[Cite as *In re N.J.M.*, 2010-Ohio-5526.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

IN THE MATTER OF:	:	
N.J.M.	:	CASE NO. CA2010-03-026
	:	O P I N I O N 11/15/2010
	:	
	:	
	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 09-N22608

John C. Kaspar, 130 East Mulberry Street, Lebanon, Ohio 45036, for appellant

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive,
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HENDRICKSON, J.

{¶1} Appellant, N.J.M., appeals his adjudication as a delinquent by the Warren County Court of Common Pleas, Juvenile Division. For the reasons set forth below, we affirm the juvenile court's decision.

{¶2} On March 23, 2009, Detective Christopher D. Brock of the city of Lebanon Police Department filed a delinquency complaint with the juvenile court alleging appellant had committed an act which would be rape, a violation of R.C. 2907.02(A)(1)(b), if committed by an adult. Pursuant to Juv.R. 32(A)(4), the juvenile court ordered a competency evaluation. On May 22, 2009, upon reviewing the report of the court-appointed psychologist, the juvenile court found appellant was "not competent to stand trial at this time." The juvenile court ordered appellant to "engage in counseling and treatment * * * toward restoration to competency," and scheduled review of appellant's competency within 100 days.[1]

{¶3} Prior to his adjudication hearing, appellant also moved to suppress a statement he made to Brock during the investigation. The juvenile court denied appellant's motion, finding appellant was not entitled to warnings and the statement was voluntary.

{¶4} The juvenile court held an adjudication hearing, and heard testimony from the victim, the victim's pediatrician and mother, Brock, another police officer, a Warren County Children's Services representative and appellant. Relying primarily on the victim's testimony and appellant's statement to Brock, the juvenile court adjudicated appellant delinquent. Appellant filed an appeal raising two assignments of error.

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1. **{¶a}** Although the record below is devoid of an entry finding that appellant was restored to competency, we note that this issue was not raised by appellant on appeal. The record appears to indicate, however, that appellant was in fact restored to competency at some point in the proceedings. (See appellant's September 4, 2009 "Memorandum in Support of Second Competency Evaluation;" the state's September 10, 2009 "Memorandum in Opposition to Request for Second Evaluation;" and the juvenile court's December 3, 2009 entry on an unrelated matter which relayed: "[in] support of these claims Defendant argues that he has an IQ of 67 and was initially found not competent to stand trial prior to being restored to competency[.]").

{¶b} Even though appellant noted in his memorandum that a second competency hearing was held on August 19, 2009, we are unable to determine whether the juvenile court set forth its competency findings on the record at the hearing, as we were not provided with a copy of the transcript of the proceeding for review. In view of the fact that appellant failed to challenge the absence of an official entry restoring him to competency on appeal, and because it appears that the issue was addressed by the juvenile court to the satisfaction of the parties, we elect not to sua sponte consider the issue at this time.

{¶5} Assignment of Error No. 1:

{¶6} "THE JUVENILE COURT ERRED IN FAILING TO SUPPRESS APPELLANT'S INCULPATORY STATEMENTS."

{¶7} In his first assignment of error, appellant contends the juvenile court should have granted his motion to suppress. Appellant argues initially that his statement to the police should have been suppressed because he was never advised of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602. In addition, appellant maintains his statement should have been suppressed because it was not made voluntarily.

{¶8} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." Id. "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." Id. "Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." Id.

{¶9} "Police[officers] are not required to administer *Miranda* warnings to everyone whom they question." *State v. Biros*, 78 Ohio St.3d 426, 440, 1997-Ohio-204, citing *Oregon v. Mathiason* (1977), 429 U.S. 492, 495, 97 S.Ct. 711. "It is well-established that the duty to advise a suspect of constitutional rights pursuant to *Miranda* * * * arises only when questioning by law enforcement officers rises to the level of a custodial interrogation." *In re J.B.*, Butler App. No. CA2004-09-226, 2005-Ohio-7029, ¶53, citing *State v. Gumm,* 73 Ohio St.3d 413, 429, 1995-Ohio-24. Custodial

interrogation, as defined by *Miranda*, is any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* at 444.

{¶10} "In order to determine whether a person is in custody for purposes of receiving *Miranda* warnings, courts must first inquire into the circumstances surrounding the questioning and, second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave." *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶27, citing *Thompson v. Keohane* (1995), 516 U.S. 99, 112, 116 S.Ct. 457. "Once the factual circumstances surrounding the interrogation are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry' of whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" (Some internal quotations omitted.) *Hoffner* at ¶27, quoting *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517. However, "[w]here a suspect has not been formally arrested, 'the restraint on the suspect's freedom of movement must be significant in order to constitute custody.'" *In re J.B.* at ¶53, quoting *State v. Coleman,* Butler App. No. CA2001-10-241, 2002-Ohio-2068, ¶23.

{¶11} The juvenile court denied appellant's motion to suppress, in part, because the court found that Brock had no duty to advise appellant of his *Miranda* rights. Observing that the duty to provide *Miranda* warnings only arises where a person is in custody, the juvenile court determined that appellant's interview at the police station was noncustodial.

{¶12} Appellant argues that the juvenile court was incorrect in denying his motion to suppress, because he was subject to a custodial interrogation by a police officer who failed to advise him of his rights under *Miranda*. Although appellant acknowledges that

he was not under formal arrest when questioned, appellant maintains that his freedom was nevertheless restrained which prevented him from leaving. Appellant argues, among other things, that the following circumstances evidence the custodial nature of the interview: (1) Brock wore a weapon during the interview; (2) the interview room was small, which placed appellant in close proximity to Brock; (3) the door to the interview room was closed, and Brock never advised appellant whether it was unlocked; and (4) Brock's statements regarding jail and appellant's lack of truthfulness were counter to any assurances made to appellant that he would be leaving with his grandmother after the interview.

{¶13} After careful review of the record, we find that appellant was not in custody, for the purposes of *Miranda*, when he gave his statement to Brock. It is clear from the following facts, when viewed objectively, that the questioning did not take place in an environment which restricted appellant's freedom to depart. See *Mathiason*, 429 U.S. at 495.

{¶14} First, appellant voluntarily came to the police station for the interview and was advised that he would be returning home with his grandmother that day. See id. In fact, Brock even stated three times during the interview that he was not going to "lock" up appellant. See Id. In addition, before the interview began, Brock informed appellant's grandmother that the interview would not be long, and that appellant was not under arrest or going to jail. See *Yarborough v. Alvarado* (2004), 541 U.S. 652, 664, 124 S.Ct. 2140.

{¶15} Second, while Brock admitted that he wore his weapon during the interview, there is no evidence that he brandished or displayed it during the meeting with appellant. See *United States v. Werts* (C.A.6, 1991), 931 F.2d 57 (Table), 1991 WL 63627, at *4. Moreover, Brock wore plain clothes, rather than a uniform, during the

interview. See Id. (noting that wearing plain clothes supports an inference that a weapon was not in view).

{¶16} Finally, the fact that the room in which Brock conducted the interview was relatively small does not in itself mean appellant was in custody. See, generally, *Yarborough* at 652, 656. Similarly, the fact that the door to the interview room was closed also does not mean the interview was custodial. See, generally, *Oregon* at 493, 495.

{¶17} Therefore, since appellant was not in custody during the interview, there was no duty to advise appellant of his *Miranda* rights. Because the warnings were unnecessary, the juvenile court did not err in denying appellant's motion to suppress based on a *Miranda* violation.

{¶18} Separate from the issue of compliance with *Miranda* in custodial interrogations is the voluntariness of the pretrial statement. *State v. Chase* (1978), 55 Ohio St.2d 237, 246. Even where *Miranda* warnings are not required, "a confession may [still] be involuntary [and excludable] if on the totality of the circumstances, the defendant's will was overcome by the circumstances surrounding the giving of the confession." *State v. Fille*, Clermont App. No. CA2001-08-066, 2002-Ohio-3879, ¶15, citing *Dickerson v. United States* (2000), 530 U.S. 428, 120 S.Ct. 2326. See, also, *State v. Porter,* 178 Ohio App.3d 304, 2008-Ohio-4627, ¶14.

{¶19} In deciding whether a juvenile's pretrial statement is involuntarily induced, a court must look at the totality of circumstances, which include, "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." (Internal quotations and citations omitted.) *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶112. See, also, *In re Watson* (1989), 47 Ohio St.3d

86 at paragraph one of the syllabus. Also, juvenile courts must be aware that "special caution" should be given to a review of a juvenile's pretrial statement, admission or confession. *In re Gault* (1967), 387 U.S. 1, 45, 87 S.Ct. 1428. See, also, *State v. Davis* (1978), 56 Ohio St.2d 51, 54 (finding that "scrupulous attention" must be given regarding the issue of voluntariness in the case of a minor). Cf. *In re Goins* (1999), 137 Ohio App. 3d 158, 162 (noting waivers in the juvenile context requires "close scrutiny" since their validity is affected by age, emotional stability and mental capacity).

{¶20} Although arguably subsumed within the totality of circumstances analysis, a prerequisite to a finding of involuntariness is the presence of coercive police activity. See *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶71, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515. Coercive law enforcement tactics may include, but are not limited to, physical abuse, threats, deprivation of food, medical treatment or sleep, use of certain psychological techniques, exertion of improper influences or direct or implied promises, and deceit. See *State v. Getsy*, 84 Ohio St.3d 180, 189, 1998-Ohio-533; *Ledbetter v. Edwards* (C.A.6, 1994), 35 F.3d 1062, 1067; *Malloy v. Hogan* (1964), 378 U.S. 1, 7, 84 S.Ct. 1489; *State v. Loza*, 71 Ohio St.3d 61, 67-68, 1994-Ohio-409; *State v. Johnston* (1990), 64 Ohio App.3d 238, 246.

{¶21} With these principles in mind, we find based on the totality of circumstances that appellant's statement to Brock was voluntary. As a threshold matter, we conclude that Brock did not use coercive police activity to obtain appellant's statement. There is certainly no evidence that Brock used any coercive law enforcement tactics in order to induce appellant's statement.

{¶22} Appellant argues that during the interview Brock made an implied promise when he told appellant:

{¶23} "If you're honest with me and you say yeah this is what happened and you

tell me everything that happened and honestly, what do you think your chances are of staying out of jail? Quite a bit better, quite a bit better."

{¶24} We agree with the juvenile court that this does not rise to the level of an implied promise of leniency or benefit in order to induce appellant to make an inculpatory statement. See *State v. Sims*, Allen App. No. 1-04-29, 2004-Ohio-5093, ¶8 (finding "[p]romises to help a defendant if he talks are not improper inducement as long as no specific promises are made.") Moreover, "[u]nder the 'totality of circumstances' standard, the presence of promises does not as a matter of law, render a confession involuntary." *State v. Edwards* (1976), 49 Ohio St.2d 31, 41.

{¶25} Next, we find that appellant's interview with Brock was not particularly lengthy, intense or frequent. Appellant's interview with Brock only lasted 35 minutes. In addition, Brock's tone was conversational throughout the interview. Although Brock repeatedly told appellant throughout the interview that he was not being truthful, admonitions to tell the truth are both permissible and non-coercive. *Goins* at 165; *State v. Cooey* (1989), 46 Ohio St.3d 20, 28.

{¶26} Also, even though Brock indicated that he had physical evidence linking appellant to the crime, the items seized for testing by the police later failed to reveal an offense had been committed. The use of deception is certainly a factor bearing on the voluntariness of a pretrial statement. *Cooey* at 27; *Frazier v. Cupp* (1969), 394 U.S. 731, 739, 89 S.Ct. 1420. "However, '[a] defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is.'" *State v. Bays*, 87 Ohio St.3d 15, 23, 1999-Ohio-216, quoting *Ledbetter v. Edwards* (C.A.6, 1994), 35 F.3d 1062, 1070. We do not believe that Brock's representations regarding the existence of physical evidence of a crime constituted a level of deceit which overbore appellant's will.

{¶27} The record shows that appellant was only 13 years old at the time of the interview and that he had no prior criminal experience. In addition, pursuant to a competency evaluation ordered by the juvenile court, appellant was tested and determined to have an IQ of 67 and had delayed cognitive and emotional development. Nevertheless, a low IQ and/or diminished cognitive abilities do not necessarily equate to an involuntary statement, especially where appellant did not have much difficulty understanding Brock's questions, and the statements appellant made were clear and responsive. See *State v. Shaffer*, Trumbull App. No. 2001-T-0036, 2003-Ohio-6701, ¶41. See, also, *Goins* at 163.

{¶28} Lastly, we have also taken into account additional factors such as appellant's emotional stability/instability during the interview, his recent illness, and the fact that his grandparents were absent from the interview room even though they were present at the police station. See *Goins* at 162; *State v. Evans* (2001), 144 Ohio App.3d 539, 561. However, even these additional considerations fail to render appellant's statement involuntary.

{¶29} After a careful review of the facts, and taking into account the totality of circumstances surrounding the interview and appellant's subsequent inculpatory statement, we do not find that appellant's confession was involuntary.

{¶30} Because there was no need to advise appellant of his *Miranda* rights, and because appellant's statement to the police was voluntary, the juvenile court properly denied appellant's motion to suppress. Therefore, appellant's first assignment of error is overruled.

{¶31} Assignment of Error No. 2:

{¶32} "THE JUVENILE COURT'S FINDING OF DELINQUENCY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶33} In his second assignment of error, appellant argues that his delinquency adjudication is against the manifest weight of the evidence.

{¶34} "The standard[ ] of review applied in determining whether a juvenile court's finding of delinquency * * * is against the manifest weight of the evidence [is] the same standard[ ] applied in adult criminal convictions." *In re J.A.S.*, Warren App. No. CA2007-04-046, 2007-Ohio-6746, ¶11, citing *In re P. G.,* Brown App. No. CA2006-05-009, 2007-Ohio-3716, ¶13-14.

{¶35} "Under the manifest weight of the evidence standard, a reviewing court must examine the entire record, weigh all of the evidence and reasonable inferences, consider the credibility of witnesses and determine 'whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380, ¶45, citing *State v. Martin* (1993), 20 Ohio App.3d 172, 175; *State v. Gibbs* (1999), 134 Ohio App.3d 247, 256; *State v. Thompkins,* 78 Ohio St.3d 380, 387. "An appellate court may only reverse a [ ] verdict as against the manifest weight of the evidence where there is a unanimous disagreement with the verdict of the [trier of fact]." *Harry* at ¶45, citing *Gibbs* at 255-56.

{¶36} If committed by an adult, a violation of R.C. 2907.02(A)(1)(b) requires proof that appellant "engage[d] in sexual conduct with another who is not the spouse of the offender * * * when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." In this case, the victim testified that she was less than 13 years old and she had sexual conduct with appellant. Although appellant denied having any sexual conduct with the victim during the

adjudicatory hearing, he admitted to Brock during the interview that sexual intercourse with the victim had occurred.

{¶37} Appellant argues that Brock's use of leading questions to provide details of the incident made the "confession" suspect, as it was Brock who created the "congruence" necessary to corroborate the victim's story. We observe that appellant has failed to cite any authority to support his contention that Brock's methods in obtaining appellant's inculpatory statement rendered the confession unreliable. Even if we were to agree that the use of leading questions affects the reliability of a confession, it would not be applicable in this case as appellant answered several questions independently of Brock's "leading" inquiries. Finally, the reliability of a confession is the province of the trier of fact. See *Crane v. Kentucky* (1986), 476 U.S. 683, 688, 106 S.Ct. 2142. The juvenile court was aware of the circumstances surrounding appellant's confession, as the court had previously denied appellant's motion to suppress. As the trier of fact, it was the juvenile court's responsibility to assess the reliability of appellant's confession and the court found that there were aspects of the confession that were not suggested by Brock. We do not believe the juvenile court lost its way in making this determination.

{¶38} Appellant also maintains that there was no physical evidence of sexual intercourse, because the victim's physical examination was normal and the items seized from appellant's home revealed no evidence of an offense. Physical evidence is not necessarily required to show that sexual conduct occurred. See, generally, *State v. Scarborough* (Nov. 18, 1991), Warren App. No. CA91-01-012, at 5; *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, ¶71. Dr. Lori Vavul-Roediger, a pediatrician with a subspecialty in child abuse pediatrics, testified that she examined the victim on March 24, 2009, approximately one week after the victim disclosed the sexual conduct with

appellant to her mother. Dr. Vavul-Roediger stated that it was possible that any injuries the victim sustained may have healed in the week before she was seen. Although Dr. Vavul-Roediger did not find physical evidence of sexual conduct, she still formulated a diagnosis of "suspected sexual maltreatment." This diagnosis was based on Dr. Vavul-Roediger's education, training and experience, as well as her examination of the victim and the victim's medical history, which included recent behavioral changes. In addition, appellant maintained that the sexual conduct occurred at a friend's home. Therefore, it was unlikely that items seized at appellant's home would have contained any evidence of an offense. We cannot say the lack of physical evidence in this case has created a manifest miscarriage of justice.

{¶39} Lastly, appellant contends that there were serious inconsistencies between the victim's testimony and the statement appellant made to Brock. Nevertheless, determinations regarding witness credibility, conflicting testimony, and the weight to be given to such evidence are primarily for the trier of fact. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Moreover appellant "'is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was offered at trial' as '[t]he trier of fact is free to believe or disbelieve any or all of the testimony presented.'" *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, ¶83, quoting *State v. Favor,* Franklin App. No. 08AP-215, 2008-Ohio-5371, ¶10. Although there were inconsistencies between the two stories, the juvenile court noted that there was "some important congruence" between the testimony and appellant's confession. It is clear that the juvenile court discounted certain portions of the victim's testimony and relied heavily on

appellant's confession to resolve conflicts in the evidence. As we cannot substitute our judgment for that of the trier of fact, we are unable to say the juvenile court clearly lost its way in rendering the delinquency adjudication.

{¶40} Because we cannot find that the juvenile court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered, appellant's second assignment of error is overruled.

{¶41} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.