendant's free will was overborne by police or his capacity for self-determination critically impaired. The Defendant had the wherewithal to ask Det. Vernon for legal advice, which Det. Vernon rightly declined to give. Armed with the knowledge that taking an attorney to speak with Det. Vernon was his choice, the Defendant chose to travel to the Sheriff's Office unaccompanied to meet with police.

The Defendant also took issue with the fact Det. Vernon would not discuss the details of his investigation with the Defendant over the phone. (R. Vol. II, 8-10). However, there is no requirement that law enforcement inform a suspect or subject of an investigation of the specifics of why they wish to speak with them.

In State v. Deal, 271 Kan. 483, 23 P.3d 840 (2001) overruled on other grounds, State v. Davis, 283 Kan. 569, 158 P.3d 317 (2006), police wished to speak with the defendant about the disappearance of Aubry Phalp. Deal, 271 Kan. at 495, 23 P.3d at 850-51. The defendant was requested to come to the police station and discuss Ms. Phalp's disappearance. Id. Police chose not to inform the defendant that Ms. Phalp's had been found dead the day before. Deal, 271 Kan. at 498, 23 P.3d at 852.

The Court did not address any issues with the fact that police did not disclose every detail of their investigation to the defendant prior his being asked to the police station for questioning and the defendant's statements were found to have been freely made. Deal, 271 Kan. at 498-99, 23 P.3d at 852-53.

Here, the Detective did not use any dishonest or misleading tactics. Det. Vernon testified he believed the information regarding the case to be sensitive in nature, as well as discussed a desire to view the Defendant's reaction to his questions in person. (R. Vol. II, 8-9). There was no trickery or deceit employed and both of the Detective's lines of reasoning are sound. The information the Detective wished to speak with the Defendant about involved accusations of sexual assault against a minor. Further, a desire by an experienced police Detective to gauge reaction and information directly is a long-established procedure employed by police and is neither deceitful nor misleading.

The invitation to the interview by Det. Vernon, as well as the interview itself, was fairly conducted with no evidence of any coercive tactics by police.

(6) The Defendant's fluency with the English language.

It is quite clear from the recording of the Defendant's interview that the Defendant is very fluent in the English language. (R. Vol. IV). There is no indication in the video or to Det. Vernon that the Defendant had any difficulty understanding the questions posed to him. (R. Vol. IV).

Conclusion

The District Court held the Defendant's statements were not the product of free will. However, the District Court simultaneously held there was a complete lack of police coercion. The District Court erred in its ruling. There is no evidence the Defendant was coerced into speaking with Det. Vernon. As a matter of fact, all evidence presented at both suppression hearings points to the contrary.

The Defendant was asked, not ordered, to speak with Det. Vernon in reference to an investigation. The Defendant came to the police station of his own free will; retained

all of his personal items including a cellular telephone; and proceeded to have a cordial and cooperative encounter with law enforcement. There is no evidence of excessive interrogation; derogatory language; abusive behavior; or any other coercive tactic employed by law enforcement.

The District Court's ruling that the Defendant's statement was not the product of free will is not supported by substantial competent evidence. The Defendant was not coerced into giving a statement and the District Court's ruling to contrary should be reversed.

Further, even if this Court finds that a Miranda violation occurred, the Defendant's statement should still be admissible for impeachment purposes as there is absolutely no evidence of police coercion present. See Kansas v. Ventris, 556 U.S. 586, 592-93 (2009) (Stevens J., dissenting). The District Court's ruling that the Defendant's statements were not freely given was a decision not supported by the evidence presented, but also an unnecessary restriction on the evidence in question.

CONCLUSION

The District Court erred in its legal conclusions regarding the requirement that the Defendant be issued a Miranda warning prior to any questioning. The Defendant was not in custody as his freedom of movement was not restricted by law enforcement in any significant way.

Further, the District Court erred in making an additional finding that the Defendant's statements were not made freely. There was no evidence of coercive tactics by police. The recording of the interview clearly shows the Defendant's free and independent will was not overborne by the actions of law enforcement.

The District Court's rulings were in error and should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael R. Serra, hereby certify that all parties required to be served have been served on this 10th day of November, 2014, by my placing of two (2) copies of the above and foregoing "Brief for the Appellant" into the United States Mail; First Class; postage prepaid; and addressed to:

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I further certify that the original and sixteen (16) copies of the foregoing "Brief for the Appellant" were simultaneously hand-filed with:

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