COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP601-CR **Cir. Ct. No. 2011CF541**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY R. OLIGNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Cory Oligney argues incriminating statements he made to police officers during an in-school interview should be suppressed

because he was not given ***Miranda*** warnings[1] and the statements were involuntary. We reject these arguments and affirm because he was not in custody and his statements were not compelled.

BACKGROUND

¶2 Oligney, then sixteen, was charged, and ultimately convicted, with sexual assault and waived into adult court. The complaint alleged Oligney had forcible sexual intercourse with the victim in Oligney's basement and later sent text messages to the victim apologizing. The complaint also stated that police officers interviewed Oligney at Southwest High School in Green Bay about one month after the crime. During that interview, Oligney admitted, both orally and in writing, to the sexual assault and to sending the incriminating text messages.

¶3 Oligney requested a ***Miranda-Goodchild*** hearing.[2] A ***Miranda-Goodchild*** hearing is "designed to examine (1) whether an accused in custody received ***Miranda*** warnings, understood them, and thereafter waived the right to remain silent and the right to the presence of an attorney; and (2) whether the admissions to police were the voluntary product of rational intellect and free, unconstrained will." ***State v. Jiles***, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798. Both interviewing officers testified, as did Oligney.

¶4 Detective James Drootsan testified he was dispatched to Southwest High School to interview Oligney following the victim's reporting of a sexual assault. He was not in uniform, but wore a firearm. He was met at the school by

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] *See* ***State ex rel Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

resource officer Rodney DuBois, who testified that he went to the attendance office and asked to speak with Oligney. The attendance office called Oligney out of class. DuBois, who was dressed in plain clothes and armed, intercepted Oligney in the hallway.

¶5 DuBois brought Oligney to the school resource office, a small room with two desks and two doors, one into the main hallway and another into a staff office. It was designed so that students could come in on their own and visit. Oligney was seated next to the hallway door, and the officers occupied the two desks. Both doors were closed, but neither was locked from the inside.

¶6 When Oligney entered the resource office, Drootsan introduced himself and said Oligney was not required to be there, was not under arrest, and was free to leave at any time. Toward the end of the approximately two-hour interview, Oligney was again advised that he was free to go at any time. The interview was recorded. Oligney was not given ***Miranda*** warnings. His parents were not advised of the interview. DuBois opined that Oligney did not appear intimidated during the interview.

¶7 Neither officer made any promises or threats to Oligney. At one point, Drootsan reassured Oligney he would not lie to him, and stated he expected Oligney to be truthful as well. However, Drootsan later told Oligney he had the incriminating text messages, when in fact he had not yet seen them.

¶8 Oligney testified that he was called out of class late in the day. DuBois met him in the hallway halfway between the attendance office and the resource office and escorted him to the interview room. He acknowledged that he was told he could leave at any time, but stated he did not feel free to leave. The interview lasted past the end of the school day. Oligney stated he did not leave

when the final bell rang out of respect for the officers and "the fear of being arrested if I left." However, Oligney acknowledged that no one ever told him he was going to be arrested. Oligney left freely at the end of the interview.

¶9 The circuit court concluded Oligney's statements were admissible because he was not in custody and his statements were voluntary. It emphasized that Oligney was informed he was free to leave twice. There was nothing indicating that Oligney was forced to give a statement, or that he was "troubled, confused, or interested in leaving the interview."

DISCUSSION

¶10 Oligney argues his incriminating statements must be suppressed for two reasons. First, he claims he was not given ***Miranda*** warnings before incriminating himself. Second, he claims his statements were involuntary.

¶11 Both Oligney's claims are subject to the same standard of review. We defer to the circuit court's findings of historical facts unless they are clearly erroneous. ***State v. Jerrell C.J.***, 2005 WI 105, ¶16, 283 Wis. 2d 145, 699 N.W.2d 110; ***State v. Armstrong***, 223 Wis. 2d 331, 352, 588 N.W.2d 606, *opinion modified on denial of reconsideration*, 225 Wis. 2d 121, 591 N.W.2d 604 (1999). The application of constitutional principles to those facts presents a question of law subject to independent appellate review. ***Jerrell***, 283 Wis. 2d 145, ¶16; ***Armstrong***, 223 Wis. 2d at 353.

I. ***Miranda*** warnings

¶12 Under ***Miranda***, law enforcement must employ certain "procedural safeguards" to protect a defendant's constitutional privilege against self-incrimination. ***Armstrong***, 223 Wis. 2d at 351. "Law enforcement officers must

administer ***Miranda*** warnings at the first moment an individual is subjected to 'custodial interrogation.'" ***Id.*** at 351-52 (citing ***Miranda***, 384 U.S. at 444, 477). Statements made during custodial interrogation and before the administration of ***Miranda*** warnings are inadmissible. ***Armstrong***, 223 Wis. 2d at 336-37. "The State must establish by a preponderance of the evidence whether a custodial interrogation took place." ***Id.*** at 345.

¶13 Generally, "a person is 'in custody' for purposes of ***Miranda*** when he or she is 'deprived of … freedom of action in any significant way.'" ***Armstrong***, 223 Wis. 2d at 353 (quoting ***Miranda***, 384 U.S. at 477 (ellipses added)). The test is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint. ***State v. Pounds***, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). However, this determination depends on the objective circumstances, not on the subjective views of the interrogating officers or the person being questioned. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998); *see also* ***State v. Lonkoski***, 2013 WI 30, ¶¶34-35, 346 Wis. 2d 523, 828 N.W.2d 552, *cert. denied*, 2013 WL 3479527 (U.S. Oct. 7, 2013). In sum, a person is "in custody" if, under the totality of the circumstances, a reasonable person would not feel free to terminate the interview and leave the scene. ***Lonkoski***, 346 Wis. 2d 523, ¶6.

¶14 Here, virtually all the relevant circumstances militate against a determination that Oligney was in custody. Perhaps the most important factor is the "defendant's freedom to leave." ***Id.***, ¶28. Oligney was informed on two occasions that he did not need to be at the interview, was not under arrest, and was free to go whenever he wanted. The doors were kept unlocked and there is nothing to suggest Oligney would have been prevented from declining to answer

any more questions and leaving. When the officers concluded the interview, Oligney walked out of the room.

¶15 Other factors, such as the location and length of the interrogation and degree of restraint used by law enforcement, were such that a reasonable person would have believed he or she was free to terminate the interview and leave. *See* ***id.*** Officers did not overtly display their authority and draw Oligney out of class; rather, the attendance office requested Oligney, and he left class by himself. The interview was held in a relatively neutral location, a school resource office. *See* ***id.*** (An interview that takes place in a law enforcement facility, such as a sheriff's department, police station, or jail, may weigh toward the encounter being custodial.). The interview lasted two hours and partially occurred during the school day. Oligney was seated next to a door, which was unlocked. The officers were not in uniform and did not draw or show Oligney their weapons, nor did they perform a frisk, handcuff Oligney, or otherwise restrain him. *See* ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

¶16 Oligney makes much of the fact that there were two officers questioning him, and his belief, articulated at the suppression hearing, that he was at risk of being arrested. However, the mere presence of two officers is insufficient to establish a custodial situation. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶32. Similarly, a suspect's belief that he or she is the main focus of an investigation is not determinative of custody. ***Id.***, ¶34. The custody inquiry is an objective test; Oligney's subjective fear of arrest is therefore irrelevant.

¶17 Oligney also emphasizes that he was still a minor at the time of the interview. "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." ***J.D.B. v.***

North Carolina, 131 S. Ct. 2394, 2403 (2011). However, a child's age is not determinative, and may not even be a significant factor. ***Id.*** Oligney was sixteen at the time of the encounter and nearly subject to adult criminal court original jurisdiction. He was eventually waived into adult court. A reasonable person of Oligney's age would not ordinarily have felt obligated to participate against his or her wishes; teenagers are often recalcitrant. We see nothing about Oligney's age that would yield an objective conclusion that Oligney was in custody.

II. Voluntariness

¶18 The admission of involuntary statements violates a defendant's due process rights under the state and federal constitutions. ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. Statements are voluntary if they are "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***Id.*** Thus, it is necessary to balance the personal characteristics of the defendant against the pressures imposed by law enforcement officers. ***Id.***, ¶37. "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***Id.***

¶19 We have already discussed many of Oligney's relevant characteistics, and so here we focus on two police practices that Oligney asserts rendered his admissions involuntary. First, Oligney emphasizes that police did not notify his parents, nor did they inform Oligney that he could contact them. Second, he contends his incriminating statements were compelled because police exaggerated the evidence they possessed.

¶20 Oligney leans heavily on ***Jerrell*** in asserting that his confession was involuntary by virtue of his parents not being notified of his interrogation. In ***Jerrell***, a fourteen-year-old defendant was interrogated for five and one-half hours after two hours of waiting while handcuffed to a wall. ***Jerrell***, 283 Wis. 2d 145, ¶¶6, 11. He requested several times to make a phone call to his parents and was denied each time. ***Id.***, ¶10. In analyzing the voluntariness of his subsequent confession, the supreme court was troubled that "police specifically denied Jerrell's requests to call his parents" and that it was the detective's practice never to allow juveniles to speak with their parents. ***Id.***, ¶31. This approach circumvented the warning set forth in ***Theriault v. State***, 66 Wis. 2d 33, 44, 223 N.W.2d 850 (1974), that "[i]f the police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements." ***Jerrell***, 283 Wis. 2d 145, ¶31.

¶21 In this case, the failure to notify Oligney's parents is not strong evidence of coercive tactics. Oligney points to nothing in the record suggesting officers refused to call his parents because doing so would "stop the flow of, or jeopardize, the interrogation." *See* ***id.*** Further, the totality of the circumstances in ***Jerrell***—including the length of the interrogation, the police tactics used, and Jerrell's age and intelligence—were such that law enforcement's refusal to allow Jerrell to speak with his parents was particularly egregious. Jerrell was in a custodial situation—restrained to a wall for several hours before a lengthy, high-pressure interrogation—whereas Oligney was present for a voluntary interview in school and was told he could leave at any time. Oligney did not request to speak with his parents or ask that they be notified of the interview. Under these

circumstances, the lack of parental notification does not render Oligney's statements involuntary.

¶22 Oligney also finds it "extremely troubling that the police lied to Oligney during the course of the interview." We are not so troubled. "The interrogation of a suspect typically requires some deception; a common form of deception is to exaggerate the strength of the evidence against the suspect." ***State v. Triggs***, 2003 WI App 91, ¶15, 264 Wis. 2d 861, 663 N.W.2d 396. An interrogator's use of deceit, although relevant to the totality of the circumstances, does not by itself make an otherwise voluntary confession inadmissible. ***Id.***, ¶16 (citing ***State v. Fehrenbach***, 118 Wis. 2d 65, 347 N.W.2d 379 (Ct. App. 1984)). Here, officers merely represented that they had in their possession text messages that they had not yet seen. This type of police conduct is not sufficiently overbearing to render Oligney's statements involuntary.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).