IN THE COURT OF APPEALS OF THE STATE OF ALASKA

W.L., a minor, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11483 Trial Court No. 3AN-10-68 DL MEMORANDUM OPINION No. 6169 — April 15, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael Spaan, Judge.

Appearances: Josie Garton, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge HANLEY.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

W.L. was convicted of two counts of second-degree sexual abuse of a minor for conduct involving a five-year-old girl, N.M. W.L.'s convictions were based, in part, on admissions he made to the police during an interview prior to his arrest.

W.L. argues that the superior court should have suppressed his statements to the police because he was in custody when the police interviewed him and he did not receive the warnings required by *Miranda v. Arizona*.[1] He also argues that the interview was coercive and that his statements were involuntary. We find no merit to these claims and affirm the superior court's decision denying W.L.'s motion to suppress.

W.L. was also charged with second-degree sexual abuse for conduct involving J.H., a five-year-old boy. W.L. argues that the superior court erred by excluding evidence that J.H. had been sexually abused by his father when he was eighteen months old — evidence W.L. offered to explain J.H.'s sexual language and behavior. We conclude that even if the court erred by excluding this evidence, the error was harmless beyond a reasonable doubt because the jury did not convict W.L. of sexually abusing J.H.

Facts and proceedings

In December 2009, five-year-old N.M. disclosed to her mother that W.L., the fifteen-year-old nephew of the woman whose day care N.M. attended, had sexually abused her. N.M.'s mother took her to Alaska CARES, where N.M. was interviewed about the alleged abuse. During the interview, N.M. told an investigator that W.L. anally and vaginally penetrated her with his fingers, penetrated her vaginally with his penis, and put his penis in her mouth.

[1] 384 U.S. 436 (1966).

N.M.'s physical examination revealed no signs of injury or abuse. However, the sexual assault nurse who examined N.M. said that it was common to find no physical signs of abuse when examining a child victim of sexual abuse.

Anchorage Police Detectives Deven Cunningham and Chris Thomas went to W.L.'s home to interview W.L. Although both detectives were present during the interview, Detective Cunningham conducted the questioning. During this interview, W.L. did not confess to sexually abusing N.M., but W.L. made inculpatory statements that were later admitted against him at trial. Detective Cunningham did not give W.L. *Miranda* warnings at any point during the interview.

Several months later, five-year-old J.H., who attended the same day care as N.M., told his mother that W.L. had anally penetrated him with his penis. J.H.'s mother took him to Alaska CARES, where J.H. detailed the abuse. J.H.'s physical examination also revealed no signs of injury or abuse.

W.L. was charged as a delinquent with five counts of second-degree sexual abuse of a minor[2]: one for penetrating N.M.'s vagina with his hand, one for penetrating N.M.'s anus with his hand, one for placing his penis in N.M.'s mouth, one for penetrating N.M.'s vagina with his penis, and one for penetrating J.H.'s anus with his penis.

Before trial, W.L. moved to suppress his statements to the police, arguing that he was interrogated in violation of *Miranda* and that his statements were coerced and involuntary. Superior Court Judge Michael Spaan denied the motion.

Following trial, the jury convicted W.L. of two counts of sexual abuse involving N.M. The jury was unable to reach a verdict on the other charges.

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[2] AS 11.41.436.

Why we conclude that W.L. was not in custody for Miranda purposes

On appeal, W.L. renews his claim that he was in custody when he made self-incriminating statements to Detective Cunningham, and that the superior court should have granted his motion to suppress those statements because he did not receive the warnings required by *Miranda v. Arizona*.[3]

Under *Miranda*, a suspect is entitled to be advised of his right against self-incrimination and his right to an attorney before he is subjected to "custodial" interrogation.[4] Police questioning is "custodial" if there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[5] The question is whether "a reasonable person [in the suspect's situation] would feel he was not free to leave and break off questioning."[6] The determination of custody for *Miranda* purposes is made considering the totality of the circumstances.[7]

The events leading up to the police interview are relevant to this custody analysis.[8] How the suspect got to the interview — whether the suspect came to the interview completely on his own, or in response to a police request, or escorted by police officers[9] — is especially relevant if the suspect was not under formal arrest.

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[3] 384 U.S. 436 (1966).

[4] *Id.* at 442, 444.

[5] *State v. Smith*, 38 P.3d 1149, 1154 (Alaska 2002) (internal quotation marks omitted) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

[6] *Id.* (quoting *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979)).

[7] *Id.*

[8] *Id.*

[9] *Id.*

The circumstances of the interview are also relevant, including when and where the interview occurred, how long it lasted, how many officers were present, what the officers and defendant said and did, whether the officers used actual physical restraint or its equivalent, and whether the defendant was obviously being questioned as a suspect.[10]

When the police interrogate a minor, the child's age is taken into account in the custody analysis.[11] This is because "children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."[12]

In this case, the superior court ruled that W.L. was not in custody when he was interviewed by the detectives. The court based this conclusion on the following facts: the detectives did not arrive at the house in a marked patrol car, they parked next door, they did not wear uniforms, and their weapons were not obviously visible. Although the interview took place in W.L.'s bedroom with the door closed, the court found that W.L. preferred a private interview. Detective Cunningham advised W.L. at the beginning of the interview that he was free to end the interview at any time, and the detective repeated that advisement later in the interview. And when W.L. asked to end the interview, Detective Cunningham immediately complied.

W.L. challenges several of the court's factual findings. He argues that the court clearly erred in finding that Detective Cunningham ended the interview as soon as W.L. expressed his desire to do so. From our review of the record, we conclude that W.L. was initially equivocal about wanting to end the interview, and that Detective Cunningham attempted to clarify what W.L. wanted. Later, when W.L. unequivocally

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[10] *Id.*

[11] *Kalmakoff v. State*, 257 P.3d 108, 122 (Alaska 2011).

[12] *J.D.B. v North Carolina*, 131 S.Ct. 2394, 2398-99 (2011).

said he was "done" talking, the detectives ended the interview. We conclude that the superior court's finding on this issue was not clear error.

W.L. also takes issue with the court's finding that W.L. "expressed to the detectives that he wished to keep the interview private." He points out that the detectives closed the bedroom door on their own initiative, not at his request. W.L.'s aunt directed the detectives to the back bedroom because the living room was noisy and the detectives wanted a quieter, more private place to conduct the interview. But there is nothing in the court's order suggesting that the court based its finding that W.L. preferred privacy on the fact that the bedroom door was closed. There was other, more direct evidence that W.L. wanted to keep the interview private: when Detective Cunningham told W.L. he could have someone present during the interview, such as a parent or his aunt, W.L. elected to proceed with the interview without anyone else there. W.L. also indicated that he was comfortable speaking with police officers. Later in the interview, W.L. told the detectives that he did not want his family to know what happened. In light of this record, we conclude that the superior court's finding that W.L. expressed a preference for privacy was not clear error.

With respect to the court's legal conclusion that W.L. was not in custody, W.L. concedes that the interview was not custodial at the outset. He argues, however, that the interview became custodial when Detective Cunningham began to use "confrontational, accusatory interrogation tactics." He argues that the second half of the twenty-minute interview "consisted primarily of Cunningham interrupting and rejecting [W.L.'s] protestations of innocence, insisting that [W.L.'s] guilt was beyond debate and that [W.L.] needed to confess to prove that he was the kind of person who could 'change.'"

During the latter portion of W.L.'s interview, Detective Cunningham's questions appeared to assume that W.L. had sexually abused N.M. W.L. attempted

multiple times to deny Detective Cunningham's accusations, but each time the detective cut him off. At one point, in response to W.L.'s protestations of innocence, Detective Cunningham stated:

> We're past whether or not this happened 'cause I know it did. The thing I need to find out is are you one of those people who can change or are you one of those people who are gonna keep doing this and keep doing this, that I'm gonna see you later on because we know that this is not gonna stop.

Soon after the interview took on an accusatory tone, W.L. made his first inculpatory statement. But not long after that, W.L. terminated the interview, telling the detectives he was "done."

When the police focus their suspicion on a suspect, and this is "made clear to the suspect in an objective manner like accusatory questioning," that factor weighs in favor of a finding that the suspect was in custody.[13] This is because "a reasonable person would conclude he was in custody if the interrogation is close and persistent, involving leading questions and the discounting of the suspect's denials of involvement."[14]

In *State v. Smith*, the Alaska Supreme Court addressed a claim that an officer's confrontational questioning transformed a casual interview into a custodial interrogation.[15] The defendant argued that even though the officer's voice remained calm throughout the interview, "the psychological tone of the interview changed radically" when the questioning focused on him as a suspect.[16]

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[13] *Smith*, 38 P.3d at 1159 (citing *State v. Murray*, 796 P.2d 849, 851-52 n.1 (Alaska App. 1990); *Hunter*, 590 P.2d at 893).

[14] *Id.* at 1158-59 (alterations and internal quotation marks omitted) (quoting 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.6(f), at 540 (2d ed. 1999)).

[15] *Smith*, 38 P.3d 1149.

[16] *Id.* at 1157.

The court agreed that the officer's accusatory questioning "strongly indicates custody."[17] But the court nevertheless concluded that when all the circumstances were considered, the interview was not custodial. Smith was interviewed in a police car by an officer who was armed and wearing a uniform.[18] But he was told that he could leave at any time and that he was not going to be arrested.[19] The officer was not physically threatening, and although he confronted Smith with the evidence against him, he did not deceive Smith about the evidence.[20] In addition, Smith was aware of his rights and eventually ended the interview by invoking his right to an attorney.[21]

We addressed a similar claim in *Motta v. State*, but reached the contrary result.[22] That case also involved an interview that was "relaxed and non-confrontational" in the beginning but later became accusatory.[23] The interview lasted three hours and took place at the police station. The officers made clear to Motta that he was a prime suspect and that they had abundant evidence against him; they also confronted him with evidence showing that his version of what happened was false and brought up his status as a parolee.[24] Motta was told "in no uncertain terms that he had 'to deal with it,' that you

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[17] *Id.* at 1159.

[18] *Id.* at 1156-58.

[19] *Id.* at 1152, 1158.

[20] *Id.* at 1161.

[21] *Id.*

[22] *Motta v. State*, 911 P.2d 34 (Alaska App. 1996).

[23] *Id.* at 39.

[24] *Id.*

can't ... deny it," and that there remained "no alternative now."[25] When Motta visited the police station restroom, he was accompanied by an officer, and when he asked to get cigarettes from his car, he was "firmly steered away from leaving the room," and a detective went to retrieve the cigarettes for him.[26]

The circumstances of W.L.'s case are more similar to *Smith* than to *Motta*. Detective Cunningham told W.L. that he did not have to talk to the detectives and that he could end the interview at anytime. The detective reiterated this later in the interview. Detective Cunningham advised W.L. that he could have someone present in the room during questioning. The interview took place in W.L.'s room, not at the police station, and the two detectives were wearing plain clothes and were not obviously armed. The interview lasted only twenty minutes. And Detective Cunningham's voice remained calm throughout the interview, even when his questions became accusatory. Although the detective told W.L. that he believed the victim's allegations of sexual abuse, he did not assert that the police had other evidence implicating W.L. And when W.L. said that he was "done," the detective ended the interview.

We acknowledge that, unlike the defendant in *Smith*, W.L. was a juvenile. In general, a fifteen-year-old is significantly more likely than an adult to be intimidated by the type of confrontational questioning that took place in this case.[27] On the other hand, W.L. was told that he did not have to submit to the interview, and he was given the chance to consult with, or obtain the presence of, a parent or guardian.[28] W.L. told the detectives that he was comfortable talking with the police. He also exercised his right

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[25] *Id.*

[26] *Id.*

[27] *See J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2398-99 (2011).

[28] *Cf. Kalmakoff v. State*, 257 P.3d 108, 121-22 (Alaska 2011).

to terminate the interview after twenty minutes. We agree with the superior court that, considering all of these circumstances, the interview was not custodial under *Miranda* because a reasonable person in this situation — including a reasonable fifteen-year-old — would feel free to terminate the interview.

Why we conclude that W.L.'s statements were voluntary

To introduce a defendant's self-incriminating statement into evidence, the State must show by a preponderance of the evidence that the statement was voluntary.[29] A statement is not voluntary if "the conduct of law enforcement was such as to overbear (the defendant's) will to resist and bring about confessions not freely self-determined."[30]

A trial court's assessment of the voluntariness of a defendant's statements has three components: "First, the trial judge must find the external, phenomenological facts surrounding the confession. Second, from these external facts, the judge must infer an internal, psychological fact: the mental state of the accused. Finally, the judge must assess the legal significance of this inferred mental state."[31] Among the circumstances relevant to this analysis are "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."[32] And "[w]hen

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[29] *State v. Waterman*, 196 P.3d 1115, 1119 (Alaska App. 2008).

[30] *Stobaugh v. State*, 614 P.2d 767, 772 (Alaska 1980) (internal quotation marks omitted) (quoting *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir. 1967)).

[31] *State v. Ridgely*, 732 P.2d 550, 554 (Alaska 1987) (citing *Troyer v. State*, 614 P.2d 313, 318 (Alaska 1980)).

[32] *Sprague v. State*, 590 P.2d 410, 414 (Alaska 1979) (internal quotation marks omitted) (quoting *Brown v. United States*, 356 F.2d 230, 232 (10th Cir. 1966)).

the accused is a juvenile, the [s]tate assumes a particularly heavy burden of proof" to show that the statement is voluntary.[33]

Here, the superior court found that W.L. was intelligent and that he expressed a willingness to cooperate with the police. The interview lasted twenty minutes, and there was no physical deprivation or mistreatment. Nor, the court found, did Detective Cunningham use threats or promises of leniency; instead, his statements were aimed at encouraging W.L. to talk. The court concluded that, under the totality of the circumstances, W.L.'s statements were the product of his own free will.

W.L. challenges this decision, contending that Detective Cunningham's confrontational questioning, the detective's repeated interruptions when he tried to assert his innocence, and the detective's insistence that he knew N.M.'s allegations were true, rendered the interview coercive and made W.L.'s statements involuntary. W.L. also argues that the court did not sufficiently account for the fact that he was a minor.

We agree that Detective Cunningham's questioning was confrontational and aimed at pressuring W.L. to admit his involvement in the crime. But when these interview tactics are considered in the context of the interview as a whole — in particular, W.L.'s demonstrated awareness that he could terminate the interview at any time — we conclude that the interview was not so coercive that it overbore W.L.'s will, even taking into account his relatively young age. We accordingly reject W.L.'s claim that the superior court should have suppressed his statements as involuntary.

W.L. argues, for the first time on appeal, that Detective Cunningham implicitly threatened him with life in prison if he did not confess. Explaining this claim requires a review of the larger context of the "threat" at issue.

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[33] *Beavers v. State*, 998 P.2d 1040, 1044 (Alaska 2000).

Early in the interview, Detective Cunningham asked W.L. what he thought should happen to people who sexually abuse children. W.L. responded that they should be sentenced to life imprisonment, or worse, because if they are released from prison "they're gonna do it again." W.L. added that "certain people can change, but not everyone." Later in the interview, Detective Cunningham referred back to this discussion, saying: "I truly think you're one of those people who can change, okay, but in order to do that you need to tell me what's happened."

W.L. argues that this statement, read in context, was the type of threat of harsher punishment that our supreme court has said renders a confession presumptively coercive and therefore inadmissible.[34] He argues that the detective effectively conveyed to W.L. that unless he confessed and showed he was a person who could change, he would be subject to life in prison.

W.L. did not raise this argument below, so the superior court made no findings on the impact, if any, that this statement had on the voluntariness of W.L.'s statements. But it is not clear to us that this statement was an implicit threat of harsher punishment. Nor, apparently, was this obvious to the superior court because the court concluded that Detective Cunningham "made no threats of harsher punishment." We find no plain error.

W.L. also argues, again for the first time on appeal, that the detective used deception to induce his confession, by presenting N.M.'s allegations of sexual abuse as if they were incontrovertible proof of W.L.'s guilt. But as the State points out, Detective Cunningham explained to W.L. why he believed N.M.'s allegations: "she's five years old, okay, she told me details, she told me things that there is no way in the world she would of been able to tell me, these things that you guys were doing." We conclude that

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[34] *See id.* at 1045-48.

the superior court did not commit plain error by failing to *sua sponte* find that Detective Cunningham used deceit to induce W.L.'s confession.

We uphold the trial court's decision that W.L.'s statements were voluntary.

Why we conclude that the court's error, if any, in excluding evidence that J.H. had been sexually abused by his father was harmless beyond a reasonable doubt

As we explained earlier, W.L. was charged with sexually abusing two children at the day care facility: N.M. and J.H., a five-year-old boy. J.H. made the allegations a couple of months after N.M. made her complaint.

At trial, the jury heard evidence that before and after W.L.'s alleged abuse, J.H. exhibited sexualized language and behavior not typical of a five-year-old child. W.L. suggested to the jury that J.H. must have learned this language and behavior from someone else and that the jury should not infer from this language and behavior that J.H. had been abused by W.L.

In support of this defense, W.L. asked the superior court to admit the testimony of J.H.'s brother, who testified in an offer of proof that he saw J.H.'s father with his penis in J.H.'s mouth when J.H. was about eighteen months old. W.L.'s attorney argued that this evidence was relevant to explain J.H.'s sexualized behavior and to show why J.H. might fabricate a story to implicate W.L. The attorney asserted that it was "within the jury's realm to consider that [J.H.] might not want to accuse his own father of things because that's someone too close to him, but it would be easy to accuse W.L., who is someone that he doesn't really like."

The superior court rejected this argument and excluded the evidence. The court found the testimony of J.H.'s brother credible. But the court concluded that the testimony was not relevant in the absence of any evidence that the father's abuse was

ongoing, or expert testimony suggesting that J.H.'s sexualized behavior as a five-year-old might have stemmed from sexual abuse that took place when he was eighteen months old. The court noted several other factors to support its decision: that the alleged acts of sexual abuse by the father (fellatio) and W.L. (anal penetration) were not similar; that J.H. had privacy interests under the rape shield law; and that the evidence would confuse the jury.

W.L. argues that the superior court erred when it ruled that the evidence that J.H. had been sexually abused by his father was not relevant. He argues that it was up to the jury to determine whether the evidence would support an inference that the abuse was ongoing. He also argues that additional expert testimony was not needed to explain the relevance of the evidence because a witness had already testified that a child's sexualized behavior could result from sexual abuse. Lastly, he argues that the evidence was not precluded by the rape shield law because it was relevant for a legitimate, case-specific purpose — to show that J.H.'s sexualized behavior had resulted from abuse by his father, not W.L.

We first note that to the extent the superior court excluded the evidence under the rape shield law, the court was wrong. As we explained in *Napoka v. State*, the rape shield statute, AS 12.45.045(a), broadly requires a defendant to seek the court's permission before introducing *any* evidence of a victim's prior sexual activity.[35] But as we also explained, the statute's rule of exclusion is narrower: "The rape shield law prohibits evidence of a victim's sexual conduct when the 'relevance' of this evidence rests on the impermissible inference that the victim is likely to have freely engaged in sexual relations with the defendant because the victim has freely engaged in sexual

[35] *Napoka v. State*, 996 P.2d 106, 108-09 (Alaska App. 2000).

relations with other people."[36] W.L. offered the evidence of J.H.'s prior sexual abuse for a different purpose: to explain J.H.'s sexualized behavior and why he might falsely accuse W.L.

Secondly, we agree with W.L. that the evidence was relevant. Under Alaska Evidence Rule 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The evidence of J.H.'s sexual abuse by his father had *some* tendency to show that J.H. had been the victim of other sexual abuse that might explain his sexualized behavior.

Whether the evidence was more probative than prejudicial under Alaska Evidence Rule 403 is a closer question, given the remoteness of the prior abuse and its potential to confuse the issues in the case. But we need not resolve that question because we conclude that, even if the superior court erred by excluding the evidence, the error was harmless because the jury did not convict W.L. of sexually abusing J.H.

W.L. argues that the excluded evidence potentially affected the jury's decision to convict him of sexually abusing N.M. He points out that the State urged the jury to rely on the fact that two children independently reported sexual abuse to corroborate each child's allegations. But we conclude that there is no reasonable possibility that the State's evidence involving J.H. was a factor in the jury's decision to convict W.L. of abusing N.M. The State had strong independent evidence that W.L. sexually abused N.M. Moreover, the jury was specifically instructed to decide each count separately and to not allow its verdict on one count to control its verdict on the

[36] *Id.* at 108.

other count. We conclude that any error in the superior court's decision to exclude the evidence of J.H.'s alleged prior sexual abuse was harmless beyond a reasonable doubt.[37]

Conclusion

We AFFIRM the decisions of the superior court.

[37] *See Smithart v. State*, 988 P.2d 583, 591 (Alaska 1999).