**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 7, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP2278-CR** **Cir. Ct. No. 2002CF361**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TRAVIS ALLEN,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Travis Allen appeals his judgment of conviction for second-degree sexual assault of a child.[1] Allen, who was sixteen at the time of the

[1] *See* WIS. STAT. § 948.02(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

crime, contends the trial court erred when it admitted an incriminating custodial statement. Allen argues that he did not understand his ***Miranda*** rights and could not, therefore, knowingly and intelligently waive them.[2] He also argues that his statement was not voluntary.

¶2 We reject both of Allen's arguments. While we are sensitive to the need for careful scrutiny of the circumstances surrounding juvenile confessions,[3] particularly confessions where no parent is present and the interrogation is not recorded, an appellant in Allen's position must do more than merely assert that his constitutional rights were violated. Because we conclude that the State met its burden of proving that Allen was informed of his ***Miranda*** rights and knowingly and intelligently waived them, and that Allen's confession was voluntary, we affirm the judgment.

## Background

¶3 Sometime in the fall of 2001, fourteen-year-old Christina P. and a friend went to Randy Mack's home where she met Mack's older brother, Travis Allen. According to Christina's trial testimony, she had consensual intercourse with Allen that day. In January 2002, again according to Christina's testimony, a teacher or guidance counselor overheard her talking about Allen with a friend.

---

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

[3] The United States Supreme Court has consistently recognized that confessions and waivers of rights by juveniles are not the same as confessions or waivers by adults. *See, e.g.,* ***Fare v. Michael C.***, 442 U.S. 707 (1979); *see also* ***In re Gault,*** 387 U.S. 1, 45 (1967) (when assessing juvenile confessions, a court must exercise "special caution," particularly when there is prolonged or repeated questioning or when the interrogation occurs outside the presence of a parent, a lawyer or a friendly adult). Wisconsin courts have expressed similar concerns. *See* ***State v. Jerrell C.J.***, 2004 WI App 9, ¶13, 269 Wis. 2d 442, 674 N.W.2d 607.

Soon after that, Green Bay police officers contacted Christina. She eventually told the police that Allen was the person with whom she had intercourse.

¶4 On January 17, 2002, Gregory Buenning, a Green Bay detective, interviewed Allen about the sexual assault at the Brown County jail.[4] Allen gave an incriminating statement to the police that day, which is the subject of this appeal, and was arrested and charged with sexually assaulting Christina. After being waived into adult court, Allen moved to suppress his statement. Allen and Buenning testified at the suppression hearing. The trial court ruled that Allen's January 17 statement was admissible because the State had met its burden with "respect to compliance with ***Miranda*** obligations." The court also concluded that Allen's statement was voluntary, finding no evidence of "any coercion at all."

¶5 A jury trial took place immediately after the hearing, on December 3, 2003. Allen was convicted and sentenced to six years, two years' incarceration followed by four years' extended supervision. Allen now appeals.

## Standard of Review

¶6 Our courts conduct pretrial hearings on the admissibility of evidence, including the admissibility of confessions, under WIS. STAT. § 901.04. *See also* WIS. STAT. § 971.31(3). In Wisconsin, hearings on the admissibility of confessions, known as ***Miranda-Goodchild*** hearings,[5] are designed to examine whether an accused in custody received and understood ***Miranda*** warnings before

[4] Allen was being detained at the jail on unrelated charges. He was thus already in custody at the time of this interview.

[5] *See* ***Miranda***, 384 U.S. 436, and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

waiving the right to remain silent and the right to the presence of an attorney and whether any admissions to the police were the voluntary product of rational intellect and free, unconstrained will. *See* ***State v. Jiles,*** 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798. These issues are separate, but overlapping, and hearings on them may be held simultaneously. *See* ***Roney v. State***, 44 Wis. 2d 522, 523, 171 N.W.2d 400 (1969).

¶7 The State has the burden of proving, by a preponderance of the evidence, the sufficiency of the ***Miranda*** warnings and the knowing and intelligent waiver of ***Miranda*** rights.[6] *See* ***State v. Santiago***, 206 Wis. 2d 3, 12, 556 N.W.2d 687 (1996). State courts disagree about the appropriate appellate standard of review to apply to a trial court's determinations of sufficiency and waiver. *See* ***id.*** at 18. In Wisconsin, however, we review those determinations de novo. *See* ***id.*** The State also has the burden of proving the defendant's statements were voluntary.[7] *See* ***Jiles***, 262 Wis. 2d 457, ¶26. We review that determination without deference as well. *See* ***id.*** In both cases, it is the application of the constitutional standard to historical facts that is the question of law. *See* ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594. We will uphold the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***State v. Henderson,*** 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613.

[6] The State's burden throughout the proceedings is preponderance of the evidence. *See* ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594.

[7] Under the due process clause of the Fourteenth Amendment, confessions that are not voluntary are not admissible. *See* ***Rogers v. Richmond***, 365 U.S. 534, 540 (1961).

## Discussion

¶8 Allen first argues that the State did not prove by a preponderance of the evidence that he was "fully aware" of the rights he was waiving and the consequences of waiving those rights. The State counters that Allen never denied being advised of his ***Miranda*** rights, and that the trial court did not err when it found that Allen's decision to speak after being advised of those rights constituted a knowing and intelligent waiver. We agree with the State's argument.

¶9 Buenning testified that, before he began questioning Allen, he read Allen his ***Miranda*** rights from a card and that Allen did not respond to him. According to Buenning, he then read the two questions on the back of the waiver card: "[d]o you understand each of these rights?" and "[r]ealizing you have these rights, are you now willing to answer questions or give a statement?" Buenning claimed that Allen answered "yes" to the second question. Buenning finally testified that Allen made corrections that were his own idea to the brief statement the police wrote, read the first paragraph out loud, but then refused to sign the statement.

¶10 Allen also testified about the circumstances surrounding his confession. Allen did not deny that Buenning gave him the ***Miranda*** warning and admitted that he had heard the rights Buenning read him more than once. But he testified that he was "not really" familiar with his constitutional rights and insisted that he had not been read his rights "a number of times" because juvenile officers often do not read them.

¶11 Based on the testimony at the ***Miranda-Goodchild*** hearing, the court did not err when it determined, as a matter of fact, that it was "uncontroverted … the ***Miranda*** rights were read and acknowledged by the defendant." Although the

trial court was less than explicit about the factual findings on which it based its conclusion that Allen's waiver was knowing and intelligent, the facts in the record support its conclusion.

¶12 At the time he made his statement, Allen was sixteen, a native speaker of English,[8] and by his own admission not unfamiliar with both police procedure and his ***Miranda*** rights.[9] His testimony indicates he is of at least ordinary intelligence and no evidence was offered of mental illness or incapacity. Given those facts, the court could have found that Allen's actions after listening to Buenning read him his rights and ask him if he wanted to talk constituted evidence of a proper waiver. There was testimony that Allen told Buenning he would speak to him after his rights were read. Allen admitted to making a statement. He also admitted to making corrections to that statement.

¶13 Allen counters that his refusal to sign the waiver of rights form and the statement is evidence he did not knowingly and intelligently waive his right against self-incrimination. However, Allen's refusals could also demonstrate that Allen regretted making an incriminating statement to the police and was looking for a way to negate its effect. At best, Allen's failure to sign the waiver card and statement is simply evidence from which a variety of inferences could be drawn.

---

[8] Where the defendant was a non-native speaker and the warning had been translated into a language other than English, questions have been raised about the relationship between having rights read and comprehending those rights. *See e.g.,* ***State v. Santiago***, 206 Wis. 2d 3, 12, 556 N.W.2d 687 (1996).

[9] Previous contacts with police have often been seen as reducing susceptibility to coercive tactics as well as increasing awareness of a potential defendant's constitutional rights. *See, e.g.,* ***Jerrell***, 269 Wis. 2d 442, ¶18; *see also* ***Hardaway v. Young***, 302 F.3d 757 (7th Cir. 2002).

¶14 Based on the record and in light of the trial court's findings of historical fact, we conclude that the State met its burden of establishing by the preponderance of the evidence not only that Allen was informed of his ***Miranda*** rights, but also that he knowingly and intelligently waived those rights.

¶15 Allen argues nevertheless that his statement was involuntary because (1) he did not understand "all his rights" and therefore both his waiver and the statement that followed could not have been "voluntary" and (2) the "circumstances of the custodial interrogation" require the statement's exclusion. Allen rightly notes the test of voluntariness for juvenile statements is the same test applied to adult confessions: the totality of the circumstances.[10] That test requires "balancing … the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." *See* ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407.[11]

¶16 In deciding whether a confession is voluntary, we first inquire whether the confession was produced by coercion or was the product of improper police pressure. We focus on that question because its answer determines whether

[10] Our supreme court is considering the propriety of adopting a per se rule which would require either that all juvenile interrogations be videotaped or that all custodial admissions from children under sixteen who were not given the opportunity to consult with a parent or interested adult be excluded. ***Jerrell***, 269 Wis. 2d 442, ¶27 (the court of appeals rejected an amicus request for a decision on the per se rule issues because it was "bound by the dictates of ***Theriault***" [***v. State***, 66 Wis. 2d 33, 223 N.W.2d 850 (1974)]), *review granted*, 2004 WI 50, 271 Wis. 2d 108, 679 N.W.2d 544.

[11] Allen properly identifies several factors relevant to the personal characteristics of the defendant, including: age, maturity, intelligence, education, experience, and the ability to understand. *See* ***Theriault***, 66 Wis. 2d at 42-43. But Allen's brief makes no attempt to analyze his own characteristics in relation to the standard. More disturbingly, Allen never explicitly addresses the second part of the totality of the circumstances test relating to improper police pressures.

an incuplatory statement is the product of "a free and unconstrained will, reflecting deliberateness of choice." ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987) (citation omitted). Police conduct need not be egregious in order to be coercive. ***Hoppe***, 2003 WI 43, ¶46. A defendant's condition can render him or her highly susceptible to police pressures. ***Id.*** Thus, pressures may be coercive under one set of circumstances and not necessarily under another set. ***Id.***

¶17 Based on our review of the record, we agree with the trial court that there is no evidence of police coercion. Buenning testified that neither he nor his partner threatened Allen or promised him anything to encourage him to talk. Buenning was in plain clothes that day and, because the interrogation took place in secure detention at a county jail, he was not armed. Allen never directly contradicted Buenning on any of those points.[12] Allen did testify that he gave a false statement because he thought that he would be released if he admitted that he assaulted Christina. But he did not testify that his belief was based on anything the interrogating officers said or did. Allen thus fails even to allege any behavior that could be seen as coercive.

¶18 Nor does he identify any personal characteristics that might make him especially sensitive to more attenuated psychological coercion or other indirect pressure. Buenning testified that Allen did not appear confused or in pain during the interrogation, that Allen's answers to questions seemed to be

[12] There is no evidence in the record about how long the questioning lasted or when Allen gave his statement, facts which can indicate coercive or improper techniques depending on the defendant's age and other circumstances. Allen also fails to demonstrate that he requested a parent or adult be present during his questioning, another significant factor in analyzing the totality of the circumstances.

appropriate, and that Allen did not appear "overly tired." Buenning also testified that Allen was not, in his opinion, under the influence of drugs or alcohol. Nothing in Allen's testimony at trial or in his brief contradicts this testimony. We thus conclude the police did not coerce Allen into an involuntary confession and the trial court properly denied Allen's motion to suppress.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.