[Cite as *State v. Rybarczyk*, 2013-Ohio-2943.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-12-009
Appellant	Trial Court No. 2011CR0519
v.	
Jason Rybarczyk	**DECISION AND JUDGMENT**
Appellee	Decided: July 5, 2013

* * * * *

Paul A. Dobson, Prosecuting Attorney, Heather M. Baker and
David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellant.

Thomas Sobecki, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, the state of Ohio, appeals from the judgment of the Wood County Court of Common Pleas, which suppressed incriminating statements made by appellee,

Jason Rybarczyk, during a police interview. The trial court found that appellee's statements were made involuntarily. We affirm.

A. Facts and Procedural Background

{¶ 2} As part of their investigation into the alleged rape of a four-year old child, Detective Justin White and Detective Sergeant Doug Hartman of the Bowling Green Police Department approached appellee and requested to interview him. The interview took place in White's unmarked police car in the parking lot of the apartment building where appellee had been living. Appellee sat in the front passenger seat, while White sat in the driver's seat and Hartman sat in the back behind White. White and Hartman were dressed in street clothes, and although they were armed, their weapons were never visible to appellee. Testimony from the suppression hearing indicated that the car doors were unlocked and the windows were down throughout the interview.

{¶ 3} During the nearly two-hour long interview, which was audio recorded, White persistently sought to obtain a confession from appellee. White stated repeatedly that he knew that something had occurred between appellee and the child, and that appellee's DNA was found on the child, for example stating, "So what I am saying is we know that your DNA is there, and what I am saying is to why?" Notably, White's statements were an artifice; no DNA evidence existed.

{¶ 4} As appellee consistently denied White's allegations, White intensified the interview by conveying that appellee could get probation if he talked, otherwise he was going to jail for a long time. On one occasion, White went so far as to say,

I am talking this is something you can go to prison for for 15 to 20 years, all right? And we have got the two groups of people. We have got the group of people beside – two groups of normal people. We have got the group that is honest and forthright and apologizes for what happened and it was a mistake or it was an accident and it was taken the wrong way. Or we got the group of people that say, No, nothing ever happened. I never did that. And this group of people is the one that, for the most part, end up doing the 15 – 10 to 15 years. I just had one I did where the grandfather, you know, had a situation with a relative, okay, and he lied about it and he is doing 10 to 15 years. And I have plenty of other situations where I am sitting in a car with somebody, they are honest. They are like, yeah, I have been drinking this and that, it shouldn't have happened, it was a mistake, and they end up getting probation services to help themselves. And as long as they don't get in trouble on that probation – it is not a free ride. As long as they don't get in trouble on that probation, they end up to be able to clear up their lives and go on with their lives. Right now you are sitting at a crossroads which one of those you are going to take.

On another occasion, White stated,

I am throwing you a lifeline here, dude. I am throwing you a lifeline possibly on the difference between large amount of years in prison or just

getting on probation or something or having your probation extended. And but the thing is is that second option isn't going to be available if you don't completely come forward.

{¶ 5} Despite White's efforts, appellee continued to consistently deny any inappropriate conduct. However, approximately one hour into the interview, appellee began to believe the officers' ruse that his DNA was found on the child. Appellee still denied that he ever made skin-to-skin contact with the child, but began attempting to justify how his DNA could have gotten there. Appellee recounted a time or two when he was horsing around with the child, and while the child was lying across another person's knee, appellee spanked her on the bottom. Appellee mentioned times where the child was up on his shoulders or straddling his knee. Appellee also recalled a time when he was playing a video game while watching the child and the child climbed onto his lap and was bouncing around. After a few minutes of the child bouncing, appellee noticed that his penis was becoming hard because of the contact, at which point he ordered the child off his lap. Finally, appellee described a time when, as he was waking up, he reached for his glasses, but instead of feeling them, he felt cloth. Appellee stated that because the child was often right in his face when he woke up that it could have been her he was feeling.

{¶ 6} Near the end of the interview, having been told countless times that the officers knew he inappropriately touched the child and that they had sufficient evidence to go to the prosecutor, and having been told that he had a choice between going to prison

if he did not talk or getting probation if he did, appellee confessed that when he spanked the child when she was across his friend's lap, his hand went into the child's underwear and touched her vagina. The interview concluded shortly thereafter.

{¶ 7} Subsequently, the Wood County Grand Jury indicted appellee on one count of rape in violation of R.C. 2907.02(A)(1)(b). Appellee entered an initial plea of not guilty, and moved to suppress the statements he made during the interview. Following a hearing, the trial court granted appellee's motion to suppress, finding that the statements were made involuntarily "due to the total circumstances of being pressured by two detectives in an unmarked police cruiser for over one hour with threats of prison for 15 years or more as opposed to probation that was intimated if he confessed."

B. Assignment of Error

{¶ 8} The state has timely appealed, asserting one assignment of error:

> The trial court improperly suppressed statements made by Rybarczyk, during a non-custodial, non-coercive two hour interview with the Bowling Green Police.

II. Analysis

{¶ 9} The Ohio Supreme Court has set forth the appropriate standard of review of a motion to suppress as follows:

> Appellate review of a motion to suppress presents a mixed question of law and fact. 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. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. 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. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

{¶ 10} Here, the facts of what was said in appellee's interview are not in dispute since the interview was audio recorded and entered into evidence at the suppression hearing. Thus, we turn to the issue of whether, based on those facts, appellee's confession was involuntary. We hold that it was.

{¶ 11} Due process requires that confessions that are involuntarily given by an accused must be excluded. *Dickerson v. U.S.*, 530 U.S. 428, 433, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The reasoning for this is grounded in the recognition that "coerced confessions are inherently untrustworthy." *Id.*, citing *King v. Warickshall*, 1 Leach 262, 263-264, 168 Eng. Rep. 234, 235 (K.B.1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt * * * but a confession forced from the mind by the flattery of hope, or by the torture

of fear, comes in so questionable a shape * * * that no credit ought to be given to it; and therefore it is rejected.") In determining whether a confession was given voluntarily, we examine "'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson* at 434, quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Those circumstances 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." *State v. Campbell*, 90 Ohio St.3d 320, 332, 738 N.E.2d 1178 (2000), quoting *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus.

{¶ 12} Here, the confession was given during a non-custodial interview that took place in an unlocked, unmarked police car between two plain-clothes officers and appellee, an Air Force veteran. During the interview, White made numerous fabrications that he knew appellee touched the child, and that appellee's DNA was found on the child. White also pressured appellee by stating that people who do not talk or admit their wrongdoing end up going to prison for 10-15 years, whereas those who do admit that it was a mistake end up getting probation. Importantly, White's suggestion of probation is a misstatement of the law, since the crime appellee was alleged to have committed – rape of a child – carries a mandatory prison term. R.C. 2907.02(B).

{¶ 13} Under similar circumstances, Ohio appellate courts have held that the confession is inadmissible. For example, in *State v. Arrington*, 14 Ohio App.3d 111, 470

N.E.2d 211 (6th Dist.1984), the questioning officers elicited a confession by promising that some of the charges against the defendant would be dropped while others would never be brought. Further, the officers erroneously represented that the crimes the defendant confessed to could lead to probation, when in fact they carried a mandatory prison sentence. In affirming the trial court's suppression of the incriminating statements, we held,

> Where an accused's decision to speak was motivated by police officers' statements constituting "direct or indirect promises" of leniency or benefit and other representations regarding the possibility of probation which were misstatements of the law, his incriminating statements, not being freely self-determined, were improperly induced, involuntary and inadmissible as a matter of law. *Id.* at paragraph two of the syllabus.

{¶ 14} Likewise, in *State v. Jackson*, 2d Dist. No. 02CA0001, 2002-Ohio-4680, the Second District held that the defendant's confession was involuntary where it was given following the officer's statements that he believed the defendant was lying when he denied the allegations, that he was going to take the results of defendant's voice stress test to the prosecutor, and that if the defendant would confess the officer would try to get probation and counseling, otherwise the defendant would do a "stretch of time." The court noted that the suggestion of probation was a misstatement of the law since the alleged crime, rape of a child, requires a mandatory prison term. In its reasoning, the Second District relied on the distinction recognized in *Arrington* that,

> When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear. *Id.* at ¶ 29, quoting *Arrington,* 14 Ohio App.3d at 115, 470 N.E.2d 211.

Thus, the court held that because the defendant's confession was given based on false suggestions of leniency, it was given involuntarily. *Id.* at ¶ 38-39. *See also State v. Petitjean*, 140 Ohio App.3d 517, 532, 748 N.E.2d 133 (2d Dist.2000) (in homicide investigation, officers' statement that defendant would probably get two years of probation if he worked with them "was a misstatement of the law that so undermined [defendant's] calculus that it critically affected his capacity for self-determination," thereby rendering his confession involuntary); *State v. Smith*, 7th Dist. No. 12 MA 64, 2013-Ohio-342, ¶ 27 (confession involuntary where it was induced by repeated misstatements of the law that a physician having oral sex with a patient is not illegal).

{¶ 15} Here, White and Hartman also made false promises of leniency to appellee. White stated that people who deny that anything happened end up in prison for 10-15 years, whereas people who admit it happened and it was a mistake get probation. Further, White stated, "I am throwing you a lifeline here, dude. I am throwing you a lifeline possibly on the difference between large amount of years in prison or just getting on probation or something or having your probation extended." The state argues that appellee nonetheless did not rely on the officers' statements when he made his confession. We disagree. Several times during the interview, appellee referenced the statements about prison and probation: "You guys are trying to tell me that if I don't remember by the time you guys leave, I'm probably going to prison;" "Not that I can recall. I could – I mean, you guys say if I tell you the truth now my probation is going to be extended, so I am really trying to think. * * * I don't want to be arrested and go to prison;" "I rather just extend my probation so I don't have to talk to my folks." It is clear from the record that the combination of the persistent lies regarding physical evidence linking appellee to the child and the threat of prison versus the hope of probation overcame appellee's free will and improperly coerced his confession. Therefore, we hold that the trial court did not err in suppressing appellee's admissions because they were not made voluntarily.

{¶ 16} Accordingly, the state's assignment of error is not well-taken.

III. Conclusion

{¶ 17} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. The state is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE